

AR 5230

ERNST C. STIEFEL COLLECTION

3/8

3/8 REFUGEE SCHOLARS - ACADEMIC & INTELLECTUAL EMIGRANTS 1946-1985



Academische und intellektuelle  
Empirien

Academische und  
Intellektuelle Empirien

Emigranten, schlummern aber noch immer, abgeheftet unter dem Stichwort »Exilliteratur«, in verschiedenen deutschen Bibliotheken und Archiven. Sie sind einem »zweiten Vergessen« anheimgegeben. »Einmal Emigrant, immer Emigrant«, könnte man mit Eike Geisel sagen – dieser Fluch lastet auf vielen Exilautoren über ihren Tod hinaus. Sie sind nochmals verbannt, und zwar aus unserem Gedächtnis, unserem Bewußtsein, unserer Erinnerung.

Weil dem so ist, sei hiermit für eine längerfristig angelegte, von Gedenktagen unabhängige, kontinuierlichere Befassung mit der Exilliteratur und der im Dritten Reich unterdrückten Literatur plädiert. Denn das bislang Begonnene ist ja, wie ersichtlich, höchstens wie der Tropfen auf dem heißen Stein! Es kann auf diesem Gebiet so leicht nicht genug getan werden – angesichts des Ausmaßes an Elend, das den Betroffenen durch die Nationalsozialisten zugefügt worden ist.

#### Anmerkungen

- 1) Zitiert nach International PEN. A World Association of Writers. Zentrum deutschsprachiger Autoren im Ausland. Autobiographien, London 1970, S. 1.
- 2) Ebd.
- 3) Zitiert nach: Die verbrannten Dichter. Szenen, Lieder und Gedichte aus dem Exil. Programmheft des Theaters »Tribüne«, Berlin 1978, S. 6.
- 4) Auch wenn er eine politisch umstrittene Gestalt ist, vermögen seine Exil-Schilderungen zu interessieren.
- 5) Zitiert nach W. Zadek (Hrsg.), Sie flohen vor dem Hakenkreuz. Selbstzeugnisse der Emigranten. Ein Lesebuch für Deutsche, Reinbek 1981, S. 193.
- 6) Die obigen Darstellungen beruhen auf persönlichen Eindrücken, die der Verfasser dieses Aufsatzes durch seine vielfältigen Kontakte mit und durch seine Besuche bei mehr als achtzig Exilautoren in den sechziger und siebziger Jahren als Schüler bzw. Student gewinnen konnte.
- 7) I. Keun, Gesammelte Werke, Düsseldorf 1979.
- 8) W. Mehring, Werke, Düsseldorf 1978.
- 9) L. L. Matthias, Es hing an einem Faden. Meine Jahre in Lateinamerika und Europa, Reinbek 1970.
- 10) Es handelt sich um Auszüge aus der Korrespondenz des Verfassers mit diversen Exilautoren.
- 11) O. Nebel, Das dichterische Werk, 3 Bde., hrsg. v. R. Radrizziani, München 1979; Raoul Hausmann, Texte bis 1933, 2 Bde., hrsg. v. M. Erlhoff, München 1982.
- 12) Eine Kopie dieser Aufzeichnungen befindet sich im Archiv des Verfassers.
- 13) A. Heuss, Die Kunst der Erinnerung. Auch die Vergangenheit gehört zur Wirklichkeit des Menschen, in: Frankfurter Allgemeine Zeitung, Nr. 267 v. 17. November 1983.
- 14) W. Zadek (Anm. 5), S. 23.

Richard Albrecht

## Wissenschaftler im Exil

### Ein Versuch nach fünfzig Jahren

*»Wer solche Erlebnisse hinter sich hat, ist, wenn er nicht ganz stumpfsinnig ist, natürlich ein anderer Mensch geworden . . . Das Merkmal des aussondernden Erlebnisses wird so bald nicht aus der Seele des Peripheren getilgt werden können.«<sup>1)</sup>*

Ernst Grünfeld

#### I.

Nicht nur, weil bisher jede Gesamtdarstellung zum Thema der deutschen Wissenschaft im Exil nach 1933 fehlt, scheint es sich jedem systematisch-kritischen Zugriff zu entziehen. Dabei war diese spezielle »unfreiwillige Auswanderung von einzelnen oder von Gruppen in ein fremdes Land« ebenso direkte oder indirekte Folge von *Ächtung* durch das nationalsozialistische Regime<sup>2)</sup> wie die Emigration aus Deutschland seit 1933 überhaupt.<sup>3)</sup> Gleichwohl scheint es, als sei die wissenschaftliche Emigration aus dem »Dritten Reich« und die wissenschaftliche Erforschung dieser Emigration, damit auch dieses besondere Exil, im Anschluß an soziologische Reflexionen Georg Simmels über die Sozialfigur des Fremden<sup>4)</sup> zunehmend Domäne einer ansonsten vernachlässigten Kultursoziologie.<sup>5)</sup>

Ob dieser sozialwissenschaftliche Zugriff mit Blick auf die Emigration im Ganzen und nicht nur auf die Aufnahme, Assimilation oder den gewiß unwiederbringlichen intellektuellen Substanzverlust für die Entwicklung der Wissenschaften in Deutschland zureichend ist, mag offenbleiben.<sup>6)</sup> Fest steht jedenfalls, daß jede Untersuchung – und schon eine erste Übersicht wie diese – über die bekannte Lückenhaftigkeit und Kopflastigkeit (Wolf Franck, 1935) der deutschen Gesamt-emigration nach 1933 hinaus vielerlei zu bedenken hat, will man sich dem Exil von Wissenschaftlern und damit auch den Schicksalen jener bis 1936 etwa 1500 aus Deutschland vertriebenen oder geflüchteten Intellektuellen und Akademikern angemessen nähern: So geht es etwa – und in jeweiliger Kombination der verschiedenen Gesichtspunkte und Merkmale – um: die einzelne Wissenschaft und ihren personifizierten Träger, den Wissenschaftler; das Ausmaß von Etablierung des Wissenschaftlers im deutschen akademischen System und/oder die Reputation in der jeweiligen internationalen »scientific community«; die wiederum durch vielerlei Komponenten personal und sozial bestimmten Prozesse von Emigration aus dem Deutschen Reich und Immigration in einen Aufnahmestaat. Neben Zufälligkeiten und Merkwürdigkeiten, persönlichen Bindungen, Beziehungen und Erfahrungen, sozialdemografischen Faktoren wie Alter, fachspezifischen



Momenten wie Reputation und – bisher demonstrierte und/oder erwartete – wissenschaftliche Leistungsfähigkeit, Fremdsprachenbeherrschung und Fähigkeit zur Aneignung von fremden oder bisher unbekanntem Lebensweisen und Kommunikationsstilen spielten auch scheinbare Banalitäten wie die »Paßfrage« (Bertolt Brecht), schließlich auch situative Momente wie Organisationsfähigkeit von einzelnen oder Gruppen, Unterstützungen in jeweiligen Aufnahmestaaten durch verschiedene Hilfsorganisationen eine nicht zu unterschätzende Rolle.

Diese gewiß bedeutsamen Faktoren, die sowohl allgemeine Probleme der deutschen antifaschistischen Emigration seit 1933 einschließen als auch wissenschaftsspezifische Fragen enthalten, machen das in hohem Maße ausdifferenzierte und komplexe Bild dieser besonderen Emigrantengruppe innerhalb der Emigration und des Exils nach 1933 aus. Insofern halte ich es für den dritten Schritt, jetzt schon anstatt des zweiten – die möglichst vollständige Dokumentation dieser Emigration – methodisch problematische Prozentvermessungen einiger soziopersonaler Merkmale einer kleinen Stichprobe der bisher namentlich ermittelten intellektuellen Emigration aus Deutschland zu präsentieren.<sup>7)</sup> Denn hier ist die Gefahr, daß damit der Blick vorschnell verengt wird, unverkennbar. (Weshalb dieses Daten keineswegs als »bare Münzen« blank eingestrichen werden sollten.)

Demgegenüber dürfte heute – gut fünfzig Jahre nach dem Beginn dieses Exodus »deutschen Geistes« – wohl auch bei der wissenschaftlichen Emigration und der Emigration von Wissenschaftlern angesichts des noch immer existierenden Dunkelfelds lediglich als gesichert gelten: Wahrscheinlich mehr als ein Drittel aller nach 1933 aus Deutschland emigrierten Wissenschaftler, aber sicherlich weniger als die Hälfte dieses besonderen Teils der Gesamtmigration – die 1938 nach der Besetzung Österreichs etwa 2000 Menschen umfaßt haben mag –, dürfte als *Wissenschaftler*, wo und wie auch immer, weitergearbeitet haben. Dabei mag diese zahlenmäßige Schätzung durchaus auch noch insofern verzerrt sein, als – abgesehen von so international renommierten Naturwissenschaftlern und Gelehrten wie den Nobelpreisträgern für Physik Albert Einstein<sup>8)</sup> und James Franck<sup>9)</sup> oder dem Nobelpreisträger für Physiologie und Medizin 1923 Otto Meyerhof<sup>10)</sup> – anzunehmen ist, daß allgemein die jüngeren intellektuellen Emigranten, die ihre Ausbildung erst im Immigrationsland abschlossen oder vollendeten, dort auch eher entsprechende Stellungen fanden als ältere emigrierte Wissenschaftler, die sich aus dem Zusammenhang der deutschen Kultur und Wissenschaft nur schwer lösen konnten.

Zugleich belegen aber gerade die genannten drei Naturwissenschaftler exemplarisch einen Sachverhalt, der durchaus sowohl auf fachspezifischen wissenschaftlichen Substanzverlust als auch auf die mit der nach 1933 rasch vollzogenen Nazifizierung der Wissenschaften einhergehende Enthumanisierung verweist. Und warum sollte hier verschwiegen werden, daß die teils aus scheinbar bloß »rassischen«, vor allem aber aus humanen und politischen Gründen emigrierten Naturwissenschaftler Einstein, Franck und Meyerhof auch jener »deutschen Physik« des Nobelpreisträgers Philipp Lenard (Heidelberg) weichen mußten, der sein völkisch-faschistisches Politikverständnis im Vorwort seiner »Deutschen Physik«

1938 erneut begründete, Naturwissenschaft »rassisch, blutsmäßig« konstituiert sah und aus der Ächtung des »wohl reinblütigen Juden A. Einstein« die Relativitätstheorie für unwahr erklärte.<sup>11)</sup>

Die vorher allgemein angesprochene Problematik der Gliederung der Wissenschaftler-Emigration aus Deutschland nach 1933 mag freilich durchaus auch ein übergreifendes Moment jeder Emigration unserer Epoche – also auch schon der russischen nach der Oktoberrevolution und dem Bürgerkrieg 1917/21<sup>12)</sup> – bezeichnen; war es doch namentlich die russische intellektuelle und akademische Emigration, die in der deutschen Reichsmetropole Berlin in den zwanziger Jahren eigene Bildungseinrichtungen schaffen konnte.<sup>13)</sup> Darüber hinaus ist – soweit ich sehe – bis heute ungeklärt, ob es sich bei den Momenten, die auch die Emigration von Wissenschaftlern aus Deutschland seit 1933 sowie ihre Aufnahme in Immigrationsländer bestimmten, nicht überhaupt um charakteristische Züge für Fernwanderung als soziale Bewegung handelt.<sup>14)</sup>

Die *Besonderheit der intellektuellen Emigration* aus dem Deutschen Reich seit 1933 hingegen dürfte in einer zunächst unabhängig vom Grad der kulturellen und wissenschaftlichen Internationalisierung bestehenden Mobilität liegen. Auch dies freilich wurde schon von zeitgenössischen Beobachtern wie dem seinerzeitigen Deutschland-Korrespondenten des »Manchester Guardian« mit Blick auf die, die nicht emigrierten und sich den Gefährdungen des »Dritten Reiches« aussetzen mußten, sensibel registriert: »Almost all workmen who were at all prominent in the local organizations of the Socialist or Communist parties, or were known in their district as keen politicians are in danger of their lives, many are hiding. They cannot emigrate with their wives and families, having no money to pay their fare, still less to live abroad.«<sup>15)</sup>

## II.

Gewiß gab es speziell im Bereich der politischen Sozialwissenschaften – und nicht zufällig dort – auch zwei Beispiele von mehr oder weniger »geglückter«, weil organisatorisch-institutionell abgesicherter Emigration und Immigration (jeweils in die Vereinigten Staaten): Zum einen handelt es sich um die Übersiedlung des »Instituts für Sozialforschung« von Frankfurt zunächst nach Genf und Paris sowie schließlich in die USA.<sup>16)</sup> Die prominentesten Vertreter der kritischen Theorie wie Th. W. Adorno<sup>17)</sup> oder Max Horkheimer<sup>18)</sup> kehrten später an die J.-W.-Goethe-Universität in Frankfurt (Main) zurück. Zum anderen ist es die Einrichtung einer »Fakultät (deutscher Gelehrter) im Exil« in New York um den bedeutenden Sozialökonom und Theoretiker der Angestelltenschaft und »neuen Mittelschichten«, Emil Lederer<sup>19)</sup>, der kurz nach seinem 50. Geburtstag als einer der wenigen sozialdemokratischen Hochschullehrer der Weimarer Republik vor den Nationalsozialisten floh und 1939 im New Yorker Exil starb.<sup>20)</sup>

Diese, wenn man so will, »erfolgreichen« Emigrationsgeschichten können freilich nicht vergessen machen, daß der Ausgangspunkt der wissenschaftlichen Emigration 1933 aus Deutschland – so bedrückend wie die Emigration selbst – vielfältig und zu oft für die Betroffenen wie für die wissenschaftliche Entwicklung



überhaupt demoralisierend und zersetzend war. So nennt das »erste grundlegende Dokument über den Charakter des faschistischen Regimes«<sup>21)</sup> – das »Braunbuch über Reichstagsbrand und Hitlerterror« (1933) – in gesonderten Kapiteln und Verzeichnissen schon mehr als 200 »gemäßregelte« Hochschuldozenten in der Frühphase der Machtaneignung durch die Nationalsozialisten und verdeutlicht so auch den Bruch 1933.<sup>22)</sup>

Allein als Diskontinuität jedoch läßt sich die Entwicklung 1933 wiederum auch nicht darstellen: Wenngleich sicherlich das faschistische »Gesetz zur Wiederherstellung des Berufsbeamtentums« Anfang April 1933 Vertreibung und Exodus vor allem engagierter demokratischer Wissenschaftler gleichsam durch Judifikation legalisierte, so hat es auch in den verschiedenen Phasen der demokratischen Republik Weimars immer wieder Angriffe etwa gegen Albert Einstein gegeben und bereits 1925/26 den »Fall Theodor Lessing«. Lessing, dessen resignative Geschichtsphilosophie<sup>23)</sup> militant-republikanische politische Publizistik nicht ausschloß, wurde 1926 aus dem Lehramt an der Technischen Hochschule Hannover entfernt und schließlich, von Goebbels in seiner berüchtigten Pogromrede vom 1. April 1933 namentlich erwähnt<sup>24)</sup>, am 30. August 1933 in der ČSR, seinem Exilland, von gedungenen Mördern erschossen.<sup>25)</sup>

Auch der Statistiker an der Universität Heidelberg, Emil Julius Gumbel<sup>26)</sup>, wurde jahrelang von rechtsextremistischen Kräften verfeimt und verfolgt. Hatte er doch schon Anfang der zwanziger Jahre in verschiedenen Büchern Fememorde aufgedeckt und die Schonung der Täter durch die Justiz der Weimarer Republik nachgewiesen. Gumbel wurde 1932 aus dem Lehramt entlassen. Lessing und Gumbel schließlich dienten den Nationalsozialisten noch Jahre später als Rechtfertigung ihrer Rassengesetzgebung von 1935 (»Nürnberger Gesetze«) bei der Entlarvung jüdischer Gelehrter als »Träger des Defaitismus«.<sup>27)</sup>

Und wie früher in der wilhelminischen Zeit der (damalige) Sozialist<sup>28)</sup> und erst später von Benito Mussolini persönlich geförderte, international renommierte Soziologe und Theoretiker der Parteiensoziologie Robert Michels<sup>29)</sup> kein Lehramt erhalten konnte, traf diese politische Tendenz gerade in der Endphase der Weimarer Republik bedeutende jüngere Wissenschaftler, wie zum Beispiel den so produktiven wie innovativen Historiker Eckart Kehr.<sup>30)</sup> Die moderne deutsche Sozialgeschichte schuldet ihm, der in seinen kritischen Analysen etwa zum »Primat der Innenpolitik« und zur »Soziologie der Reichswehr«<sup>31)</sup> eine progressive Traditionslinie in der deutschen Geschichtswissenschaft hätte begründen können, wesentliche Impulse. Kehr freilich emigrierte in die USA, und erst durch eine 1965 erschienene Edition seiner wichtigsten Arbeiten gelang eine nun freilich um gut eine Generation »verspätete« akademische Rezeption.

Ähnlich ist die Entwicklung bei dem demokratisch engagierten Historiker und kritischen Sozialwissenschaftler, Wolfgang Hallgarten<sup>32)</sup>, der 1933 emigrierte, schließlich in den Vereinigten Staaten Zuflucht fand, jedoch, wie der heute in Düsseldorf lebende Sozialismus-Forscher und Historiker Helmut Hirsch<sup>33)</sup>, in der akademischen Welt der Bundesrepublik der fünfziger und sechziger Jahre niemals Fuß fassen konnte, geschweige denn auf einen Lehrstuhl berufen wurde.

Bleiben wir im speziellen Emigrationsfeld der Sozialwissenschaftler im engeren Sinn, so mag sich auch hier »Größe und Erbärmlichkeit« (Lion Feuchtwanger), schließlich immer auch die widersprüchliche Einheit von Hoffnung und Resignation, Verzweiflung und Optimismus<sup>34)</sup> der aus Deutschland vertriebenen oder geflüchteten Wissenschaftler erschließen und beispielhaft, über einzelne Lebensschicksale, veranschaulichen lassen. Denn in diesem besonderen Bereich der Wissenschaftleremigration liegen schon systematische Sichtungen vor.<sup>35)</sup> Zweitens haben inzwischen einzelne Sozialwissenschaftler, teils im herkömmlichen Sinn berichtend<sup>36)</sup>, teils aber auch in ambitionierten Reflexionen<sup>37)</sup> Memoiren und Autobiografien veröffentlicht. Drittens ist hier wenigstens die Exil-Geografie mit ihrem späteren Zufluchtsschwerpunkt USA in den Grundzügen dokumentiert<sup>38)</sup> – wenngleich einzelne Wissenschaftlerschicksale, wie zum Beispiel das des international renommierten Kunstsoziologen Alphons Silbermann, kaum bekannt sind. Silbermann, der heute in Köln lebt und über die Niederlande und Frankreich 1938 ins ferne Australien emigrierte, dort unterrichtete, 1952 nach Frankreich zurückkehrte und schließlich 1963 zum Leiter des »Instituts für Massenkommunikation« an der Universität zu Köln berufen wurde, ist bis heute australischer Staatsbürger geblieben.<sup>39)</sup> Viertens schließlich gehörten nicht zuletzt Wissenschaftsemigranten aus dieser Fachmigration – so Adolph Lowe, der als Nationalökonom in Kiel, Frankfurt, nach 1933 in Manchester, New York und Jerusalem unterrichtete<sup>40)</sup> – zu den akademischen »Emigrationsgewinnlern«.

Sosehr freilich gerade diese Fachmigration zur – soziologischen – Verallgemeinerung anregen mag, sowenig soll hier ein entsprechender Versuch unternommen werden. Vielmehr geht es zunächst nur um eine typologische Illustration der sich immer in einzelnen Schicksalen, Lebensläufen und Karrieren brechenden Ausgangsbedingungen von (Sozial-)Wissenschaftlern aus Deutschland ins Exil und damit zugleich auch um eine Skizze der Spannweite dieses spezifischen Exils selbst.

Da ist beispielsweise der österreichische Sozialist und Sozialwissenschaftler Paul Lazarsfeld<sup>41)</sup>, der sich jahrelang mit kommerzieller Auftragsforschung im Rahmen einer »wirtschaftspsychologischen Forschungsstelle« in Wien durchgeschlagen hat und 1933 als Koautor der ersten deutschsprachigen Arbeitslosenstudie<sup>42)</sup> wissenschaftliche Reputation erwirbt. Lazarsfeld befindet sich zur Zeit der Etablierung des nationalsozialistischen Regimes in Deutschland als Forschungsstipendiat in den Vereinigten Staaten – und zieht es vor, dort zu bleiben. Dieser Sozialwissenschaftler, der insbesondere die Methoden der empirischen Sozial- und Medienforschung schon einige Jahre später weiterentwickeln wird, setzt sich dann auch relativ rasch als Wissenschaftler und Forschungsmanager in den USA durch, wird Professor an der Columbia University, schließlich geachtetes Mitglied der amerikanischen und internationalen Fachgemeinschaft der Sozialwissenschaftler.

Da gibt es – auf der anderen Seite – die damaligen Kommunisten und Sozialwissenschaftler um das Frankfurter Institut für Sozialforschung, Paul Massing<sup>43)</sup> und Karl August Wittfogel<sup>44)</sup>, die zunächst in Deutschland bleiben und am Untergrundkampf gegen die Nazis teilnehmen wollen, aber rasch politische Gefangene



der neuen Machthaber werden, das Grauen eines deutschen Konzentrationslagers erleben, 1935 freigelassen werden, emigrieren können, schließlich Ende der dreißiger Jahre nach den Erfahrungen der »Moskauer Prozesse« mit der Kommunistischen Partei brechen und jeder in seinem Arbeitsfeld – Antisemitismusforschung und Politikanalysen (Massing) bzw. »asiatische Produktionsweise« und vergleichende Formationsuntersuchung (Wittfogel) – anerkannte Sozialwissenschaftler werden. Beide haben schließlich ihre Erfahrungen in deutschen Konzentrationslagern unter pseudonymer Autorenschaft im Exil publiziert.<sup>45)</sup>

Sozialwissenschaftler-Emigration aus Deutschland seit 1933 meint aber auch die Auswanderung solch prominenter und fachlich renommierter Gelehrter wie des Ordinarius Karl Mannheim<sup>46)</sup>, der nach dem Sieg des Horthy-Regimes aus Ungarn geflüchtet war, in den zwanziger Jahren als Privatdozent in Heidelberg gewirkt hatte, gleichzeitig wichtige ideologietheoretische Diagnosen und Kritiken veröffentlichte<sup>47)</sup>, 1930 an die Frankfurter Universität berufen wurde und von 1933 bis zu seinem Tod 1947 an der »London School of Economics and Political Science« lehren konnte und hier seine wissens- und ideologiesoziologischen Ansätze in eine technokratische Planungssoziologie transformierte. Mannheim war einer der wenigen, die zeitweise zwischen mehreren Anstellungsangeboten wählen konnten.

Die Emigration von Sozialwissenschaftlern aus Deutschland umfaßt aber auch antifaschistische bürgerliche Gelehrte wie etwa Theodor Geiger<sup>48)</sup> und René König<sup>49)</sup>, die zunächst zu emigrieren zögerten, sich dann aber schließlich doch zur Flucht aus Nazideutschland entschlossen und unter ganz verschiedenen Arbeitsbedingungen als Soziologen weiterarbeiten konnten. Zu dieser Emigration gehörten seinerzeit auch jüngere Soziologen wie Hans Gerth<sup>50)</sup>, der erst 1938 auswanderte, dafür im Aufnahmeland USA später strikten polizeilichen Kontrollen und Auflagen ausgesetzt war und die erzwungene räumliche Immobilität nutzte, um das Werk Max Webers zu übersetzen und sich auf seine Lehrtätigkeit zu konzentrieren (der US-amerikanische Soziologe C. W. Mills war einer seiner »Schüler«).

Schließlich machte die Emigration manchen Intellektuellen erst zum Wissenschaftler. Der politische Strafverteidiger und Journalist Rudolf Olden<sup>51)</sup> – im Exil PEN langjähriger Generalsekretär und 1940 umgekommen – nahm Lehraufträge in Oxford und London wahr, und die damals jüngeren Exulanten Lewis A. Coser<sup>52)</sup> und Henry Jacoby<sup>53)</sup> verarbeiteten auch ihre Exilerfahrungen als unabhängige, nicht parteigebundene Sozialisten wissenschaftlich und wurden später international angesehene Soziologen.

Die Emigration hat – umgekehrt – auch manchen sensiblen Intellektuellen aus der deutschen geisteswissenschaftlichen Tradition von der wissenschaftlichen Arbeit entfernt. Günter Anders<sup>54)</sup> berichtete noch Jahrzehnte später von seinen bitteren Erfahrungen im US-amerikanischen Hochschulsystem: »Als solide anerkannt wurde man dort nur dann, wenn man außer einer einzigen winzigen Spezialität nichts wußte. Das Fehlen der Allgemeinbildung war Kriterium der Solidität. Europäische Fachidioten sind daneben geradezu Universalisten.«<sup>55)</sup> Anders remigrierte 1950 nach Wien und wurde später als humanistisch-philosophischer Kritiker des Atomzeitalters bekannt.<sup>56)</sup>

Emigration als letztlich erzwungener Exodus meint aber auch existentielle Bedrohung: Stellvertretend für weitere – von denen Ernst Toller und Walter Benjamin sowie Stefan Zweig die Bekanntesten sein dürften<sup>57)</sup> – soll hier Ernst Grünfeld genannt werden. Der frühere Hallenser Ordinarius für Genossenschaftswesen<sup>58)</sup> sah für sich keine Arbeits- und Überlebenschancen und wählte schließlich den Freitod.

Die genannten Schicksale können natürlich nur exemplarisch für viele weitere stehen, um die Vielfalt des Exils von Wissenschaftlern zu verdeutlichen und zugleich eindringlich vor einer allzu glatten Fachgeschichtsschreibung zu warnen. So gab es schließlich auch einen Sozialwissenschaftler wie Heinz Maus: Er arbeitete zwar zeitweilig an der Osloer Universität, versuchte aber gleichzeitig von dort aus, als Wissenschaftler im »Dritten Reich« zu publizieren, engagierte sich nach der militärischen Niederlage des Nationalsozialismus im Sinne der französischen Aufklärung, arbeitete als Dozent einige Jahre an der Humboldt-Universität in Berlin und starb nach langjähriger produktiver Tätigkeit als Ordinarius an der Philipps-Universität Marburg 1979.<sup>59)</sup>

### III.

Fritz Neumarck hat in seinen reflexiven Erinnerungen ganz zu Recht darauf aufmerksam gemacht, daß auch für die deutsche Wissenschaftler-Emigration die USA als Zufluchtland der bedeutendste spezielle Immigrationsstaat waren; daß aber zugleich in der euroasiatischen Türkei aufgrund des Modernisierungsschubs durch die Reformprogramme Atatürks vor allem in infrastrukturellen Bereichen, einschließlich Verwaltungsorganisation und Planung, in den dreißiger Jahren<sup>60)</sup> »die relative Bedeutung von Emigranten aus dem »Dritten Reich« außerordentlich »groß und ihre Arbeit so nachhaltig wirksam gewesen ist.«<sup>61)</sup> Diese besondere »deutschsprachige Emigration in die Türkei nach 1933« ist unter dem (vielleicht ein wenig unglücklich gewählten) Titel einer »Bildungshilfe« wohldokumentiert<sup>62)</sup>, so daß sich hier Memoirenliteratur und systematische wissenschaftliche Studie gut ergänzen.

Zugleich jedoch verweist gerade die institutionell abgesicherte und staatlicherseits durch den Immigrationsstaat getragene Aufnahme von deutschen Wissenschaftlern (knapp hundert zunächst deutsche, später auch österreichische Professoren, die vor allem in den reformierten Hochschulen in Istanbul und Ankara neue Wirkungsstätten fanden) im türkischen Exil seit 1933 nicht nur auf besondere, mit den Emigranten zwar gleichgerichtete, aber nie identische Interessen der Türkischen Republik in dieser Zeit, sondern auch auf einen wichtigen Aspekt der Organisation dieser speziellen Emigration. Hier spielte die »Notgemeinschaft deutscher Wissenschaftler im Ausland« eine gewichtige Rolle. Sie wurde zunächst, folgt man Widmann, der für seine Darstellung die unveröffentlichten Memoiren ihres »Hauptorganisators« Philipp Schwartz<sup>63)</sup> auswertete<sup>64)</sup> – als Selbsthilfeeinrichtung aus einer in Zürich seit April 1933 ansässigen »Beratungsstelle für deutsche Wissenschaftler« entwickelt und konnte – bis 1937 – etwa 1800



»emigrationswillige bzw. schon emigrierte deutsche Wissenschaftler« karteimäßig erfassen.<sup>65)</sup>

Philipp Schwartz, dem für die »Notgemeinschaft« exilierter deutscher Wissenschaftler vom britischen »Academic Assistance Council« eine mit Übersiedelung nach London verbundene Unterstützung angeboten wurde und der selbst noch im Herbst 1933 als Pathologe an die Universität Istanbul berufen worden war, hat den Ausgangspunkt der Hilfsorganisation für deutsche Wissenschaftler im Exil 1933 so beschrieben: »Große Not hat uns veranlaßt, eine Gemeinschaft zu bilden. Es handelt sich dabei nicht um den Versuch, Stellen zu finden, die uns zu einem gesicherten Einkommen verhelfen. Wir schlossen unsere Reihen, um eine Degradierung jenes Geistes zu verhüten, der uns zur Entwicklung unserer Fähigkeiten verhalf und in dessen Dienst zu stehen wir geboren wurden. Heute, kaum sechs Monate nach den abscheulichen Szenen der Vertreibung, stehen wir nicht mehr allein. Wir können beruhigt, ja stolz in die Zukunft schauen: Jeder, der sich als Lehrer und Forscher der Wissenschaft widmete, wird seine Arbeit weiterführen können und wenn er dabei seine Eignung vielleicht noch einmal oder noch zehnmal wird von neuem beweisen müssen.«<sup>66)</sup>

Die erste erfolgreiche Vermittlungsorganisation, die jedoch den so idealistischen wie triumphalischen Optimismus ihres ersten Organisators nicht verallgemeinernd trug, erbrachte vertraglich gesicherte Berufungen deutscher Gelehrter, zumeist exilierter Ordinarien verschiedenster Disziplinen, in die Türkei, vor allem in die Zentren Istanbul und Ankara. Hier freilich galten – so Neumarck – für die aufgenommenen Wissenschaftler nicht nur die »allgemeinen Probleme, die jede – insbesondere natürlich eine nicht freiwillige – Emigration, wohin auch immer, mit sich bringt«, sondern darüber hinaus zwei zusätzliche Schwierigkeiten, die die Arbeit der Wissenschaftler in der Türkei belasteten: »Das eine war die islamische Religion, das andere die Sprache.«<sup>67)</sup>

Diese Probleme konnte die »Notgemeinschaft« auch bei ihren erfolgreichen Vermittlungen, sei es in Aufnahmestaaten mit entwickeltem Wissenschaftssystem oder auch in Randregionen von Emigration und Wissenschaft (wie der Türkei) ebensowenig lösen wie die intellektuelle »Schmutzkonzurrenz« (Clara Zetkin) einzelner Wissenschaftler um individuelle Berufungen, Placierungen und Anstellungen. Diese im Exil deutscher Wissenschaftler nicht aufhebbare Mangellage – Bewerberüberangebot einerseits gegenüber Anstellungsmöglichkeiten andererseits – hat gewiß – wie von George W. F. Hallgarten am Beispiel einer ihm zunächst gesichert erschienenen Anstellung im fernen Panama 1936 später bitter kommentiert<sup>68)</sup> – zu lebensbedrohlicher Verzweiflung nicht weniger geführt. Der Historiker Hallgarten, seinerzeit gerade als Nazigegner ausgebürgert<sup>69)</sup>, hat in seinen Erinnerungen 1969 diese Erlebnisschicht angesprochen.

#### IV.

Zwei bisher eigentümlicherweise wenig beachtete wissenschaftliche Veröffentlichungen aus dem Exil deutscher Wissenschaftler nach 1933 scheinen mir – durchaus exemplarisch – bedeutsam. Es handelt sich dabei um Bücher, die in jene

Phase des Exils fallen, als wohl jede Hoffnung auf einen raschen, gar vom inneren Widerstand bewirkten Sturz des nationalsozialistischen Regimes aufgegeben werden mußte, als jedoch ein Zweiter Weltkrieg noch abwendbar schien.

In dem von Emil Julius Gumbel als – so der Untertitel – »Sammelbuch aus der deutschen Emigration« edierten Band »Freie Wissenschaft«<sup>70)</sup> setzt sich der Herausgeber einleitend polemisch mit der »Gleichschaltung der deutschen Hochschulen« auseinander, veranschaulicht die politischen Säuberungen nach der Etablierung des Nationalsozialismus am Lehrkörper der Universität Heidelberg mit 56 Dozentenentlassungen (von 215 Dozenten, die dort 1932 beschäftigt waren), skizziert die Militarisierung der Hochschulen und ihrer Studenten im »Dritten Reich« bis 1936 und kritisiert die schwächliche Haltung der Hochschullehrer selbst gegenüber den neuen Herren. Programmatisch heißt es dann abschließend: »Wir wollen die Tradition der deutschen Hochschulen, soweit sie freiheitlich und weltbürgerlich war, fortsetzen. Wir trennen das Regime von dem Inhalt der Kulturbegriffe, die Deutschland repräsentierte. Dies legt uns die Pflicht auf, den Widerspruch zwischen den nationalsozialistischen Lehren und denen der Wissenschaft nachzuweisen. Durch dieses Buch hoffen wir, den vertriebenen Gelehrten moralischen Halt und neues Ansehen zu geben. Wir verneinen den Vernichtungsfeldzug der Nationalsozialisten, und wir wollen uns auch nicht durch Schweigen mitverantwortlich machen an ihren Verbrechen.«<sup>71)</sup>

Die fünfzehn Autoren sind exilierte und aus dem faschistischen Deutschland vertriebene Gelehrte und Wissenschaftler<sup>72)</sup>, die in den drei Teilen »Geistige Situation« (sechs Beiträge), »Staat und Gesellschaft« (sechs Beiträge) und »Naturwissenschaft« (drei Beiträge) einerseits eigene Forschungsergebnisse präsentieren, sich aber andererseits, wo immer möglich, auf nationalsozialistische Lehren kontrapunktisch beziehen und schließlich in verschiedenen Aufsätzen den Nationalsozialismus als gesellschaftliches und staatliches System selbst analysieren. Durchgängig wird dabei auf Humanität und Rationalität beharrt: Etwa in Theodor Geigers Aufsatz »Aufgabe und Schicksal der Intellektuellen«, einem Vorentwurf für später erschienene größere Studien zur sozialen Schicht der Intelligenz.<sup>73)</sup> Hier setzt sich der Soziologe Geiger mit bedrohlichen Tendenzen von Irrationalismus und Technokratie auseinander und wendet intellektuelle Rationalität gegen jede »defaitistische Abkehr von der Ratio«.<sup>74)</sup>

Arthur Rosenberg<sup>75)</sup>, der im Exil der Historiograph der Weimarer Republik wurde<sup>76)</sup>, skizziert in seinem freilich allzu knappen Aufsatz »Die Aufgabe des Historikers in der Emigration« die Kontinuitätsthese und hält es für »einfach unmöglich, daß irgendein Historiker, der in die Emigration gehen mußte, in der alten Form der prinzipienlosen Pseudo-Sachlichkeit weiterforschen könnte. Seine eigenen Erlebnisse zwingen ihm ein Prinzip auf, und zwar das Prinzip, das Dritte Reich zu negieren. Die Negation des Dritten Reiches aber ist die demokratische und soziale Republik.«<sup>77)</sup>

Wurde engagierte Gesellschaftswissenschaft auf diese Weise auch ihres antifaschistischen Auftrages gewahr, kommt in Ernst Grünfelds mit dem Untertitel »Ein Kapitel Soziologie« posthum veröffentlichtem Werk »Die Peripheren«<sup>78)</sup> das



selbst erfahrene Exil des Wissenschaftlers, der als Agronom schon vor dem Ersten Weltkrieg in Japan gearbeitet und über »Die japanische Auswanderung« (1912) geschrieben hatte, nie direkt und offen zur Sprache. Und doch liest sich die sensible und reflexive Studie Grünfelds wie ein so systematisch angelegter wie unabgeschlossener Versuch, eigene und gewiß verallgemeinerbare Exil-Erfahrung aufzuarbeiten. Begrifflichkeit und Formalklassifikation sind unverkennbar der idealistischen Strömung der deutschen Soziologie entlehnt, können aber sicherlich des Autors Hauptanliegen – nämlich sozialwissenschaftliche Rechenschaft des Exils als Lebensform selbst zu thematisieren – kaum verhüllen. Insofern mag die Existenzweise des Peripheren, also all jener, die als Rand- und Außenseiter »in bezug auf irgendein soziales Gebilde peripher sind, so daß ihre Zugehörigkeit zu den übrigen Gebildegliedern und dem Gebilde selbst gelockert oder aufgehoben sind«<sup>79)</sup>, durchaus als gruppentypologische Metapher für eine durchs eigene Schicksal in der Fremde bestimmte »Labilität der Gefühle und der Geisteshaltung«<sup>80)</sup> stehen und die seelischen Spuren des Fremden und Ausgesonderten im Sozialtypus des Peripheren sensibel sprechen machen.

Das »aussondernde Erlebnis«<sup>81)</sup> schafft denn auch – so Ernst Grünfelds mitgeteilte Exilerfahrung – nicht nur einen »anderen Menschen«, sondern wird auch »so bald nicht aus der Seele des Peripheren getilgt werden können.«<sup>82)</sup> Auch spätere Remigration bei nur vorübergehendem »Peripher-Sein« erscheint wohl vor allem für den »Peripheren der geistigen Bereiche«<sup>83)</sup> schließlich keine Lösung.<sup>84)</sup> Hier drängt – so René König in einem Kommentar zu Grünfelds wissenschaftlicher Aufarbeitung eigener Exilerfahrung – »die erlebnisgemäße Unterlage des Gesagten«<sup>85)</sup> hervor – und läßt sich zugleich deuten als Versuch eines Intellektuellen, gegen Sprachlosigkeit<sup>86)</sup> und Vergessen als solche zu kämpfen.

So gesehen, stellt sich Ernst Grünfelds verdeckter Versuch durchaus als sozialwissenschaftliche *Thematisierung des Exils im Exil* selbst dar und ist den heute mehr oder weniger bekannten und teilweise sozialkulturell angeeigneten literarischen Ausdrucksversuchen des antifaschistischen Exils nach 1933 – etwa bei Fritz Erpenbeck, Paul Zech, Klaus Mann oder Lion Feuchtwanger<sup>87)</sup> – intentional vergleichbar. Zugleich jedoch scheint mir das kleine »Kapitel Soziologie«, das Ernst Grünfeld hinterlassen hat, ein wissenschaftliches Dokument gerade des Leidens eines exilierten Wissenschaftlers, der zwar aus dem »Dritten Reich« entkommen war, aber im Exil nicht weiterleben mochte.

#### V.

Gewiß war die Emigration und ihre Geschichte speziell von Wissenschaftlern aus dem Deutschen Reich immer eine Geschichte des Leidens; auch wenn sie, als Emigrationsgeschichte, nicht nur »eine erschütternde Folge von Elend, Beleidigung, Flucht, Hunger und Tod« war, weil es hier – so Georg Glaser aus der Sicht des »namenlosen« Emigranten – um »einige begehrte Fachleute« ging.<sup>88)</sup>

Mit Blick auf die Gesellschaft, die diese Wissenschaftler, aber auch Künstler und Intellektuelle mit humanistischer Grundeinstellung direkt oder indirekt ächtete und so letztlich in die Emigration – und damit auch in ein anderes kulturelles

Milieu – zwang, dürfte in der letzten Konsequenz der langfristige Verlust aus der Wissenschaftleremigration nach 1933 doch größer sein. Und vielleicht mag das neuerlich wieder spürbarer werdende Unbehagen mancher hierzulande zu den – unumkehrbaren – Spätfolgen der Emigration gehören.

Die Folgen für eine Bewußtseinslage, die der idealistische deutsche Soziologe Georg Simmel »philosophische Kultur« genannt hat<sup>89)</sup>, sind ebenso unverkennbar wie unwiderruflich.

Das tragische Geschehen enthält aber auch einen komischen Aspekt: Viele sozialwissenschaftliche Konzepte und Reflexionen über psychoanalytische Ansätze bis hin zur kultursoziologischen Thematisierung und Analyse von Fremdheit und Entfremdung sind später dann doch – in einer amalgamisierten Form aus der weiterentwickelten amerikanischen Sozialwissenschaft – ins westliche Deutschland zurückgekommen und wenigstens teilweise angeeignet worden. Dieser ideelle Wirkungsprozeß mußte vielfältig gebrochen sein.<sup>90)</sup> Und nicht selten hat auch die spezifische Optik der eher pragmatischen als geisteswissenschaftlich orientierten amerikanischen Kultur, Lebensweise und Wissenschaft über materielle und ideelle prismatische Brechungen Blicke verstellt.<sup>91)</sup> Der Aneignungsprozeß könnte jedoch heute noch die Chance enthalten, auf die wie immer verschütteten genuinen Ansätze der Entwicklung kritischer Sozial- und Geschichtswissenschaft der zwanziger und frühen dreißiger Jahre nunmehr unbelastet und im neuen generativen Zugriff zurückzukommen – ohne natürlich der Illusion einer bruchlosen Anknüpfung an definitiv vergangene Entwicklungen aufzusitzen.

Insofern mag denn auch aus allgemeiner Melancholie und Trauer intellektueller Provenienz, die – nach einem Wort Walter Benjamins – immer dazu tendiert, »links vom Möglichen überhaupt« zu stehen, vielleicht doch noch eine zumindestens produktivere Haltung entstehen: nämlich ein Aneignungsprozeß Heutiger, die einerseits um den unwiderruflichen Verlust vergangener ideeller Entwicklungen wissen, die aber gleichwohl durch eigenes Engagement auch im fachspezifischen Feld ihrer Wissenschaft oder intellektueller Arbeit überhaupt nach eben der Erkenntnis, Moral und Humanität streben, welche Wissenschaftler im Exil bewegt hat. In diesem präzisen Sinn wäre denn auch ihr »Erbe« als erst noch tätig einzulösende Verpflichtung eine Herausforderung in unserer Zeit.

#### Anmerkungen

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2) H. Pross, *Die Deutsche Akademische Emigration nach den Vereinigten Staaten: 1933 – 1941*, Berlin 1955, S. 18.

3) Allgemeine Übersichten in: *Biographisches Handbuch der deutschsprachigen Emigration nach 1933/International Biographical Dictionary of Central European Emigrees 1933*



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- <sup>8)</sup> Emigration, Bd. 2 (Anm. 3), S. 245 - 248; vgl. Albert Einsteins Memoiren: Out of my Later Years, New York 1950.
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- <sup>22)</sup> Zuerst Basel 1933, als Reprint Frankfurt a. M. 1973, hier S. 147 - 155 u. S. 175 - 181.
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- <sup>25)</sup> Vgl. R. Ströbinger, Mord in Marienbad. Vor 50 Jahren: Die SA-Aktion gegen Theodor Lessing. Deutschlandfunk-Sendung vom 23. August 1983; zu T. Lessing vgl. Reichshandbuch (Anm. 20), Bd. 2, S. 1106; Encyclopaedia Judaica, vol. 11, Jerusalem 1971. S. 50; Emigration, Bd. 2 (Anm. 3), S. 712 f.; zuletzt das sensible Porträt von Julius Schoeps, in: Tribüne 88 (1983).
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- <sup>46)</sup> Vgl. *Emigration*, Bd. 2 (Anm. 3), S. 775; D. Sills (Anm. 29), vol. 9, S. 557 – 562; W. Bernsdorf (Anm. 20), S. 267 – 269; die Autorin Anna Seghers hat, aus genauer Kenntnis des Heidelberger Milieus und der ungarischen Emigration, in ihrem Simultan-Roman »Die Gefährten« (Darmstadt/Neuwied 1981<sup>4</sup>/1932) auch in einem Entwicklungsstrang eine vergleichbare Karriere beschrieben.
- <sup>47)</sup> Vgl. v. a. K. Mannheim, *Ideologie und Utopie*, Bonn 1929/1930<sup>2</sup>.
- <sup>48)</sup> Vgl. *Emigration*, Bd. 2 (Anm. 3), S. 363; D. Sills (Anm. 29), vol. 6, S. 83 – 85; W. Bernsdorf (Anm. 20), S. 138 – 142; eingehender P. Trappe, *Einführung*, in: T. Geiger, *Arbeiten zur Soziologie*, Neuwied/Berlin 1962; zuletzt als biographischer Abriss S. Bachmann, in: *Mitteilungen der Technischen Universität Carolo-Wilhelmina zu Braunschweig* 15 (1980).
- <sup>49)</sup> Vgl. v. a. R. Königs *Autobiographie, Leben im Widerspruch* (Anm. 37); *Kurzvita in: Emigration*, Bd. 2 (Anm. 3), S. 373.
- <sup>50)</sup> Vgl. ebd., S. 373.
- <sup>51)</sup> Vgl. ebd., S. 539; eingehender zur Tätigkeit Oldens als Generalsekretär des deutschen PEN im Exil und zu seinem Tod vgl. W. Berthold u. a., *Der deutsche PEN-Club im Exil (1933 – 1948)*, Frankfurt a. M. 1980, S. 179 – 221.
- <sup>52)</sup> Vgl. *Emigration*, Bd. 2 (Anm. 3), S. 196.
- <sup>53)</sup> Vgl. *Emigration*, Bd. 1 (Anm. 3), S. 326; für Cosers und Jacobys Entwicklung aufschlußreich die Erinnerungen der Jahre 1936 bis 1946 von H. Jacoby, *Davongekommen*, Frankfurt a. M. o. J. (1982).
- <sup>54)</sup> Vgl. *Emigration*, Bd. 2 (Anm. 3), S. 26.
- <sup>55)</sup> Zitiert nach M. Greffrath (Anm. 44), S. 41; wissenschaftliche Karrieren ehemaliger Publizisten der Weimarer Republik in den USA scheinen den »harten Kern« dieser harschen Wertung zu bestätigen.
- <sup>56)</sup> Vgl. G. Anders, *Die Antiquiertheit des Menschen*, München 1957.
- <sup>57)</sup> Nach dem Selbstmord Stefan Zweigs Anfang 1942 entstand Carl Zuckmayers bewegender »Aufruf zum Leben«; vgl. ders., *Aufruf zum Leben. Porträts und Zeugnisse aus bewegten Zeiten*, Frankfurt a. M. 1982<sup>2</sup>, hier S. 7 – 15.

- <sup>58)</sup> Vgl. *Reichshandbuch* (Anm. 20), Bd. 1, S. 605 f.; *Kürschners Deutscher Gelehrtenkalender*, Berlin 1 (1925), S. 318 f.; dass., 2(1926), S. 602 f.; dass., 3(1928/29), S. 752 f.
- <sup>59)</sup> Vgl. zur Person den Nachruf von F. Benseler in: *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 31(1979); sowie die brillante wissenschaftliche Camouflage von H. Maus, *Zur gesellschaftlichen Funktion der Soziologie*, in: *Archiv für Rechts- und Sozialphilosophie* 33 (1939/40).
- <sup>60)</sup> Vgl. K. Steinhaus, *Soziologie der türkischen Revolution. Zum Problem der Entfaltung der bürgerlichen Gesellschaft in sozioökonomisch schwach entwickelten Ländern*, Frankfurt a. M. 1969.
- <sup>61)</sup> F. Neumark, *Zuflucht am Bosphorus. Deutsche Gelehrte, Politiker und Künstler in der Emigration 1933 – 1953*, Frankfurt a. M. 1980.
- <sup>62)</sup> Vgl. H. Widmann, *Exil und Bildungshilfe. Die deutschsprachige akademische Emigration in die Türkei nach 1933*, Frankfurt a. M./Bern 1973.
- <sup>63)</sup> Vgl. *Emigration*, Bd. 2 (Anm. 3), S. 1059.
- <sup>64)</sup> H. Widmann (Anm. 62), S. 53 – 61.
- <sup>65)</sup> Die im Herbst 1936 unter dem Signum »strictly confidential« von der »Notgemeinschaft deutscher Wissenschaftler im Ausland« veröffentlichte »List of Displaced German Scholars« (London 1936) dürfte etwa 1600 Personen enthalten. Einige der dort Genannten freilich – etwa Adolf Reichwein (S. 33), der später im Vorfeld des 20. Juli 1944 festgenommen und von den Nationalsozialisten getötet wurde – lebten noch im Dritten Reich.
- <sup>66)</sup> Zitiert nach H. Widmann (Anm. 62), S. 54 f.
- <sup>67)</sup> F. Neumark (Anm. 61), S. 9; vgl. auch zusammenfassend ders., *Die Emigration in die Türkei*, in: M. R. Lepsius (Anm. 19), S. 442 – 460.
- <sup>68)</sup> Vgl. G. W. F. Hallgarten (Anm. 32), S. 213 f.; v. a. die Erinnerungen von Hallgarten und Jacoby (Anm. 53) sprechen die widersprüchliche Einheit von »Größe und Erbärmlichkeit« (Feuchtwanger) des Exils deutscher Wissenschaftler nach 1933 erfahrungsbezogen an. Beide Autoren gehörten zur jungen Generation der antifaschistischen Emigration.
- <sup>69)</sup> C. Misch, *Gesamtverzeichnis der Ausbürgerungslisten 1933 – 1938*, Paris o.J. (1939).
- <sup>70)</sup> E. J. Gumbel (Hrsg.), *Freie Wissenschaft*, Strasbourg 1938.
- <sup>71)</sup> Ebd., S. 28.
- <sup>72)</sup> *Ausgiebige Bio-Bibliographie der Autoren ebd.*, S. 263 – 283.
- <sup>73)</sup> Vgl. T. Geiger, *Intelligensen*, Stockholm 1944; deutsch als: *Aufgaben und Stellung der Intelligenz in der Gesellschaft*, Stuttgart 1949.
- <sup>74)</sup> E. J. Gumbel (Anm. 70), S. 64.
- <sup>75)</sup> Vgl. *Emigration*, Bd. 1 (Anm. 3), S. 612.
- <sup>76)</sup> Vgl. A. Rosenberg, *Geschichte der deutschen Republik*, Karlsbad 1935; englische Ausgabe London 1936; Neuaufgabe hrsg. v. K. Kersten, Frankfurt a. M. 1961.
- <sup>77)</sup> E. J. Gumbel (Anm. 70), S. 213.
- <sup>78)</sup> E. Grünfeld (Anm. 1).
- <sup>79)</sup> Ebd., S. 2.
- <sup>80)</sup> Ebd., S. 77.
- <sup>81)</sup> Ebd., S. 79.
- <sup>82)</sup> Ebd.
- <sup>83)</sup> Ebd., S. 82.
- <sup>84)</sup> Ebd., S. 53. f.



- <sup>85)</sup> Zitiert nach R. König, Studien zur Soziologie, Frankfurt a. M. 1971, S. 105.
- <sup>86)</sup> Vgl. E. Bloch, Zerstörte Sprache – Zerstörte Kultur, (1939), wiederabgedruckt in: ders., Vom Hazard zur Katastrophe, mit einem Nachwort v. O. Negt, Frankfurt a. M. 1972.
- <sup>87)</sup> Vgl. R. Albrecht, Exil im Roman, in: Diskussion Deutsch 13 (1982).
- <sup>88)</sup> G. Glaser, Geheimnis und Gewalt. Ein Bericht. Stuttgart/Hamburg 1953, S. 347 f.; in der Taschenbuchauflage Reinbek 1983, S. 261 f.
- <sup>89)</sup> Vgl. G. Simmel, Philosophische Kultur. Gesammelte Essays, Leipzig 1919<sup>2</sup>.
- <sup>90)</sup> Eine historisch-konkrete Untersuchung der Karriere des Konzepts: Frustration mag hier exemplarische Einsichten vermitteln.
- <sup>91)</sup> Beispielhaft veranschaulicht: Selbstverständlich verstellt eine reduzierte Einvernahme des Werks Max Webers in der amerikanischen main-stream sociology mit ihrer Überzeichnung der Werturteilsproblematik den Tatbestand, daß Weber 1918/19 einem wichtigen Teil der aus den Schützengräben des 1. Weltkriegs in die Hörsäle zurückkehrenden akademischen Jugend als moralpolitischer Orientierungspunkt galt; ähnlich Wilhelm Raimund Beyer in einer »Zwischenbemerkung« in: ders./J. Drexel (Hrsg.), Rückkehr unerwünscht, München 1980<sup>2</sup>, S. 363.

Georg Schwinghammer

## Im Exil zur Ohnmacht verurteilt

Deutsche Politiker und Parteien  
in der Emigration 1933 bis 1945

Ob Politiker der Weimarer Republik, nach Hitlers Machtantritt geächtet, verfemt und verfolgt, nach Westen oder Osten emigrierten: Sie mußten trotz aller Zuversicht, ihr politisches Wirken – wenn auch unter geänderten Voraussetzungen – gegen die Gewaltherrschaft im eigenen Lande von außen her fortsetzen zu können, alsbald zur bitteren Gewißheit gelangen, daß die Umstände des Exils allenfalls ein sehr beschränktes Handeln erlaubten.

Noch bedrückender mußte vornehmlich Exilierte der deutschen »Linken« die Erkenntnis treffen, daß trotz des gemeinsam erlebten harten Schicksals und des Eingeständnisses der gemeinsam erlittenen Niederlage die tiefe innere Zerstrittenheit der Arbeiterbewegung und mit ihr aller linken Gruppierungen trotz verschiedener Ansätze nicht zu überwinden war. Denn schon an der Bewertung der Ursachen für den ruhm- und kampflösen Untergang der Weimarer Republik schieden sich die Geister so gründlich, daß an eine neue Basis für ein politisch gemeinschaftliches zukünftiges Handeln im Kampf gegen die Hitler-Diktatur, geschweige denn für die Zeit nach deren Beseitigung, nicht zu denken war. (Auch der Kampf Seite an Seite in den Internationalen Brigaden im spanischen Bürgerkrieg vermochte, wie sich herausstellen sollte, die tiefe ideologische Kluft zwischen Sozialisten und Kommunisten nicht zu überbrücken.)

Diese Situation war kennzeichnend für die gesamte Dauer des Exils und wirkt sich, für jedermann sichtbar, bis in unsere Tage aus. Mochten auch Sozialdemokraten und Kommunisten, die einen im westlichen, die anderen im östlichen Exil, zeitweilig – vor allem unmittelbar nach Beginn des Zweiten Weltkriegs – einen wenn auch sehr begrenzten Einfluß auf die Haltung der Regierungen der Anti-Hitler-Koalition und deren Nachkriegsziele ausgeübt haben, so wurde er mit dem Herannahen der sich von Monat zu Monat immer deutlicher abzeichnenden Niederlage Deutschlands zunehmend geringer. Da alle Aussichten für eine Beseitigung der Hitler-Diktatur durch einen Volksaufstand von innen (wie ihn vor allem die KPD erhoffte) oder durch einen Putsch der Wehrmacht stetig mehr dahinschwanden, war der Sturz des Regimes ohnehin nur noch durch seine totale militärische Kapitulation erreichbar.

So liegt denn die eigentliche historische Leistung exilierter deutscher demokratischer Politiker, obschon nach Lage der Dinge weitgehend zur Ohnmacht verurteilt, zum einen darin, dem NS-Regime durch tatkräftige Unterstützung des



# Widerstand und Exil 1933 – 1945

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Sie muß sich darum bemühen, das politische Geschehen als Einheit zu begreifen und darf sich nicht dazu verleiten lassen, Phänomene der Innen- und Außenpolitik unter Verkennung ihrer Interdependenz isoliert voneinander zu betrachten. Ist doch – um das nächstliegende Beispiel heranzuziehen – die Bedeutung unserer freiheitlich rechtsstaatlichen Institutionen und der Grundlagen, die sie in unserem Selbstverständnis haben, nur in einem weltumfassenden Sinn zu begreifen und verständlich zu machen. Und so ist denn die politische Funktion der politischen Wissenschaft darin zu erblicken, verfügbares Wissen in den Dienst des politischen Urteils zu stellen mit dem Ziel, durch Eliminierung romantisierender und utopischer pseudo-politischer Vorstellungen zu echten politischen Entscheidungen zu gelangen.

Es kann nicht meine Aufgabe sein, im einzelnen auf Bergstraessers Theorie der politischen Entscheidung einzugehen. Sie enthält in ihrem Kern das Programm eines Systems einer wissenschaftlichen Politik. Sie ist ohne Vorbild und stellt wissenschaftliches Neuland dar. Indem er andeutet, daß es entscheidend darauf ankommen wird, darzutun, welche Bedeutung für eine jede politische Entscheidung die Möglichkeit besitzt, der „Diagnose“ der vorgegebenen Realitäten des politischen Lebens, der „Prognose“ der politischen Entwicklung und dem „Entwurf“ einer politischen Lösung politischer Probleme wissenschaftliche Erkenntnisse zugrunde zu legen, hat er unserer Wissenschaft Anregungen hinterlassen, mit denen wir uns noch auf lange Zeit hin auseinandersetzen werden. Die Freiburger Schule der Politikwissenschaft hat einen Meister besessen, der die erregendsten Fragen gestellt hat, die im letzten Jahrzehnt in der politischen Wissenschaft in Deutschland aufgeworfen worden sind. Sie zu beantworten, ist ihm versagt geblieben; durch die Schulung eines in seinen Denkmethode geübten Nachwuchses die Möglichkeit ihrer Beantwortung geschaffen zu haben, ist nicht das geringste seiner dauernden Verdienste um die Wissenschaft von der Politik. Arnold Bergstraesser hat Freiburg und seiner Universität nicht nur ein großes, sondern auch ein verpflichtendes Erbe hinterlassen.

Diese allzu knappe und notwendigerweise stark vereinfachende Zusammenfassung der Grundgedanken der Bergstraesserschen Politologie vermag nur einen oberflächlichen Eindruck des Gedankenreichtums und des sittlichen Ernstes zu vermitteln, die in Arbeiten niedergelegt sind, die ein Torso blieben. Arnold Bergstraesser hätte mit größtem Nachdruck das Lob zurückgewiesen, er habe ein dauernd-gültiges Wort, geschweige denn ein endgültiges Wort über Ziele und Methoden einer deutschen Politikwissenschaft gesprochen. Er darf aber für sich in Anspruch nehmen, als erster ein entscheidendes Wort zur Begründung einer universalen und daher einer neuen Wissenschaft von der Politik in Deutschland gesagt zu haben. War er doch nicht nur bemüht, die Bewegungsgesetze der Politik wissenschaftlich zu begreifen, wollte er doch auch mittels wissenschaftlicher Erkenntnisse dazu beitragen, die Kräfte, die die Politik als unser aller Schicksal bestimmen, sinnvoll zu zügeln und vordenkend zu lenken. Arnold Bergstraesser hat sich um die Wissenschaft und um die Politik, er hat sich um die Wissenschaft von der Politik wohl verdient gemacht.

JFA 10(1965)

## Deutsche Wissenschaftler in den Vereinigten Staaten in den Jahren nach 1933\*

—  
Louise W. Holborn

„... Amerika hat mir die Chance gegeben, in meinem Beruf, in meinem Denken und Schaffen, in meiner Voraussetzung und meiner Arbeit, europäisch, ja sogar deutsch zu bleiben, und doch von ganzem Herzen ein Bürger Amerikas zu sein – ein Nachbar in einem nachbarlichen Land voll klarer, sauberer, einfacher Menschlichkeit ... das aus unserer europäischen Zukunft nie mehr wegzudenken ist, nicht als unser Beherrscher, sondern als unser Weggenosse, und mit dessen freiem Volk wir gemeinsam eine freie und brüderliche Welt erstreben wollen.“

„Carl Zuckmayer“, Als Emigrant in Amerika, 1948.\*\*

Die Umstände und Motive, die nach 1933 viele deutsche Gelehrte veranlaßten, die Vereinigten Staaten als Auswanderungsland zu wählen, waren denen ähnlich, die fast anderthalb Jahrhunderte früher den englischen Pfarrer und Chemiker Joseph Priestley bewogen hatten, seine Zuflucht jenseits des atlantischen Ozeans zu suchen. Die älteste wissenschaftliche Vereinigung des Landes, die Amerikanische Philosophische Gesellschaft, von Benjamin Franklin gegründet, hatte ihn schon 1785 zu ihrem Mitglied gemacht. Nach seiner Ankunft im Juni 1794 begrüßte sie ihn feierlich:

In this free and happy country, those unalienable rights, which the Author of Nature committed to man as a sacred deposit, have been secured. Here, we have been enabled, under the favour of Divine Providence, to establish a government of laws and not of men; a government, which secures to its citizens equal rights and equal liberty; and which offers an asylum to the good, to the persecuted, and to the oppressed of other climes.<sup>1</sup>

Seine Antwort auf die Ernennung zum Mitglied darf uns gewissermaßen als Einführung gelten.

It is, in great part, for the sake of pursuing our common studies without molestation, tho', for the present, you will allow, with far less advantage, that I left my native country, and have come to America; and a society of philosophers, who will have no objections to a person on account of his political or religious sentiments, will be as grateful as it will be new to me ...<sup>2</sup>

\* Vortrag gehalten am 21. Mai 1964 auf der Jahrestagung der Deutschen Gesellschaft für Amerikastudien in Frankfurt/Main.

\*\* In *Verbannung. Aufzeichnungen Deutscher Schriftsteller im Exil*, Hamburg, 1964, S. 154.

<sup>1</sup> Dresden, Arnold, "The Migration of Mathematicians", *American Mathematical Monthly*, Vol. 49 (1942), S. 415. Dieser Aufsatz führt die Namen der eingewanderten Mathematiker für die Jahre 1933–1942 auf.

<sup>2</sup> Ebd., S. 429.



Und dann fuhr er fort – in der Sprache und mit dem Ethos seiner Zeit –, die Regierungsformen Europas mit der Amerikas zu vergleichen:

I am confident, from what I have already seen of the spirit of the people of this country, that it will soon appear that republican governments, in which every obstruction is removed to the exertions of all kinds of talents, will be far more favourable to science, and the arts, than any monarchical has ever been.<sup>3</sup>

Nicht nur die Gelehrten, sondern die gesamte Gruppe der deutschen und österreichischen Flüchtlinge nach 1933 waren durch ähnliche Umstände und Motive zur Übersiedlung nach Amerika veranlaßt worden wie Priestley anderthalb Jahrhunderte vor ihnen. Alle waren Flüchtlinge auf Grund der politischen Ereignisse in ihrer Heimat. Sie hatten freiwillig oder zwangsweise ihr Land verlassen, da ihr Leben und ihre Freiheit wegen ihrer politischen oder religiösen Überzeugung oder ihrer rassischen Abstammung bedroht waren. Sie kamen zum großen Teil nach Amerika wegen des dort herrschenden Geistes der Aufnahmebereitschaft und der Freiheit.

Es ist schwierig, eine genaue Zahl für die Flüchtlinge zu nennen, die in der Zeit von 1933–1944 nach Amerika eingewandert sind, da in der offiziellen Statistik keine Trennung zwischen Einwanderern und Flüchtlingen besteht. Die Gesetze von 1917 und 1924, unter denen die Einwanderung reguliert wurde, sahen qualitative (physische, moralische, geistige und finanzielle) und quantitative Begrenzungen vor. Unter dem Quotensystem konnten jährlich 150 000 Personen zugelassen werden, aber wegen der Wirtschaftskrise war die Quote von 1931–1944 sehr viel geringer.<sup>3</sup> Es ist aber vorsichtig errechnet worden, daß vom 1. Januar 1933 bis zum 30. Juni 1944 insgesamt 279 649 Personen, die vor der Verfolgung durch den Nationalsozialismus flohen, in Amerika Aufnahme gefunden haben (diese Zahl schließt sowohl die sogenannten „permanent migrants“, die mit einem Visa kamen, als auch die „non-permanent migrants“ ein). Die Zahlen umfassen jüdische und nicht-jüdische Ankömmlinge aus Deutschland von 1933 an, aus Österreich von 1938, aus der Tschechoslowakei von 1939 und aus anderen europäischen Ländern von 1940 an.

Die Einwanderung von 1933–1944 unterscheidet sich nicht nur zahlenmäßig, sondern auch nach ihrer demographischen Zusammensetzung, im wesentlichen nach Alter, Geschlecht, Schul- und Berufsbildung, Tätigkeit und Religion. Die Schar der Einwanderer bestand vorwiegend aus Familien, das heißt aus alten und jungen Leuten, aus einer Überzahl der weiblichen Personen gegenüber den männlichen, im Gegensatz zu den früheren Einwanderern, die vorwiegend junge, unverheiratete Arbeiter, Handwerker und Bedienstete gewesen waren. In der Einwanderung von 1933–1944 waren ungefähr achtzig Prozent jüdischer Abstammung; in der sogenannten arischen Gruppe war das Verhältnis von Protestanten zu Katholiken ungefähr drei zu zwei.<sup>4</sup>

Im allgemeinen war es eine städtische Gruppe mit kosmopolitischem Ausblick. Die meisten hatten in guten wirtschaftlichen Verhältnissen gelebt und am Kulturleben ihres Heimatlandes teilgenommen. Sie gehörten vorwiegend den mittleren und höheren Klassen an. Viele von ihnen waren Professoren, Schriftsteller, höhere Beamte, Geschäfts- und Unternehmensleiter, Bankiers und qualifizierte Handwerker und Inge-

<sup>3</sup> Siehe Tabelle in Davie, Maurice R., *Refugees in America*, New York: Harpers, 1947, S. 21.

<sup>4</sup> Ebd., S. 37–46.

nieure. Sie besaßen also eine höhere Schul- und Berufsausbildung.<sup>5</sup> Die meisten hatten eine zehnjährige Schule absolviert und beinahe die Hälfte hatte ein Gymnasium und die Universität besucht. Unter ihnen befanden sich zwölf Nobelpreisträger, und in der kurzen Zeit bis 1946 wurden in *Who's Who in America* ungefähr 103 und in *American Men of Science* 220 Gelehrte aus dieser Gruppe aufgeführt.

Wieviele dieser deutschen und österreichischen Einwanderer Professoren, Dozenten und Akademiker anderer Berufe waren, ist schwer zu schätzen. Soweit das zahlenmäßig festzustellen ist, gehören ungefähr 7622 den akademischen Berufen an.<sup>6</sup> Es ist verständlich, daß von deutscher Seite, im Rückblick auf die Besonderheit der Auswanderung in den 30er Jahren, von einem „Auszug des Geistes“ gesprochen worden ist.<sup>7</sup> Der englisch-jüdische Gelehrte und bedeutende Philanthrop Professor Dr. Bentwich sprach für die gesamte westliche Welt, als er über die internationale Flüchtlingshilfe für die Deutschen berichtete: „No feature of the Nazi persecution made such a deep impression on the world as the exile of the university scholars and intellectuals. In the academic world there had been nothing comparable to it since the emigration of the Greek scholars on the capture of Constantinople by the Turks in the fifteenth century.“<sup>8</sup>

Trotz der traditionellen amerikanischen Bereitschaft, politisch und geistig Verfolgte aufzunehmen und sie an den verbürgten Freiheiten teilnehmen zu lassen, war für viele der Flüchtlinge die Aufnahme mit großen Schwierigkeiten verbunden. Das verständnisvolle Entgegenkommen der amerikanischen Dienststellen konnte einige Hindernisse nicht überbrücken. Obwohl von 1933–1943 im ganzen 580 000 Visa für die von den Nationalsozialisten Verfolgten ausgestellt wurden, konnten weniger als die Hälfte der Visa benutzt werden.

Die nationalsozialistische Regierung stellte den Opfern beinahe unüberbrückbare Hindernisse in den Weg, so daß viele das Land nicht verlassen konnten. Eine weitere Behinderung war auch das schwerfällige Verfahren bei der Ausführung des Einwanderungsgesetzes – die Notwendigkeit, eine Reihe von Dokumenten zu beschaffen (Paß, Geburtsschein, polizeiliche und militärische Bescheinigung, Photographie, Arbeitsnachweis oder Zusicherung von privater Unterstützung). Dazu kam weiterhin erschwerend die Wirtschaftskrise in den Vereinigten Staaten. Der Furcht, daß der Einwanderer

<sup>5</sup> Schibsky, Marion, „Who is the New Immigrant?“, *Social Work Today* (Dezember 1939), S. 15. „... In many cases he is a highly educated person. In 1914 only 1.2 percent of the immigrants belonged in the professional group – architects, actors, teachers, etc.; in 1938 the corresponding percentage was 8.0. In 1914 only 14.2 percent were classified as skilled workers – carpenters, machinists, tailors, engravers, etc.; in 1938 21.2 percent were so classified. Farm laborers and servants constituted 54.0 percent in 1914; in 1938 they constituted only 12.8 percent. Obviously the average new immigrant is better trained and better educated than was the prewar immigrant. ... Undoubtedly refugees from the German. ... Reich are largely responsible for the high level of today's immigration.“

<sup>6</sup> Siehe Kent, Donald Peterson, *The Refugee Intellectual*, New York: Columbia Univ. Press, 1953, S. 11–40.

<sup>7</sup> *Auszug des Geistes*, Radio Bremen. Bericht über eine Sendereihe, Bremen: B. C. Heye und Co., 1962.

<sup>8</sup> Bentwich, Norman, *The Refugees from Germany, April 1933 to December 1935*, London: G. Allen and Unwin, 1936, S. 175. Seit 1933 war Bentwich stellvertretender Hochkommissar des Völkerbundes für Flüchtlinge aus Deutschland.



dem Staat oder den Gemeinden zur Last fallen könnte, mußte durch die Bürgschaft von einzelnen Amerikanern und von Stiftungen begegnet werden. „Affidavits“ spielten daher eine große Rolle. Andererseits gelang es der Regierung, gewisse beschränkte Erleichterungen für den Eintritt in das Land zu schaffen. Ein „corporate affidavit“ für 1000 Flüchtlingskinder (für die Zeit von 1933–1941) war dem Komitee der Hilfsorganisation für europäisch-jüdische Kinder zu verdanken. Das „Beratende Komitee für Politische Flüchtlinge“, das durch eine Ausführungsverordnung des Präsidenten im Juli 1940 gegründet wurde, ermöglichte in seiner einjährigen Arbeit ungefähr 2000 politischen Flüchtlingen den Eintritt. Unter ihnen befanden sich höhere politische Beamte, Rechtsanwälte, Richter, Herausgeber, Professoren sowie international bekannte Schriftsteller und Gelehrte. Für Gelehrte standen zusätzliche akademische Visa zeitlich begrenzter Art außerhalb der Quote unter der Voraussetzung zur Verfügung, daß ihre Anstellung in College oder Universität im voraus zugesichert worden war.

Im Krieg wurden die Bedingungen juristisch wie technisch verschärft. Im Interesse der Wahrung der öffentlichen Sicherheit wurden 1941 neue Maßnahmen getroffen, während gleichzeitig die Transportschwierigkeiten zunahmen, so daß die Vereinigten Staaten, wenn überhaupt, nur auf Umwegen erreicht werden konnten. Dazu kamen persönliche Schwierigkeiten: die seelische Belastung durch die Ungewißheit über das Schicksal der zurückgelassenen Familienmitglieder und Freunde; die Erschütterung über das Entwurzeltsein, die Betroffenheit über die ungläubliche politische Veränderung in dem Land, das einstmal die Heimat gewesen war.<sup>9</sup>

Jeder, der Amerika kennt, weiß, daß nach Überwindung der gesetzlichen Schwierigkeiten die Anpassung an die amerikanische Lebensweise notwendig wird. Bei aller Bereitschaft zur Umstellung bedeutete das, rein äußerlich gesehen, die Gewöhnung an ein völlig anderes Klima, das Kontinentalklima, dessen extreme Gegensätze dem an ein gemäßigttes Klima gewohnten Mitteleuropäer viel zu schaffen machten. Auch war eine innere Umstellung im gesellschaftlichen Verkehr nötig. In den Worten Franz Neumanns: „... a clean break – psychological, social, and economic – had to be made, and a new life started.“<sup>10</sup> Alte Gewohnheiten mußten überwunden werden, die für die in einer Klassengesellschaft aufgewachsenen Menschen selbstverständlich waren.<sup>11</sup>

Für die Wissenschaftler bedeutete es auch in den meisten Fällen ein Umdenken ihres Wissensstoffes: vom Abstrakten zum mehr Konkreten, vom komplizierten Ausdruck zum einfacheren, von historischen und kulturellen Voraussetzungen der Alten Welt zu denen der Neuen.

Die größte Hürde war für die Gelehrten, wie für alle Intellektuellen, die Sprache. Es ist mit Recht gesagt worden: Maurerarbeit kann man in jedem Lande leisten, wenn man nur über einige Sprachbrocken verfügt, aber Lehren und Schreiben verlangt ein Sichhineinleben in den andersartigen Geist einer fremden Sprache, den man erfaßt

<sup>9</sup> Stephen Duggan and Betty Drury, *The Rescue of Science and Learning*, New York: MacMillan Co., 1948, S. 35.

<sup>10</sup> Neumann, Franz L. et al., *The Cultural Migration*, New York, 1961, S. 17.

<sup>11</sup> Barschak, Erna, *My American Adventure*, New York: Ives Washburn, Inc., 1945; Zuckmayer, Alice Herdan, *Die Farm in den grünen Bergen*, Fischer Bücherei, 1956. Beide geben auf Grund persönlicher Erfahrungen ein anschauliches Bild von den Schwierigkeiten der Anpassung.

haben muß, um volle Kommunikation herzustellen.<sup>12</sup> Waren die Anfangsschwierigkeiten einmal überwunden, so bewegten sich die Menschen freier und leichter als vorher. Dies ist der großen Bereitschaft der amerikanischen Bevölkerung zu danken, die den Einwanderern, wenn sie nur anpassungsfähig waren, die Eingewöhnung erleichtert hat. Die meisten Neankömmlinge waren aufgeschlossen für die Neue Welt. Sie wollten vergessen, was hinter ihnen lag. Es war überraschend und wohltuend für sie, so viel Freundlichkeit und Menschlichkeit zu begegnen. Auch wenn nicht eine volle Assimilierung erwartet werden konnte, so half es doch, wenn Sitten und Gebräuche an die im Vergleich zu Europa klassenlose Gesellschaft angepaßt wurden. Daß man sowohl manuelle wie geistige Arbeit leistete, wurde als eine Selbstverständlichkeit erwartet. Konnte man nicht lehren, so konnte man doch in der Fabrik am laufenden Bande arbeiten, Schlipse verkaufen, Haus- oder Gartenarbeit verrichten oder sich als Kellner sein Brot verdienen. Trotz aller Hindernisse und Schwierigkeiten wurden gerade die Intellektuellen in der neuen Welt besonders angesprochen und zur Entwicklung ihrer latenten Kräfte angespornt, um so mehr als sie sich von Verfolgung, Mißachtung und erzwungener Untätigkeit befreit fühlen konnten.

Gegen ihren Willen losgelöst von der historischen Tradition, zu der sie gehörten, ohne gemeinsame Erlebnisgrundlagen mit dem Volk des Aufnahmelandes zu haben, hätten sie unter anderen Verhältnissen als denen, die sie in den Vereinigten Staaten vorfanden, vielleicht verkümmern müssen. Dort aber konnten sie, indem sie oft die Sprache und ihre Begriffe erst richtig oder auch ganz neu zu lernen hatten, in eine Welt hineinwachsen, die bereit war, sie voll aufzunehmen. Viele der Flüchtlinge haben rückblickend von einer zweiten Jugend gesprochen. Daß ihre Verpflanzung erfolgreich war, war im wesentlichen dem politischen System und der menschlich-politischen Atmosphäre, vor allem an den Universitäten und Colleges, zu verdanken.

Die besonderen Probleme der Anpassung der Flüchtlinge führten zu der Entwicklung eines besonderen *refugee service program* (Flüchtlingshilfsprogramm), das sich durch die Initiative und Unterstützung von humanitären, liberalen und kirchlichen Gruppen erfolgreich entwickelte. Eine große Anzahl von Organisationen nahm an dieser Hilfsaktion teil. Über finanzielle Unterstützung und berufliche Beratung hinaus halfen sie den Flüchtlingen, sich kulturell wie gesellschaftlich einzugewöhnen, oft auch, sich auf ein neues Leben außerhalb von New York City umzustellen.

Da die seit langem bestehenden Hilfsorganisationen für Immigranten dem neuen Ansturm nicht gewachsen waren, wurde das *National Coordinating Committee for Aid*

<sup>12</sup> Dr. Henry Siger, „Celebration of the Seventieth Birthday of Arturo Costigliani“, *Yale Journal of Biology and Medicine*, vol. 17 (Dec., 1944–45), 415. Siger schreibt: „Only few realize what it means for a writer and teacher to be obliged to change languages, particularly at an advanced age... The language in which we uttered our first words, in which we expressed our emotions, in which we formulated our thoughts and developed our own style has become an essential part of our personality. Only those who have gone through the experience know that feeling of humiliating helplessness and frustration that a mature scholar feels when all of a sudden he has to carry on his work in a foreign tongue and know how much time it takes before he is able to express himself in his own personal style in the new language.“

Siehe auch Eduard Heimann, „The Refugee Speaks“, *Annals of the Academy of Political and Social Science*, vol. 203 (1939), 111.



to *German Refugees* geschaffen. Aber auch das erwies sich als unzureichend. So wurde zur Zeit des größten Exodus aus Deutschland, 1939, ein *National Refugee Service* als eine einzige Organisation mit vielfachen Aufgaben gegründet, welches die Aufgaben des *Coordinating Committee* durchführte, unter dem ein Netz von über 900 lokalen *Community Committees* mitwirkte. Noch stärker konzentriert auf persönliche Hilfe waren die Organisationen der drei konfessionellen Gruppen.

Daß die Verpflanzung so vieler Flüchtlinge erfolgreich war, ist im wesentlichen dem politischen System und der menschlichen Atmosphäre zu verdanken. Das trifft besonders für das Einleben der Wissenschaftler an den Universitäten und Colleges zu. Zehn Jahre früher wäre eine solche Verpflanzung nicht so erfolgreich gewesen. Die *Roosevelt Administration* mit ihrem "New Deal" hatte sehr dazu beigetragen, Professoren in die Politik zu bringen und sie an den politischen Diskussionen teilhaben zu lassen. Dieses politische Leben war ein sehr belebendes Element für die Deutschen. Die Teilnahme aller Bürger an der Regierung und an den lokalen Problemen (*civic affairs*) und die Entdeckung, daß der Staat für das Volk existierte und nicht das Volk dem Staat diene, hatte nach den Erfahrungen in Deutschland einen nachhaltigen Einfluß. Man fühlte sich aufgerufen. Über die Erlangung der juristischen Staatsbürgerschaft hinaus nahmen nicht wenige an den Aufgaben der engeren Gemeinschaft in Stadt und Ländern teil, gemäß der Art der Amerikaner, die sich auch bei einer Verpflanzung von Ort zu Ort oder von Einzelstaat zu Einzelstaat voll einsetzen. Überdies stand hinter allem die gesamte, in nachbarschaftlicher Überlieferung durch Generationen geformte hilfsbereite Haltung des Amerikaners: Weitherzigkeit, Hilfsbereitschaft, Gastfreundschaft und guter Wille waren ermutigend und halfen über die großen Schwierigkeiten der ersten Jahre.

Es bewährte sich die Tradition des Landes, Asyl zu sein für politische und religiöse Flüchtlinge und für die wegen ihrer Abstammung Verfolgten. Entscheidend waren vor allem die Tatkraft und die öffentliche Verantwortlichkeit der Universitäten und Colleges.

Das amerikanische Konzept vom Asyl für die Unterdrückten, tief verwurzelt in der naturrechtlichen Philosophie der dreihundert Jahre alten amerikanischen Tradition, ist auch heute noch ein wesentlicher Teil des demokratischen Ideals. Schon Thomas Paine schrieb in *Common Sense*: "... this new world hath been the asylum for the persecuted lovers of civil and religious liberty from every part of Europe." Aber das Asylrecht hat nicht nur Schutz bedeutet für die Flüchtlinge, sondern auch Bereicherung für die Einheimischen.<sup>13</sup> Als die Harvard Universität 20 Stipendien für deutsche geflüchtete Studenten stiftete, wies Präsident Conant darauf hin, dies sei „ein Symbol für die Entschlossenheit der jüngeren Generation, durch Wort und Tat zu beweisen, daß die humanitäre Grundlage der Demokratie nicht tot sei“.<sup>14</sup>

Studenten der Harvard Universität gründeten 1938 das *Harvard Committee to Aid Refugees*, um Hilfe für Studenten aus Nazi-Europa zu bringen. Diese Anregung wurde von vielen Colleges und Universitäten in verschiedenen Gebieten des Landes aufgegriffen und führte zu der Gründung des *Intercollegiate Committee to Aid Student*

<sup>13</sup> Robert Ernst, "The Asylum of the Oppressed", in *The South Atlantic Quarterly*, XL, 1 (January, 1941), 2.

<sup>14</sup> Ebd., 10.

*Refugees*. Eine große Anzahl von Stipendien wurde an mehr als 300 Colleges zur Verfügung gestellt. Auch andere Organisationen boten Wohnung und Lebensunterhalt für viele geflüchtete Studenten, um ihnen den Abschluß ihrer Studien zu ermöglichen.<sup>15</sup> Viele von diesen jungen Leuten sind heute lange in Amt und Würden.

Für die volle Eingliederung in das Land und seine Gesellschaft waren die Kriegsjahre von 1941 bis 1945 von wesentlicher Bedeutung. Die Erlebnisse und Erfahrungen in der militärischen Gemeinschaft brachten die Jüngeren, die unmittelbar im Kriegsdienst verwandt wurden, zu einer vollen Integration. Aber auch für die Älteren bedeutete der Krieg eine neue Phase in ihrem Einsteigen für das Aufnahmeland und ihrem Zugehörigkeitsgefühl. Man war der gleichen Bedrohung ausgesetzt wie die Amerikaner, und man wurde als Mitkämpfer voll anerkannt. Mit Recht ist oft betont worden, daß im Gegensatz zu der Lage im Ersten Weltkrieg die Reaktion gegen „feindliche Ausländer“ sehr viel geringer war. Es kam nicht darauf an, ob sie als Verfolgte oder aus politischer Opposition die alte Heimat verlassen hatten, ob sie schon amerikanische Bürger waren oder nicht. Zwar waren die letzteren gewissen Beschränkungen in ihrer Bewegungsfreiheit unterworfen, aber alle hatten sie doch an dem gemeinsamen Wirken und an den Erlebnissen Anteil. Viele wurden von dem Bewußtsein getragen, an der gleichen Front zu kämpfen und gemeinsam nicht Nation gegen Nation, sondern für die Freiheit und Gerechtigkeit gegen ein totalitäres System zusammenzustehen. Deutsche Akademiker arbeiteten in Kriegsämtern in Washington. Besonders wesentlich war ihre Tätigkeit in dem *Office of Strategic Services*, dem *Bureau of Economic Warfare*, dem *Office of War Information*, *Office of Price Administration* u. a. Ihre Aufgaben waren die Auswertung von Feindesnachrichten für die Kriegsführung und die mögliche Aufnahme von Kontakten, ferner eine Darstellung und Analyse der historischen, politischen, ökonomischen und sozialen Verhältnisse in den gegnerischen Ländern. Eine ansehnliche Anzahl von Handbüchern für den Gebrauch der militärischen und später der zivilen Dienststellen verdankt ihnen ihre Entstehung.

Weitere Programme, an denen die Emigranten als Studierende, aber auch als Lehrende teilnahmen, waren das *Army Specialized Training Program* (ASTP), das von 1942 bis 1944 zu einer Art Rückgrat für das Programm der Colleges und Universitäten wurde, und *Allied Military Government Kurse*. Hier wurden den Soldaten Kenntnisse über die Feindländer vermittelt. Sie lernten nicht nur die Sprachen, sondern sie wurden auch mit Geschichte, Wirtschaft und politischen Institutionen der verschiedenen Länder vertraut gemacht. Das nach dem Krieg immer stärker entwickelte "Area Study" verdankt diesen Kursen viel in bezug auf Inhalt und Methode. Neue phonetische Hilfsmittel für den Sprachunterricht fanden hier ihren Ursprung.<sup>16</sup>

In allen diesen Tätigkeiten waren die Flüchtlinge von besonderer Wichtigkeit. Die neuen Aufgabenbereiche gaben ihnen ein verstärktes Bewußtsein der Zugehörigkeit und schufen für sie viele bedeutsame neue menschliche Kontakte. Da die Vereinigten Staaten das Hauptaufnahmeland für die meisten Gelehrten waren – andere europäische Länder fungierten mehr als eine Art *Clearing House* –, waren für die einzelnen Gelehrten persönliche, vor der Auswanderung angeknüpfte Verbindungen mit der amerikanischen akademischen Welt von wesentlicher Bedeutung. Prominente

<sup>15</sup> Davie, ebd., S. 114f.    <sup>16</sup> Duggan, ebd., S. 51–59.



Amerikaner hatten in Europa, sehr häufig in Deutschland, studiert und hatten Beziehungen zur dortigen wissenschaftlichen Welt aufrecht erhalten, die später einzelnen ihrer deutschen Kollegen nach der Emigration zugute kamen. Wenn auch mehr als es Ende des 19. und Anfang des 20. Jahrhunderts der Fall war, der volle akademische Grad an den Graduate Schools Amerikas, die sich zu wirklichen Universitäten umgewandelt hatten, erworben werden konnte, so stand doch ein Studium in Europa, zumal für Naturwissenschaftler, in hohem Ansehen. Es sei daran erinnert, daß Robert J. Oppenheimer immer die Bedeutung seiner Göttinger Studienjahre hervorgehoben hat. Ähnlich lag es auf dem Gebiet der Musikwissenschaft und der Archäologie. Eine Wiederaufnahme des jenseits des Ozeans gepflegten Kontaktes, eine Erwidern der Gastfreundschaft, kam vielen deutschen Emigranten zugute. Umgekehrt waren deutsche Gelehrte in den ersten Jahrzehnten des 20. Jahrhunderts – wie z. B. der Soziologe Max Weber – auf Gastreisen in die USA gekommen oder hatten Lehrstühle an den amerikanischen Universitäten angenommen – wie der Gestaltpsychologe Kurt Koffka – und hatten dadurch manchen vertriebenen Gelehrten den Weg bereitet. Nach 1933 konnten die anderen Gestaltpsychologen, Max Wertheimer, Wolfgang Kohler und Kurt Lewin, ihrem Kollegen folgen.

Von ähnlicher Bedeutung waren amerikanische Stiftungen, die seit dem Ersten Weltkrieg Zeugnis geben von der veränderten wirtschaftlichen und politischen Stellung der Vereinigten Staaten. Wie in anderen Ländern wurden auch in Deutschland seit den zwanziger Jahren einige Institute und Lehrstühle, sowie die Ausbildung manches jungen Gelehrten von Amerika aus finanziert. Z. B. wurde der Lehrstuhl für Diplomatie und Geschichte an der Deutschen Hochschule für Politik aus Mitteln des Carnegie Endowment und das Deutsche Mathematische Institut in Göttingen aus Mitteln der Rockefeller Foundation errichtet. Gelehrte aus beiden Instituten haben später in den Vereinigten Staaten Zuflucht gefunden.

Eine ganze Reihe von Kontakten sind auch der Herausgabe von Alvin Johnsons Enzyklopädie der Sozialwissenschaften, für die er viele deutsche Gelehrte zur Mitarbeit herangezogen hatte, zu danken. Besorgniserregende Nachrichten hatten Johnson schon im Jahr 1932 durch seine Verbindung mit Professor Moritz Bonn (von der Handelshochschule in Berlin) erreicht, auch durch Werner Hegemann (Stadtplaner in Berlin) und durch Professor Emil Lederer (Nationalökonom in Heidelberg).<sup>17</sup>

So wichtig aber auch Empfehlung, Bürgerschaft, persönliches Eintreten auf Grund alter Beziehungen war, so war doch eine institutionelle Basis notwendig, als der Massen-Exodus begann. Das Geld mußte auf freiwilliger Grundlage zusammengebracht, die Arbeit von freiwilligen Helfern geleistet werden, wobei auch den Stiftungen eine bedeutende Rolle zufiel. Präsident Roosevelt machte seinen Einfluß auf die öffentliche Meinung geltend und erinnerte mehrfach daran, daß die Vereinigten Staaten von Auswanderern aus der Alten Welt begründet und aufgebaut seien, daß alle Bürger Amerikas von Emigranten abstammten. Zugleich sah er, wie auch andere Führer der öffentlichen Meinung, eine Gelegenheit, aus der großen Schar der vertriebenen hochqualifizierten Menschen wertvolle Kräfte auf den verschiedensten Gebieten des geistigen und praktischen Lebens für die Vereinigten Staaten zu gewinnen.<sup>18</sup> Schon 1933

<sup>17</sup> Alvin Johnson, *Pioneer's Progress*, University of Nebraska Press, 1960, S. 304ff.

<sup>18</sup> "This problem involves no one race group – no one religious faith. It is the problem of all

war in den Vereinigten Staaten wie in England aus dem Solidaritätsgefühl mit allen Wissenschaftlern, gleichgültig welcher Nationalität, der Kampf um die bedrohte akademische Freiheit aufgenommen worden. So war in England im Mai 1933 die Gesellschaft zum Schutz für Wissenschaft und Forschung (*The Society for Protection and Learning*) gegründet worden. Sir William Beveridge, einer der Gründer und späterer Präsident, rief im Herbst 1935 in Birmingham zum Handeln auf: "Learning, freedom, brotherhood are not as safe as we had dreamed they were. They need our continuing help and sacrifice. – . . . what is happening in Germany today is a challenge to two great civilizing principles, of science and religion. It denies free movement of the spirit in pursuit for truth in every field."<sup>19</sup>

Ein gleiches Bewußtsein der Verpflichtung, des eigenen Beteiligtseins, half in den Vereinigten Staaten die sehr großen Schwierigkeiten zu überwinden, die hier einer Koordination der Bemühungen im Wege standen. Denn infolge des Aufbaus des amerikanischen Bildungs- und Erziehungswesens, das keine zentrale Leitung kannte, waren diese Schwierigkeiten sehr groß. Das Nebeneinander von Staats- und privaten Universitäten, die Fülle konfessionell gebundener Colleges – von zahlreichen, verschiedenen Glaubensgemeinschaften –, die Verschiedenheit zwischen Nord und Süd, all das stand der gemeinsamen Aktion im Wege. Dazu kam die anhaltende Wirtschaftskrise, die trotz aller Erfolge des *New Deal* erst im Krieg völlig überwunden wurde. Man hat deshalb von dem *contracting market for academic brains in the United States* gesprochen.

Aber schon frühzeitig riefen Einzelne und Gruppen aus der amerikanischen akademischen Welt zu koordinierter und kollektiver Hilfe von Colleges, Universitäten und Forschungsinstituten auf. Das geschah nicht nur in dem Bewußtsein der Verpflichtung gegenüber der dringenden Not der Akademiker, sondern auch, um mit beispielhafter Tat der Universalität der freien Lehre und Forschung Ausdruck zu verleihen. Im Mai 1933 wurde das *Emergency Committee in Aid of Foreign Scholars* unter Leitung des früheren Direktors des Instituts für internationale Erziehung, Dr. Stephen Duggan, gegründet: "The *Emergency Committee* was organized in the spirit of the Declaration of Independence. It served as a protest in defense of the dignity of man regardless of race, creed, or political opinion."<sup>20</sup> Bis Juni 1945 vermittelte das Komitee Lehr- oder reine Forschungspositionen an 288 Gelehrte und 47 Personen aus dem allgemeinen Berufsleben unter dem *Rosenwald Plan*. An Universitäten und Colleges, die einen Wissenschaftler anstellen konnten, zahlte das Komitee als einen Teil des Gehalts für ein oder zwei Jahre die Summe von \$ 2000, in der stillschweigenden Annahme, daß die anstellende Institution den Gastprofessor dauernd übernehmen

groups and all faiths. It is not enough to indulge in horrified humanitarianism, empty resolution, golden rhetoric and pious words. We must face it actively if the democratic principle based on respect and human dignity is to survive – if world order, which rests on the security of the individual, is to be restored . . . let us . . . build new refuges for the tired, for the poor, for the huddled masses yearning to be free."

Franklin D. Roosevelt auf dem Treffen des "Intergovernmental Committee on Political Refugees" in Washington, D. C., am 17. Oktober 1939. Zitiert von Robert Spivak in "Social Contributions of New Americans", *Social Work Today* (December 1939), 10–12, 46.

<sup>19</sup> Lord Beveridge, *A Defence of Free Learning*, Oxford University Press, 1959, S. 11.

<sup>20</sup> Stephen Duggan and Betty Drusy, S. 191.



würde, wenn er in dieser Zeit seine fachliche Qualifikation bewiesen hätte. Das traf in den meisten Fällen zu.

Dieses Komitee schlug aber nur Professoren und Privatdozenten im Alter von 30 bis 58 Jahren vor, um nicht junge amerikanische Akademiker einer Konkurrenz auszusetzen. Andere Organisationen unterstützten nicht nur das Hilfskomitee, sondern hatten auch ein eigenes, intensives Programm. Dazu gehörten besonders die Rockefeller Stiftung, die Carnegie Stiftung und der Oberlaender Trust (eine Abzweigung der Carl Schurz Gesellschaft in Philadelphia), der vor allem von amerikanischen Bürgern deutscher Abstammung finanziert wurde. Eine besondere Aufgabe, den Wissenschaftlern in dem Einleben in die Eigenart des amerikanischen Lehrens an den Instituten und dem Seminarsbetrieb beizustehen, hatte sich das *Friends Service Committee* (ein Zweig der Quaker) gestellt. Auch war es zu einer Bildung von Komitees gekommen, die gleichmäßig verteilt im ganzen Land in einzelnen Fächern (Psychologie, Ökonomie, Philosophie, Mathematik, Astronomie, Anthropologie, Soziologie und Geschichte) zur Beratung der geflüchteten Wissenschaftler bereit waren. Aktiv waren auch die akademischen Frauen (die *American Association of University Women*, und der internationale akademische Frauenbund, *International Federation of University Women*). Auch der Verband der Universitätsprofessoren (*American Association of University Professors*) setzte sich für die vertriebenen Gelehrten ein.

Das *Institute for Advanced Studies* (ein Forschungsinstitut in Princeton) öffnete seine Tore. In Harvard bot sich Gelegenheit, als *Research Associate* unter einem von Professor Harlow Shapley angeregten Plan zu arbeiten. Diese Beispiele erschöpfen bei weitem nicht die mannigfaltige Hilfe, die kleinere Colleges, Universitäten und humanitäre Gruppen gaben. Überragend in seinem Weitblick war Alvin Johnson. Er gliederte im Jahre 1933 der nach dem Ersten Weltkrieg gegründeten *New School for Social Research* eine „Universität im Exil“ an. Er sah beides, die Größe der alten deutschen Universität und die aufkommende führende Rolle des amerikanischen Gelehrtentums; er ahnte die gegenseitige Befruchtung der zwei Gedankenwelten. So schreibt er in seiner Autobiographie: „For it was the university itself that was being exiled from Germany.“<sup>21</sup>

Und im April 1941: „The international position of the United States is changing rapidly, in consequence of the disorders and destruction of the European war. Everyone realizes that after the war America will be compelled even against its will to assume a virtual hegemony in world trade and investment. It is even more clear that America will have to assume the hegemony in science and the arts of civilization. Isolation, economic or cultural, can be only a dream, as unreal as it is unworthy.“<sup>22</sup>

Um die besten deutschen Köpfe in einer Universität zusammenzubehalten, gliederte er an das Institut für Erwachsenenbildung (*The New School for Social Research*) eine Fakultät für *Graduate Studies* an, eine festgefügte Gruppe von deutschen Gelehrten, in der jeder einzelne in seinem eigenen Fach arbeitete. Schon im September 1933 fand die erste Fakultätssitzung statt. Hier wurde der Beschluß gefaßt, ein Seminar zu gründen, in dem die Professoren regelmäßig Referate vor Fakultät, Studenten und Gästen zu halten hatten. Auf diese Weise wollte Johnson nicht nur die Zusammenarbeit der

<sup>21</sup> Alvin Johnson, *Pioneer's Progress*, University of Nebraska Press, 1960, S. 338.

<sup>22</sup> Alvin Johnson, „The Refugee Scholar in America“, *Survey Graphic* (1941), 228.

Sozialwissenschaftler innerhalb der Universität sichern, sondern auch seine Fakultät einer weiteren Öffentlichkeit vorstellen, so daß, wie er sich ausdrückt, die einzelnen Professoren immer bekannter werden und sich mit Amerika vertraut machen könnten. Durch ihren Zusammenhalt sollten sie zugleich die Charakteristik der deutschen Universitätsüberlieferung bewahren.

Unzweifelhaft ist der Beitrag der eingewanderten Wissenschaftler auf allen Gebieten von weittragender Bedeutung gewesen. Um nur einige Beispiele zu nennen: Der einflußreiche Mathematiker Richard Courant aus Göttingen hat die Fakultät der New York University aufgebaut, und damit der Angewandten Mathematik, die in Amerika noch wenig gepflegt wurde, in enger Verbindung zur Reinen Mathematik zu großer Anerkennung verholfen. Das mathematische Institut der New York University hat heute eine fast nicht zu bewältigende Zahl von Doktoranden. Ähnlich liegen die Verhältnisse in der Physik, obgleich hier im Gegensatz zur Mathematik die Theoretische Physik stärker in Deutschland, die Experimentalphysik stärker in den Vereinigten Staaten betrieben wurde. Zwei Namen sind vor allem zu nennen: Albert Einstein und James Frank. Durch den Atomphysiker Hans Bethe, der einen Ruf nach Cornell hatte, kam es zu einer weit größeren Beachtung der Theoretischen Physik und gleichzeitig zu einer intensiveren Zusammenarbeit zwischen Deutschen und Amerikanern in der Experimentalphysik. Auf dem Gebiet der Psychologie vollzog sich ein wertvoller Austausch zwischen zwei kulturellen Traditionen. Die deutsche Gestaltpsychologie hat unverkennbar einen nachhaltigen Einfluß auf die amerikanische Psychologie gehabt, und die deutschen Psychologen sind andererseits stärker in die Arbeit der Experimentalpsychologie hineingewachsen.

Auch auf den Gebieten des humanistischen und künstlerischen Lebens kann man von einem Einfluß der Einwanderer sprechen. In den letzten zwei Jahrzehnten haben die eingewanderten Historiker die amerikanische Geschichtswissenschaft durch ihre europäischen geisteswissenschaftlichen Lehren maßgebend beeinflusst. Auf der anderen Seite hat sich die Perspektive der Eingewanderten durch ihre geistige Naturalisation in Amerika geweitert und der amerikanischen Geschichtswissenschaft einen so bedeutenden Aufschwung verliehen, daß sie in vielem die europäische überflügelt hat.<sup>23</sup> Vor 1933 hat es eine eigentliche Musikwissenschaft in Amerika nicht gegeben;<sup>24</sup> als Kunstgeschichtler sind Erwin Panofski, Edgar Wind und Richard Krautheimer führend geworden.<sup>25</sup> In der Sprachwissenschaft, die immer schon wesentlich von der deutschen Wissenschaft abhängig war, hat die neue Einwanderung die früheren deutschen Einflüsse verstärkt. Darüber hinaus hat sie zu einer gegenseitigen Befruchtung und einer Synthese der europäischen und amerikanischen Denk- und Lebensweisen geführt.

Es hat wohl jeder einzelne emigrierte Wissenschaftler die ihm von einer demokratischen Gesellschaft gebotene Gelegenheit zum Nehmen und Geben im neuen Berufsleben als das eigentliche Geschenk der Einwanderung empfunden. Wie es Dr. Else Staudinger nachdrücklich erklärt hat: „Die große Masse der Einwanderer hat, wenn sie sich einlebte, genau so viel von Amerika gelernt, wie sie Amerika beigebracht hat. Der Einzelne hätte niemals erfolgreich lehren können, wenn er nicht die vollkommen

<sup>23</sup> John Higham, Leonard Krieger and Felix Gilbert, *History*, Prentice-Hall, 1965, S. 282.

<sup>24</sup> Harrison, Frank, et. al., *Musicology*, New Jersey: Prentice Hall, Inc., 1963, S. 3f.

<sup>25</sup> Crawford, ebd., S. 34.



andere Beziehung zwischen Mensch und Mensch, die vollkommen andere Beziehung zwischen Lehrer und Student und die vollkommen demokratische Einstellung zum Leben als Ganzen begriffen hätte.“<sup>26</sup>

Vertreter verschiedener Disziplinen haben den Vorzug betont, der Menschen aufgegeben und gegeben ist, wenn sie eine neue Situation meistern müssen. „Man ist gleichsam einen Gipfel höher gestiegen, man kann die Dinge vergleichsweise beobachten und sich von vielen provinziellen Gefühlen frei machen. Denn jedes nationale Gefühl kann man wohl auch ein provinzielles nennen.“<sup>26</sup>

Wenn sich die Emigranten als „Wanderer zwischen zwei Welten“<sup>27</sup> ansehen, so bedeutet das nicht, daß sie gleichsam heimatlos zwischen zwei Welten stehen, sondern daß sie sich der Brücke bewußt sind, die zwischen Europa und Amerika geschlagen worden ist. Ein Mitglied der *Graduate Faculty of the New School for Social Research*, Eduard Heimann, hat für die Emigranten gesprochen, wenn er sagt: „... if we can stand the strain, pass the test, and live long enough, we may hope that something will still become of us and will enable us to repay, from our purified European tradition our debt to America.“<sup>28</sup>

Wenn man Priestleys Lage mit der Lage der verfolgten deutschen Gelehrten im zwanzigsten Jahrhundert vergleicht, so ist allerdings die Einwanderung in vieler Weise komplizierter geworden, aber immer noch sind die Vereinigten Staaten auf Grund der unwandelbaren politischen und religiösen Überzeugungen der Amerikaner das bevorzugte Land der Emigranten.

<sup>26</sup> In *Auszug des Geistes*, ebd., S. 214. Dr. Staudinger arbeitete von 1940 bis 1945 im *Refugee Scholar Fund* und wurde der „Executive Director“ des 1945 gegründeten *American Council for Emigrees in the Professions*. Mehr als 3000 beruflich ausgebildete Flüchtlinge von osteuropäischen Ländern haben Hilfe und Arbeit durch diese Organisation gefunden.

<sup>27</sup> Ebd., S. 105.

<sup>28</sup> Ebd., S. 113.

## Der Einfluß der deutschen Emigration auf das amerikanische Geistesleben: Philosophie und Soziologie\*

—  
Herbert Marcuse

Meine Damen und Herren, ich habe vor, den Einfluß der deutschen Emigration auf das amerikanische Geistesleben in Philosophie und Soziologie nicht nach Buchtiteln, Gruppen und Namen zu behandeln – (das ist heute erstens sehr schwer zu identifizieren, zweitens kann es zu aller Art von Unannehmlichkeiten, persönlichen Beleidigungen usw. führen). Ich möchte statt dessen vorschlagen, den Einfluß nach Denkweisen, Ideen und Richtungen zu behandeln; nach Denkweisen, Ideen und Richtungen, die auf das amerikanische Geistesleben einen identifizierbaren Einfluß gehabt haben, d. h. Denkweisen, Forschungsmethoden, Ideen, die eine demonstrierbare Veränderung im amerikanischen Wissenschafts- und Forschungsbetrieb hervorgerufen haben. Meine persönliche Qualifikation, diesen Einfluß, wenn auch in sehr allgemeiner und, wie Sie sehen werden, auch persönlicher Weise zu messen, ist eine beinahe 30jährige Lehrtätigkeit an verschiedenen amerikanischen Universitäten. Ich konnte dort im unmittelbaren Verkehr mit Studenten und Kollegen solche demonstrierbaren Veränderungen in der Denkweise und Forschungsmethode feststellen. Der Einfluß der „Emigration“: Sie wissen, daß der Begriff der Emigration in Amerika nur in sehr beschränktem Maße anwendbar ist; Emigration und Immigration sind mehr oder weniger eine Zeitfrage. Was die Demonstrierbarkeit des Einflusses noch schwerer macht, ist, daß es jetzt schon beinahe unmöglich ist, zu unterscheiden, was Rezeption ist und was das amerikanische Geistesleben von sich aus beigesteuert hat. Wir sollten eigentlich nur von einer Wechselwirkung zwischen Gast- und Wirtsland sprechen.

Und doch glaube ich, daß wir gerade mit dem Begriff der „demonstrierbaren Veränderung“ so etwas wie einen Einfluß oder eine Richtungsänderung nach 1933 feststellen können. Nebenbei gesagt, ungefähr in den letzten zehn Jahren haben sich Tendenzen entwickelt, die wiederum innerhalb dieser Periode Veränderungen feststellen lassen; ich kann aber leider darauf nur ganz kurz eingehen.

Zunächst lassen Sie mich angeben, welche Hauptrichtungen ich behandeln werde: in der Philosophie diejenige Denkweise, die bei weitem den stärksten und breitesten Einfluß auf das amerikanische Geistesleben ausgeübt hat, die positivistischen und empirischen Richtungen; ich werde diese Begriffe späterhin, wenn es nötig ist, kurz definieren. Zweitens die „Philosophy of Science“, die Philosophie der Wissenschaft und besonders der Naturwissenschaft, drittens die Existentialtheologie. Die Existentialphilosophie, wie sie hier hauptsächlich von Heidegger vertreten wird, hat in Amerika bis jetzt nur einen sehr geringen Einfluß gehabt. Existentialismus ist wesentlich in der Form der Theologie zu einer breiteren Wirkung gelangt. Dann, viertens, metaphysische Staats- und Geschichtsphilosophie, fünftens Phänomenologie im Anschluß an Husserl, sechstens Kulturosoziologie – eigentlich mehr Kulturphilosophie, die Grenzen sind

\* Leicht gekürzter und leicht ergänzter Text eines am 22. Mai 1964 auf der Jahrestagung der Deutschen Gesellschaft für Amerikastudien in Frankfurt/Main gehaltenen Vortrags.



Some Demographic and Occupational Characteristics of Emigrés  
included in Vol. II of the *Dictionary*

Herbert A. Strauss

Biographical dictionaries, analysts have established, do not lend themselves readily to quantitative analysis. Methodological strictures apply with even greater force to a compilation like the present volume. Although the teams of researchers and scholars who produced this volume in the Federal Republic of Germany and the U.S.A. strove to define the standards by which a person would be included in this *Dictionary* with maximum clarity and precision (see the Technical Introduction to this volume), they would have failed in their commitment to record not only the triumphs but also the losses caused by Nazi persecution, if they had not also included individuals active in the frequently fleeting or temporary subcultures created by refugee communities. The *Dictionary* thus records also those intellectual émigrés who strove to make the lives of their fellow sufferers more bearable, or who planned futures for their homelands that never came as they had visualized them in their most ardent intellectual efforts. Thus, from its inception, the *International Biographical Dictionary* was designed to transcend the format of the standard *Who's Who*.

Our design for this double commitment was tempered, from the very beginning, by the realities of the "sample" we constructed on the basis of our evolving standards of inclusion. Emigrés, exiles, and immigrants have always been men, women, and children in flight from a situation seen as less tolerable than an unknown new situation elsewhere. For the émigré of the Nazi period, especially for the intellectual or political persecutee who had sought safety in a European country, the pattern of Nazi conquest in Europe as much as the unwillingness of these countries to serve as permanent havens for Nazi persecutees meant a prolonged period of continued persecution and flight. More than half of all persons included in this volume (53%) had been forced to leave their country of first refuge before striking final roots in a new environment, or being able to return to their homelands. Fully one fifth of biographees had to pull up stakes three or more times before reaching countries where they could settle permanently (Table 1).

Table 1: Percentage Distribution of Sample by Number of Countries of Settlement following Emigration

Number of Countries	Pct "stops"	N
One country	46	(275)
Two countries	34	(206)
Three or more cos.	20	(117)
Total	100	(598)

Thus, many of the intellectuals had been forced to flee persecution precipitously and repeatedly to avoid arrest, concentration camps, or a worse fate, as Nazi secret police agents hunted their human prey. A number of prominent refugees committed suicide. Many lost papers and documentary materials. For those caught, the trail was lost in the deportation and extermination machine that swallowed them up. When research for this program began, four decades had already passed since the Nazi seizure of power, and many of the older refugees had died. Members of the younger generation had often blended into new environments, changed their names, or became hard to identify for other reasons. For many persons, information had to be obtained from surviving next-of-kin, whose memory was often dimmed by the passage of time. The dead answered no questionnaires. Thus, although the instruments developed to gather information were designed for uniform responses, information on many aspects of a biographee's history was lacking or spotty.

In addition, the "sample" brought together in this *Dictionary* does not "represent" the entire group of émigrés of the Nazi period or its major sub-groups, like Jewish, political, or intellectual migrants. It does not correspond in major demographic ways to the composition of the whole émigré group estimated to have included about 94% professing the Jewish religion, or having been persecuted for "racial" reasons, and 6% persons persecuted for political reasons (disregarding overlapping of these two factors of Nazi persecution). Within the standards of inclusion which have been applied as conscientiously as the often poor information situation permitted, the teams strove to obtain complete samples. Quantitative analysis reflects only this sample.

Finally, using statistical information to describe some of the contents of this *Dictionary* should not obscure the sense of the author of this essay, and the Research Foundation for Jewish Immigration, that the lives whose documentation it has undertaken must not be turned into numbers for the sake of scholarly curiosity. The Research Foundation commissioned Prof. Philip Leonhard-Sparks of the City College of the City of New York to design a first computer summary of the biographies included in this volume, because it trusted that this would not obscure its commitment to see respect for this unique group maintained, even in the face of quantitative social science.

The study, some of whose results will be discussed below and recorded in the tables following this essay, is based on a random sampling of every seventh biography available in the New York office of the Research Foundation for Jewish Im-



migration, New York, N.Y., on April 1, 1982 — 598 biographies of a total of 4,190 biographies. The final volume as printed here includes about 4,650 biographies. The 460 biographies not sampled in this way were not available at the time, for technical reasons, in a form accessible to sampling and coding. They were, however, entirely random, and thus considered irrelevant for the commissioned study. The categories for coding the material were developed in a test procedure by the coding staff in cooperation with members of the editorial staff of the project (Ms. Hannah Caplan and Ms. Belinda Rosenblatt). In coding the material, some ambiguities could not be avoided. The practically worldwide dispersion of biographies often made it difficult to equate English-language usages and designations with foreign designations e.g. of positions, career patterns, artistic or scholarly specializations, especially in cases in which translators had retained foreign designations in their final versions of biographies. The material resulting from the study is available for interested and qualified researchers at the Research Foundation for Jewish Immigration, New York, N.Y.

If, for the sake of comparison, the largest group among refugees from Nazi persecution is taken as a foil, the sample (i.e. the group selected from the present volume for this study; the term will be so used subsequently) was considerably younger when it emigrated than the German-Jewish group, which provided the largest contingent of the entire Nazi period emigration. In 1933, about half of German Jewry was age 40 years or older. In contrast, only 31% of this sample was aged 40 years or older at the point of emigration. 28% of the sample were less than 19 years of age, 19% age 20–29, and another 32% 30 to 39 years old (Table 2). This relative youth reflects a variety of factors and conditions: education abroad was a factor in achieving prominence; pupils, students, and children's transports were assisted in emigrating as a matter of policy, while older persons found greater difficulties in being admitted to other countries: many Nazi persecutees in Germany expected to be able to live out their lives in reduced, if relatively undisturbed, conditions there.

Table 2: *Percentage Distribution of Sample by Age and Sex at Emigration*

Age	Sex	Pct Male	Pct Female	Total Pct	Total N
0–9		9	0	9	(51)
10–19		20	9	19	(109)
20–29		19	26	19	(114)
30–39		22	22	22	(130)
40–49		14	19	15	(86)
50–59		10	10	10	(59)
60 and over		6	4	6	(36)
Totals		100	99	100	
N		(517)	(68)	(585)	(585)

The frequency and timing of leaving the country of origin reflects the pattern of persecution discussed above. In 1933, one third of persecutees aged 20 years or older left Germany (Ta-

Table 3: *Percentage Distribution of Sample by Year of Emigration and Age at Emigration*

Year	Age: 0–19	Pct Age 20 & over	Pct Row Totals	(N)
Before 1933	—	2	1	(9)
1933	16	34	29	(172)
1934	6	9	8	(49)
1935	4	7	6	(36)
1936	9	6	7	(40)
1937	6	5	6	(33)
1938	29	20	23	(134)
1939	25	14	17	(102)
1940 and after	4	1	2	(13)
Total %	99	98	99	
(N)	(161)	(427)		(588)

ble 3). They represented the adult population of intellectual and political refugees bearing the first brunt of Nazi measures. The second peak occurred in 1938 and 1939. During 1938/39, 54% of all persons in the sample aged 19 years or younger left their countries of origin, and slightly more than one third of all persons aged 20 years or older emigrated. The year 1938, as pointed out elsewhere, had seen the occupation (*Anschluss*) of Austria, the take-over of the Sudeten area of Czechoslovakia following the Munich Agreements, and a tightening of Nazi discriminatory measures against Jewish economic activities, culminating in the pogroms of November 9/10, 1938, and the internment of about 30,000 male Jews in concentration camps.

The high ratio of young persons among émigrés of 1938 and 1939 also suggests that Jewish emigration (by then, most political persecutees had long left Germany) was a family emigration, although political persecutees were included in the figures of émigrés from Austria and Czechoslovakia 1938/39. The relatively higher ratios of persons aged 19 and under for the years 1936 and 1937 (15% compared to 11% for the older group) may also be related to the pattern of persecution and immigration restrictions as outlined elsewhere.

The occupational distribution of émigrés as related to year of emigration (Table 4) also reflects the pattern of emigration as represented by the differences between political and academic, and Jewish persecutees. The years 1933 and 1934 saw the exclusion of Jewish and politically oppositional university personnel from positions, and led to the resignation from university posts of persons unwilling to serve the Nazi régime or anticipating later measures against themselves (for example on account of a Jewish family background). 1933 also saw violent attacks on oppositional intellectuals, and the disgraceful ritual of a public burning of the books of enemies of the régime by German students at the universities. Writers and artists of Jewish background or of dissenting political views were excluded from membership in the *Kulturkammern* (chambers of culture) that was made a prerequisite for continued cultural ac-



Table 4: Percentage Distribution of Sample by Year of Emigration and Occupation at Emigration

Year of Emigration	Occupation	Pct Students	Pct Medicine	Pct Scientists Engineers	Pct University Teachers	Pct Writers	Pct Musicians	Pct other Artists	Pct other professionals & technical	Pct managers and administrators	Pct other groups	Row Totals Pct	N
Before 1933		—	—	—	1	5	2	5	—	—	—	2	(9)
1933		19	32	47	36	41	24	51	31	15	37	29	(169)
1934		8	5	12	10	11	9	8	7	—	—	8	(47)
1935		4	9	3	9	6	6	3	11	8	—	6	(33)
1936		8	11	8	9	5	4	5	—	8	12	7	(39)
1937		7	1	—	3	3	6	5	9	—	12	5	(31)
1938		27	22	23	16	19	37	13	20	31	25	23	(134)
1939		24	17	7	15	11	9	11	22	23	13	18	(101)
1940 and later		3	5	—	1	—	2	—	—	15	—	2	(13)
Total Pct		100	100	100	99	100	99	101	100	100	99	100	
N		(207)	(51)	(31)	(48)	(64)	(46)	(63)	(45)	(13)	(8)		(576)

tivity. As a result, 52% of émigré writers, 59% of émigré scientists and engineers, 46% of university teachers, 37% of émigré medical personnel, and 38% of professional technical personnel left Germany in 1933/34. This was an "exodus of the intellect" that created the image of a barbaric and crude new Germany, and had considerable cultural and world-historic consequences, the best known of them in physics. That 31% of musicians left in 1933/34, a somewhat smaller ratio than

other artists, may have been due to the fact that Jewish musicians were in part absorbed by a Jewish cultural organization created by the Nazi government, the *Jüdischer Kulturbund*. This enabled musicians (and other performing artists) to continue performing before Jewish audiences in rigidly limited programs offering only works composed or written by Jews (after an initially more liberal period). The peaks of emigration for all occupations in 1938/39 are adequately explained

Table 5: Percentage Distribution of Sample by Occupation at Emigration and Year of Emigration

Occupation	Year:	Pct Before 1933	Pct 1933	Pct 1934	Pct 1935	Pct 1936	Pct 1937	Pct 1938	Pct 1939	Pct 1940 and later	Row Totals %	N
Students		11	23	34	24	44	48	41	48	53	36	(207)
Scientists and Engineers		—	8	8	3	8	—	4	2	—	5	(31)
Medicine		—	7	6	15	13	—	10	7	15	9	(51)
University Teachers		11	8	11	12	10	6	5	11	8	8	(48)
Writers		33	15	15	12	8	6	9	7	—	11	(64)
Musicians		11	6	8	9	5	10	13	4	8	8	(46)
Other Artists		33	20	11	6	8	10	6	7	—	11	(63)
Other professionals and technical people		—	8	6	15	—	13	7	10	—	9	(45)
Managers and Administrators		—	1	—	3	3	—	3	3	2	2	(13)
Other Occupations		—	2	—	—	3	3	1	1	—	1	(8)
Total %		100	100	100	100	100	100	100	100	100	100	—
N		(9)	(169)	(47)	(33)	(39)	(31)	(134)	(101)	(13)	—	(576)



by the Nazi invasion of Austria, the rape of Czechoslovakia, and the events of November 9/10, 1938 which were described previously. It should be remembered, though, that these peaks include considerable numbers of younger persons who had not as yet embarked upon their later careers: 36% of all émigrés in this sample were students, 30% academics and professionals, 31% artists, writers, etc. (Tables 5 and 6).

**Table 6:** *Percentage Distribution of Sample by Occupational/Social Group; Occupation at Emigration and Lifetime Occupation*

Occupational Group	Pct Occupation at Emigration	Pct Lifetime Occupation
Students	36	—
Academics and Professionals	30	65
Artists	31	34
Other Occupations	3	1

The breakdowns for the nationality of émigrés at birth is limited to 3/5th of the sample due to insufficient information. If representative, it suggests that about 3/5th of émigrés came from Germany, while about 30% originated in Austria and a very small ratio (1%) in Czechoslovakia. That even this unrepresentative table (see Table 7) includes 3% of émigrés born in Poland/Russia and 2% in Hungary points to the small but culturally significant number of nationals of these countries who played major roles in German and Austrian artistic, literary, and scientific life, including medicine and psychoanalysis, in the inter-war period. Still, the data base is too small to warrant more than suggestions.

Similarly restricted is the validity of data on the religious affiliation and background of this sample (1/3rd of the sample does not include information on religious affiliation, and the

**Table 7:** *Percentage Distribution of Sample by Nationality at Birth*

Nationality	Pct	Nationality	Pct
Germany	61	C.S.R.	1
Austria	28	All Others (II)	2
Russia (Imperial+Soviet)	3	Total %	100
Hungary	2	N	((396)
Latin America	2		

Missing Cases: 202.

traditional method of using names or other indirect indices for religious affiliation does not seem reliable for this group) (Table 8). On the basis of this limited segment, the number of persons professing the Jewish religion appears to have been smaller than the ratio estimated for the entire group of 500,000 émigrés. (63% over against 94% estimated for the entire émigré population.) Nazi legislation was based on "racial" categories, for it discriminated against, and persecuted, persons married to a Jewish spouse, or having some Jewish ancestry. If this factor in persecution and emigration is considered, for about 4/5th of émigrés in this sample some Jewish family background, marital link, or ancestry may have been a factor, or an additional factor, in emigration, while about 20% of the sample had no such ancestry or affiliation (Table 8). If correct, these ratios would suggest a higher degree of acculturation for this sample, possibly as a factor in appointments to university or research positions (prior to 1918, the appointment of religious Jews to university positions in Germany was restricted in a number of faculties). This would also be suggested by the strong over-representation of Protestant and Catholic émigrés in university positions (39% and 13% respectively over against 19% Protestant and 6% Catholics as indicated by 2/3rds of the sample: Tables 9 and 10). The relatively larger ratio of Jews among medical personnel (73% of medical personnel in the sample) and of students (71% of students in the sample) reflects the known representation of Jews in the medical professions in Germany and Austria, and the facts of persecution dis-

**Table 8:** *Percentage Distribution of Sample by Religion and Religious ("Jewish-ethnic") Family Background*

Religion	Religious Family Background	Pct at Emigration	Pct No Jewish Background	Pct Jewish Religions Identificat.	Pct Jewish Background	Pct Jewish Spouse	Pct other Indication of Jewish Background	Total %	Total N
Protestant		19	57	—	23	11	9	100	(74)
Catholic		6	76	—	16	4	4	100	(25)
Jewish		63	—	100	—	—	—	100	(241)
Other		1	25	—	75	—	—	100	(4)
None		11	29	—	50	3	18	100	(38)
Total Column %		100							
N		(382)	(73)	(240)	(44)	(10)	(15)	—	(382)

Missing Cases: 208.



Table 9: Percentage Distribution of Sample by Religion and Occupation at Emigration

Religion	Occupation:	Pct Students	Pct Medicine	Pct Science/Engineering	Pct University Teachers	Pct Writers	Pct Musicians	Pct other Artists	Pct other Professional and Technical	Pct Management Administrators	Pct other Groups	Total Row Pct	N
Protestant		14	16	29	39	28	8	20	13	33	—	19	(72)
Catholic		2	3	—	13	8	8	17	12	—	—	6	(24)
Jewish		71	73	65	39	59	59	50	68	56	75	63	(244)
Other		1	2	—	3	—	4	—	—	—	—	1	(4)
None		13	8	6	6	5	21	14	6	11	25	11	(42)
Total		101	101	100	100	100	100	100	100	100	100	100	
N		(150)	(29)	(17)	(23)	(39)	(24)	(42)	(42)	(9)	(4)		(386)

Missing Cases: 212.

Table 10: Percentage Distribution of Sample by Occupation at Emigration and Religion

Occupation	Religion	Pct Protestant	Pct Catholic	Pct Jewish	Pct Other	Pct None	Row Total %	Row Total N
Students		29	12	44	25	45	39	(150)
Scientists and Engineers		7	—	5	—	2	4	(17)
Medicine		6	4	12	25	7	10	(39)
University Teachers		17	17	5	25	5	8	(31)
Writers		15	12	9	—	5	10	(39)
Musicians		3	8	6	25	12	6	(24)
Other Artists		11	29	9	—	14	11	(42)
Other Professionals and Technical People		6	17	9	—	5	8	(31)
Managers and Administrators		4	—	2	—	2	2	(9)
Other Groups		—	—	1	—	1	1	(4)
Total %		100	100	100	100	100	100	—
N		(72)	(24)	(244)	(4)	(42)	—	(386)

cussed above. (The ratios of persons professing no religion, under such self-identification as agnostic, free-thinker, freely religious [*freireligiös*], and others, warrants further investigation in this connection. It may reflect the influence of active Marxist party affiliation or function, which frequently carried religious dis-affiliation with it.)

The pattern of settlement for émigrés in the sample suggests differences in the function of European countries of refuge or emigration, including the smaller European neutrals (Switzerland, the Scandinavian countries, Belgium and Holland), as compared to Israel and overseas areas, with Great Britain occupying an intermediate position with regard to this function.

Independent information has established that European countries adjoining the Third Reich, especially France, Czechoslovakia, Holland, Belgium, and Switzerland, had been the first countries of refuge for Hitler persecutees during the first two years of the régime, and following the take-over of Austria in March 1938. These waves of émigrés also included a sizeable group of Jewish émigrés who fled Germany in response to, or anticipation of, persecution. Czechoslovakia and France (as described in another section of these introductions) also harbored the first political centers towards which oppositional intellectuals gravitated. Great Britain, guided by the concern of British academicians with the fate of the refugee intellectual, was the first European country to develop effective organized



assistance to displaced scholars and university teachers, although, given the limited openings available during a period of academic depression and the national orientation of higher education, the placement of intellectual refugees in permanent positions was limited. Switzerland also stood ready to provide havens for students and intellectuals, as long as it was assured that such havens would remain temporary and not affect an economy that saw itself as depressed, and turned towards the placement of its own nationals in preference to foreign specialists, however qualified.

Table 11: *Percentage Distribution of Sample by Country of First Settlement (.6 Pcts and Above)*

Country	Pct	N	Country	Pct	N
Austria	3	(16)	Hungary	1	(4)
C.S.R.	3	(16)	U.S.S.R.	1	(9)
U.K.	19	(112)	U.S.A.	27	(162)
Netherlands	3	(16)	Israel	8	(50)
Sweden	1	(6)	Australia	1	(4)
Belgium	1	(6)	Argentina	1	(5)
France	9	(56)	Brazil	1	(4)
Switzerland	9	(57)	All Others	7	(20)
Italy	3	(21)	Total %	100	
Turkey	2	(11)	N	—	(589)

Table 11 reflects this pattern. 25% of émigrés in the sample chose the smaller European countries, including Czechoslovakia, Italy, Austria, and Turkey, as their first country of settlement (refuge). Turkey appointed the largest number of émigré university teachers of any country to its two universities and to its technical schools to promote their modernization. 19% of students and intellectual refugees were admitted to the United Kingdom in 1933/34 and following the pogrom of November 1938. France was chosen by 9% of the sample as country of first refuge.

This contrasts with the ratios of those persons in the sample who recorded European countries as their countries of final settlement: 10% stayed on, or returned to those smaller European countries that had originally been the targets of 25% of émigrés, 2% were found in France (over against 9% arriving there as their first country of settlement), 10% found permanent positions in Great Britain (over against 19% being admitted there as a country of first refuge or emigration [settlement]). 10% of the sample returned to either of the two German states, and 4% to Austria. (See Tables 12 and 14.)

Several factors account for the fact that European countries served in larger measure as countries of first rather than of final settlement. They include government policies restricting permanent settlement and promoting re-emigration, limited employment opportunities, the Nazi take-over of continental European countries forcing émigrés to flee abroad, and, in case

Table 12: *Percentage Distribution of Sample by Country of Origin and Final Settlement or Return*

Country	Origin Pct	Final Settlement or Return in Pct	N	N Origin
Germany	73	10	(61)	(422)
Austria	24	4	(22)	(140)
C.S.R.	1.5	.5		9
U.S.A.	—	48	(288)	—
U.K.	—	10	(63)	2
Israel	—	8	(49)	—
Switzerland	—	4		1
Netherlands	—	2		1
France	—	2		—
Australia	—	2		—
Argentina	—	1		—
All Others	2.5	9.5		(23)
Total %	100	100		
N	(587)	(598)		

of Great Britain, the admission of refugees following 1938 on condition that they migrate elsewhere. They were allowed to wait out the time until such opportunity would be realized in what was thought to be a reasonably short time. It lasted in many cases until the end of World War II and beyond.

In contrast to European countries, the two major overseas countries of immigration, the U.S.A. and Israel, showed either no change in the ratio of first versus final settlement (8% even for Israel), or record a dramatic increase of the ratio of final settlement as in the case of the U.S.A. (48% of all émigrés in the sample over against the ratio of first settlement, 27%). Practically all émigrés appointed to Turkish universities and institutions left that country following World War II. If, once again, the trend of general Jewish emigration from Nazi Germany is taken as a foil, these ratios parallel migration patterns in the general population. Following 1934, Israel became a major target of immigration, to be superseded in 1937 by the U.S. as a major destination of Jewish migration from Germany and Austria. From 1930 to 1937, severe restrictions had been in effect in the admission practices of the U.S.A. which retarded considerably the immigration from Germany. The U.S.A. continued to play this central role as a place of final settlement for intellectuals (the "brain drain") for a considerable time during the postwar period.

The minute ratio of émigrés admitted to the U.S.S.R. (1%) derives from the rigid exclusion policies of that country, even for members of Communist parties in Axis-controlled countries. Similarly, Canada, Australia, and New Zealand tended to follow severely restrictive admission policies for refugees from Nazi Germany and Austria.



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Table 13: Percentage Distribution of Sample by Country of First Settlement and Occupation at Emigration

Country nation:	Occu- pation	Pct Students	Pct Science and Engineering	Pct Medicine	Pct University Teachers	Pct Writers	Pct Musicians	Pct Other Artists	Pct other Professional and technical	Pct managem., Administr.	Pct other Groups	Pct Row Total	N
Austria		1	—	—	—	3	6	9	2	—	—	3	(15)
C.S.R.		1	—	—	1	9	—	10	—	—	—	3	(16)
U.K.		22	37	22	14	12	9	13	20	8	12	19	(109)
Scandinavia		1	—	3	1	1	—	1	2	23	12	1	(12)
Belgium/Netherlands		2	—	7	1	3	4	6	9	—	—	4	(23)
Switzerland		10	8	7	11	15	4	10	2	23	—	9	(55)
France		6	3	3	21	21	15	12	7	8	—	9	(55)
Italy		4	—	1	6	3	2	3	7	—	—	3	(20)
Turkey		2	—	9	1	—	2	—	2	—	—	2	(11)
U.S.S.R.		1	—	3	—	1	6	2	—	—	—	1	(9)
Canada, Australia, New Zealand		1	—	3	6	—	2	—	—	2	12	1	(8)
U.S.A.		34	35	18	31	12	32	13	27	31	37	27	(160)
Brazil and Argentina		.5	5	—	—	3	4	—	—	—	—	2	(9)
Israel		10	8	13	6	8	2	6	13	8	—	8	(48)
All others (coun- tries and regions		4	5	9	—	9	4	12	5	—	25	4	(23)
Total %		100.5	101	98	99	100	101	97	96	103	98	96	—
N		(208)	(31)	(51)	(49)	(66)	(46)	(67)	(45)	(13)	(8)	—	(583)

Table 14: Percentage Distribution of Sample by Country of Final Settlement and Occupation at Emigration

Country	Occu- pation	Pct Students	Pct Science and Engineering	Pct Medicine	Pct University Teachers	Pct Writers	Pct Musicians	Pct other Artists	Pct other Professionals Technical	Pct manage- ment and Administr.	Pct other Groups	Total Row Pct	N
Germany		4	—	14	11	15	13	21	13	8	13	10	(59)
Austria		2	—	3	1	1	13	7	4	—	—	4	(22)
U.K.		8	11	9	14	14	4	12	16	—	12	10	(61)
Small and Neutral European Countries		3	11	20	12	11	9	9	4	15	—	7	(42)
France		.5	—	—	9	6	2	3	—	—	—	2	(10)
Other Europe		.5	—	—	4	4	2	9	2	—	—	3	(15)
U.S.A.		65	57	40	42	32	35	28	38	70	50	48	(281)
Other Western Hemisphere		5	8	—	—	8	13	1	7	—	—	5	(29)
Israel		9	6	12	1	8	4	9	13	8	—	8	(48)
Asia, Africa, Pacific		3	6	3	5	1	4	—	2	—	25	3	(16)
Total %		100	100	101	99	100	99	99	99	101	100	100	
N		(208)	(31)	(51)	(48)	(66)	(46)	(67)	(45)	(13)	(8)		(583)



If first admission to countries is controlled by occupations, the data suggest the predominant role of the United Kingdom among European countries in admitting trained engineers, scientists, university teachers, and other professional and technical personnel in ratios exceeding her average admissions for the entire sample. Switzerland and France were sought by the largest ratios of émigré writers (15% and 21% respectively, over against 12% each for the United Kingdom and the U.S.A.). Both Switzerland and the United Kingdom accepted a ratio of students above that for other European countries (10% and 22% respectively). The age breakdown of persons in the sample settling in selected countries of settlement reflects the fact that overseas countries took in the bulk of émigré students (Table 15): almost 3/4th of the age groups 19 years and under, and nearly half of the age group 20–39 years settled in the U.S.A. as the country of final settlement, with Israel following as a distant second (14% of age group 9 years and under, 6% of age group 10–19 years). The ratios of those in these age groups who stayed there for final settlement is correspondingly substantial, or reflects additional arrivals of pupils and students from countries of intermediate settlement.

The ratio of males to females in this sample is 88%: 12%, significant only in that it confirms a tradition of male predominance in German, Austrian, or Czech professional and artistic life, that appears to have held even for the younger group and during emigration. Occupational breakdowns for each sex do not yield significant differences, except for a persistently and significantly lower ratio of women in professions such as engineering and science, in contrast to stronger predominance of women in medicine and some of the arts. The ratio of women writers to men among the sample is about even for the period before emigration, but significantly larger for occupations following emigration (23% women: 13% men writers following emigration). Women also drew even in university appointments following emigration, compared to the ratio before leaving their countries of origin (4%: 9% before, 24%: 28%

after emigration; a significant effect of emigration on *this sample* [the lop-sided ratio fo 88%: 12% remains to be considered!]). Similarly, the ratio of persons holding doctorates is nearly twice as large for men as for women (48%: 25%), while ratios are reversed for persons holding baccalaureates or their equivalents (*Abitur*): 34% of women, but only 15% of men hold such degrees as highest degrees achieved. In view of problems in identifying foreign degrees, no more than suggestive quality is claimed for this section. A study of the role of women in emigration should clarify male-female roles further.

As suggested above, the occupational breakdown indicates that more than 1/3rd, or 36% of the sample, were students at the time of emigration. The specific ratios for individual occupations at emigration show writers and "other artists" (plastic, theater, non-music performing arts) at 11% each, followed

Table 16: Percentage Distribution of Sample by Occupation at Emigration and Lifetime ("Career") Occupation

Occupation	Pct occupation at emigration	Pct Lifetime occupation	Occupation	Pct occupation at emigration	Pct Lifetime occupation
Students	36	—	Other Artists	11	11
Scientists and Engineers	5	19	Other Professionals and Technical people	8	3
Medicine	9	14	Managers and Administrators	2	3
University Teachers	8	28	Other Occupations	1	2
Writers	11	15	Totals	100	100,2
Musicians	8	7	N	(583)	(590)

(Consolidated Occupational Groups.)

Table 15: Percentage Distribution of Sample by Age at Emigration and Country of Final Settlement

Country	Age:	Pct Age 0–9	10–19	20–29	30–39	40–49	50–59	60 et over	Pct Totals	N
Germany		4	3	13	7	20	15	11	10	(59)
Austria		—	2	3	4	5	8	6	4	(22)
U.K.		2	9	15	8	7	12	28	11	(62)
France		—	—	2	3	1	3	6	2	(10)
Israel		14	6	8	7	9	7	8	8	(47)
U.S.A.		73	72	45	45	37	37	14	49	(285)
Other Countries: Small and Neural; other		8	9	15	25	21	17	28	18	(103)
Europe; other Western Hemisphere, Aisa, Africa, Pacific										
Total %		101	101	101	99	100	99	101	102	
N		(52)	(109)	(114)	(132)	(86)	(59)	(36)		(588)



by medicine (9%), university teachers and other professionals (8% each), musicians (8%), scientists and engineers (5%), a.o. The greatest increase in ratios for occupations *following emigration* ("lifetime occupations," i.e. occupations held consistently from before until after emigration, or occupations chosen following emigration, primarily by younger persons) occurred for academics and professionals, a gain of 20 percentage points for university teachers, 5 percentage points for medical personnel, 14 percentage points for scientists and engineers. A decrease in ratio is registered for "other professional and technical personnel," a numerically small category, from 8% before to 3% after emigration (Table 16).

Thus, the ratio of persons in this sample who maintained occupational continuity before and after emigration has to be read as indicating the distribution of the student population in the sample following emigration (no student was included under the standards of inclusion for this *Dictionary*) as well as the continuous career pattern of persons indicating occupations before emigration other than students (the "older group"). 35% of those who were students when they emigrated achieved distinction in university teaching, 33% in science and engineering (a partly overlapping category, at least for some persons for some time). Thus, more than 2/3rds of the persons in this sample who were still students at emigration achieved distinction through continued education and/or university appointment. Given the large ratio of persons making the U.S.A. their country of final settlement, this result conforms to observations made independently about the expansion of

American higher education following World War II and its significance for immigrant absorption and the social mobility of younger immigrant groups. Equally significant, however, are the ratios for occupational continuity in most other occupations indicating a range from 100% (engineers and scientists), 91% for medical personnel, to about 72%—75% for university teachers, writers, musicians and other artists. University teaching also attracted the largest ratio of "other professional and technical personnel" (45%), and of "management and administrative personnel" (50%, but a numerically minute group N = 12) and "other groups" (50%, but N = 8). These ratios do not reflect the real difficulties and dislocations attending the career patterns of émigrés. They occurred especially during the earlier stages of settlement, when "entry jobs," the proverbial dish-washing, were the general rule for the overwhelming number of professionals, while work-study was typical for students, especially during periods of educational expansions. Lower income families and immigrant children and students had benefited from equal opportunity education in urban America since the 1930s (Table 17).

These tables, more than others, suggest the tenacity with which factors dominating pre-emigration occupational choices or new factors affecting social mobility appear to have been operating following emigration. It is hoped that these observations, like others contained in this short summary, will be tested by detailed investigations of the social and intellectual history of this unique group of migrants.

Table 17: Percentage Distribution of Sample by Occupation at Emigration and "Lifetime" Occupation

Carreer Occupation	Emigration Occupation	Pct Students	Pct Science and Engineering	Pct Medicine	Pct University Teachers	Pct Writers	Pct Musicians	Pct other Artists	Pct other Professional & Technical Administrat.	Pct Managem.	Pct Groups	Row Total %	N
Science Engineering		33	100	—	6	1	—	—	9	—	12	18	(24)
Medicine		14	—	91	8	2	2	—	7	8	13	14	(83)
University Teachers		35	—	1	72	11	16	6	45	50	50	28	(158)
Writers		7	—	4	5	74	2	11	16	17	25	15	(84)
Musicians		2	—	—	3	—	74	1	4	—	—	8	(43)
Other Artists		5	—	—	—	6	2	75	2	—	—	11	(65)
Other Professional and technical		2	—	2	1	3	2	1	11	—	—	3	(16)
Managers and Administrators		2	—	2	5	3	2	6	4	25	—	3	(19)
Other Groups		—	—	—	—	—	—	—	2	—	—	2	(1)
Total %		100	100	100	100	100	100	100	100	100	100	—	
N		(208)	(30)	(48)	(47)	(66)	(45)	(66)	(45)	(12)	(8)		(575)



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# The Rescue of Science and Learning )

*The Story of the Emergency Committee  
In Aid of Displaced Foreign Scholars*

By **STEPHEN DUGGAN**  
CHAIRMAN OF THE EMERGENCY COMMITTEE

and **BETTY DRURY**  
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COMMITTEE

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THE EMERGENCY COMMITTEE IN AID OF  
DISPLACED FOREIGN SCHOLARS

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## THE RESCUE OF SCIENCE AND LEARNING



the museum had been procured by him. Finally, all his property was confiscated, and he was obliged to borrow three thousand dollars from his friends to get out of Germany. The appointment which he received [in the United States] was the only thing that saved him from death in a concentration camp." Professor Haber, famous for his synthesis of ammonia, fled to Switzerland and died there a suicide.

Some of these fine scholars left beleaguered cities on foot, fleeing with hordes of civilians over roads which were torn by bombing and strafing raids, to take refuge with other refugees in cellars and ruined churches. Some found temporary though precarious asylum in cities of transit, waiting for the help of foreign rescue committees. Varian Fry of the Emergency Rescue Committee, to whose help so many distinguished refugees owed their lives, tells of one among many such cases:

Professor Dietrich von Hildebrand, formerly of the University of Vienna, was hiding with his wife in an apartment on the corner of the rue Breteuil and the rue Grignan. As one of the most prominent of the Austrian [anti-Nazi] refugees, Professor von Hildebrand was in danger of extradition under Article 19, Swiss passport or no Swiss passport, and I had agreed to help him escape.<sup>4</sup>

Some crossed the Pyrenees on foot to escape from France after the German occupation; others were smuggled across borders by car and motor lorry. Of one scholar of international law the report states: "When the Germans invaded Poland, he escaped; was wounded by the Germans, hid for several months in the forests of Poland, and then finally was able to reach nearby Lithuania." These personal histories might be multiplied indefinitely.

<sup>4</sup> Varian Fry, *Surrender on Demand* (New York: Random House, 1945), p. 27.

## PLACEMENT OF THE SCHOLARS IN THE UNITED STATES

Once in the United States, the fate of these men and women varied. Some received calls at once to distinguished universities; other, less fortunate although often no less important in their fields of work, lived in obscurity for many years. Some were fortunate to have the help of interested organizations—the Rockefeller Foundation, the Oberlaender Trust, the service agencies, or our own organization. To others the years of waiting were years of hardship. Some tutored, or labored at small salaries in impoverished schools and academies without the wherewithal to buy adequate clothing, pay for much-needed medical and dental care, or send help overseas to even more destitute relatives. In fact it was not easy for the foreigner, intellectual or nonintellectual, to comprehend the nature and extent of the difficulties he had to face in the new country. Times were unexpectedly bad in 1933 and the years immediately succeeding. The United States, long considered a land of promise, was only beginning to work its way out of the depression. Jobs of any kind were hard to find. The immigrant, greeted with good humor and a sympathetic manner by American friends and colleagues in his efforts to find work, was often misled into taking this interest as a promise of a job. John Whyte has written of this misunderstanding out of the wealth of his experience with German scholars:

Germans frequently mistake a friendly reception of themselves and their projects for genuine interest and hence meet with cruel disappointments. A German looking for a position or for help of some kind may be met with, "I'll see what I can do for you," or "I'll consider you for the position," which, if nothing more definite is added, such as "Call me up again in a few days," or "I'll let you know by next Monday," is likely to be merely an evidence of friendliness or sympathy. In North Germany, where



people are much more forthright, such friendliness might be considered as very encouraging to the candidate or to his project.<sup>5</sup>

Saddest of all, perhaps, but typical of a few, was the plight of the celebrated scholar who came to the New World expecting the same warm welcome and requests for scholarly collaboration as had invariably greeted him in happier days:

As a scientist he was known in many lands and everywhere was received as a distinguished and honored guest. When the storm clouds of Naziism broke over Europe, we felt confident that somewhere among the many scientific institutions which so often had solicited his cooperation or which, even, had elected him their honorary member, there would be surely a place for him to continue his work in his chosen field. His years of experience, his standing as a scientist would undoubtedly be of value in trying to obtain employment in the United States.

And so he came to America.

But how different was it now. He who had been an esteemed collaborator, whose advice in special questions had always been appreciated, was, now, only an immigrant—one among the thousands of immigrants coming to America as a haven of refuge, seeking employment and a chance to begin life anew in a strange land. Not yet did he realize all this. Not until he had traveled throughout the country seeking out every scientific institution which might have need of his services and abilities. Bewildering and disheartening were the answers he received. Everyone was cordial but regretful. They would like to have him as a member of their staff, but their staff was complete, and unfortunately there were not sufficient funds to employ an additional member.<sup>6</sup>

This was, however, an unusual experience for a scholar of real distinction.

<sup>5</sup> John Whyte, *American Words and Ways* (New York: Viking Press, 1943), p. 142.

<sup>6</sup> From an address given before the Seventeenth Triennial Convention of the National Council of Jewish Women, Chicago, 1943.

Ultimately, no fewer than 459 of the 613 university personnel known to the Emergency Committee through its own files (plus 70-odd academicians from an additional group of 94 of whom it learned from the Committee for the Study of Recent Immigration from Europe) found opportunity to teach or carry on research in American colleges or universities. Access to their own particular field or profession was thus by no means closed to the refugee scholars in this country; on the contrary many of them became firmly established in institutions of higher learning, and attained positions of eminence.

However, not all European academicians could follow academic careers. One former professor of medicine obtained an appointment on the staff of the chief medical examiner of a large eastern city; another appeared as a member of a medical advisory board in connection with Selective Service. Laboratory work on heart, hormones, and vitamin testing claimed quite a number. It was to be expected that university scientists who had contrived formulas for the manufacturing of adhesives for the leather industry, for the production of artificial meat flavors, for cosmetic preparations, for metal polishes, or who had labored to give soap powders special virtue, might, when necessary, by-pass the university for business and industry. Refugee academicians secured places in the Eastman Kodak Company, the Shell Development Company, the General Electric Company, the United States Radium Corporation, the United States Steel Corporation, the California Conference of Real Estate Taxpayers. Others found posts in public health departments, at the Rockefeller Institute for Medical Research, at the Federal Security Agency, in the Office of Price Administration, at the Saratoga Springs Authority, in the Fish and Wildlife Service of the Department of the Interior.



Like the professorial and university group, nonuniversity teachers, scholars, and scientists suffered greatly as a result of Nazi oppression. Although the Emergency Committee's primary concern was not with this group, a great deal of material concerning it came to the Committee's files. For teachers and many engaged in research, as for the university professors, conditions in Europe became unbearable. Race and creed forced many of them to leave. Others gave up their professional chances rather than capitulate to a government of which they could not in conscience approve. The concentration camps yawned for some, and the names of Dachau and Gurs appear constantly in the records. Not at all uncommon was the history of the former Gymnasium teacher who, having declined to become a Russian citizen during his residence in the Soviet Union, was expelled from that country in January, 1936, only to be sent by the Germans in the following July to the concentration camp of Esterwegen near the Dutch border, then to Sachsenhausen near Berlin, and lastly to Dachau.

To have suffered a period of imprisonment before exile is not the best preparation for life in a new country. Some diminution of personal attractiveness is bound to follow upon physical maltreatment. Lamé bodies and scarred faces are a detriment when one goes job hunting. The man who has had his teeth knocked out by brutal prison guards is embarrassed to find himself mumbling when he asks for work. One record comments on a refugee applying for a teaching job:

This man has been deprived of whatever natural charm he may have possessed. He must have been very badly used in Germany for he gives every evidence of extreme nervousness and mental anguish. Some of his teeth are missing. His face is twisted as if by a partial stroke.

Many former teachers and research workers courageously took any work they could find. One woman did housework and acted as a governess. Another made artificial flowers; a third worked in a doll factory. A summer camp offered a place to a woman who taught needlework, crafts, and pattern making. A specialist in Romance languages gladly took a position with a banking firm as secretary and correspondent. The file of a Volkshochschule teacher stated, "She had nothing but a little light factory work from time to time when last contacted." An erstwhile teacher of mathematics and physics hired out as a domestic, became nursemaid to a six-year-old youngster, worked next in an accounting office, and—not concurrently—sewed uniforms in a factory. She later found her way back into teaching. Others became tutors, worked in settlement houses and summer camps, taught skiing, tennis, or horseback riding; and a few entered business and industry.

Similar were the experiences of the group of 329 men and women of scholarly or scientific attainments who had not, so far as the Committee knew, been formally affiliated with university life in Nazi, Fascist, or occupied countries or belonged at all to the teaching profession in Europe. There was a musicologist who carried on research for several years at a Western institution until his job folded up; answering an advertisement placed in the newspapers by a great industrial concern, he was employed as a day laborer at \$6.00 a day. "When I met him," the field representative of the Emergency Committee wrote, "he had finished his first week of work there and was able to sit in his friend's home, smoke his pipe, admit his muscles were rather sore, and smile about it." A classical scholar succeeded at first only in finding employment as a dishwasher in a restaurant. "He handles garbage cans and freight elevators," stated his record, "meets many Greek, Italian, and Puerto Rican employees—but does not find



them an aid to his Americanization. He has been able to save a little out of his \$20 a week plus meals. His wife and parents, who could not escape from Europe, have probably been deported to Poland, or are dead."

The experience of the music historian was sobering, who worked as a machinist in a defense plant until his sensitive pianist's fingers were almost blunted. Another scholar who wrote to the Committee asking about his own prospects in the teaching field stated:

I moved to town last summer after the grant allowed to me by the Committee for last year had expired and have been here ever since doing research in my special field of legal history. I have not, however, been able yet to secure any position either as a teacher or as research worker and have been forced, after my savings ran out, to take work in a bakery.

As the Emergency Committee had found former university men and women outside their own grantees teaching in American institutions of higher learning, it was also interested to find that, among the 230 refugee nonuniversity teachers in the United States of whom it had partial records, at least twenty-eight secondary school teachers found appointments of varying degrees of permanency at American colleges and universities, particularly though by no means exclusively during the war years. In addition, a nursery school teacher and a physical education instructor found posts in American colleges, as did five representatives of teacher training and eight teachers of adult education. Eighteen other teachers of nonuniversity status found similar appointments, for the most part during the war years.

Evidence of the extent to which the Committee's own group finally became established, causing the Committee to feel that it could in justice draw its work to a close, was the

fact that as time went on the problems which scholars and teachers brought for discussion to its office were less and less concerned with securing a bare livelihood or establishing professional status, and resembled more nearly the situations which faced American teachers already launched in the stream of academic life—need for higher salaries to meet the rising cost of living, desire to change jobs to obtain more favorable working conditions or better research facilities, and the necessity of keeping in touch with the changing labor market. The following excerpts from recorded interviews are typical of the trend which had become pronounced about 1943.

The situation of a woman teacher has wide applicability:

Came in to renew contact with us. Her mother died about a week ago. She is sad and disturbed. Should she remain at her small college, which is primarily vocational and does not recognize any need for art history, or should she break away and try to get back into the mainstream? She has no time for research, but finds the life there not unpleasant.

A distinguished economist voiced the reality which faced many older men:

Feels there is nothing for him here in academic life, since he is already sixty-three years old. Would like to go into government service.

The teaching career of a younger refugee scholar is interestingly illustrative of adjustment to American conditions:

Has been at State University for past year on leave of absence from College. Had rank of Associate Professor at \$150 a month. Believed this experience was excellent for his Americanization. Will teach again this summer at the State University. Is under considerable financial pressure because of his large and growing family—parents, wife, one child, and another on the way. Can return to the College, but prefers not to. Learned a



great deal from teaching Army Specialized Training Courses. States that he would not be interested in government employment, except perhaps in OSS. If he were called upon to work on Austrian problems, however, he would feel in duty bound to accept "as if drafted."

At the time the Emergency Committee closed its work in 1945, it had in its files by actual count, inclusive of its own grantees and fellows, partial records of 613 men and women who had lost their posts in European colleges, universities, or Hochschulen during the Hitler years, and who subsequently came to the United States. These records were sometimes quite full but were often incomplete. A letter of inquiry often came from a professor, while he was still in a foreign university town, seeking help in securing an academic post overseas and sometimes enclosing his curriculum vitae and list of publications. From such inadequate notes as the files offered, however, it was possible to piece together some related facts that contributed to a composite picture of the displaced academician as this Committee saw him.

Of the total group known to the Emergency Committee who had to give up hope of an academic career in Europe and who succeeded in reaching the United States, 582 were men and 31 were women. The largest number of these—166—had been born between the years 1896 and 1905, so that they might have been anywhere from twenty-eight to thirty-seven when Hitler came into power. Of the entire group—which, it should be understood, included Emergency Committee academicians—some 366 had been professors, 74 had attained the rank of Privatdozent or its equivalent before being displaced, and 15 classified themselves as Dozenten.<sup>7</sup> The remainder fell into less readily identifiable groupings—"instructors," "researchers," "lecturers," and others, difficult

<sup>7</sup> See footnote 1, p. 12.

because of linguistic ambiguity to equate too surely to recognized university ranks. It should be borne in mind that, had more biographical material been available about certain others of the men and women in the Committee's files, this list of displaced university personnel later domiciled in the United States might have been increased.

The marital status of 387 of the group of 613 was known, and it appeared that 311 of this number were married, 65 single, 9 widowers or widows, and 2 divorced or separated.

The dates of arrival in the United States of 371 had been established as follows: 30 arrived in 1933; 32 in 1934; 15 in 1935; 20 in 1936; 15 in 1937; 43 in 1938; 97 in 1939; 59 in 1940; 50 in 1941; and 10 during 1942 and 1943 (none recorded during the last two years of the Committee's life). There is of course a reflection here of events in Europe—the outbreak of war, the fall of France, and the virtual cessation of emigration to this country while the United States was engaged in hostilities. Scanty information is available about visas: of 224 persons whose immigration status at the time of entry was known to the Committee, 210 entered on immigration visas.

The countries of birth, or of last known citizenship where the birthplace was not established, follow the pattern which might have been expected. Of the total number of 613 men and women in the academic group, data were available on 486, of whom more than half—248—came from Germany. The next largest group, 53, came from Austria. Poland and Italy each claimed 36, while France, Czechoslovakia, and Russia trailed with 26, 25, and 23 respectively. Hungary was represented by 13 academicians, Belgium by 8, Spain and Switzerland by 4 each, the Netherlands by 3, Estonia and Yugoslavia by 2 each, and Bulgaria, Denmark, and Norway by 1 each.

As already indicated, the files contained little to enlighten



the curious as to the religious affiliations of the refugee scholars. The Emergency Committee never requested this information of the men and women who turned to it for assistance. Some chose to publish their allegiance to a particular faith, however, and about others newspaper clippings left no doubt. When every source has been considered, we are only able to say that, of 177 men and women whose affiliation was known to us, 82 were Jewish, 55 Protestants, 39 Roman Catholics, and 1 Eastern Orthodox.

No description of the group would be complete without a consideration of the disciplines they represented. Law was the favored field of interest, claiming 69 scholars out of the total group of 613, and 63 had devoted themselves to physics. Economics and chemistry followed with 54 and 53 adherents respectively. Language and literature, and medical sciences, came immediately after with 51 each. Other disciplines followed in this order: mathematics, 46; philosophy, 43; history, 41; art and archaeology, 32; psychology, 23; sociology, 19; biology, 14; music and musicology, 10; political science, 9; theology and religion, 7; engineering, 6; uncertain, 6; astronomy, 5; zoology, 4; anthropology, 3; education, 3; geology and geography, 1.

## CHAPTER III

*The Displaced Scholar in His New  
Environment*

THE displaced scholars invited to our universities with the help of the Emergency Committee were in most cases men of distinction in European universities. There were several Nobel Prize holders among them. Fifteen were listed in *Who's Who in America* for 1944-1945 and thirty-eight in *American Men of Science* for 1944. The more fortunate were absorbed very soon into the faculties of our universities and scientific institutions. Others equally eminent were for years partially dependent upon the grants by the Emergency Committee to their institutions, for the country was slow in coming out of the depression. But financial difficulties confronting the displaced scholars constituted by no means the only obstacle in their adjustment to their new environment. The profound difference which existed between the administrative set-up of American and German institutions of higher education was a source of astonishment and sometimes of discomfort to the displaced foreign scholars. A professor in a German university is a man of research rather than a teacher. He delivers a few set lectures every week and otherwise has little contact with his students. The quiz and discussion as aids to the lecture system, which are such important and valuable aspects of the American system, are the exception.



Herbert Freundlich of the Kaiser Wilhelm Institute at Berlin was another example of the First World War. Without his studies which enabled the Germans to protect their armies in gas warfare gas would never have been introduced in the first place, and had it been introduced the German armies would have been decimated when the gas manufacturing facilities of the United States were thrown on the scales. For this he was rewarded by Hitler with essential banishment.

Other examples of the type of people that I have in mind are Professor George B. Kistiakowsky at the present time professor of chemistry at Harvard University who came to the United States in 1926, Professor Peter Debye who has just taken over the headship of the chemistry department at Cornell University, Albert Einstein at the Institute for Advanced Study, etc. The list could be expanded very largely, but I believe the illustrations which I have already used are adequate.

In spite of need strongly felt in many quarters, however, it was not until we were in actual combat that foreign displaced scientists who had sought refuge in the United States came fully into their own. The discriminating words of Dr. Bruzus of Latvia, in his 1938 report to the Committee on Science and its Social Relations of the International Council of Scientific Unions, come to mind: "I distinguish two elements in science, its utility and its intellectual charm."<sup>1</sup> In the smoke of battle, nations are understandably less preoccupied with the charms of science than with its usefulness. Whereas for years lack of laboratory facilities or need of a job with which to keep body and soul together had often prevented the refugee intellectual from pursuing the delights of his calling suddenly he was called upon to mobilize his knowledge for the national welfare.

On December 7, 1941, came the Japanese attack upon

<sup>1</sup> Quoted in Walter B. Cannon and Richard M. Field, "International Relations in Science," *Chronica Botanica*, Vol. 9, No. 4 (Autumn, 1945), pp. 285-286.

Pearl Harbor, and with it the entrance of the United States into World War II. Now the displaced scholar had his opportunity to contribute to the war effort of his adopted country in the classroom, in government bureaus, at the proving grounds, or in the laboratory.

Participation in the war effort affected every one of our economic and social institutions; but upon none of these did it exert a more profound or far-reaching influence than upon American colleges and universities. Here changes in plant and structure became inevitable, the number and kind of students were altered, perplexing problems in management confronted harassed administrations, and curricula had to be tailored to meet war needs. Almost all male students nineteen years of age and over were enrolled in the army, navy, or marines. Others received instruction in revised courses of training which placed strong emphasis upon the scientific and technical branches of learning as a preparation for the war effort. "Accelerated" programs to guarantee an early supply of technical assistants were introduced. There was strong emphasis upon the faculties of medicine and language, whose graduates were in special demand, but no technical field was overlooked.

All these factors had their effect upon the refugee scholar. Younger American teachers in colleges and universities were drawn into the army and navy, while older instructors in the scientific and technical faculties were drafted by the military services for research on special problems of defense and offense. For a time many institutions found themselves all but denuded of mathematicians, physicists, and chemists. It was natural and inevitable that the ranks should be filled up by displaced scholars. By 1941, many of the newcomers had become American citizens, and although the military authorities were reluctant to employ recently naturalized men and women upon technical jobs of secret character, exceptions



were made if unusual skill, appropriate experience, and an unblemished security record had peculiarly qualified the refugee for the work which was to be done. Here at long last the displaced scholar stood among his peers, accepted as one of them. Paradoxically enough, it was in the rush and fever of implementing accelerated programs and specialized training courses, that displaced intellectuals found themselves in a more nearly normal working situation than they could have hoped to find in peacetime. As one college administrator stated, what was expected of refugees was no more and no less than what would have been expected of Americans in comparable jobs. And émigré scholars responded handsomely to the demands made upon them.

The interest of friendly administrators among the defense services in the work of the Emergency Committee is reflected in the following letter written to Dr. Duggan on March 2, 1942, by Dr. Robert Leigh, former president of Bennington College:

I am working with the National Resources Planning Board, and one of my tasks is to serve as an executive in connection with the Science Committee of the Board. This Committee is made up of representatives of the National Research Council, the Social Science Research Council, and others.

At the last meeting of this Committee there was a discussion of the loss of scientific and scholarly help due to the regulations which prevent qualified and loyal alien scholars from carrying on business tasks for the government. It was left to me to find out the facts regarding the regulations and to see what forces are afoot to get some reasonable individual relaxation of the barriers.

It occurred to me that you might be in a position to give me a description of what is being done and has been done, and who is working on the problem. I am not at all sure that the Science Committee can or will do anything, but I want to find out what the possibilities are.

The information provided by the Committee stimulated increased use of our refugee scholars.

A report of the Committee's grantees and Fellows as of June 30, 1944, during the progress of the war, showed that thirty-one of its scholars were employed with government bureaus, including the Office of Strategic Services, the Bureau of Economic Warfare, the Office of War Information, and the Office of Price Administration. Eighty-seven other grantees were engaged in some other form of activity helpful to the war effort, ranging from contributions of time and service to the Office of Civilian Defense and donations of plasma to the blood banks, to participation as teachers in the Army Specialized Training Program, Navy V-12 Program, Civil Affairs Training Schools and Allied Military Government classes. Several answered that they had worked with commissions studying the location of cultural monuments within occupied Europe so that these monuments might be spared during bombing raids. One had worked with the International Labour Office in Montreal, and another was engaged in teaching classes for the Canadian Army Corps. Five served on the Applied Mathematics Panel for the National Defense Research Council. One lectured on musicology at an army hospital as part of the recreational readjustment program. Two former scholars were employed as mathematicians at the Aberdeen Proving Ground in Maryland. Several had temporarily left academic posts to devote all their time to war work. One scholar wrote that he had given up the teaching of art history in order to work in the engineering department of a large shipyard as draftsman. A chemist was working on a portable still for use in life rafts so that sea water might be made potable. A malacologist contributed information about such edible or poisonous invertebrate animals as the army might expect to encounter in out-of-the-way corners of the globe.



Scholars wrote not only about themselves but about their children as well, a number of whom were in the armed forces. A former grantee remarked: "One boy of mine is in the air corps, another is an already disabled war veteran, a third will go to the army now." The son of another was in the Navy. One of the scholars told of a son who was in active service as an intelligence officer overseas. Typical was the letter from a former grantee written in 1946 which stated proudly: "My son took part in the Pacific campaign from Bougainville over New Guinea, Leyte landing, Manila, to Japan, and last October, has been discharged with eighty-six points. He is not yet quite twenty-one, and at present a student of the University."

Supporters of the Emergency Committee have sometimes said, half in earnest, half in jest, that the Emergency Committee in Aid of Displaced Foreign Scholars imported the atomic bomb. This is friendly if gross exaggeration: although many of Europe's noted atomic physicists who were obliged to flee because of racial or political reasons turned to the Committee for help, most of them made their own contacts in this country and were successful in securing scientific appointments independently of this organization's help. Yet the Committee's rôle need not be minimized, for much assistance was given, through correspondence and letters of introduction, to a number of Europe's displaced men of science who worked on the applications of nuclear fission. Of the Committee's grantees and Fellows, five were atomic physicists, and at least two were known to have been active in research in the United States on atomic energy for military purposes: one the Nobel Prize Laureate, James Franck, a director in the Metallurgical Project; the other the Italian physicist, Bruno Rossi, who worked at Los Alamos Laboratory on an important phase of the experimental program connected with the engineering of the atomic bomb. There is some reason to

believe that as security regulations lift, it will be found that others among the Committee's former grantees, as well as among scholars less directly aided by the Committee, contributed to the working out of the Manhattan Project. It is significant that the Official Report on the development of the atomic bomb under the auspices of the United States Government contains this statement: "At that time [January, 1939] American-born nuclear physicists were so unaccustomed to the idea of using their science for military purposes that they hardly realized what needed to be done. Consequently the early efforts both at restricting publication and at getting government support were stimulated largely by a small group of foreign-born physicists centering on L. Szilard and including E. Wigner, E. Teller, V. F. Weisskopf, and E. Fermi."<sup>2</sup>

One way or another, the hopes and expectations of Professor Gortner, and of others like him, were realized by the time of the war's end. Even before R. G. D. Richardson declared in 1944 that there were more of the leading German mathematicians in the United States than there were in Germany, no less a personage than Grand Admiral Karl Doenitz, in a letter to the German scientist, Professor Karl Kuepfmueller, written December 14, 1943, deplored the scientific impoverishment of the Reich. In speaking of U-boat warfare he is reported to have stated,

For some months past, the enemy has rendered the U-boat war ineffective. He has achieved this objective, not through superior tactics or strategy but through his superiority in the field of science; this finds its expression in the modern battle weapon, detection. By this means, he has torn our sole offensive weapon

<sup>2</sup> Henry De Wolf Smyth, *Atomic Energy for Military Purposes: The Official Report on the Development of the Atomic Bomb Under the Auspices of the United States Government, 1940-1945* (Princeton: Princeton Univ. Press, 1946), p. 45.



in the war against the Anglo-Saxons from our hands. It is essential to victory that we make good our scientific disparity and thereby restore to the U-boat its fighting qualities.<sup>3</sup>

It was not only in the scientific and technical fields of learning that the refugee scholar proved his worth. He was especially needed in the field of languages. A scholar of the Committee wrote, "During the war I conducted, assisted by natives of India, a number of very successful courses on Hindustani in connection with the war effort." Another told us, "I wrote for the American Council of Learned Societies the army manual of Spoken Greek." While military authorities placed little value on the study of the literature of a foreign language and small emphasis upon the study of its grammar and structure, they badly needed men and women who could speak the language itself. An ability to read and write it was also valuable, but the need for our officers to talk with the natives of the overrun countries, and especially of Germany and Japan, was of the first importance. The refugee scholar was sometimes the best instructor in the accelerated teaching of foreign languages and especially of German.

In still another endeavor of the military authorities the refugee scholar was of almost unique value. The army knew that when the day of victory arrived, it would be its task to take over the administration of Germany. To do this with any measure of success it would be necessary to have a reservoir on which to draw, of personnel familiar with the geography, history, government, and forms of administration of Germany, but especially with the psychology of the German people. No person was better qualified to prepare Americans for this task than the refugee scholar. He was thoroughly familiar with the German *Kultur* of pre-Hitler days and knew

<sup>3</sup> Letter released by Rear Admiral H. G. Bowen, Chief of the Navy's Office of Research and Inventions, *New York Times*, Feb. 14, 1946.

from sad personal experience the meaning of the Nazi totalitarian ideology. In the special schools organized by the military authorities for the training of men and women as administrators in Germany after victory, the refugee scholar was of unusual value as a teacher. This was equally true of the school established at the University of Maryland for the training of assistants in the work to be undertaken by the United Nations Relief and Rehabilitation Administration in the devastated areas. Two of the Committee's former stipendiaries taught at Biarritz American University in 1946, while a former scholar, Dr. R. M. W. Kempner, was attached as Deputy Chief of Counsel to the legal staff prosecuting major Axis war criminals in the Nuremberg trials.

This has been part of the record of the Committee's men and women in the war effort. There is still a large contribution which they can make to the new homeland. With the settling down to the struggles and conflicts of a peacetime world, the active rôle of the scientist and scholar does not end. What science has labored to destroy, it must now dedicate itself to rebuild. There is ample room for the gifts of all intellectuals, refugees and natives alike. As Thomas B. Appleget has so strongly put it:

If there is any nucleus of international goodwill and understanding left in the world, it resides, I think, in scientific personnel. They will be the first to mend the broken wires of communication, and I hope this time all the world will realize, whether we like it or not, we have to live together on a globe which science has made too small for war.<sup>4</sup>

<sup>4</sup> Quoted in Walter B. Cannon and Richard M. Field, *ibid.*, p. 258.



*Fields of Study and Geographical Distribution  
of the Displaced Scholars*

THE Committee throughout its long career acted on the principle that the universities and colleges to which it made grants should exercise full right of choice as to whom they wished to call, as well as free judgment concerning fields of study in which they believed they could introduce newcomers without overloading curricula, antagonizing faculty members or bringing foreigners into unfair competition with American teachers. Fields of study represented by scholars in whose behalf our grants were made, therefore, were determined by the action of the universities and not by any solicitation or pressure on the part of the Committee. A glance at the disciplines for which the Committee's grants were made (see Appendix I) is not without interest as showing fields in which American institutions believed they need not fear competition or in which they welcomed new blood.

It appeared to be the conviction of American educators that there was more opportunity for foreign scholars in the humanities than in any other branch of learning. Of the total of 335 stipendiaries of the Committee (including grantees, National Research Associates, and Rosenwald Fellows), 137, or about two-fifths, were representatives of the humanities. An apparent preference for men and women who had been

trained as philologists or teachers of language and literature is evidenced by the fact that 43 of the people in the humanities came from those fields. Of the others: 27 were art historians or archaeologists, and 22 represented philosophy. Music and musicology together claimed 18.

The division of learning in which educators declared themselves least ready to engage displaced professors was social science. It was commonly said that for the teaching of American youth at the undergraduate level there was no substitute for the American sociologist or economist who, steeped in the scientific literature as well as the folkways of this country, knew conditions here and understood American young people. In spite of this fact, a not inconsiderable portion of the entire group of stipendiaries—110 out of 335—were men and women in the social sciences. Interestingly enough, some 33 of this number came from the field of law. A word of explanation about this category should be offered. In most continental universities there are but four traditional faculties: law, medicine, philosophy, and theology. With the growth of branches of knowledge in other fields, they became incorporated into some one of these four, e.g., history, economics, government, diplomacy, politics, and some other branches would be studied under the faculty of law. Hence when displaced scholars in these latter branches first arrived they sometimes stated in answer to inquiries as to their field of work that it was law. This explains the large number under law in the statistics. The versatility of the legal group after their arrival in this country was striking. Not a few men from Europe who had gone so far as to specialize as professors, Privatdozenten, or assistants in the law faculties of foreign universities, changed over into other fields in the United States, turning their talents with a good measure of success to philosophy, classics, history, or even in one instance to zoology. Economics also accounted for 33 scholars



in the social sciences group, with history claiming 19 and sociology 14.

Comparatively speaking, there were not many natural scientists on the Committee's roster—81 out of a total of 335, or less than a quarter. Looking back over their years of activity, members of the Committee often recall their anxiety lest they bring in too many physicists and mathematicians to strive with young Americans for the few vacant posts in colleges and universities. With the outbreak of war, however, there may have been some regret that we had not invited more scientists in these fields to help supply the crying demand for scientific personnel in the war effort. It is certain that the Committee's 26 mathematicians, 16 physicists, and 7 chemists were kept particularly busy during those years—as indeed were most of the qualified scientists in the refugee group who were known to the Committee.

Because of the existence of specialized services to help refugees in the field of medicine, the medical sciences represented a field in which the Emergency Committee in Aid of Displaced Foreign Scholars properly exercised little activity. It was somewhat by exception that a few grants were made in this department to men who were active in the Hebrew University in cancer research and gynecology. Former professors or Privatdozenten from the medical faculties of foreign universities who had been deprived of their posts by the Nazis were not in principle, however, ineligible for our support; and a total of seven grants in all were given in the field of medicine.

#### GEOGRAPHICAL DISTRIBUTION

As was natural, the greatest single concentration of scholars and professional people on subvention from the Committee or receiving aid indirectly in the form of salary payments

from the institutions to which our grants were made, occurred in New York State. Not only did many refugees tend of their own accord to cluster near the main port of entry where they found friends and compatriots, but among the displaced scholars there was a certain fear of what they would find in the small colleges as opposed to the great urban universities. Some European professors whose academic career had been spent at a university of international fame dreaded loss of prestige if they entered upon American teaching life in a rural or suburban college. In European countries education is divided into three categories: elementary, secondary, and university. In the United States there are four divisions, the college being interposed between the secondary school and the university. Many Europeans failed to understand the honorable status enjoyed by the college in the American world of higher education. Anxiety was frequently expressed also lest library facilities in the smaller institutions might not prove adequate—a doubt that closer acquaintance with the American scene often dispelled.

In addition to these considerations, institutions of higher learning were numerous in the New York area and as experience showed tended to be hospitable to the newcomers. Thirty-one different institutions in that area provided a working place for a total of 111 refugees on stipends from the Committee, whether as grantees, as Rosenwald Fellows, or as National Research Associates.

In New York City, the New School for Social Research alone had at some time 17 of the Committee's scholars in addition to 4 Fellows, making a total of 21. Columbia University, including Columbia College, Barnard College, and Teachers College, accounted for 15 refugee scholars. New York University had 13, of whom 5 were attached to the Institute of Fine Arts.

Ten grantees and 1 Fellow of the Committee were enabled



to carry on their researches at the Institute of Social Research—an association of scholars transplanted from Zurich and now domiciled at Columbia University although not an integral part of that institution.

Five scholars and 1 Fellow received assignments at the New York Public Library. At the City Colleges within New York City 6 grantees of the Committee received teaching posts.

Of specialists in Jewish, Hebrew, and Yiddish studies working at special institutions in the metropolitan area under stipends from the Committee, 8 were grantees.

A fruitful concentration of Committee scholars in the eastern states occurred at the Institute for Advanced Study at Princeton, New Jersey, where 11 grantees found an environment that was stimulating to scholarly production. It is perhaps interesting as an aside to note that although the *average* age level of these men as of the year of the Committee's first grant was just below forty years, 5 of the 11 were in their thirties when first carried on the Committee's books. This high valuation placed on the younger scholars of brilliant promise is noteworthy in that it occurred nowhere else to such a marked degree. Although the Committee's general policy reserved its grants for older scholars save in exceptional cases, relaxation of the rule was possible in such a situation where a scientific or scholarly institution of the Institute's standing vouched for the competence and scholarly achievements of the men selected.

Massachusetts received 27 stipendiaries of the Committee, of whom 13 were at Harvard (including National Research Associates) and 4 at Massachusetts Institute of Technology. Connecticut numbered 11, of whom 9 were at Yale University.

Pennsylvania welcomed 27 of the Committee's grantees, with the largest concentration, 22, in the Philadelphia area.

The University of Pennsylvania alone listed 7 grantees and 1 Fellow of the Committee, while Swarthmore and Bryn Mawr each accommodated 5.

Nineteen grantees found teaching and research opportunities in the District of Columbia, including 5 each at the Library of Congress and the American University, and 3 at the Catholic University.

Kentucky took 6 of the Committee's grantees, distributed between the University of Louisville and the University of Kentucky, while Ohio, with its large number of colleges, took 9.

It was to be expected that Illinois, with its great universities and numerous progressive colleges, would be very hospitable to the refugee scholar; and 26 grantees and Fellows taught or carried on research there under subventions from the Emergency Committee, 9 of whom were at the University of Chicago. Among the new institutions to avail themselves of the Committee's grantees was Central Y.M.C.A. College in Chicago—now Roosevelt College—which engaged 5.

West of the Mississippi, California was the most important center to provide a working place for an appreciable number of the Committee's grantees. That state took 16 in all—8 of whom were attached to the University of California and 3 to Stanford.

The only institution not in the United States to share in the Committee's plan was the Hebrew University in Palestine. Certain of the Committee's funds could not be expended overseas for they were earmarked solely for use in the United States. Enough money was found, however, partially to subsidize at the Hebrew University one of the most important groups of men assisted by the Committee anywhere. Fifteen outstanding scholars and scientists found a secure and stimulating locus for their work at this most remarkable institution on Mount Scopus, where they carried on their re-



searches in radiology and cancer research, in gynecology, and in the humanities.

It will be noted that sectarian and church-related institutions in different parts of the country found their way into the Committee's list along with the large private universities, the state universities, land-grant colleges, and small independent foundations. It is to the credit of all of them that they aided with marked impartiality scholars of different faiths. Catholic institutions were found harboring both Protestant and Jewish exiles, while the Protestant schools carried out their traditional role of religious tolerance. Jewish institutions, like Jewish funds, were at the service of all denominations.

In the many institutions with which the Committee's grantees and Fellows were connected, refugee scholars in addition to those aided by this Committee were taken on, sometimes with the help of other organizations but frequently on the budget of the institutions themselves. A great number of the Committee's own grantees, once launched on the stream of American academic life and moving from college to college when called, even as American professors are normally accustomed to doing, did not remain indefinitely at the institution to which our assistance was given but went on to other seats of learning.

#### THE ROSENWALD FELLOWSHIPS

An additional word should be said about the Rosenwald Fellowships. They were founded in 1942. The Emergency Committee decided at the very beginning of its career to confine its efforts to assisting mature scholars who had already made their mark in German universities and Gymnasien. William Rosenwald of the Rosenwald Family Association consulted the Executive Committee to ask whether the Emer-

gency Committee would receive a grant from the Association to be used for the benefit of younger refugees. The fellowships established by means of the grant were not intended primarily for scholars and were to be awarded in most cases to men and women outside the teaching profession: to artists, musicians, architects, men of letters, and others who gave promise of creative work in their special fields. The aim of the fellowships was to enable the younger refugees, particularly those who had but recently arrived in this country and who had not yet had an opportunity to make their own way, to secure a foothold in their new environment as the beginning of a career which might lead to complete independence of any assistance.

Whereas scholars on the Committee's Grants-in-Aid program were, in accordance with the Committee's policy, attached to institutions of higher learning rather than enabled to participate in the academic life of the country on an independent basis, the writers, painters, sculptors, and other professional people who shared in the Rosenwald Fellowship program worked under another set of conditions. By the very nature of their work, the Fellows benefited by the opportunity to carry on their activities quietly at a writing table, often it is true in a small furnished room, in the seclusion of a rented studio, or in a cubicle of the public library. Although the occupation of certain ones took them into the laboratory or classroom of a scientific or academic institution, only 15 Fellows—less than a third of the group of forty-seven—were formally affiliated with an American institution during the term of the Committee's stipend.

Although the program for the Rosenwald Fellows was originally set up for the assistance of the younger group, great freedom of action and choice as to the age of Fellows selected and the amounts to be awarded to them was allowed the Committee when the plan went into operation. Out of a list of



147 applicants, 47 were chosen. They ranged in age from thirty-six to seventy years. Thirty-eight were men and 9 were women. There were 21 Germans, 15 Austrians, 3 Russians, 2 Hungarians, 2 Italians, 2 Czechs, and 1 each from Latvia and Poland.

The Fellows represented 14 different fields of work, with the largest concentration in the humanities. Applied art and art history claimed 13 of the total number of 47; letters came second with 8 Fellows. Out of 17 social scientists, 5 were economists.

There were many requests for renewals of these grants, but the Committee was obliged to restrict its assistance under this program to a one-year period. Renewals were refused to all but 4 Fellows, whose cases were of special merit. The usual stipend granted for a one-year period was \$1,200.

The fellowships had good results. Despite the original objective of the fellowships, of the forty-seven holders eighteen became at least temporarily established in universities, colleges, and other research institutions. These placements occurred in the fields of history, art history, economics, literature, art, costume design, psychology, sociology, drama, law, and archaeology. Eleven of the Fellows carried on projects or research investigations dealing with Germany—such as anti-Semitism, labor movements in Germany, German youth, German education, and German history. Several of the fellows held highly successful art exhibitions in New York galleries; others published books which were well regarded by the critics.

As of May, 1945, the last date on which these figures were available, 28 of these Fellows had applied for their first citizenship papers, 5 had applied for final papers, five had become citizens.<sup>1</sup>

<sup>1</sup> A complete list of the holders of the fellowships and the fields in which they worked is given in Appendix VIII.

When the Emergency Committee came for the last time to attempt a statistical and interpretive study of its grantees, Fellows and National Research Associates, it had to face the fact that its very philosophy and chosen manner of operation had limited the quality as well as the character of available data. It had at no time sought intimate or confidential information from its clients, hence its files were lacking in such material about them. (It should be added that the scholars were by and large a group of composed, objective personalities little given even under extreme stress to pouring out their frustrations or heartaches in the course of interviews or in letters or reports from the field.) The Committee had been meticulous in avoiding interference in relationships between the refugee professor and the institution which wished his services. Much of the story of these relationships, therefore, was not directly known to the Committee. Moreover, it had respected the scholars' almost unanimous desire to shun publicity and their disinclination to answer forms and questionnaires, and had made a very restricted use of such research instruments in its dealings with them. Frequently the extent of the Committee's knowledge about its early grantees beyond certain vital statistics was that celebrated scholarly and scientific people judged their work to be of outstanding importance, and that leading American institutions asked for the privilege of adding them to their faculties.

It should not be thought that in the first years of the Committee's work all scholars who were to benefit from grants came into the Committee's office on their way to the university to which they had been called. Certain scholars were never interviewed by members of the staff at any time in their career. As time went on, however, with more publicity inevitably attending our work through the achievements of eminent grantees, and as refugee scholars began to attend annual conferences of scientists and educators meeting and talking with



other scholars about their common interests, and as the Committee's own policy with regard to placement changed from a passive to an active one, face-to-face contact with new grantees became essential. By the time the Committee's Fellowship program had gotten under way in 1942, an interview with each candidate was mandatory, and detailed biographical material was required.

In a review of the marital status of its 288 grantees and National Research Associates, 209 were found to be married and 31 single. Three had been widowed and 2 divorced, while concerning 43 the Committee had incomplete information. Somewhat less than a dozen of the scholars had married American women. At least 131 had one child or more.

The preponderant number of the Committee's grantees were male. Of the total group of 288 grantees and National Research Associates, only 13, or less than 5 per cent, were women. In this small but distinguished group, 3 had been professors in German universities and 2 Privatdozenten, while the others had been variously active as curators, librarians, researchers, and social workers.

Of the Committee's 47 Rosenwald Fellows, 25 were married, 13 single, 4 widowed, and 1 was divorced. Information was lacking about 4. Eleven of the group were parents.

## CHAPTER VII

*Cooperation of the Emergency Committee with  
Other Organizations*

THOUGH the Emergency Committee in all probability assisted more of the displaced scholars than any other organization, it was by no means the only organization devoted to their service. Some organizations already in existence turned their attention to the problem as soon as it arose. Others, especially of a professional nature, were organized for the specific purpose of assisting in the placement of refugees in the particular profession. Practically all the organizations cooperated most heartily in the work of the Emergency Committee.

## THE ROCKEFELLER FOUNDATION

Even before the organization of the Emergency Committee, the Rockefeller Foundation had undertaken its extensive program in aid of the displaced scholars. From the very beginning of the Emergency Committee's activities Dr. Alan Gregg, Director of the Medical Sciences of the Rockefeller Foundation and Thomas B. Appleget, the Foundation's Vice President, sat in at executive committee meetings of the Emergency Committee and rendered great service with their advice, the result of the long and continuous experience of



the Rockefeller Foundation in the field of international scholarship and scientific collaboration. The contribution of the Rockefeller Foundation, however, was not confined to advice. From the beginning of the activities of the Emergency Committee, it duplicated in almost all cases the grant made by the Emergency Committee to a college or university receiving a displaced scholar. With the passage of time, when the grants made by the Emergency Committee had to be reduced because of the increased demands upon its resources the Rockefeller Foundation continued its original contributions. By the close of 1945, when its refugee scholar program ended, the Foundation had expended \$1,410,778 for the purpose and had aided 303 individual scholars.

In the face of the new emergency caused by the sudden undeclared war by Germany upon the countries of Western Europe, the Rockefeller Foundation generously came forward to give additional assistance to the cause of the displaced scholars. Dr. Alvin Johnson, Director of the New School for Social Research, had already organized the University in Exile for the benefit of displaced German scholars and now offered to receive refugee scholars from other countries and to find chairs for them in the University in Exile provided funds were forthcoming. Such definite appointments were necessary in order to meet the requirements laid down in the immigration law that a foreigner may not be admitted to the United States unless a guarantee is given that he will not become a public charge. Our consuls abroad also regarded closely the provision of the Immigration Act which required that the scholar entering on a professor's visa must have taught the last two years before leaving Europe and must have received an invitation to teach in an American college or university.

To enable the New School to carry out its part of the plan, the Executive Committee appropriated \$35,000 to the School

for additional operating expenses over a two-year period. Subsequent appropriations raised the total granted for this purpose to \$65,589. By 1940 the Emergency Committee had become highly regarded in practically all our institutions of higher education for its work with refugee scholars, and it at once put all its facilities at the service of the new group of displaced scholars. The Rockefeller Foundation made a grant to the Emergency Committee of \$10,000 a year for two years to enable it to assist in the administration of the additional activity involved in the organization of a placement program. Under the plan, the New School, the Institute of International Education, and the Emergency Committee were authorized to recommend scholars to the Foundation. Final decision in all cases, however, rested with the Foundation. The Foundation also nominated scholars directly. Actually, over 60% of the initial grants were made to the New School. The grant covered travel expense and stipend, ranging from \$1,500 to \$2,500 annually for two years. Under its Emergency Program the Foundation expended a total of \$348,794 in grants for fifty-two individual scholars. The Emergency Committee wishes to record its tribute to the Rockefeller Foundation for the splendid service it rendered to the cause of learning and scholarship by its prolonged assistance to the refugee scholars.

#### THE UNIVERSITY IN EXILE

Because of the important work of the New School for Social Research in connection with refugee scholars, Dr. Alvin Johnson, its Director, was asked to contribute a statement which follows:

In the spring of 1933, when the first list of German university professors expelled from their chairs was published, the New School for Social Research launched a project for assembling a



group of these professors to form a well coordinated Faculty of the Political and Social Sciences.

The Director of the New School had for many years been impressed by the international character of scholarship, and had been an adherent of the aims and ideals of Dr. Stephen Duggan's Institute of International Education. With most of the scholars dismissed by Hitler the Director of the School had been in correspondence, and some of them had contributed articles of great value to the *Encyclopaedia of the Social Sciences* of which he was Editor. It was clear that the Nazi policy, in destroying academic freedom in Germany, had in effect exiled the German university as the world knew it. Hence the name adopted for the proposed Faculty by the New School: the University in Exile.

At the same time Dr. Duggan was working out a far more extensive project involving the placement of exiled professors in all the leading educational institutions of the country. At an early interview between Dr. Duggan and the Director of the New School it was recognized that the two plans were in complete harmony. The Emergency Committee plan offered opportunity to a wide range of American scholars and students to benefit from the abilities of excellent German professors. The New School plan offered the possibility of an organized group, carrying on cooperatively the methods by which German political and social science had latterly won eminence. The Emergency Committee plan looked to the assimilation into America of the individual scholar. The New School looked to the assimilation of a Faculty as a whole. It was agreed that both plans held out significant promise for American scholarship. And as additional lists of proscribed professors were published from week to week, it became ever clearer that there was room for two plans, indeed for many plans.

Certain specific differences were obvious from the start. Under the plan of the Emergency Committee, the initiative in employing professors lay with the universities and colleges. The New School, as an operating institution, could issue its invitations, carrying non-quota visas, without any delay. The difference was not important, at first, owing to the extraordinary efficiency of the Emergency Committee in animating the universities and colleges. It became important when the French army collapsed,

placing scores of refugee professors in France in instant jeopardy, a situation that will be discussed later.

In this first interview between Dr. Duggan and the Director of the New School it was agreed that the New School would seek independent sources of support. This it succeeded promptly in doing, thanks to the magnificent generosity of Hiram J. Halle, who underwrote its requirement of \$60,000 a year for two years. The New School undertook two other limitations on its own action. It resolved that members of its own Faculty would not be candidates for positions that could be filled by candidates of the Emergency Committee. This did not preclude the acceptance of non-subsidized positions, and a number of the men brought over by the New School have accepted such positions. The New School also resolved that it would not appeal to the Emergency Committee for grants. But with the steady increase of European scholars who needed to be taken care of the New School had to drop this limitation. Some twenty-one grants were made to the New School by the Emergency Committee, many of them at the generous suggestion of Dr. Duggan.

It is too early to appraise the effectiveness of the New School plan for American scholarship. If the publication of books and articles in scientific magazines is taken as a criterion, the New School plan of an organic Faculty has worked well. If its appeal to students is a criterion, it has also worked well. The University in Exile, now known as the Graduate Faculty, has more students than most university faculties in America. No student of American education can doubt that the Emergency Committee plan has worked well. There are scores of American institutions whose intellectual life has been greatly enriched by the distinguished scholars introduced by the Emergency Committee.

The educational consequences of the fall of France created a new justification for the New School plan, if any were needed. All refugee, liberal, and Jewish professors in France were at the mercy of the Nazi conquerors, who had passed on from expulsion and confiscation to torture and murder. It was no longer possible to wait for action by university presidents and faculties, as in the early days of the Emergency Committee. Instant action was required. The Director of the New School petitioned the Rockefeller Foundation for grants to cover transportation expenses



and two year stipends for, at the outside, a hundred scholars, officially invited to the Faculties of the New School, but placeable in any institution better equipped to use their services. The petition was granted, and the cables were kept hot with messages of invitation to scholars who had already lost hope. Similar appeals to the Carnegie Corporation and the Belgian American Educational Foundation met a ready response. So also appeals to private individuals. By the gallant support of the American consuls something over a hundred scholars were rescued from the teeth of the Nazi hyena.

Most of these scholars were distributed through the universities—some of them to play a material part in the construction of the atomic bomb. A contingent of the social sciences and the liberal arts remained with the New School, to form the *Ecole Libre des Hautes Etudes*, for a time the only freely functioning French university. It is functioning still\*, and has high hopes of permanence, as a liaison between French and American university life, an outpost in the system of international education, of which Dr. Stephen Duggan is the great leader, and the New School for Social Research an ardent follower.

#### THE IRANIAN INSTITUTE AND SCHOOL FOR ASIATIC STUDIES

From Dr. Arthur Upham Pope, Director of the Iranian Institute, comes this account of the building of a curriculum of Asiatic studies around a core of refugee scholars:

One of the earliest grants of the Emergency Committee was to the Iranian Institute for the salary of Dr. Richard Ettinghausen. That the grant was justified is indicated by the fact that Dr. Ettinghausen subsequently became Professor of Islamic Art in the University of Michigan, Editor of *Ars Islamica*, and is now Curator of Near Eastern Art in the Freer Gallery.

More important grants came again at a critical time when the Nazi Anschluss in Austria released several important men from the University of Vienna. Through the assistance of the Emergency Committee it was possible to add to our staff Pro-

\* The *Ecole Libre des Hautes Etudes* became an independent institution in 1947.

fessor Bernhard Geiger, thought by many to be the outstanding scholar in the field of Indo-Iranian language and literature. At the same time Professor Gustave von Grünebaum, a brilliant Arabist, was added; he was subsequently called to the University of Chicago.

Grants from the Emergency Committee made possible the further addition to the faculty of Dr. Leo Oppenheim, a brilliant scholar in the field of early Mesopotamian studies. Dr. William Haas, a noted historian of Oriental civilization, and Professor von Heine-Geldern were aided by grants at critical times which enabled us to retain them on our staff.

These grants made possible the nucleus of a School of Asiatic Studies. We are pleased to report that the appointments were of the finest character, that the spirit of cooperation and good will, and the adjustment to the flexibility needed for a pioneer enterprise were all and more than could be expected. I doubt that any grants that the Emergency Committee made could have had a greater significance than those given to our Institute; and the Institute is gratefully aware that these grants required courage and imagination, which we believe have been justified by the results. The School of Asiatic Studies, which was not in existence when the first grant was made, has made as high as 165 registrations. The faculty has grown from nothing to a resident full-time faculty of 14. The resources of the Institute, chiefly in the form of unusual *objets d'art*, have increased from approximately \$10,000 to a value well in excess of \$600,000. During this period the intellectual productivity of the Institute has been extraordinary. It seems improbable that any comparable group has made so many important contributions in so short a time. If this desirable end is achieved, the faith and generosity of the Emergency Committee will have been an indispensable factor.

#### THE INSTITUTE OF FINE ARTS OF NEW YORK UNIVERSITY

Dr. Walter W. S. Cook, the Director of the Institute, writes as follows:

The rise of the Hitler regime and the domination of Germany by the Nazi party brought about a real Renaissance in the study of the Fine Arts in this country. At the time of the German elec-



tion in April, 1933, Dr. Erwin Panofsky was here as a Visiting Professor from the University of Hamburg which, as in 1931 and 1932, had given him a leave of absence to our Institute of Fine Arts of New York University. At once he was added to our staff as a permanent professor. After teaching for two years on our staff, he accepted a new position at the Institute for Advanced Study at Princeton, New Jersey. He has, however, constantly maintained a personal connection with our Institute where, as Lecturer, he has given each year one or two courses for our students. Altogether the Institute of Fine Arts of New York University was assisted by the Emergency Committee in aiding five displaced scholars to its staff.

The history of art and archaeology is a relatively recent field of study in this country, and there were relatively few Americans sufficiently equipped to teach graduate students in this field. But as a result of the addition of so many able scholars from Europe, numerous American students have been, and are now, receiving a training rarely received in this country before. The great contribution made at our Institute of Fine Arts is that these scholars have trained, and are still training, a new generation of American students, who will in turn be capable of instructing future generations of American students. At present, students come here from all parts of this country as well as from Central and South America, and Canada for advanced graduate instruction for the degrees of M.A. and Ph.D. Thus the instruction given our students by these foreign scholars has proved to be a very effective force in the progress of American scholarship in the history of art and archaeology. For this consummation we owe much to the generosity of the Emergency Committee.

#### THE NATIONAL RESEARCH ASSOCIATES

In the early part of 1939 Professor Harlow Shapley of Harvard University established the Harvard National Research Associates. These consisted of a small group of displaced scholars of an age beyond that at which places might be readily found in a college or university. The facilities of the library and laboratories of Harvard were to be placed at their disposal for personal research, but they were not re-

quired to give instruction. Moneys which had been raised by the efforts of Professor Shapley were subsequently, by arrangement with the donors and with the full consent of Harvard University, turned over to the Emergency Committee in Aid of Displaced Foreign Scholars in trust to carry out the purposes for which this fund was collected. Five of the original group at Harvard University were taken over by the Emergency Committee, and six other distinguished scholars, fifty-eight years of age or older, were added from among the Emergency Committee's own grantees at other institutions. Of these men two, who could not be added to the regular list, were added to the grantees of the National Research Associates for one year by virtue of a special arrangement. As in the case of Harvard, the universities agreed that the Associates should be enabled to carry on the same type of scholarly pursuit as members of their permanent professorial staff. In almost all cases the National Research Associates remained dependent on the particular funds in this account. This did not mean life tenure for any scholars, but rather that a modest yearly grant would be available to them so long as the principal and interest of the Fund should last.

#### THE OBERLAENDER TRUST

Another organization which was in continuous cooperation with the Emergency Committee was the Oberlaender Trust of Philadelphia, of which Dr. Wilbur K. Thomas was Secretary.

The Oberlaender Trust was an offshoot of the Carl Schurz Memorial Foundation, which had been organized in 1930 and was supported by funds contributed by American citizens chiefly of German descent. The Trust had been established in 1931 by Gustav Oberlaender with an endowment of one million dollars. The Carl Schurz Memorial Foundation had



been organized to develop cultural relations with Germany and to stimulate an interest in the contributions made to American civilization by Germans, as in the case of the so-called "Pennsylvania Dutch." The Oberlaender Trust had the same objectives as the Carl Schurz Memorial Foundation, but its regulations permitted it to use its funds for assistance to refugees.

The methods of the Oberlaender Trust differed from those of the Emergency Committee in some respects, though the objective was the same. The Oberlaender Trust concerned itself with all kinds of refugees from Germany: scholars, physicians, lawyers, technicians, musicians, and others. Contrary to the practice followed by the Emergency Committee, the Trust dealt directly with the refugees. It had no objection to the practice whereby the scholar himself sought a place in a college or university on his own initiative. In cases where the scholar was successful, the Trust would consider making a grant to the institution as part of his salary. In fact, the Trust was willing to assist a refugee who had secured a teaching position even though he might not have taught before. The Trust did not require of an institution a definite promise of permanent employment, but rather the assurance that there was an actual opening in the man's field. The Trust followed the practice of making small grants to refugees, even as small as \$100 if this would assist a refugee to get a start. Sometimes these small grants were in the form of loans. Like the Emergency Committee the Trust believed in enabling a refugee to switch from his own field of work to some other which offered greater opportunities of employment.

As of June 28, 1945, the Oberlaender Trust had contributed over \$300,000 for aid to refugees. Part of this amount had been expended to help those who were, technically speaking, displaced scholars; another part had been used to assist professionals and other refugees.

The cooperation of the Oberlaender Trust was particularly valuable in the later career of the Emergency Committee when the Trust frequently added to the reduced grant that the Emergency Committee was compelled to make, a sufficient amount to justify a college or university in extending an invitation to a displaced scholar.

#### ADDITIONAL COOPERATING AGENCIES

As news of the Emergency Committee's activities became generally known, requests came from institutions outside the United States for grants to enable them to invite displaced scholars to their faculties. In an attempt to rescue deposed professors from their desperate situations within their native lands, friends and interested societies sought to secure calls for them to universities in parts of Europe not yet violated and in the New World. Although the Committee had on several previous occasions seriously considered applications for stipends to be awarded Canadian and English institutions, as well as to Continental universities, it was obliged to establish as one of its prime points of policy the regulation that it could not make grants to institutions outside the United States. The one exception to this rule was that grants might be, and were, made to the Hebrew University in Palestine, where a total of fifteen displaced foreign scholars from Germany and Italy were ultimately assisted under a subvention from this Committee.

The Carnegie Corporation, during the period 1934-1940, made grants totaling \$110,000 under which colleges and universities, chiefly in the British Dominions and Colonies, were enabled to arrange places on their faculties for about twenty displaced foreign scholars. Grants were sufficient to help the institutions, during an initial two-year period, to pay salaries of the scholars selected, the universities thereafter



assuming responsibility for salaries if the scholars remained on the staffs. A few other grants were made by the Corporation to aid displaced scholars in research and publication, or in study preparatory to teaching in a field other than that in which they had originally specialized. Since 1940 no grants for purposes such as the above have been made by the Corporation.

The American Friends Service Committee, though not founded specifically to aid refugee scholars, undertook to participate in assisting them as part of its over-all work. As has already been made evident, many displaced scholars were not prepared to move directly from a European post and from refugee difficulties into university positions in the United States. They needed preparation and orientation. The American Friends undertook to prepare scholars and their wives for happy and continuing relations with American colleges. Anything that could be done to keep scholars from living and brooding among members of their own language groups was a forward step in orientation.

Our field secretary wrote as of October 1, 1941:

In the summer of 1940 the American Friends conducted their first American Seminar at Wolfeboro, New Hampshire. In the following year at the Plymouth Seminar they gathered some eighty displaced scholars and their wives with fifty Americans. They set up a cooperative community on the pleasant campus of the Holderness School (Episcopal) with each member helping in the work of the dining-room and kitchen. This was, of course, a bit strange to some of our displaced foreign scholars, but they all rallied round it. For two hours each morning they joined in a lecture-discussion session, directed by Dr. Herbert Adolphus Miller and dealing with "American sociology." There were also group and individual lessons in English. In the evenings there were recreation, lectures, etc. A fine relationship with the town of Plymouth was established, with visits to the Rotary Club, the League of Women Voters, *et al.* A concert was organized for the benefit of the local hospital at which the talent came from the

Seminar musicians. I went up to see the experiment and some of our own displaced scholars participating in it. So many people wished personal conference that I remained for five days, while my wife and daughter joined the group of English tutors.

It was not only under the auspices of the Friends that these splendid gatherings took place, gatherings so characteristic of the American way of realizing objectives by means of the cooperative efforts of individuals and so illuminating to foreigners. They sprang up in widely scattered parts of the country wherever refugee scholars were to be found.

On August 21, 1941, the late Ernie Pyle wrote from Stillwater, Minnesota, of "The Experiment in International Living" there:

This is its second year. It has about ten foreign professors, ten visiting students from the East, and more than a hundred local students, most of them Stillwater adults. . . . The professors get no pay. But each one is housed free by a local family; in return the whole family can go to school for nothing. The professors make some extra money by giving private lessons and putting on plays and operettas. . . . Classes are held both day and night. Stillwater people can attend the entire summer for \$12. a family. They can study French, Spanish, Italian, or German. They can study stagecraft, music appreciation, dramatics, or history. They can listen to lectures on "Development of Democratic Thought" or "The Nations of Europe," etc.

The Committee adhered to its decision to secure positions for scholars alone in spite of the increasing demand for places by physicians, lawyers, and civil servants driven from their homes in Germany. Our trustee, Dr. Alfred E. Cohn, was requested by the Committee to investigate among American physicians the possibility of organizing an Emergency Committee for Displaced German Physicians. In this effort which he undertook with energy and enthusiasm he was completely successful, and on November 18, 1933, the Physicians' Com-



mittee was organized with Dr. Bernard Sachs as Chairman, Dr. George Baehr as Secretary, and Dr. Edwin Beer as Treasurer. Refugees in the field of medicine gained immeasurably from the assistance of this committee of specialists. Pressure upon the Scholars Committee was relieved at the same time. It proved much more difficult to render assistance to lawyers. Refugee German lawyers were usually unfamiliar with our system of law and the administration of our courts. A very few distinguished scholars in jurisprudence were awarded positions in some of our important law schools to give courses on the philosophy of law. A considerable number of lawyers wisely undertook to follow retraining courses in other fields of work, with good results.

Among the organizations with which the Emergency Committee cooperated, one of the most effective of the small committees to serve refugees from the professional fields was the Committee for the Re-education of Refugee Lawyers, which grew out of the efforts of the Committee for the Guidance of Professional Personnel. The Committee for the Re-education of Refugee Lawyers, product of joint efforts of the law schools and the American Bar in raising money and exploring possibilities, granted nine fellowships for the academic year 1939-1940, and nineteen additional ones for the year 1940-1941. Thus a total of twenty-eight men were enabled to undergo retraining courses in the law at twenty-one different colleges and universities, scattered over a sufficiently wide area to be fairly representative of the whole United States.

The initial sums raised, as well as the initial impetus, were the product of the generosity of the New York Bar, acting under the leadership of John W. Davis, the Committee's Chairman; Arthur A. Ballantine, its Treasurer; and Walter Mendelsohn, its Secretary. Professor David Riesman of the University of Buffalo served as secretary of a selection com-

mittee of university professors, whose task it was to select men for retraining and to make arrangements for their studies in law schools throughout the country.

Since the Committee for the Re-education of Refugee Lawyers wished to spread its limited funds as far as possible, and to elicit cooperation in the communities to which the fellowship recipients went, it established the policy that it would meet no more than half the living expenses of the Fellow; his tuition and the balance of his living expenses would ordinarily have to be provided locally. Since, moreover, the schools were required to relax their academic requirements, and to institute special speed-up courses for the men, it was at first believed that not many schools would be able to afford cooperation. When, however, after the initial success of the program in 1939 and 1940, a number of additional schools, and the communities in which they were situated, volunteered to help, it became imperative for the Committee to raise additional funds, in order to match with its own commitments the commitments made by local groups throughout the country. Mr. Davis and his associates generously renewed their appeal to the donors who had originally contributed, and in almost every case they pledged additional amounts. The National Refugee Service, Inc. made a contribution, and Samuel S. Fels, the noted Philadelphia philanthropist, assured the success of the Committee's work at a critical point by guaranteeing to match local contributions up to \$5,000—the limit which was, in fact, reached.

The following law schools cooperated: the University of Buffalo, University of California, University of Chicago, Columbia University, University of Pennsylvania, Tulane University, Southern Methodist University, University of Wisconsin, State University of Iowa, University of Colorado, University of Cincinnati, University of Toledo, Harvard University, Washington University in St. Louis, John B. Stetson



University, Western Reserve University, Yale University, New York University, Fordham University, Ohio State University, and The College of William and Mary.

There had been evident for a long time an urgent need for a single organization which would serve as the center for exchange of information and advice upon the whole problem of the displaced foreign scholar. Upon the advice of the Rockefeller Foundation, the Emergency Committee was selected for that function. Following the summer of 1940, the Executive Committee of the Emergency Committee invited the following persons to join it as representatives of their organizations:

Dr. Frank Aydelotte of the Institute for Advanced Study  
 Dr. Hertha Kraus of the American Friends Service Committee  
 Dr. Alvin Johnson of the University in Exile  
 Dr. Henry Allen Moe of the Oberlaender Trust  
 Mr. Charles A. Riegelman of the National Refugee Service  
 Dr. Harlow Shapley of the National Research Associates

This action had the happy result of eliminating duplication of work by the various organizations concerned and of obtaining the benefit of the advice of additional experienced administrators. By means of the grant made to the Emergency Committee by the Rockefeller Foundation, the Committee was able to engage Dr. Laurens H. Seelye, former President of St. Lawrence University, as field secretary to visit colleges and universities in various parts of the United States in order to stimulate interest in the program of the Emergency Committee. At the same time an Advisory Committee was organized, composed of scholars in the different fields of learning who were eminently qualified to give the best available advice on ways and means of using the scholars to advantage. In practice, however, the cooperation of the Emergency Committee with the administrative officials of our

colleges and universities was so intimate that it was found unnecessary to burden the members of the Advisory Committee with frequent calls for assistance. A list follows of the members of this panel to whom the Committee's gratitude goes out:

Ross G. Harrison National Research Council	A. J. Olson Association of Governing Boards of State Universities and Allied Institutions
William M. Hepburn American Association of University Professors	J. Salwyn Schapiro American Historical Association
Ralph E. Himstead American Association of University Professors	Guy E. Snavelly Association of American Colleges
Waldo G. Leland American Council of Learned So- cieties	Harold C. Urey American Philosophical Society
H. M. Lydenberg American Library Association	Malcolm M. Willey Social Science Research Council

In the early days of the Emergency Committee the majority of the displaced scholars assisted were Jews because the Nazi terror was directed especially against Jews. One of the finest attributes of the work of the Emergency Committee was that, although its income came almost exclusively from Jewish sources, it never made any distinction between Jewish and non-Jewish scholars in its grants. In fact, it was only by chance that the Committee discovered the religion of any of its grantees since it scrupulously refrained from asking them about their creed. A college or university had only to request a grant for a displaced scholar of whatever race or religion to receive immediate consideration to the extent permitted by the resources of the Committee.

The needs of Jewish relief cases—for subsistence, employ-



ment, and resettlement—were taken care of by the National Coordinating Committee (later the National Refugee Service, Inc., which in 1946 became the United Service for New Americans, Inc.). This organization was established by the American Jewish Joint Distribution Committee as a central agency to deal with the many problems involved in the immigration and settlement of refugees in this country.

As the years passed, a Christian committee (the American Christian Committee for Refugees) made up primarily of Protestants, and a Catholic organization (the Catholic Committee for Refugees), were established to aid displaced scholars and other refugees. The Emergency Committee cooperated with these committees chiefly in the exchange of information and advice but continued to make grants to displaced scholars of all faiths. The Committee found itself leaning more and more heavily upon the Family Service Section of National Refugee Service as its work developed. Whereas originally the Committee had looked to the college or university which had invited a given professor to its faculty to charge itself with his welfare and, as his host, assist tactfully in the details of his social adjustment, the Committee was gradually brought closer to problems in the daily lives of its Fellows which were often not purely economic, and not purely physical or medical, but emotional and psychological. In all these cases the Emergency Committee was glad to be able to avail itself of friendly services of professional casework agencies.

Midway in its career the Emergency Committee suffered a grievous loss in the death of its Chairman, Dr. Livingston Farrand. Before Dr. Farrand retired as President of Cornell University on June 21, 1937, he rendered invaluable service in providing wise counsel on the policies of the Emergency Committee. During his frequent absences at Cornell, Dr. Duggan acted as temporary chairman; but after mid summer of 1937 Dr. Farrand was able to devote himself unstintedly

to the work of the Committee. Unfortunately he died two and a half years later. Dr. Duggan was elected Chairman to succeed him. On this occasion the Emergency Committee adopted the following resolution presented by the Chairman:

In the death of Livingston Farrand scholarship sustains a great loss. Humanity suffers a greater loss. His life was one long devotion to noble causes. He fought the white plague and saw it conquered. He headed the Red Cross and made it a living force. He became a university president and his students lived nobler lives. His voice and his pen were ever given to causes that aimed at the freedom of the human spirit.

It was most natural that when the Emergency Committee in Aid of Displaced Foreign Scholars was formed, the Committee should have turned to Dr. Farrand for guidance. He responded with a warm affirmative. He became its Chairman and directed its work with the sympathy and wisdom needed in confronting a difficult situation replete with human cruelty.

The Emergency Committee in Aid of Displaced Foreign Scholars wishes to record its admiration and appreciation for the leadership of Dr. Farrand and its affection for him as a humane person.

(Signed) STEPHEN DUGGAN, *Chairman*  
 ALFRED E. COHN  
 L. C. DUNN  
 BERNARD FLEXNER  
 CHARLES J. LIEBMAN  
 NELSON P. MEAD  
 FRED M. STEIN



Two of the scholars provided absolutely no problem in any respect. Two have found difficulty in adjusting their language teaching to the methods used in an American college, but both made great strides during their period of service here.

I should say that every one of the group made a distinctly scholarly contribution to the college. As I think back over the group I believe that the greatest single contribution was their ability to cut across narrow fields of specialization. Each of them seemed to feel at home in a much wider area of knowledge and to see more clearly the relationships between the different fields than is sometimes true of American scholars.

Visiting scholars and students from other lands tend to make a group of American college students more cosmopolitan in their thinking and better prepared to understand the world responsibilities which their country will have in years just ahead.

CHAPTER XI

*Origin, Organization, and Policies of the  
Emergency Committee*

THE close of Chapter I mentioned the formation, early in May, 1933, of an organizing committee consisting of Dr. Cohn, Mr. Flexner, Mr. Stein and Dr. Duggan, which adopted the name Emergency Committee in Aid of Displaced German Scholars. The Committee proceeded vigorously to work. The following letter explaining the objective of the Committee was sent to the presidents of colleges and universities:

INSTITUTE OF INTERNATIONAL EDUCATION

2 West 45th Street, New York City

May 27, 1933

My dear President :

A group of persons interested in the problem of the university professors ousted from their chairs in Germany because of their political opinions or race, has been holding conferences in New York to determine whether assistance might be granted by us over here, and the nature of such assistance. Several meetings have been held, and I have been requested to write to you concerning some of the plans that we have in view.

It is obvious that, because of the financial condition of our own institutions of higher education, they ought not to be called upon in any way for financial assistance. It would naturally



cause resentment in our own country were moneys to be voted by universities for this purpose when so many of our own young instructors and assistant professors have been dropped from the rolls and are in dire need themselves. The funds necessary to carry out any program must be raised from sources outside the universities.

Individuals have already contributed some funds for this purpose, and this is also true of two foundations. If one of the great universities were to write to the group, stating that it would like to invite Professor "X" from among the ousted scholars to engage in graduate work, but that it had not the funds wherewith to do this, the group would meet the need to the extent permitted by the resources at its disposal. The group believes that the younger men ousted from the universities of Germany might be assisted to continue their work in the universities of European countries with aid furnished by the foundations. This would be less expensive and probably more helpful.

The Provisional Committee's view as to what ought to be done is as follows: A committee should be formed consisting, among others, of representatives of the Association of American Universities, the National Research Council, the Social Science Research Council, and the American Council of Learned Societies (representing the humanistic branches). To this committee a university should write, naming the distinguished authority in a specific field whom the university would care to invite. If it has no particular scholar in mind, the committee would be prepared to send a list of such men and women, from among whom a choice may be made. The Committee would provide the salary of the scholar invited. While the committee would like to have such a scholar receive as high a salary as the American professor, it thinks that, considering the matter is one of emergency, it should be less. Moreover, in order to avoid any resentment arising in educational circles in our own country from the belief that the foreign professor might remain permanently and occupy a chair in the university which an excellent American scholar might reasonably have looked forward to filling, the committee believes that the chairs that are to be filled should be honorary chairs, and that the invitation should be for a specific number of years—probably three—and that it should be clearly understood that

any commitment on the part of the university itself or of the committee should stop at the close of that period.

I have personally talked this matter over with committees from Princeton and Columbia and with presidents of universities in different parts of the United States. There is general agreement as to the need of a committee representing the cultural interests of the country, to which the plan outlined above by the provisional committee may be submitted, and which will direct the realization of the program indicated. I am now, however, writing to the heads of our most representative universities to ask

1. Whether the provisional Committee may have the benefit of your criticism of the plan.
2. Whether your institution will participate to the extent and under the conditions indicated in the plan.

As the scholastic year is drawing to a close and the Committee would like to act as quickly as possible, I shall be much indebted for as prompt an answer as your engagements will permit.

Sincerely yours,

STEPHEN DUGGAN

P.S. The Committee requests that this information be restricted to university circles.

S.D.

It is a tribute to the broad-mindedness of our university men, and to their understanding of the crisis that had arisen in the domain of scholarship, that the letters of acceptance were nearly always accompanied by expressions of great satisfaction that the Provisional Committee had been organized, of hope that it would start its activities at once, and of a desire personally to do whatever was within the power of the writer to make the work of the Committee a success.

The following letter was then sent to distinguished scholars and university presidents inviting them to become members of the General Committee:



INSTITUTE OF INTERNATIONAL EDUCATION  
2 West 45th Street, New York City

June 10, 1933

My dear President

You have already received a copy of the letter sent out by the Provisional Committee in Aid of Displaced German Scholars. The replies to these letters from the Presidents who have already answered are all favorable to the plan, only one hesitating to agree and then for another reason than disapproval.

The Provisional Committee wishes to have a General Committee made up entirely of university representatives. It does not want a committee of large dimensions, but it does want a committee that is representative of the scholarship and interest in international relations of our institutions of higher education. I am enclosing the list of those to whom requests are being sent. Some of these have answered the first letter so cordially—in some cases enthusiastically—that I believe they would not hesitate to permit their names to be used. If it will be agreeable to the membership of the General Committee, the officers of the Provisional Committee will be glad to continue to serve in the same capacities. They are: Livingston Farrand, Chairman; Stephen Duggan, Secretary; and Fred M. Stein, Treasurer.

Let me hasten to say that what is desired is a Committee whose standing in the world of scholarship and university affiliations will help to make the activity appear to the public to be one worthy of approval. The members will not be expected to meet and work; an Executive Committee will do that. Moreover, the safeguards provided in the plan which you have already received, for the rights of unemployed American teachers, for the temporary nature of the invitation to the German scholars, for the complete disappearance of any commitments on the part either of this Committee or of the University when the period of invitation comes to an end—these safeguards will be faithfully observed. The Provisional Committee wishes those invited to serve on the General Committee to understand that no new commitments of any kind, other than those outlined in the original plan, will be undertaken without everyone being consulted.

While we appreciate that there may be reasons why a scholar

or President invited to serve may not see his way clear to do so, we sincerely hope that the answers will be in the affirmative. We shall, moreover, appreciate as prompt a reply as your engagements permit.

Sincerely yours,

STEPHEN DUGGAN

Again the replies were of a nature to hearten the Committee in its work. They uniformly expressed belief in the need and importance of the plan and a desire to cooperate. Many educators consented to serve on the General Committee, which ultimately consisted of the following persons:

- \*Thomas S. Baker, Carnegie Institute of Technology
- \*Lotus D. Coffman, University of Minnesota
- \*Sir Arthur Currie, McGill University
- Harold Willis Dodds, Princeton University
- Sidney B. Fay, Harvard University
- Abraham Flexner, Institute for Advanced Study
- \*Harry A. Garfield, Williams College
- Robert M. Hutchins, University of Chicago
- \*James H. Kirkland, Vanderbilt University
- Henry N. MacCracken, Vassar College
- Robert A. Millikan, California Institute of Technology
- Wesley C. Mitchell, Columbia University
- Harold G. Moulton, Brookings Institution
- \*William A. Neilson, Smith College
- \*George Norlin, University of Colorado
- Marion Edwards Park, Bryn Mawr College
- Walter Dill Scott, Northwestern University
- Harlow Shapley, Harvard University
- Robert G. Sproul, University of California
- Oswald Veblen, Institute for Advanced Study
- Ray Lyman Wilbur, Stanford University
- Ernest H. Wilkins, Oberlin College
- \*Mary E. Woolley, Mount Holyoke College

\* Now deceased.



Dr. Livingston Farrand, President of Cornell University, became Chairman of the Committee, Dr. Stephen Duggan its Secretary, and Mr. Fred M. Stein its Treasurer. Edward R. Murrow, the Assistant Director of the Institute of International Education, was asked to serve as Assistant Secretary, which he did until 1935, when he joined the Columbia Broadcasting System to become Chief of the European staff. It would be difficult to overemphasize the loyalty to the cause, the steadfast devotion to the work, and the efficiency of the results of Mr. Murrow's activities. When he retired from the Committee, Professor John Whyte, who was afterward Chairman of the Department of German in Brooklyn College, became the Assistant Secretary. His professorial duties, however, became so heavy that to the regret of the Committee he was compelled to resign in November, 1937. He was succeeded by Miss Betty Drury. Professor Nelson P. Mead of the College of the City of New York and Professor L. C. Dunn of Columbia University were added to Messrs. Cohn, Farrand, Flexner, Stein, and Duggan to form an Executive Committee.

In November, 1937, the Committee welcomed Charles J. Liebman, then Vice President and later President of the Refugee Economic Corporation, as a member of its Executive Committee. With him the Committee worked out plans for participating in the placement of displaced European scholars in Venezuela and the Philippines. As mentioned earlier, the Executive Committee had the good fortune in 1940 to add to its membership Dr. Frank Aydelotte of the Institute for Advanced Study, Dr. Hertha Kraus of the American Friends Service Committee, Dr. Alvin Johnson of the New School for Social Research, Dr. Henry Allen Moe of the Guggenheim Foundation and of the Oberlaender Trust, Charles A. Riegelman of the National Refugee Service, and Professor Harlow Shapley of Harvard University.

The Executive Committee held stated meetings every month except in summer. All the members of the Executive Committee were devoted to the work of the Emergency Committee, but it is not invidious to mention that without the unceasing efforts of Messrs. Stein and Flexner in interesting Jewish foundations to support this cause, the Emergency Committee could not have accomplished the great work that was done. The authors of this little volume cannot emphasize too strongly their admiration for the steadfast loyalty of these two men. The time, thought, and effort they gave to the work of the Emergency Committee appeared to have no limits. They were the driving force in its activities.

The Committee cannot adequately thank Miss Marie White, Mr. Stein's personal secretary, who kept its books during twelve active years. Miss White unselfishly contributed many hours of her own time year after year to the Committee's work.

In October, 1944, Miss Drury, who since 1933 had conducted the detail of the Committee's work, left the Emergency Committee to join the research staff of the Committee for the Study of Recent Immigration from Europe. The Committee was most fortunate in securing Mrs. Frances Fenton Park, formerly Dean of Smith College, to succeed her. Mrs. Park rendered unusual service in the closing period of the Committee's existence, after which Miss Drury returned to serve in a voluntary capacity as the Committee's Executive Secretary, carrying on its residual correspondence.

The name Emergency Committee in Aid of Displaced German Scholars was adopted because it was expected that the evil situation within Germany was an "emergency" or temporary one, which would change, even if only gradually. Few people anticipated that it would last twelve years and would extend through Central and most of Western Europe as the result of the Nazi conquests. This forlorn hope is well



portrayed in a letter from an experienced observer within a year of the advent of Nazis to power:

In this matter of taking care of deposed scholars, one thought should be kept in mind; namely, that while the present Nazi regime will likely continue for some years at least, its anti-Semitic policy may well be modified within a few months. And since normally conditions for scientific work are better in Germany than in any country of Continental Europe, the ultimate return of a considerable number of the best of the deposed men—young and old—should be considered a probability. I therefore feel that it would be wiser to help establish these men in *temporary posts* than to cooperate in the establishment of permanent places, except of course where a return to Germany can be very definitely excluded. I talked to several Jews in London, including who felt that in the interest of the race the best men should stay in Germany, if possible, though they recognize that some scientists have been so deeply outraged that one should not expect them to stay on or go back for the sake of the race.

In addition to the letter sent to the presidents of colleges and universities, it was decided to request the learned societies to issue a statement of protest against the suppression of freedom of teaching in the German universities and persecution of professors because of reasons that had nothing to do with scholarship. The request was in the form of a letter sent by the Secretary of the Emergency Committee to the following officials of the learned societies:

Dixon Ryan Fox, American Historical Association  
 Virginia C. Gildersleeve, American Association of University Women  
 Robert Lincoln Kelly, Association of American Colleges  
 Charles B. Lipman, Association of American Universities  
 Ernest M. Patterson, American Academy of Political and Social Science  
 Edwin R. A. Seligman, American Economic Association  
 James T. Shotwell, American National Committee of International Commission on Intellectual Cooperation

H. W. Tyler, American Association of University Professors  
 Henry B. Ward, American Association for the Advancement of Science

The letter, dated December 16, 1933, was as follows:

H. W. Tyler, General Secretary  
 American Association of University Professors  
 744 Jackson Place  
 Washington, D.C.

My dear Professor Tyler:

I am enclosing a declaration concerning the suppression of freedom of speech and of teaching in Germany as a mere contribution to the subject. I am hoping that the great cultural organizations which usually hold their meetings during the Christmas holidays or in January will not let the occasion pass without taking some action on this question. I personally think we have reached a crisis in the history of human thought and its expression. I really believe that if we in the United States take action in the matter it will have a real effect in Europe, especially if the declaration is without political attachments—as this is.

I am not vain enough to suppose this is the right form of declaration, but it might suffice as a beginning for purposes of discussion. Were the associations whose names are given all to agree upon the same statement, and were teachers in our institutions of higher education to sign it in large numbers (I believe five thousand would gladly do so), I feel sure that the enemies of freedom of speech and of teaching would pause in their activity.

Unfortunately I sail tonight for Europe, to be away for some months, or I should personally follow up the attempt to get action upon the subject. I am hoping that if action is eventually taken, I may be permitted to be identified with it—even though I be absent—for I feel deeply upon the subject.

Sincerely yours,

STEPHEN DUGGAN, *Chairman*

*Committee on International Relations of  
 the American Association of University Professors*



The following Protest was drawn up by the Council of the American Association of University Professors, which represented twelve thousand professors in more than four hundred institutions of higher education throughout the country:

Protest Against Tyranny in German Universities

The American Association of University Professors is deeply concerned with the maintenance of those fundamental principles of academic freedom and tenure, without which university work of the highest quality cannot be permanently sustained.

The Council of the Association has become reluctantly convinced that in certain European countries and notably in Germany, so long and so honorably distinguished for its particular emphasis on *Lehrfreiheit* and *Lernfreiheit*, those high principles have been sacrificed and subordinated to political and other considerations ulterior if not irrelevant to true scientific research and scholarship.

The Council has no wish to express any opinion on the political life or ideals of any nation, but science and scholarship have long since become international, and the conditions of intellectual life in every important country are a matter of legitimate concern to every other. It is, therefore, resolved that this expression of the conviction of the Council and of its profound sympathy for members of the profession who have been subjected to intolerant treatment in these difficult times be published in the Bulletin of the Association and communicated to the Commission of Intellectual Cooperation of the League of Nations.

Though the International Commission of Intellectual Cooperation of the League of Nations had been formed to develop understanding and good will among the nations by means of educational and cultural agencies, no action was taken as the result of this communication. No protest was made to the German government and communicated to the governments of the other members of the League. The

situation was ignored as far as the League of Nations was concerned.

The general belief that the evil events in German universities were only of a temporary nature and would soon be overcome was again made evident in the comment on the action of the Association by its President:

Evidence which seems conclusive has led the Council of the Association to the conclusion that a wave of emotion, without doubt caused by the recent distressing economic conditions under which Germany has been living, has brought about an unthinking, and, it is hoped and believed, temporary abandonment of the cherished principles of freedom of teaching and research. The resolution of the Council is published in the hope that it may aid those elements in Germany who seek a return to these well-tried principles of university organization.

The Emergency Committee wishes to record here its indebtedness to Professor H. W. Tyler, who was at that time the General Secretary of the American Association of University Professors, and to Dr. Ralph E. Himstead, who succeeded Professor Tyler upon the latter's death February 3, 1938. Both men were deeply interested in the work of the Emergency Committee and gave frequent help in solving its problems. The Emergency Committee wishes to express its indebtedness also to D. W. MacCormack (since deceased), the Commissioner of Immigration and Naturalization in the Department of Labor, for his helpful attitude in easing the immigration procedure for the incoming refugee scholars. The desire to serve in this cause was general throughout the country.

Once the colleges and universities had been informed of the nature of the Committee's program and its activities became known to displaced scholars, its work was greatly increased and accelerated. Difficulties of administration had



already appeared in the United States and in England. For example, an excellent service organization, the National Coordinating Committee (later the National Refugee Service) had circularized the colleges and universities with requests for the appointment of refugee German scholars. As will be indicated later, such a procedure of soliciting jobs for refugees was in opposition to that adopted by the Emergency Committee. As the result of a conference between representatives of the two organizations it was decided that the National Coordinating Committee would no longer consider the placement of refugee scholars as part of its activities.

A similar situation had arisen in England. The Academic Assistance Council (later the Society for the Protection of Science and Learning) was quite overwhelmed by the numbers of displaced scholars who had fled to England seeking positions, and it was naturally inclined to seek assistance for the displaced scholars in the United States. As the Council was unfamiliar with the needs of our institutions and their methods of administration, this sometimes led to confusion of effort. E. W. Bagster-Collins, Professor of German at Teachers College, Columbia University, was engaged by the Emergency Committee in 1933 as its foreign representative. He went first to London to develop relationships with the Academic Assistance Council. He was requested by the Emergency Committee to make frequent trips to Germany for first-hand information about the dismissal of eminent German scholars, their whereabouts and availability for invitations to American institutions, and to deliver such invitations in person if necessary. It was early realized that extreme care would have to be used in communicating with the dismissed professors, and the Committee urged that where letters had to be written no allusion be made to the exigencies of the situation within Germany, and no mention be made of solicitations from the scholar himself for help in finding a

post outside Germany. However, it was not until David Cleghorn-Thomson, a representative of the Academic Assistance Council, visited the Emergency Committee in 1939 that complete clarification of the working relationship between the two organizations was obtained.

Dr. Walter Kotschnig, a distinguished young Austrian law scholar who spoke English admirably and had chosen to leave Germany because of his political and social views, arrived in the United States in the spring of 1936. He had served in 1935 as representative of our Committee and of the *Notgemeinschaft deutscher Wissenschaftler im Ausland*, in cooperating with the Academic Assistance Council in Europe. He had earlier acted as Director of the High Commission for Refugees Coming from Germany, of which James G. McDonald was Chairman. He was requested by the Emergency Committee to visit institutions in the Middle West to discover any additional needs that might be served by the Committee, and that could be learned only from personal discussion. Dr. Kotschnig, who had had wide experience with students and university administrators in Germany, was particularly well qualified for this investigation and performed an efficient job.

On a mission in Europe during 1934, the Secretary of the Emergency Committee, Dr. Duggan, was able to explore further the possibility of future relations with the overseas organizations working in the field. Two years later Dr. Alfred E. Cohn and Mr. Edward R. Murrow represented the Committee at meetings of the Experts' Committee and Advisory Council of the High Commission in London and studied measures to advance work in behalf of refugee scholars. The sum of \$5,000 was appropriated at this time by the Emergency Committee to be expended in Europe for such purposes as would contribute most to the solution of the problem facing the deposed professors.



## PRINCIPLES AND POLICIES OF THE EMERGENCY COMMITTEE

When the Emergency Committee was organized in May, 1933, the United States was in the midst of the Great Depression. Colleges and universities suffered with all other organizations and institutions. Enrollment of students dropped, and contributions to endowments were much diminished. With the difficulty of making both ends meet and with a lessened need for teachers, many of our institutions of higher education found it necessary to drop the younger and more recent additions to their staffs. Under such conditions, would not absorbing foreign teachers and research scholars cause resentment among our own university personnel? To meet this difficulty the Committee adopted certain policies which furthered its activities immensely.

Aware of the great number of scholars who would want to come to the United States to secure a position, larger by far than the number of positions available, the Committee decided to confine its efforts to displaced scholars of such eminence in their fields that there would be no thought of competition with young American scholars. The Committee decided also that it would not, save in exceptional cases, make grants for refugee scholars under thirty years of age or over sixty. In this respect its policy paralleled that of the Rockefeller Foundation and the Carnegie Corporation, both of which tended to reserve their funds for the support of distinguished older scholars who would not compete with younger Americans who had their way to make. In general, the Committee's help which was given in the form of grants-in-aid to colleges and universities in behalf of displaced scholars was limited to men and women who had been professors or at least Privatdozenten (or the equivalent) in European universities.

Of greater importance was the decision, adhered to for some years, to make no direct grant to an individual scholar. The request for a grant must come from a college or university, which would indicate the scholar it wanted and express willingness to disburse our stipend in his behalf in the form of salary payments. The Committee did, however, keep a list of displaced scholars seeking positions, so that if an institution should ask for the services of one in any field, a candidate could be provided. This procedure removed all possibility of misinterpreting the motives of the Committee as being actuated by charity in any ordinary sense of the term. It was of great importance that the personal pride of the refugee scholar, often the chief support of his morale, should not be undermined.

In passing, it might be mentioned that the number of displaced scholars and professional people in Europe who appealed to the Committee finally exceeded 6,000. The Committee could expect to place only a small part of them. Because of the eminence of the scholars who received invitations during the early career of the Committee and because of the fact that their salaries came not from the college budgets but from outside sources, American college teachers did not appear resentful to any marked degree.

In the early years of its history the Committee usually made a grant of \$2,000 a year to an institution toward the salary of each displaced scholar. If the institution could not place the scholar upon its own budget at the end of the academic year, the Committee sometimes renewed the grant for a second year. Preference was always given, however, to requests from institutions that gave promise of absorbing the scholars into their faculties at an early time. As the years passed, the situation of scholars in Germany grew worse, and the number of refugee scholars reaching the United States increased. Under such conditions the grant-in-aid for a



scholar had progressively to be diminished until at the end of its career the Emergency Committee was unable to make a grant beyond \$1,000 for one year. The rest of the sum necessary for adequate support of a refugee scholar came either from cooperating agencies or from the college budget, or from both.

The expanded program of the Emergency Committee required constantly increased financial support. The Rosenwald Family Association, whose grant is described at length on page 72, contributed generously. National Refugee Service made large donations to the Committee's program. It is noteworthy that, although the Committee's program was nonsectarian, its financial support came almost exclusively from prominent Jewish foundations. Two to which the Committee was immensely indebted, and without whose assistance it would have been wholly unable to realize its objective, were the New York Foundation and the Nathan Hofheimer Foundation. During the twelve years' existence of the Emergency Committee the New York Foundation contributed to its work a total of \$339,851, and the Nathan Hofheimer Foundation a total of \$67,000. When one considers the tremendous demands made upon our Jewish citizens for the succor of their cruelly persecuted co-religionists throughout Europe, this tribute to Jewish reverence for scholarship and learning cannot be too strongly stressed. Nor can the Committee allow this occasion to pass without recording the continuous courtesy with which Messrs. Stein and Flexner were received when presenting the needs of the Emergency Committee to the Directors of the two Foundations.

The Emergency Committee offered no relief services to the scholars who came into its office. Refugees in need of personal counsel and guidance were referred to the voluntary service agencies throughout the city according to the nature of their problem and in accordance with their religious

preference. The Committee depended upon the testimony of colleagues in the academic world, and upon the evidence of such documents as its clients could bring with them out of Europe, to establish their standing in the world of scholarship. As to their personal problems, it listened sympathetically to such confidences as they might wish to unfold; but it sought always to respect the essential human dignity of the troubled persons who came to it. If a client found relief in speaking of absent wife and children, or in pouring out the pent-up misery induced by religious persecution followed by bitter and often grim experiences in the concentration camps, a quiet and receptive listener was present. At no time, however, was the refugee asked specific, point-blank questions about his intimate problems—except in so far as they touched upon the particular area in which the committee could render service—any more than he was asked to state his religious faith or racial background. The Committee tried by every means at its disposal to maintain an atmosphere in which the scholar would feel at ease and relaxed—accepted as an academician in an academic setting. The aim was through an understanding and sensible appraisal of his difficulties to help him use his own abilities to best advantage.

One fear that disturbed the Committee in the beginning of its career was not realized to any considerable extent; namely, the fear that anti-Semitism might be aroused in our colleges and universities because most of the displaced scholars seeking positions were Jews. Anti-Semitism was found in a few places, but they were very few. One flagrant case occurred in an eastern college where a scholar who had apparently given satisfaction from the standpoint of scholarship was dropped because of incompatibility with the head of the department. The professor who investigated the matter and reported his findings to the Emergency Committee wrote as follows:



I have known X for eight or ten years and have always considered him a thoroughly competent Germanist—keenly intelligent and scholarly, and a very attractive personality. I also know Professor Y, whose actions I can only explain as the instinctive emotional reactions of a native German to the blood and soil doctrine—a phenomenon I have observed often in some of our German-born colleagues.

I know there is a tendency among college teachers to assume that when a colleague is dismissed there must be reasons other than those generally stated—"The man must be difficult to get along with, etc." But I have lived so close to the emotional atmosphere of the present war years that I am convinced that, whatever truth there may be in such mental reservations at other times and places, X was dismissed for one reason only—his outspoken and determined criticism of Nazi Germany.

Such a case, however, was most unusual.

Our decision to limit our task to securing positions for refugee university scholars brought us some heartbreaks. One late afternoon after the staff had gone home a fine-looking man with tragedy written on his countenance entered Dr. Duggan's office unannounced. "What can I do for you, sir?" said Dr. Duggan. "I am one of the displaced Germans," answered the visitor. "Were you a university scholar?" inquired Dr. Duggan. "No, I was the statistician of the city of \_\_\_\_\_," answered the man. "I am sorry," said Dr. Duggan, "but this Committee confines its work to service to displaced scholars. However, there are some bankers on my Board of Trustees, and I shall be glad to give you letters of introduction to them." "I have already visited bankers," said the visitor, "and they cannot help me." "Then I shall give you letters to some industrialists whom I know," said Dr. Duggan. "I have talked with a number of industrialists but without any result," said the man. "Then I am sorry," said Dr. Duggan, "but I fear I do not know how to help you."

"I haven't a dollar left," answered the visitor. "What am I to do with my wife and children?"

He was not the kind of man whom one wanted to offer money to, or refer to a relief agency; yet his was inevitably a relief case. It did not require many experiences of that kind, and unfortunately there were many, to impress upon us the extent and degree of tragedy wrought by the atrocious conduct of the Nazi government.

The Emergency Committee was organized in the spirit of the Declaration of Independence. It served as a protest in defense of the dignity of man regardless of race, creed, or political opinion. It was guided by a determination that in the domain of the spirit intolerance and repression should have no place. It adhered to a decision that the teaching of youth should be based solely upon truth, without restriction upon teacher or student. It was particularly fitting that such an organization should be founded in the United States, whose very existence depends upon freedom, and whose Constitution provides for freedom of speech, of press, and of worship.

In carrying out these great principles, Americans have not differentiated between the citizen and the alien, the native and the immigrant. It was nevertheless very human that, among those who joined us from the old world in the desire to help build a better new world, the men and women whose vocation was concerned with the life of the spirit should receive a particular welcome. The mass of immigrants who came to our shores were persons who could help develop our country in a material sense and improve their own personal status while doing so. This was not true of the displaced scholar. It was almost inevitable that he should receive a lessened material reward and possibly fall to a lower social



status than he had enjoyed in his native land. His great reward for flight here was the chance to continue work in the vocation for which he had made such prolonged preparation, and in which he had become adept. He hoped that he could do so in comparative freedom of mind.

The authors believe that the displaced scholars have kept the faith and have contributed largely to the spiritual life of our country; and they believe also that our country as symbolized by its institutions of learning has realized at least in part the spirit of its great Declaration in extending "life, liberty, and the pursuit of happiness" to this group of splendid scholars.

APPENDIX I  
 FIELDS OF SPECIALIZATION OF EMERGENCY COMMITTEE  
 SCHOLARS, NATIONAL RESEARCH ASSOCIATES, AND  
 ROSENWALD FELLOWS \*

	Emergency Committee Scholars	National Research Associates	Rosenwald Fellows	Total
<b>HUMANITIES</b>	104	4	29	137
Archaeology	6	..	..	6
Architecture	1	..	..	1
Art, Applied	2	..	8	10
Art, History of	14	2	5	21
Education	5	..	1	6
Language and Literature	39	1	3	43
Letters	2	..	8	10
Music	7	..	1	8
Musicology	9	..	1	10
Philosophy	19	1	2	22
<b>MEDICAL SCIENCES</b>	7	..	..	7
Gynecology	1	..	..	1
Pathology	1	..	..	1
Physiology	2	..	..	2
Psychiatry	1	..	..	1
Public Health	1	..	..	1
Radiology	1	..	..	1
<b>NATURAL SCIENCES</b>	78	2	1	81
Astronomy	5	1	..	6
Biology	8	..	..	8
Chemistry	7	..	..	7
Engineering	2	..	..	2
Geography	1	..	..	1
Mathematics	26	..	..	26
Meteorology	1	1	..	2
Paleontology	2	..	..	2
Physics	16	..	..	16
Psychology	10	..	1	11
<b>SOCIAL SCIENCES</b>	88	5	17	110
Anthropology	2	..	..	2
Economics	26	2	5	33
History	16	..	3	19
Law	26	3	4	33
Political Science	8	..	1	9
Sociology	10	..	4	14

\* In attempting to establish the field of specialization as of the time of the stipendiaries' arrival in the United States, the authors sought the direct cooperation of Scholars, Associates, and Fellows. In certain cases the field has been changed since the time of arrival. A number of Scholars in the field of law, for example, have turned to language teaching and political science since coming to this country.



clue to the geographic or cultural area within which the stipendiary's major contribution has been made, since in certain cases citizenship was acquired as a matter of expediency from a country of temporary asylum when the individual was driven from the nation in which his own scientific or professional development had taken place.

For these reasons, the country of major or longest professional activity seemed to have greater significance than other nationality factors in determining the origin of the Emergency Committee's stipendiaries.

APPENDIX IV  
NUMBER AND AVERAGE SIZE OF GRANTS-IN-AID  
ACCORDING TO ACADEMIC YEARS

Academic Year	Number of Grants-in-Aid	Amount of Average Grant-in-Aid
1933-34	30	\$1,856.67 *
1934-35	51	1,716.11
1935-36	47	1,696.81
1936-37	33	1,592.55
1937-38	46	1,456.79
1938-39	49	1,345.45
1939-40	68	1,008.09
1940-41	109	898.87
1941-42	78 †	802.43 †
1942-43	69 †	831.40 †
1943-44	36 †	898.61 †
1944-45	14 †	646.43 †

The Emergency Committee's National Research Associates plan commenced during the academic year 1941-42 and has continued since that time. The Rosenwald Fellowships project started the following academic year and was concluded before the end of the academic year 1944-45.

As both of these were separate projects financed from special funds which made possible the maintenance of a uniformly higher scale of stipend than could be given under the Committee's Grant-in-Aid program, it did not seem proper to take them into consideration when figuring the average yearly grant available for Emergency Committee stipendiaries. The above table includes, therefore, only Grants-in-Aid given under the Committee's regular program.

\* Figure adjusted to reflect rate for a full academic year. Many scholars during the Committee's first twelve months did not reach the United States until the academic year was well advanced. Compensation received by them out of funds supplied by the Committee was accordingly prorated. To present as a figure for the academic year the average of sums actually received for portions of the year varying in length from one scholar to another would, therefore, give a false picture. Instead, an estimate has been given of what the average stipend would have been for the full academic year.

† Exclusive of National Research Associates' stipends or Rosenwald Fellowships.

APPENDIX V

NUMBER OF YEARS THE EMERGENCY COMMITTEE HAS ASSISTED EACH OF ITS 335 SCHOLARS, NATIONAL RESEARCH ASSOCIATES, AND ROSENWALD FELLOWS, AS AT THE CLOSE OF ITS WORK IN 1945

156 persons were assisted for no more than one year.  
82 persons were assisted for no more than two years.  
46 persons were assisted for no more than three years.  
19 persons were assisted for no more than four years.  
16 persons were assisted for no more than five years.  
13 persons were assisted for no more than six years.  
2 persons were assisted for no more than seven years.  
1 person was assisted for ten years.

APPENDIX VI

INSTITUTIONS WHICH RECEIVED GRANTS FROM THE EMERGENCY COMMITTEE

- Albright Art Gallery, Buffalo
- American Academy for Jewish Research, New York
- American Law Institute, Philadelphia
- American Museum of Natural History, New York
- American University, Washington, D.C.
- Antioch College, Yellow Springs, Ohio
- Atlanta University, Atlanta
- Barat College of the Sacred Heart, Lake Forest, Ill.
- Barnard College, Columbia University, New York
- Bennett College, Greensboro, N.C.
- Black Mountain College, Black Mountain, N.C.
- Boston University, Boston
- Brookings Institution, Washington, D.C.
- Brooklyn College, Brooklyn, N.Y.
- Brown University, Providence, R.I.
- Bryn Mawr College, Bryn Mawr, Pa.
- University of Buffalo, Buffalo
- University of California, Berkeley
- Carnegie Institute of Technology, Pittsburgh
- Catholic University of America, Washington, D.C.
- Central Y.M.C.A. College (now Roosevelt College), Chicago
- University of Chicago, Chicago
- Claremont Colleges, Claremont, Calif.
- Coe College, Cedar Rapids, Iowa
- Colby College, Waterville, Maine
- Columbia University, New York



Connecticut College, New London  
 Converse College, Spartanburg, S.C.  
 Cornell University, Ithaca, N.Y.  
 University of Denver, Denver, Colo.  
 Dubuque University, Dubuque, Iowa  
 Duke University, Durham, N.C.  
 Duquesne University, Pittsburgh  
 East Indies Institute of America, New York  
 Elmhurst College, Elmhurst, Ill.  
 Erskine College, Due West, S.C.  
 Fenn College, Cleveland  
 Field Museum of Natural History, Chicago  
 Fletcher School of Law and Diplomacy, Medford, Mass.  
 Fordham University, New York  
 University of Georgia, Athens, Ga.  
 Guilford College, Guilford College, N.C.  
 Hamilton College, Clinton, N.Y.  
 Harvard University, Cambridge, Mass.  
 Hebrew University, Jerusalem  
 Hobart College, Geneva, N.Y.  
 Howard University, Washington, D.C.  
 Illinois College, Jacksonville  
 Illinois Institute of Technology, Chicago  
 Indiana University, Bloomington, Ind.  
 Institute for Advanced Study, Princeton, N.J.  
 Institute of Pacific Relations, New York  
 Institute of Social Research, New York  
 Iowa State College of Agriculture and Mechanic Arts, Ames  
 State University of Iowa, Iowa City  
 Iranian Institute and School for Asiatic Studies, New York  
 Jewish Institute of Religion, New York  
 College of Jewish Studies, Chicago  
 Jewish Theological Seminary of America, New York  
 Johns Hopkins University, Baltimore  
 University of Kansas, Lawrence  
 University of Kansas City, Kansas City, Mo.  
 Kent State University, Kent, Ohio  
 University of Kentucky, Lexington  
 Kenyon College, Gambier, Ohio  
 Lawrence College, Appleton, Wis.  
 Library of Congress, Washington, D.C.  
 Longy School of Music, Cambridge, Mass.  
 University of Louisville, Louisville, Ky.  
 Marquette University, Milwaukee, Wis.  
 Mary Washington College, Fredericksburg, Va.  
 Massachusetts Institute of Technology, Cambridge  
 Miami University, Oxford, Ohio  
 University of Michigan, Ann Arbor  
 Mills College, Mills College, Calif.

Milton College, Milton, Wis.  
 University of Minnesota, Minneapolis  
 Mount Holyoke College, South Hadley, Mass.  
 Mount Union College, Alliance, Ohio  
 Museum of Fine Arts, Boston  
 University of New Hampshire, Durham  
 New Jersey College for Women, New Brunswick  
 University of New Mexico, Albuquerque  
 New School for Social Research, New York  
 College of the City of New York, New York  
 New York Public Library, New York  
 New York State Psychiatric Institute and Hospital, New York  
 New York University, New York  
 H. Sophie Newcomb Memorial College for Women, Tulane University, New Orleans  
 University of North Carolina, Chapel Hill  
 Northwestern University, Evanston, Ill.  
 Ohio State University, Columbus  
 Olivet College, Olivet, Mich.  
 Our Lady of the Lake College, San Antonio, Texas  
 Pacific School of Religion, Berkeley, Calif.  
 Parsons College, Fairfield, Iowa  
 Pendle Hill, Wallingford, Pa.  
 Pennsylvania State College, State College  
 University of Pennsylvania, Philadelphia  
 Pomona College, Claremont, Calif.  
 Princeton University, Princeton, N.J.  
 Purdue University, Lafayette, Ind.  
 Queens College of the City of New York, Flushing, N.Y.  
 Rand School of Social Science, New York  
 Richmond Professional Institute of the College of William and Mary, Richmond, Va.  
 Rockford College, Rockford, Ill.  
 Rockland State Hospital, Orangeburg, N.Y.  
 Rutgers University, New Brunswick, N.J.  
 St. John's College, Annapolis, Md.  
 St. John's University, Brooklyn, N.Y.  
 St. Lawrence University, Canton, N.Y.  
 St. Michael's College, Winooski Park, Vt.  
 College of St. Thomas, St. Paul, Minn.  
 University of Scranton, Scranton, Pa.  
 Settlement Music School, Philadelphia  
 Smith College, Northampton, Mass.  
 University of the South, Sewanee, Tenn.  
 University of Southern California, Los Angeles  
 Southern Illinois Normal University, Carbondale  
 Southwestern, Memphis, Tenn.  
 Stanford University, Stanford University, Calif.  
 Swarthmore College, Swarthmore, Pa.



Teachers College, Columbia University, New York  
 Temple University, Philadelphia  
 University of Toledo, Toledo, Ohio  
 Union Theological Seminary, New York  
 U.S. Government, Bureau of the Census, Washington, D.C.  
 Vanderbilt University, Nashville, Tenn.  
 Vassar College, Poughkeepsie, N.Y.  
 University of Virginia, Charlottesville  
 Washington University, St. Louis  
 Wayne County Training School, Northville, Mich.  
 Wayne University, Detroit  
 Wellesley College, Wellesley, Mass.  
 Wesleyan University, Middletown, Conn.  
 West Virginia State College, Institute  
 Western Reserve University, Cleveland  
 Westminster Choir College, Princeton, N.J.  
 Wilson College, Chambersburg, Pa.  
 Winthrop College, Rock Hill, S.C.  
 University of Wisconsin, Madison  
 Worcester Polytechnic Institute, Worcester, Mass.  
 Yale University, New Haven, Conn.  
 Yankton College, Yankton, S.D.  
 Yiddish Scientific Institute, New York

APPENDIX VII

GEOGRAPHICAL DISTRIBUTION OF EMERGENCY COMMITTEE  
 SCHOLARS, ROSENWALD FELLOWS, AND NATIONAL RESEARCH  
 ASSOCIATES \*

CALIFORNIA .....	16
University of California, Berkeley	8
Claremont Colleges	1
Mills College	1
Pacific School of Religion	1
Pomona College	1
University of Southern California	1
Stanford University	3
COLORADO .....	1
University of Denver	1
CONNECTICUT .....	11
Connecticut College	1
Wesleyan University	1
Yale University	9

\* A number of individuals have been assisted at more than one institution, and their presence at each institution has been indicated and counted separately.

DISTRICT OF COLUMBIA .....	19
American University	5
Brookings Institution	3
The Catholic University	3
Howard University	2
Library of Congress	5
United States Government, Bureau of Census	1
GEORGIA .....	3
Atlanta University	1
University of Georgia	2
ILLINOIS .....	26
Barat College of the Sacred Heart	1
Central Y.M.C.A. College (now Roosevelt College)	5
University of Chicago	9
Elmhurst College	1
Field Museum of Natural History	1
Illinois College	1
Illinois Institute of Technology	1
College of Jewish Studies	1
Northwestern University	3
Rockford College	2
Southern Illinois Normal University	1
INDIANA .....	2
Indiana University	1
Purdue University	1
IOWA .....	5
Coe College	1
University of Dubuque	1
Iowa State College of Agriculture and Mechanic Arts	1
Parsons College	1
State University of Iowa	1
KANSAS .....	1
University of Kansas	1
KENTUCKY .....	6
University of Kentucky	2
University of Louisville	4
LOUISIANA .....	1
H. Sophie Newcomb Memorial College	1
MAINE .....	1
Colby College	1
MARYLAND .....	10
Johns Hopkins University	9
St. John's College	1
MASSACHUSETTS .....	27
Boston University	1
Fletcher School of Law and Diplomacy	2



SOUTH DAKOTA .....	1	1
Yankton College	1	
TENNESSEE .....		4
University of the South	1	
Southwestern	1	
Vanderbilt University	2	
TEXAS .....		1
Our Lady of the Lake College	1	
VERMONT .....		2
St. Michael's College	2	
VIRGINIA .....		4
Mary Washington College	1	
Richmond Professional Institute of the College of		
William and Mary	1	
University of Virginia	2	
WEST VIRGINIA .....		1
West Virginia State College	1	
WISCONSIN .....		6
Lawrence College	2	
Marquette University	1	
Milton College	1	
University of Wisconsin	2	
PALESTINE .....		15
Hebrew University	15	

## APPENDIX VIII

## A. THE 288 DISPLACED SCHOLARS (INCLUDING NATIONAL RESEARCH ASSOCIATES) ASSISTED THROUGH THE EMERGENCY COMMITTEE, AND THEIR FIELDS OF STUDY \*

Hanokh Albeck, Talmudic Studies	Gustav Bergmann, Mathematics
Berthold Altmann, History	Ernst Berl, Chemistry
Eugen Altschul, Economics	Felix Bernstein, Mathematics
Valentin Bargmann, Physics	Hans Beutler (b), Physics
David Baumgardt, Philosophy	Margarete Bieber, Archaeology
Guido Beck (a), Physics	Erwin Reinhold Biel, Meteorology
Maximilian Beck, Philosophy	Justus Bier, History of Art
Walter Beck (a), Psychology	Felix Bloch, Physics
Richard Behrendt, International Affairs	Erwin Bodky, Music
X Adolf Berger, Law	Werner A. Bohnstedt, Sociology
	Enzo Joseph Bonaventura, Psychology

\* In these lists a parenthetic *a* signifies, Returned to Europe; *b*, Deceased; *c*, Nobel Prize winner; *d*, Served in U.S. Army; *e*, Served at Biarritz (France) American University, 1946; *f*, Formerly a grantee of the Committee; *g*, Subsequently a grantee of the Committee.

Curt Bondy, Education	Rudolf Freund, Economics
Theodor von Brand, Biology	X Hans Fried, Law
Alfred T. Brauer, Mathematics	Hans Fried (b), Mathematics
Richard Brauer, Mathematics	Paul Friedlaender, Classical Philology
Theodor Brauer (b), Economics	Walter Friedlaender, History of Art
Kurt Braun, Economics	Kurt Friedrichs, Mathematics
Otto Brendel, Archaeology	Walter Fuchs, Chemistry
Warner F. Brook (b), Economics	William R. Gaede, Education
X Eberhard Friedrich Bruck, Law	Felix M. Gatz (b), Musicology
Martin Buber, Philosophy	Bernhard Geiger, Oriental Philology
Manfred Bukofzer, Musicology	Moritz Geiger (b), Philosophy
Walter V. Burg, Chemistry	Hilda Geiringer, Mathematics
Hans Cassel, Chemistry	Karl Geiringer, Musicology
Umberto Moshe David Cassuto, Philology	Melitta Gerhard, Literature
Gustave Cohen (a), Literature	Felix Gilbert, History
X Sigmund Cohn, Law	X Rudolf Glanz, Law
Ernst Cohn-Wiener (b), History of Art	Kurt Gödel, Mathematics
Victor Conrad, Meteorology	Franz Goldmann, Public Health
Richard Courant, Mathematics	G. E. von Grünebaum, Oriental Philology
X Heinz Dallmann, Law	Gotthard Günther, Philosophy
Max Dehn, Mathematics	X Wolfgang Guenther, Law
Max Delbrück, Physics	Emil J. Gumbel, Statistics
Leonid Doljanski, Pathology	Herman S. Gundersheimer, History of Art
Adolph B. Drucker, Economics	Julius Guttmann, Philosophy
Ludwig Edelstein, Philology	Fritz Haas, Zoology
Tilly Edinger, Paleontology	Otto H. Haas, Paleontology
Maximilian Ehrenstein, Chemistry	William S. Haas, Sociology and Anthropology
Friedrich Engel-Janosi, History	Jacques Hadamard (a), Mathematics
Fritz Epstein, History	Ludwig Halberstaedter, Radiology
Richard Ettinghausen, History of Art	Wolfgang Hallgarten (d), History
Ladislau Farkas, Chemistry	Ludwig Hamburger, Economics
Bruno Fels, Statistics	Viktor Hamburger, Zoology
William Fiedler, Music	Joseph Hanč, Government Service
Eva Fiesel (b), Linguistics	Willy Hartner (a), Astronomy
X Ossip K. Flechtheim, Political Science	Werner Hegemann (b), Architecture and City Planning
Max Förster (a), Philology	Robert von Heine-Geldern, Ethnology
Abraham Adolf Fraenkel, Mathematics	Ernst Hellinger, Mathematics
Hermann Fraenkel, Classics	John L. Herma (d), Psychology
James Franck (c), Physics	Léon Herrmann (a), Classical Literature
Louis R. Franck, Economics	Gerhard Herz, Musicology
Erich Frank, Philosophy	X John H. Herz, Law
Philipp Frank, Physics	Ernst Emil Herzfeld, Archaeology
Oskar Frankl, Education	Artur von Hippel, Physics
Paul Frankl, History of Art	Rudolf Höber, Physiology
Erich Franzen, Letters	
Aron Freimann, Bibliography	



- X Heinrich Hoeniger, Law  
 Oscar Hoffman, Engineering  
 Hajo Holborn, History  
 X Richard Martin Honig, History and  
 Philosophy of Law  
 X Erich Hula, Law  
 Hugo Iltis, Biology  
 Luigi Jacchia, Astronomy  
 Ernest Jackh, International Relations  
 Fritz Jahoda, Music  
 Roman Jakobson, Philology  
 Fritz John, Mathematics  
 Victor Jollos (*b*), Zoology  
 Oswald Jonas, Musicology  
 Henry R. Kahane, Linguistics  
 Alfred Kähler, Economics  
 Richard A. Kahn, Economics and  
 Public Administration  
 Franz Kallmann, Psychiatry  
 Ernst Kanitz, Music  
 Ernst Kantorowicz, History  
 Ernst Kapp, Classical Philology  
 Fritz Karsen, Education  
 Adolf Katzenellenbogen, History of  
 Art  
 Felix Kaufmann, Philosophy  
 Fritz Kaufmann, Philosophy  
 Stephen S. Kayser, History of Art  
 X Robert M. W. Kempner, Police Ad-  
 ministration  
 X Friedrich Kessler, Law  
 X Hans Kirchberger, Law  
 X Otto Kirchheimer, Law  
 X Guido Kisch, Law  
 Jacob Klatzkin, Philosophy  
 Jacob Klein, History of Mathematics  
 and Mathematical Physics  
 Richard Koebner, History  
 Zdenek Kopal, Astronomy  
 Siegfried Kraus, Sociology  
 Richard Krautheimer, History of Art  
 Manfred Kridl, Literature  
 X Heinrich Kronstein, Law  
 Helmut Kuhn, Philosophy  
 Gustav Land, Astronomy  
 Carl Landauer, Economics  
 Oscar Lassner, Music  
 X Rudolf von Laun (*a*), Law  
 Albert Lauterbach, Economics  
 Max Lederer, Language and Litera-  
 ture  
 Fritz Lehmann (*b*), Economics  
 Karl Lehmann (Lehmann-Hartleben),  
 Archaeology  
 Frederick Lehner, Language and  
 Literature  
 X Arthur Lenhoff, Law  
 Friedrich Lenz, Classical Language  
 and Literature  
 Wolf Leslau, Languages  
 Kurt Lewin (*b*), Psychology  
 Hans Lewy, Mathematics  
 Julius Lewy, Philology  
 Wolfgang Liepe, Language and Lit-  
 erature  
 Julius Lips, Anthropology  
 X Karl Loewenstein, Law  
 Karl Loewner, Mathematics  
 Moritz Löwi (*b*), Psychology  
 Edward Lowinsky, Musicology  
 Erna Magnus, Sociology  
 Nicolai Malko, Music  
 Alfred Manes, Insurance and Eco-  
 nomics  
 Ernst Manheim, Sociology  
 Fritz Karl Mann, Economics  
 Thomas Mann (*c*), Letters  
 Siegfried Marck, Philosophy  
 Herbert Marcuse, Philosophy  
 Jacques Maritain (*a*), Philosophy  
 Carl Mayer, Sociology  
 Karl W. Meissner, Physics  
 Kaethe Mengelberg, Economics  
 Julie Meyer, Sociology  
 Kathi Meyer-Baer, Musicology  
 Franz Michael, Chinese History and  
 Far Eastern Affairs  
 Rudolf Minkowski, Physics  
 X Hans Morgenthau, Law  
 Otto Nathan, Economics  
 Alfons Nehring, Philology  
 Hans Neisser, Economics  
 Paul Nettel, Musicology  
 Otto Neugebauer, Mathematics  
 Franz Neumann, Economics  
 Sigmund Neumann, Sociology  
 X Robert Neuner, Law  
 Emmy Noether (*b*), Mathematics

- Lothar Wolfgang Nordheim, Physics  
 X Arthur Nussbaum, Law  
 Leonardo Olschki, Philology  
 Oskar Oppenheimer, Psychology  
 Melchior Palyi, Economics  
 Wolfgang Paulsen, Language and  
 Literature  
 X Alexander H. Pekelis (*b*), Law *Italian*  
 Nicolás Percas, Languages  
 X Georg Petschek (*b*), Law  
 Kurt Pinthus, History of Literature  
 and of the Theater  
 X Willibald Ploechl, Law  
 Ernst Posner, Archives Administra-  
 tion  
 Richard Prager (*b*), Astronomy  
 Karl Pribram, Economics  
 Peter Pringsheim, Physics  
 Luis Quintanilla, Painting  
 X Ernst Rabel, Law  
 Giulio Racah, Physics  
 Hans Rademacher, Mathematics  
 Hermann Ranke (*a*), Archaeology  
 Egon Ranshofen-Wertheimer, Politi-  
 cal Science  
 Franz J. Rapp, History of Theater  
 Art  
 Anton Raubitschek, Archaeology  
 Victor Regener, Physics  
 Fritz Reiche, Physics  
 X Max Rheinstein, Law  
 Werner Richter, Language and Lit-  
 erature  
 Fernando de los Ríos, Political Sci-  
 ence  
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 Alfred Schuhmann, Philosophy  
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 Rudolf Schwenger, Economics  
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 X Hans Julius Wolff, Law



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**B. THE 47 ROSENWALD FELLOWS OF THE EMERGENCY COMMITTEE  
 AND THEIR FIELDS OF SPECIALIZATION AT TIME OF ARRIVAL  
 IN UNITED STATES**

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X Julius Fischer ( <i>b</i> ), Law	Alfred Sendrey, Musicology
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Hans Heymann ( <i>f</i> ), Economics	Karl Weigl ( <i>g</i> ), Music
Emil Kaufmann, History of Art	X Frederick Welt, Law
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## The Migration of the Academic Intellectuals

Herbert A. Strauss

The intellectuals and artists who suffered the persecutions described above reflected the diversity of the culture from which they had been displaced. This diversity of their origins persisted in their flight and emigration. The world of nation states and empires, to which they were forced to turn for shelter and a chance to begin anew, was not hospitable to newcomers. No country welcomed intellectual or artistic émigrés in large numbers. Those who gained admission faced numerous obstacles in securing jobs to maintain themselves and their families. The support they received from family members, especially their wives, forms a persistent theme in many biographies documented in this volume. Only the best-known among displaced scholars and artists found the doors of universities, institutes, or art organizations open when they sought to continue their lives' work. For the others and for the young, starting at the proverbial bottom of their professions was the more characteristic experience. For émigrés whose large majority was formed by middle-class values and traditions, this was a new social experience.

The process by which the émigré related to the cultural stimuli of his country (or countries) of settlement is best summarized by the term acculturation. It denotes the unstable equilibrium which the fusion of diverse cultural traits brings about when a person or group comes into intimate and prolonged contact with persons or groups of another culture. It is characterized by changes in attitudes and values ("subjective factors:" self-image, identity) as well as observable behavior ("objective factors:" traits, habits, language behavior, sociability, etc.). Acculturation is a function of concrete situations as well as the generalized images, perceptions, and values the several cultures or personalities bring to bear upon the circumstances of the cultural encounter.

The concept acculturation thus describes also the two extreme situations found in cultural encounters as documented in this volume. For one significant group of primarily literary and political intellectual émigrés, being forced to flee and reside in another country constituted an exile. Upon close analysis, this did not, in most instances, exclude an "objective" and behavioral acculturation, and may have included use of the language of the host country, economic activities of the exile or his wife, schooling of children, active or passive participation in the political, intellectual, and entertainment aspects of the host culture, acquaintance with its literature and history, or sociability with neighbors and like-minded natives. Subjectively, however, and in professional and political activities, the exile identified with his home country, and maintained a national component in his self-understanding that was often sharpened by his absence from home or by active participa-

tion in exile politics. Such politics consisted primarily of the usually somewhat abstract planning, publicity, lobbying and writing for post-totalitarian reconstruction, and maintained intra-exile dissension along older party lines. The political divisions of the German and Austrian exile of the Nazi period influenced the activities of German writers who continued to write and publish in the German language. (Their outlines are presented in the essay preceding this section.) These writers, who had been established or were active *prior* to their emigration, and had made up a central segment of the Austrian and Weimar cultures referred to below, created a literature in exile — German *Exilliteratur*. Research has established that this literature, too, bears some influence, at least in its contents, of the exile, i.e. the acculturation experience.

At the other extreme stands the group consisting primarily of younger persons for whom acculturation constituted "full integration" into the culture and society of the country of settlement. Such integration, verifiable by objective indices such as education, military service, language habits, customs, leisure time activities, or marriage and child rearing patterns, and by "subjective factors" such as identification with national history and politics, may be characterized by minimal influences from parental cultures, at least on observable conscious or verbal levels of behavior, and in extreme ideal-typical cases.

For intellectual émigrés, the particular cultural traits of original and host cultures (including the complex pattern of acculturation derived from Jewish sub-cultures in home or settlement countries) were not correlated directly enough to allow predictions of individual behavior from group attitudes. The variety of historic situations in which intellectual émigrés experienced acculturation permits, none the less, some empirically verifiable generalizations about group behavior. Among the factors involved were age, political and professional activities and orientation, country of settlement, perception of historic experiences, Jewish ties, family ties, and/or economic and other interests.

That group identification is closely related to patterns of socialization and peer group relationships derives sufficiently from social and educational psychology so that it need not be detailed here. Observations of group behavior in the immigration situations of "second generations" are a commonplace of American immigration history. This pattern of second generation acculturation/integration is significant for the large group of younger émigrés included in this volume, and deserves a separate study. It also affects older generations, especially in Jewish and similar groups that accept family cohesion as a strong determinant of behavior. Withall, age by itself is not a



## LXVIII Introduction

stable or continuous factor, since attitudes towards the older parental generation and culture change as the cycle of life advances. The recent concern with "roots" among minority groups in the U.S.A. suggests further that cultural history and politics as provided by the media may affect group attitudes. Reversals in the language habits of aging persons and the increased European travel of older émigrés suggest other dimensions of age-[or income-]specific changes in the acculturation process.

Of major significance for émigrés of the Nazi period, including intellectual émigrés, was the generalized image of German and Jewish history and culture. For the Jewish group, Nazi persecution, adverse personal experiences with friends and neighbors during the Nazi period, the absence of effective German and Austrian resistance to anti-Semitism, and finally, genocide and the murder of close relatives had tended to strengthen the wish to cut identification and cultural ties with the country of origin, and to seek as much integration with the new homeland as the situation permitted. For some, this included a strengthened Jewish identification, and the acceptance of Jewish collective attitudes towards the generalized image of German culture and the German people. The foundation of the state of Israel and the political success of the Federal Republic of Germany and its policy of compensating victims for their material losses were additional influences on attitudes. They, too, deserve detailed investigation. It is further possible that the pattern of Jewish acculturation in Germany and Austria may have provided some models for the acculturation of émigrés.

Acculturation differed also with respect to the cultural expectations of the country of settlement. European nation states did not perceive themselves as immigration countries during the migration period under discussion, and in the majority do not see themselves as such today. Therefore, they do not have the collective memory or social habit of tolerating the coexistence of majority cultures with immigrant strains undergoing acculturation in a generational sequence. Even multinational states like Switzerland or prewar Czechoslovakia, or Poland have failed to develop social thought accounting for acculturation processes. Most, if not all of these states perceived the immigrant as a temporary sojourner or foreign laborer ("guest worker" in the postwar period). They exerted cultural pressures to either eliminate the alien through complete integration, or return him to his country of origin. Acculturation, or the process of combining features of several cultures, appeared as a "lower form" of the "pure" national culture, e.g. in countries like France or Great Britain whose cultures stress language behavior as an index of in-group belonging, or Greece or Latin America where religious uniformity is tied to the perception of the national culture. In the 1930s, economic factors and fears of émigré competition on labor markets, as well as xenophobic and anti-Semitic currents reenforced such perceptions.

The U.S.A., too, the prototype of a Western industrialized immigration country, looked back in the 1930s on a history of nativism, xenophobia, racism, and anti-Semitism. Such trends had emerged in public precisely during the period of large-scale immigration beginning in the second half of the 19th century, and had formed a reflex against such immigration. Earlier, this nativism was expressed as Protestant fear of Catholicism, white rejection of blacks, or rural rejection of urbanism. Empirical studies based on interviews and questionnaires, and

public opinion polls taken during the 1930s and 1940s suggest a high degree of generalized rejection of immigrants from Central Europe. They also suggest that immigrant intellectuals teaching in American universities and colleges faced considerable pressures to "adjust" their behavior to prevailing standards in their professional activities and in human relations. Such attitudes were strongly reinforced by the economics of academic employment (as discussed below). Still, with the economic expansion following World War II and the arrival of new groups of immigrants, cultural pluralism as propagated earlier by liberal groups appeared to be more widely accepted, and became incorporated in the national ideology. As a result, immigrant subcultures reflecting changing equilibria of cultural elements became part of the national self-understanding. The intellectual immigrant, instead of meeting hostility and reserve, now turned into a national asset and reached the highest levels of government, intellectual life, or the academic world.

The culture in which the intellectuals and artists documented in this volume originated was the German-language culture of Central Europe between the two World Wars. It comprised the German Reich, a republic, the Austrian *Bundesrepublik*, and the German-language areas of the Czechoslovak Republic. Each of these cultures left its imprint on their national scholars and artists. The central component called "Weimar culture" in postwar literature has given its name to the period. German intellectual life had been influenced strongly by foreign (including Austrian) intellectuals and artists who had migrated primarily to Berlin following the break-up of the Austro-Hungarian Empire. To be sure, singling out Weimar culture to reflect upon the original cultures of *all* émigré intellectuals disregards the refugees from Austria and Czechoslovakia, especially their writers and musicians. It appears justified, nonetheless, to see in Weimar culture the paradigm of German-language civilization and the major embodiment of the intellectual and artistic achievements and failures of the pre-Hitler period.

Long before the exodus of scholars and artists from Germany had become an international event in demographic and intellectual history, German culture had been part of, and influenced by, European cultural history, especially by personalities and trends originating in other countries. It has been pointed out correctly that most of the characteristic features of Weimar culture had been created in many countries prior to World War I. What characterized the post-World-War I period in Germany (and Austria) was the profusion and creative intensity with which its energies found release. The war had left Germany with a cauldron of political and social contradictions. Of the barely 15 years the Weimar Republic survived, only five years, 1924–1929, bore a semblance of normalcy. All others were years of political and economic turmoil, dissolution, and polarization. In the atmosphere of crisis, the polarities inherited from the prewar world not only sharpened, but also turned into intense political confrontations, especially when the Republic proved unable to solve the economic and social problems created by the World Depression, and took refuge in authoritarian government in 1930. As a result, Weimar culture became intensely politicized. Politicization extended not only to traditionally political branches of thought like political science and theory, economics, history, *Literaturwissen-*



*schaft* (literary science), the social sciences, or literature. It also translated as politically-inspired styles in entertainment media such as theater and motion pictures, painting and sculpture, musical composition, architecture, or psychology. Even the theories of relativity and psychoanalysis shared in this politicization since their opponents attacked them as "Jewish intellectualism and destructiveness."

*Kulturpolitik* — really the politicization of culture, its political interpretation and use — had, of course, antecedents in European cultural history. Conservatives had condemned literary trends like realism or naturalism, and innovators, in turn, had interpreted styles like social realism, expressionism, or Dadaism, as direct attacks on the prevailing "system." That socialist scholars had not been able to obtain university appointments in Germany prior to 1918 (and only sparingly afterwards) illustrates merely in an extreme example the finely tuned political uses of government controls over *Kulturpolitik* — which also had discriminated in major fields against Jews who failed to submit baptismal certificates to obtain professorships.

The background of this *Kulturpolitik* derived from the birth defect of the Republic: it had carried over in its government, business, social, and intellectual structures the achievements and thus the short-comings represented by the prewar establishment of Imperial Germany. The already far-reaching bureaucratization of intellectual life — life-tenure provisions for the professoriate, even for actors and musicians, the civil-service mentality of cultural elites — had thus imprinted upon Weimar establishment culture a stamp of conservatism that was shared by wide segments of the educated middle classes, business, the teaching profession, and the social elites of middle and small towns across the country.

The churches, too, shared in conservative *Kulturpolitik*. The Catholic Church had long been active in defense of its moral and social teachings in German politics, and used its influence to ward off modernization or innovations that (it believed) might morally endanger its members. The Weimar constitution and German legal codes had provided accordingly, that literature and art could be censured as "Schund und Schmutz" — worthless and dirty — and its creators prosecuted in the courts. Protestant churches, while neglecting to found a party of Protestants to defend their interests, joined battles with modernism through the political channels of middle class and conservative-right-wing parties. As a result, the Weimar judiciary meted out harsh sentences to "cultural offenders" of the left while excusing "offenses" committed by those of the right. It also allowed itself to be used to censure works of art offensive to the churches, and works of literature that satirized official definitions of national interest and honor, German war service, generals, or public personages. It sought to suppress movements to liberalize laws against abortion and homosexuality (*Sexualreform*) while finding it hard, under law, to send pornographic anti-Semitic propagandists and liars to jail.

Academic scholarship and higher (university) education in the Weimar Republic continued to function on levels that had earned them a worldwide reputation prior to World War I. In some fields of science, in mathematics, sociology, Gestalt psychology, Weimar Germany became a recognized leader or participant in advancing knowledge through pioneer investiga-

tions. In many other fields, Weimar scholars enjoying worldwide recognition continued their work or started on their careers. The impact of universities such as Göttingen, Hamburg, Munich, or Berlin on the development of modern physics represents the most noted and influential example, and there are less noted parallels in other fields. Increasing numbers of students, including students of middle- and lower-class origin, attended universities to prepare for higher service careers, reflecting the changed social role of higher education in post-industrial society. Seeking to guard their professional and increasingly labor-divided standards of scholarship, university teachers sought to isolate the university from the partisan political currents swirling around them. Only a minuscule minority among the 7,000 university professors of the period participated in efforts to commit university professors to public loyalty declarations for the liberal-democratic *Republik*. Since Nazi decrees were to sever about 2,000 professors from their positions, it follows that those among them who would emigrate had shared, to a large extent, the turn to non-political professionalism characteristic of the period.

Significant exception to this general trend occurred both within and without established academic institutions. New departures in the social sciences took place within the university system. At the University of Frankfurt/Main, a young and thus less tradition-bound institution, Marxist scholars established an Institute for Social Research that promoted critical theoretical scholarship. Other universities also provided appointments for younger and critical scholars. A significant number of émigrés who, in retrospect, embodied the innovative aspects of Weimar culture in exile, began their careers in German universities in the late 1920s and early 1930s.

Significant innovation also occurred in institutions engaged in research and teaching outside the formal framework of the universities. They included the *Deutsche Hochschule für Politik* (Academy of Political Science) in Berlin which attracted to its teaching staff not only outstanding future émigrés but also American liberals. In Hamburg, the Institute-Library founded by Aby M. Warburg created a center for a renewal of the classics as a cultural force in Western civilization. Re-introducing the comprehensive revisions in classical scholarship promoted by such 19th century scholars as Jacob Burckhardt and Friedrich Nietzsche and stressing Warburg's, interest in the non-rational aspects of culture, the Library stimulated new departures in research on Renaissance and Reformation thought, art history, and philosophy. The Bauhaus, founded in Weimar in 1919 and continued in Dessau in 1923, summarized inventive and integrative trends in European art. Its architects and designers would achieve worldwide recognition and pervasive influence as émigrés from Hitler Germany. Psychoanalysis, too, as organized in the *Psychoanalytisches Institut Berlin* developed outside the university framework. Its Viennese center as well as its German and Hungarian theoreticians joined as émigrés in making depth psychology a broad force in culture and scholarship.

Besides such institutionalized centers of innovation, Weimar culture was most typically represented in today's view by its intelligentsia — the nonbureaucratized intellectual and artist. He created the art, literature, architecture, and music that has, in part, enjoyed acceptance in the Western world as anticipating the sense of life and reality of the later 20th century.



Joined with this group, although considerably more limited in their influence, were the writers and journalists that made up the cultural opposition to the "Weimar system" on the left of the political spectrum. In political orientation, these writers ranged from the liberal center to the Communist extreme seen, as yet, as a radical ally in the common cause of change and "revolution." Like the Weimar parties and the intellectual Left elsewhere, they had split and subdivided into numerous ideological and political factions. Like the radical right, they fought the "system," sought to transform society in the image of their Utopias, and rejected the accommodations of the Weimar *Republik* in the name of a "new Man," and a "new Society." Their political journals pointed out early, and correctly, the numerous nationalistic and civil rights violations of the constitution, or fought for world peace, *Sexualreform*, the nationalization of industry, disarmament, free speech, or new forms in communal life, art, or literature. Their novels reflected sharp analyses of social ills and oppression. Their most pervasive stylistic loyalty belonged to the expressionist school, seen as revealing the incoherent structures of modern society, the shock of discontinuity, the greater "realism" of distortion and violent color, the rejection of the pretty surface.

Many of these men and women were of Jewish background or ancestry although quite distant, in most instances, from the middle-class community of organized religious life. A variety of explanations have been offered at the time to account for the relative strength of such persons in this group: the spirit of Judaism and its prophetic ethics of care for the poor; identification of past Jewish oppression and suffering with the hunted and exploited; Jewish critical intellectualism and a search for new solutions.

Explanations such as these are, as yet, beyond proof for the group as a whole, although their correctness for individual biographies is acknowledged, as long as they avoid the circularity of "Volksgeist" explanations that have haunted German intellectual life since romanticism. More to the point, and subject to empirical study, would be a link between the course of acculturation, and its stages, on the one hand, and Jewish reactions to such stages, including their share in avant-garde art and literature, on the other. Such a study would have to be related to socio-economic conditions, urbanization, immigration, political images and self-perceptions, socialization and other factors. It would show that not one but a number of typical situations created a series of options for the Jewish intelligentsia of which avant-gardism would be only one. It might also show, however, as has been impressionistically asserted, that some of the most creative minds severed their connection with Judaism before or when they achieved distinction in the wider German culture and society.

Although this intelligentsia was set apart, in its social role, from the salaried university scholar and teacher, only a small minority represented the "free-floating" intellectual of *Wissenssoziologie*. Weimar freelance writers created their works for a cultural and political market that flourished in the pluralistic atmosphere of culture and counter-culture, primarily in Berlin. Their literary essays and political criticism were published in "newspapers, magazines, collections, or books by a variety of publishers serving clienteles (*Gemeinden*) of devotees of every style, taste, or shade of opinion" (Pachter). They were supported by theaters and academies, state prizes and

book clubs. The political parties, following their own *Kulturpolitik*, absorbed and supported the works of fellow-travellers and party members. A substantial number of the best-selling writers of the period, by no means political extremists — Franz Werfel, Emil Ludwig, Stefan Zweig, Alfred Döblin, the Mann brothers are examples of future émigrés among them — enjoyed considerable public and financial success in the 1920s. For all of them, emigration ended all links with their informal networks of finely shaded political and cultural support. That such networks could not be established abroad was, in fact, one of the tragedies suffered by exile writers of the Nazi period.

Although a national culture open freely to other German-language influences, especially the Austrian, Weimar culture rested on the traditions of European internationalism. This internationalism had expressed itself not only in literature where superb translations of foreign writers had created a *Weltliteratur*, but rested also on the internationalism of musical life and the central position of art metropolises like Paris for the plastic arts. In many other fields, especially the more nationally conceived humanities and social sciences, international cross-fertilization was as yet rare. Weimar culture represented a transitional stage in developing systems of international communications networks. By the evidence assembled in this volume, Weimar musicians and artists travelled extensively and had contacts with their foreign colleagues. Musical performers accepted engagements in foreign countries: the Salzburg festivals organized by later émigré Max Reinhardt are one example of the trend. German musical scores were performed abroad. In literature, writers like Thomas Mann enjoyed international contacts and notoriety, and the Nobel Prize he received in 1929 was testimony to his worldwide reputation. Best-sellers by German writers found foreign publishers and translators, especially in the field of biography and the lighter novel (*Unterhaltungsliteratur*). The developing motion picture industry also created international styles for German actors until the introduction of sound limited it to directors and other non-acting personnel. There were to be outstanding exceptions to this observation in the Hollywood of Marlene Dietrich in the 1930s and 1940s.

Internationally connected also were the Catholic Church and the world of Jewish learning, whose scholars and theologians benefited from study abroad. Although Protestant ecumenicism was still in its infancy, it had been inaugurated in time to afford social assistance to refugees from its developing headquarters in Geneva.

Soviet and Communist *Kulturpolitik* had started as an international movement open to experimentation and innovation. The bureaucratic controls that entered into Soviet society with the five-year plans under Stalin's dominance ended experimentation in Soviet art and literature, and enforced conventions like social realism or architectural monumentalism as part of the party's control mechanism. Communist innovations in the arts outside of the Soviet Union were redirected accordingly, as the Comintern asserted Soviet control over communist parties, and enforced compliance with Soviet policies. Protests by theoreticians like Ernst Bloch or George Lukács in the late 1920s against the sociological inappropriateness of applying Soviet styles in *Kulturpolitik* to the "class struggles" of Western industrial societies did not change this poli-



cy. Communist or "revolutionary" artists were encouraged instead to use accepted forms of "proletarian art" (e.g. in the theater, in "agitprop," in photocollages etc.) for their creative work.

The international exchange of scholarship occurred on several levels prior to Hitler's rise to power. Each of the fields in which scholarship had produced major innovators has its own history of the reception of such innovations in other countries. The prestige of German graduate study and scholarship e.g. in the U.S.A. prior to World War I derived from American perceptions of the excellence of German scholarship. Following World War I and during the depression years of the early 1930s, American philanthropic organizations like the Carnegie or Rockefeller foundations had encouraged the international exchange of scholars. (Some of their grantees would become émigrés following Hitler's rise to power.) The reception of Freud's depth psychology, of experimental and Gestalt psychology, or of Weberian and Simmelian sociology in the U.S.A. preceded the advent of the intellectual émigrés, and was characteristic of the developing internationalism.

The natural sciences, in contrast to such humanities as history, literature, and *Germanistik*, or to jurisprudence, may have been among the most effective in developing early international communications networks. Foreign students had early on attended lectures at German universities: in mathematics, for example, a survey of doctorates held in the U.S.A. published in 1936 disclosed that since 1862, 114 degree holders (both native and foreign born) had obtained degrees abroad compared to 1,286 American and Canadian graduates: "Göttingen, with 34 such degrees, far surpassed any other foreign source" (Reingold). Albert Einstein's career before and after World War I and prior to his emigration, and the careers of American physicists point to considerable international exchanges, studies, conferences, and personal contacts since the turn of the century. Modern physics exemplifies international interaction in the development of a discipline at its best. It formed the most noted and outstanding example of the internationalization of the sciences in personnel, exchange of information, and joint multinational organizations.

Yet, as the history of the intellectual migration made quite clear, this personnel and communications revolution did not lead to the undisputed admission and absorption of émigré intellectuals from Nazi Germany or Austria. Internationalism had been institutionalized by national intellectual structures. It did not change the institutional imperatives or the national policies of these structures. Internationalism had never penetrated German intellectual life beyond the most successful top layers of the universities or the arts and literature. As a factor in intellectual migration, internationalism was effective if émigrés had belonged to the German (Austrian, Czech-German) branch of an international institution. Thus, Catholic organizations like the orders or theological seminaries, used their international organization to shift some of their property and their politically or racially persecuted or endangered members out of the reach of Nazi persecution. Austrian-Catholic persecutees transferred to Roman institutions following the invasion by Nazi Germany in March 1938. In the mid-1930s German Catholic orders had responded in similar fashion to Nazi charges of criminal financial manipulations and sexual misconduct raised against their members. Most leaders of the Jewish

religious and political community (with the exception of German Zionist leaders) remained with their charges until personally persecuted or until after March 15 (Austria) or November 1938 (Germany). Following their emigration many of them were employed abroad by sister agencies or founded organizations on the homeland model. Communist internationalism, although difficult to document, appears to have been influential in setting up propaganda centers (like the Muenzenberg center in Paris), and to have financed Communist activities among exiles. Communists also set up their own publishing houses for exile literature. Gerhart Eisler served as a Comintern agent in the U.S.A. during World War II. Postwar trials in Switzerland established that Communist exiles assisted Soviet intelligence efforts there, especially after June 22, 1941. Other radical left writers and artists served in the Spanish Civil War. Writers and artists as well as political exiles living in the Soviet Union in the 1930s and 1940s were supported partly by having their works published, or through theater and film activities. They were paid (as with all such work) by government or government-supported agencies. Some of them were later murdered in Stalin's purges. Social-Democratic exiles, too, received support from "fraternal parties" and organizations in other countries; they too included artists and writers.

The organizational structure of the intellectual *Exil* was, in part, linked with the political network of exile organizations. Political cohesion and, at times, coercion along party lines formed the background for this politically oriented segment of the *Exilliteratur* of the Nazi era. The *Kulturpolitik* emerging at international meetings of intellectual exiles followed the political currents of the period and continued basic Weimar groupings. In addition, *Exilliteratur* reflected new problems, such as the popular front policies of the mid-1930s, propaganda activities against the Third Reich, or the shape of postwar Allied policies towards Germany.

For the large majority of émigrés, political and ideological internationalism was of little help in establishing themselves abroad. The political activists among intellectual émigrés constituted only a small, if vocal and visible minority. Most intellectuals emigrated, like their fellow persecutees, by using the assistance of families, colleagues, or friends, the formal or informal small groupings they had related to before emigration. This explains in part the concentration of some schools of thought or of political friends and allies in certain countries and localities following emigration. Only Communist and fellow-travelling intellectuals and artists were permitted to live in the U.S.S.R., a small and select group in view of harsh Soviet restrictions on immigration. The New School for Social Research, New York, appointed a group of progressive German professors, most of whom had known each other as Social-Democrats or Liberals in universities or government service. Psychoanalysts concentrated in New York and Chicago on the strength of having been preceded by others before arrival, and being able to establish contact with the "American movement." Similar attractions created centers of other psychoanalytic schools, e.g. Alfred Adler's in New York, or of Gestalt psychology at Smith College, Bryn Mawr, and the New School, and the re-founded branch of *Bauhaus* in Chicago and at Harvard. Professors who emigrated would attract advanced student assistants wishing to continue their work in emigra-



## LXXII Introduction

tion. Such informal groupings are known from the natural sciences, some social sciences, labor law, and, of course, literature, and deserve detailed analysis as factors in emigration.

Aside from the Warburg *Bibliothek* (which had had close contacts with English scholars prior to Hitler's rise, and transferred to London in 1933 to begin a brilliant international career) the outstanding example of international diversification through emigration was the *Institut für Sozialforschung* directed by Max Horkheimer at the University of Frankfurt/M since 1931. Privately endowed, the *Institut* had transferred funds to, and established a branch office in, Switzerland prior to 1933, then moved to Paris, and finally, to New York's Columbia University in 1934. President Nicholas Murray Butler arranged for a loose affiliation of the *Institut* with Columbia University. Most of its co-workers and students remained intellectual exiles interested in Marxism and psychoanalysis. That the *Institut* was refounded by Max Horkheimer in Frankfurt/M following World War II and gained new attention for its critical theory, represents a rare example of an *institution* closing a transatlantic circle of scholarly exchange and communication.

The corporate transfer of a Central European institution abroad and into emigration remained the exception in the pattern of intellectual emigration. For the political-literary émigré, advice and assistance was provided by fraternal organizations, newly established social agencies, and by the mutual assistance associations established by them in major centers of refuge in Prague, Paris, Switzerland, or the Netherlands. Many received help from fellow refugees. Artists and writers formed small colonies, e.g. in Sanary-sur-Mer (France) in the 1930s, and in New York and Hollywood in the 1940s, where exile art and literature were created and appreciated. As long as it was still possible, political intellectuals were helped in Germany by their political friends and associates. Within the churches, organizations to assist Christian "non-Aryans" sprang up in Germany, but failed to elicit major financial or moral support for their work from the established churches. Jewish persecutees benefited from the elaborate network of social agencies the Jewish Community had created to assist earlier migrants to Germany, overseas, or Palestine, or to provide social assistance to Jews abroad. For intellectuals and students financially and personally capable of preparing their emigration, these aid agencies provided the advice and help with which to start the search for positions in their fields abroad.

Just as migration in general faced increased restrictionism, intellectuals faced major obstacles in their search for employment. Few, if any, countries had included provisions for the immigration of university teachers, scientists, lawyers, writers, artists, or engineers in their immigration codes. Some countries, e.g. in Latin America, had excluded physicians and other professionals from their lists of desirable immigrants. In most countries, the placement of foreign university teachers in national institutions had been rare, and had not called for regulation by law. Only the American immigration code provided for the preferential non-quota immigration of university teachers (and their families) who had been appointed to teaching or research positions in a recognized institution of higher learning in the U.S.A. Mandate Palestine also provided for the admission of university personnel of some financial means. As a result, the search for a haven abroad became pri-

marily a search for a position in which to continue one's career, even after one had succeeded in obtaining the desired immigrant visa or residence permit.

The two main difficulties intellectual émigrés faced in this situation were economic and cultural. In the entire Western world, employment conditions for university graduates had worsened in the 1930s. The increase in the number of university graduates had created an "academic proletariat" of considerable size and had led to fears of political extremism in its wake. (For example, about half of the 25,000 graduates *per annum* of German universities had been unable to find positions in fields for which they had been trained.) With the lower birth cohorts of World War I entering schools and colleges, and shrinking endowments or incomes, teaching positions became scarce: in the U.S.A., about 2,000 college and university teachers lost their jobs between 1930 and 1933 — about as many persons as may have been dismissed from university positions in Nazi Germany in 1933—35. In the arts, too, unemployment was widespread. In Great Britain alone, 16,000 musicians received public support in 1933 (Lord Beveridge).

As a result, the traditional cultural nationalism with which a country's higher education system was administered and perceived gained strong support and created additional obstacles to the placement of émigrés. National university systems, aware of academic unemployment and the need to produce native *Nachwuchs* impressed upon them by policy and interest groups, now faced the question of whether to make room for a substantial group of foreign colleagues. Even the emigration of "White Russians" after 1917 had not posed a similar challenge to Western universities, to scientific research centers in governments, and to private industry.

The wanton displacement of academic experts by Nazi Germany aroused not only fear of economic competition or national defense reactions, but was also perceived from early on as an attack on academic freedom and human rights everywhere. Albert Einstein and other less prominent refugees aroused the conscience of their colleagues in the Western, especially the English-speaking world, in well-attended and widely reported mass meetings. Political émigrés, for their part, propagandized the brutalities and injustices affecting political and intellectual enemies of the Régime. In many countries, liberal intellectuals had long been on the defensive against conservative trends threatening academic freedom. Although the U.S.A. was not among the first major targets of academic emigration in 1933—35, its voluntary philanthropic agencies and its academic defense organizations joined their continental Western European colleagues and the major British center to support intellectual refugees.

The placement of academic intellectuals was thus the result of the efforts of an aroused liberal community of conscience pitted against economic realities and against national self-interests as perceived by conservative traditionalists in government and academic bureaucracies. Concerned university teachers set up organizations through which effective aid could be made available: the *Comité des Savants* and the *Foyer Henri Heine* in France (Paris), the *Academisch Steunfonds* in the Netherlands (Amsterdam), and, on a more international and lasting scale, the *Comité International pour le Placement des Intellectuel Réfugiés* in Geneva (which established branches in Paris, Brussels,



and London, and cooperated closely with the High Commissioner for Refugees of the League of Nations). Similar committees sprang up in other continental European countries that were the first targets of refugee intellectual migration after 1933.

The history of these continental European committees has not yet been sufficiently analyzed to be placed into the context of the academic and political forces determining their successes or failures. In 1933, the French committees succeeded in placing 54 scholars, and the Dutch committee 44 scholars in temporary positions. Their work was financed partially by grants from the Rockefeller Foundation and Jewish agencies, but these funds were drying up as early as 1934. Relatively few academic intellectuals were placed permanently in continental European universities or other institutions.

Major assistance, on the other hand, came from the Academic Assistance Council founded in London by the (then) head of the London School of Economics, Sir (later Lord) William Beveridge. It was supported by the contributions of more than 2,000 subscribers in Great Britain, composed mainly of university teachers and professionals (1937), and worked closely with American funding and aid agencies. In 1933/34, the Council succeeded in placing 57 scholars in permanent positions in the United Kingdom, 155 in temporary positions. 56 of these were at the London School of Economics, 30 at Cambridge, 15 at Oxford, 7 in Scottish universities, the rest in other agencies and institutions. These temporary placements represented 46% of the total temporary placements (336 persons) effected during these first two years. The Council continued to assist refugees through the entire period of the Third Reich, extending its aid later to Austrian, Italian, and other refugees from Nazi-occupied Europe.

Still, already in 1933/34 the number of job seekers registered with the Council had amounted to more than three times the number of those placed, a total of 650 displaced scholars. European institutions proved unable to absorb the university scholars or the students seeking research or teaching careers.

Of overseas universities, the Hebrew University in Jerusalem was only 8 years old when Hitler was appointed chancellor. By 1933, its original three departments (Jewish studies, chemistry, parasitology/microbiology) had grown to 9, but its student body included only 151 matriculated, 20 non-matriculated and 17 research students. Unsure of its ultimate role in the developing Jewish society, and beset by internal crises concerning its governance structure, the university saw itself unable to use the talent set free by Nazi persecution for the construction of a full-fledged university. In addition, the Carnegie Foundation, a major potential source of funding, had not included Palestine, then a British mandate, in its definition of British Commonwealth countries whose development it stood ready to advance. Jewish attempts to raise funds for a larger number of displaced scholars proved disappointing. As a result, by 1937 only 8 professors, 3 lecturers, and 9 fellows or assistants had found employment with the university. They had grown to about 20 by 1939. An equally limited number of scientists, although of great significance for the institution's development, found employment with the Weizmann Institute of Science in the 1930s. (As indicated by this volume of the *International Biographical Dictionary*, however, by the 1970s the number of immigrants hol-

ding positions at these and other major Israeli institutions (Technion, Bar-Ilan University, Tel Aviv University) was considerable 8% of all persons listed are located at institutions in Israel.) A comprehensive analysis of the intellectual immigration to Palestine/Israel has not been undertaken to date — a major gap in the account of Nazi period emigration and acculturation. Unique in the annals of intellectual migration was the appointment of about 100 displaced German and Austrian scholars to universities and institutes in Ankara and Istanbul, Turkey, between 1933 and 1938. Their appointment was carried out through the good offices of a mutual aid agency for academic refugees from Nazi Germany, the *Notgemeinschaft deutscher Wissenschaftler im Ausland*. Paradoxically, the scholars displaced in Nazi Germany had benefited from long-standing intellectual and political connection between the German and Turkish governments. German influence had displaced the strong French connection in Turkish foreign policy in the 20th century, and had led the Turkish government as early as World War I to appoint 19 German professors to the University of Istanbul in 1915. With the seizure of power by Kemal Pasha, the long-standing attempts by Turkish rulers (beginning with reform-minded sultans in the 19th century) to secularize and Westernize Turkish society and education had received new impetus. In the late 1920s, a German advisory team recommended the establishment of an institute devoted to the agricultural sciences and veterinary medicine. It opened in 1933 with a staff of 20 German professors under a German *Rektor* (president) (Yückseck Ziraat Enstitütü), the last of whom left Turkey for Germany in 1942. For the reform of the traditional university in Istanbul, where older forms of higher education persisted alongside a modern Islamic university, a Swiss pedagogue (Prof. Malche, University of Geneva) had submitted a plan in the early 1930s. He proposed to entrust the desired changes in research and teaching to a group of university teachers selected from several European universities in order to avoid control of Turkish higher education by a single country.

As a result of contacts between the founder of the *Notgemeinschaft*, Prof. Philipp Schwartz, formerly of the medical faculty of the University of Frankfurt/M and himself a refugee scholar, and Prof. Malche, the Turkish Ministry of Education under Resit Galip, appointed 139 displaced scholars (including assistants) in universities and institutions of higher education in Ankara and Istanbul between 1933 and 1939. In what may well have been the most massive appointment process at one time in academic history, 30 professors were appointed in a short series of meetings between Prof. Schwartz and Minister Galip in mid-1933, and others were added subsequently.

The following tables 1 and 2 on page XXIV indicate the extent of these appointments:

The appointments at the University of Istanbul were accompanied by the foundation of 14 university institutes in medicine, 14 in mathematics and the natural sciences, 12 at the faculty of philosophy, and 5 in the faculty of law. 10 of 17 directors of medical institutes (1933—1945), and 7 of 17 directors of university clinics were refugees. In addition, 3 displaced scholars were appointed to the Technical Academy (Technical University 1944), and 3 to the Academy of Fine Arts. Displaced artists (including Paul Hindemith and Carl Ebert) were appointed to the music school (1935 conservatory) in Ankara to help with its modernization.



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**Table 1:** *Refugee scholars, University of Istanbul*

	Profs.	Assists.	Aids	Total
Medicine	19	20	7	46
Mathematics and natural sciences	17	4	—	21
Philosophy	10	11	—	21
Law	10	—	—	10
	56	31	7	98

Source: Adapted from H. Widmann, *Exil und Bildungshilfe: Die deutsch-sprachige akademische Emigration in der Türkei nach 1933* (Berne, 1973).

**Table 2:** *Refugee scholars, appointed at institutions in Ankara*

	From Germany	From Austria	Total
Music	12	9	21
Language, history, geography	5	1	6
Schools of medicine	7	1	8
Agricultural and technical	3	1	4
Acad. political science	1	1	2
Totals	28	13	41

Source: *idem*.

The faculties which included distinguished scholars in several fields enjoyed a unique position because they co-existed, without social or professional contacts, with a non-refugee German faculty in the agricultural school. In contrast to the German colony, they played a special, non-chauvinistic role as displaced scholars, and had the benefit of working closely with a sophisticated Turkish intelligentsia advancing Turkish modernization. Their stay in Turkey, presumably also as conceived by Turkish authorities, was temporary as indicated by the following Table 3:

**Table 3:** *Emigration and Remigration from Turkey*

Year	U.S.A.		Germany		Other countries	
	Profs.	Assts.	Profs.	Assts.	Profs.	Assts.
1934—39	12	9	—	1	7	2
1940—45	2	—	—	—	3	—
1945—50	8	2	2	3	3	—
1950—56	1	5	20	2	—	—
1956—	—	—	2	—	1	1
	23	10	24	6	14	3

Source: *idem*. 15 refugee academics died while in Turkey, three while travelling. By the mid-1970s, only six members of the original group remained in Turkey.

The United States of America took in more persecutees of the Third Reich than any other country. It also saved more refugee academics and intellectuals than any other country. Its immigration laws, as has been pointed out, permitted the non-quota immigration of academic teachers who had been engaged in teaching at the university level for at least two years, and secured positions in recognized American universities or colleges. Given the number of such academic institutions a-

cross the continental expanse, even the strict application of restrictive practices to immigration provisions failed to close America's borders to the intellectual refugee.

America's preeminent position in providing admission and new careers for the refugees is illustrated by the fact that 48% of all persons documented in this volume were immigrants to America, where, in large proportion, they achieved the levels of excellence required for inclusion in this *Dictionary*. That this large proportion includes persons of the younger generation of émigrés, who received most or all of their professional training following their emigration, documents the important changes in admission and appointment policies that had revolutionized American higher education since the World War I and, irreversibly, since World War II.

The admission of displaced scholars to the U.S.A. and their placement in academic positions took several forms. For a large majority, and for the younger generation, employment, training, or retraining for a position in a college or university was a personal initiative that followed immigration. Such persons arrived with their families as quota immigrants, especially during the large-scale immigration following November, 1938, and went through the stages of integration and acculturation characteristic of their fellow immigrants. The biographies of numerous university teachers of language and literature (especially German), of political science, sociology, economics, or history suggest successful retraining patterns for former lawyers, civil servants, high school teachers, or businessmen. Like those of the younger generation, their careers were made possible by the expansion of American higher education following World War II. Many received assistance from their families, especially wives, while preparing for those careers. For the younger generation, government support for veterans (the "G.I. Bill-of-Rights") provided grants or loans for advanced training or study. Careers also began for some through training received while serving in the Armed Forces, e.g. in engineering, space, psychology/psychiatry, or information control/communications.

For the numerically most significant group of older and younger refugees, however, the aid they acknowledged receiving from voluntary organizations was decisive in establishing their careers. These organizations were set up primarily along denominational lines, and supported mostly by Jewish contributions. Also significant for refugees of the Nazi period in the U.S.A. were the numerous "self-help" and communal organizations set up by the refugee community in many localities across the country. Their record is beyond the purview of this introduction.\*

Academic refugees displaced by Nazi legislation from established positions in Germany (and after 1938, Austria and Czechoslovakia) began to arrive in the U.S.A. in some number only after 1935. An agency to assist academic scholars, the Emergency Committee in Aid of Displaced Foreign Scholars, had been organized in 1933 by the Institute of International Education, an agency of the Rockefeller Foundation. By 1935, this Emergency Committee had placed 68 scholars in permanent, and 83 in temporary positions, numbers that fall considerably

\* Cf. Steven W. Siegel, compiler, *Archival Resources*, volume I of series, *Jewish Immigrants of the Nazi Period in the U.S.A.* (New York, Munich, 1978).



below the figures for the United Kingdom, where resources were much smaller than those available to American institutions. The number of scholars placed by the Committee between 1933 and 1943 was 228, out of a total of 613 applicants. Only less than half of these 228 scholars had originated in Germany. The number of scholars placed by the Rockefeller Foundation in the U.S.A. between 1933 and 1945 was 313. After November 1938, numerous *ad hoc* committees sprang up across the United States to assist teachers or students among refugees from Germany and Austria. Following the fall of France in 1940, a non-denominational committee, the Emergency Rescue Committee, operated alongside agencies of the American Jewish Joint Distribution Committee, the American Friends Service Committee, and the Unitarian Church in France, Spain and Portugal, to rescue intellectual and political leaders, especially trade unionists. Their admission to the U.S.A. outside the quota system was effected by the President's Committee on Political Refugees, and by the political, religious, and labor organizations whose pressure had brought it into existence. 2,500 of the 3,268 visas issued with the authorization of the President's Committee went to intellectual refugees, including academics.

The placement of refugee scholars from Germany was not popular either in Great Britain or the U.S.A. until by 1937/38, the public perception of the depth of the human crisis engendered by Nazism began to be changed by events. The motives for this lack of wide public support in the perception of the aid agencies concerned, were economic, intellectual, and social. In the U.S.A., younger scientists and academics opposed jobs for refugees since many young American scholars were out of work. Also, the university administrators directing the Emergency Committee feared that placing refugees in large numbers would damage the development of a new generation of productive American scholars. Voluntary Jewish aid agencies whose financial contributions, to a large extent, made the activities of the specialized and non-denominational agencies possible, saw increased anti-Semitism and further immigration restrictions result from a steep increase in the number of refugees in American universities, or in sharper competition between native professionals and the émigrés. The unwillingness of Congress to change immigration laws, and of the Roosevelt Administration to ease their application appear to lend credence to their caution. Immigration was opposed by a vocal conservative lobby. Numerous states and trade unions had long required U.S. citizenship or loyalty oaths as prerequisites for employment or membership.

Of equal influence had been the restrictions imposed by ivy league and other colleges and universities across the country since the 1920s on the admission of Jewish students, and the appointment and promotion of Jewish faculty members, even in departments of science and mathematics. Many of these restrictions had developed in opposition to the opening of admissions to gifted children of immigrants, placing obstacles in the paths of their search for jobs as college teachers. As a result of such social changes, and in defense against the intrusion of "modern doctrines" like evolutionism, religious and philosophical dissent, even abolitionism and bimetallism in the 19th century, American education had split into liberal and conservative factions. This split was reflected, for example, in faculty defense organizations like the American Association of Uni-

versity Professors (founded 1915), and in the increased vulnerability of faculty vis-a-vis administrators during the Depression years. A report by the American Historical Association in the late 1930s revealed substantial inroads into academic freedom. By the late 1930s, several state legislatures had invaded the colleges in search of subversives, and had intimidated faculties into conformity.

If these difficulties arose out of the conservative image of radicalism and pushiness impugned to immigrants and their children, especially the Jewish immigrant of the period, other images derived from changes in the educators' image of German education. Although American intellectuals had shared in the strong anti-German moods of the First World War and repudiated the high esteem in which they had held German graduate studies as models for American universities, by the late 1920s German universities, once again, appeared to influential educational administrators as examples to be emulated, in contrast to what they perceived as the deterioration of American undergraduate education at the hands of the progressives, and its effect on graduate studies.

Crosscurrents such as these shaped the policies of agencies like the Emergency Committee in Aid of Displaced German (Foreign) Scholars and the Rockefeller Foundation, and the numerous organizations established in the 19th century by distinguished German-Jewish immigrant families that now turned to assisting academic refugees. Their involvement, like that of American and British college and university professors, was sparked by the conviction that academic freedom and civil rights were in danger not only in Germany, but that it could happen here, too. To forestall right-wing and anti-Semitic turns in a situation they considered volatile, they refused to assist all but the elite among displaced scholars, did not solicit jobs among American institutions for fear of stirring up anti-Semitism, and strove to disperse refugee scholars among institutions across the entire expanse of the United States. (Contrary to this policy, refugee scholars clustered in institutions in the Middle Atlantic states and New England, the Midwest and California.) This cautious policy of American agencies soon met with the opposition of the British Academic Assistance Council (Society for the Protection of Science and Learning), which provided fares to refugee scholars for visits to the U.S.A., thus expediting the personal search for placement (frequently during speaking tours at colleges and universities), and disregarding the sharp protests of their American colleagues. U.S. placement agencies did not assist younger scholars until 1942, and it was only by the late 1940s that they began cautious solicitation of positions for displaced academics.

Although British academic leaders continued to chide the financial assistance provided for this work by e.g. the Rockefeller Foundation as inadequate, the record contained in this *Biographical Dictionary* suggests far-reaching success in placement, a testimony to the voluntarism and humanism of wide strata of the Jewish community, and of leading academics who sparked the aid effort.

The few postwar investigations available on the "adjustment" of refugee scholars in American undergraduate institutions appear to reflect, in part, the division among progressive and conservative educators and administrators. For the faculties of small, non-cosmopolitan colleges, the German graduate style



of teaching, and the personal and social aloofness of refugee professors appeared grating precisely because it appeared to deny the teaching faculty's progressive and generous impulse to help in defense of academic freedom. Placing elite scholars in graduate positions at major universities, on the other hand, tied in with conservative aims to upgrade higher education. Yet, in placing refugee professors who were either Jewish or of Jewish family background in faculties across the country, a major step was taken towards breaking down anti-Jewish prejudice among faculty, while changed economic conditions and the expansion of higher education following World War II as well as the changed image of the Jew and the Jewish immigrant following the Holocaust permeated public consciousness.

The policy of dispersing refugee scholars across the country to avoid resentment was disregarded by institutions like the Frankfurt Institute for Social Research and the *Bauhaus*, which were transferred whole, or refounded by former members in New York and Chicago, or at the architectural school of Harvard University. Other scholars succeeded in opening up employment opportunities for fellow refugees at their institutions once they had established reputations with faculty, administration, or students. Similarly, faculties and administrators seeking strength in an area of research or teaching that had been introduced by the appointment of refugee scholars sometimes increased the number of refugees on the faculty. This was true, for example, at the University of Chicago where the educational reforms introduced in the humanities by Mortimer Adler and in the social sciences by President Hutchins stressed the kind of integrated learning that corresponded to their image of the "Bildungsideal" of the European elite university and its goal of combining professional training with an integrated world view. Refugee scholars appeared especially qualified to serve as models for such elitism.

Based on similar models and educational convictions was the unique Institute for Advanced Study founded in Princeton, N.J. by Abraham Flexner with funds provided by a private Jewish foundation. Flexner, long an educational conservative, admired prewar German universities for their alleged excellence, and saw the Institute as a frankly elitist and aristocratic statement that could stem the decline brought to American education by reformers and progressives. A number of refugee scholars from several countries, beginning with Albert Einstein, were appointed as life members of the Institute, and succeeded in making major intellectual contributions to American scholarship in fields including mathematics, physics, art history, computer science, economics, political science, and history. Other refugees obtained invitations to work at the Institute for limited periods. However, the results it produced did not differ in kind from work done at major universities across the country; the "democratization," or opening of American higher education to lower economic income groups or minorities, remained the secular trend.

If these appointments originated in conservative images of German education, the other best-known example of a group appointment of refugee scholars grew out of the more traditional American association of immigration with political radicalism. It took place at the New School for Social Research in New York City. Founded in 1919 by American progressives including John Dewey, Thorstein Veblen, Charles Beard, and

James Harvey Robinson, the school was headed since 1923 by Alvin Johnson, an economist and radical-progressive who had served as one of the two editors-in-chief of the *Encyclopedia of the Social Sciences*, and had become acquainted with a number of its German and Austrian contributors in economics and political and social science. The New School differed in design from traditional American universities and colleges, in serving an adult population without imposing the strict qualifications and requirements leading to degrees, and in stressing a critical spirit of progressivism and social reform. Its closest German equivalent was represented by the Berlin *Hochschule für Politik*, where two of Johnson's close associates and colleagues, Charles Beard and Nicholas Murray Butler, had taught as Carnegie professors in the 1920s. By 1933, the New School had established a solid reputation for innovative research and teaching, and had introduced the American public to several new departures in the arts and social sciences.

Shocked like the rest of his academic colleagues by the Nazi dismissal of "the most creative and ablest scholars to be found anywhere," Johnson established a Graduate Faculty of Political and Social Science at the New School — a "University in Exile." He secured its financing from Jewish philanthropists and the Rockefeller Foundation, often precariously. It was "to preserve the methods and character of a German faculty," and would be composed of well-known German university teachers who, in addition, had had practical experience in government, economics, politics, or the media. The 10 refugee social scientists with which he opened the Graduate Faculty in 1933 were selected with the help of refugee economist Emil Lederer, with Hans Speier serving as a go-between to London. They corresponded to Johnson's image of the Faculty. However, among the twenty tenured faculty members teaching at the Graduate Faculty during the first six years, the majority originated outside the German university establishment of Weimar, having taught at labor or business academies, the Hochschule für Politik (seven faculty members), pedagogical academies, or having served in high government positions. It was precisely this non-academic-establishment character of the faculty that had set them apart from their non-political German university colleagues in the 1920s, and fitted them into Johnson's purposes — the upgrading of progressive education, protest against Nazi barbarism, creation of a power center for social reform in the U.S.A., assistance to eminent liberal refugees, and development of the New School's academic standing.

As a result, the New School became a nationally recognized center for innovation. It attracted not only scholars, but also artists like Erwin Piscator, who opened a Theater Workshop there following his exit from the Soviet Union, or the composer Hanns Eisler, whose appointment on a Rockefeller Foundation grant for a study of film music subjected the New School to conservative attacks in Congress for "harboring known Communists" and subversive radicals. Johnson succeeded in giving almost 170 refugee scholars (from *all* Europe under Nazi or Axis domination, in addition to Germany and Italy) at least a first opportunity to start a career in the academic world: most of the refugees obtained more permanent positions at other colleges and universities following their term of service at "the School." The "Graduate Faculty" introduced new levels of adult education into American academic life, saw



faculty members participate in the war effort, or take influential government positions, and became another, possibly important, influence in breaking down American faculty prejudice against Jews. Faculty members remaining at the School achieved respected and influential positions among New York City's liberal establishment (Hannah Arendt, Hans Morgenthau, Albert Salomon, Hans Speier being among the more widely known at the time), precisely as American radical reform was pushed into a defense of New Deal achievements, and as the Cold War broke up the tactical Communist-Liberal alliance of the more innocent 1920s and 1930s. The Graduate Faculty, the "University in Exile," had entered the mainstream of American intellectual life and politics. Like other progressive experiments in American education, colleges like Bard, Bennington or Reed, or like the more temporary and radically experimental Black Mountain College, the progressive New School, for its own reasons and purposes, had joined their humane or forward-looking colleagues at other established universities in welcoming the persecuted scholar.

It is beyond the scope of this introduction to summarize the increasing number of studies dealing with the *intellectual* history of the academic immigrant, his role in research and higher education, and as an agent in the transfer and retransfer of knowledge and methods between his country of origin and the countries receiving him. This *International Biographical Dictionary* provides the first firm basis for comprehensive studies of various fields of knowledge, and of a generation — the so-called "younger generation" — that has received scant

attention in the literature to date. In several fields, the record suggests that international exchanges of personnel preceded the arrival of these refugees, for example through the Rockefeller Foundation after World War I, through foreign students attending continental universities, or, on another level, in the translation and reception of ideas by developing international communications networks. In some fields, most notably physics, mathematics, and some of the social sciences, research and teaching institutes in immigration countries were ready to receive their expelled German or Austrian colleagues because their disciplines were developed sufficiently to accommodate sophisticated contributions from foreigners. In some countries and fields, important stimuli are said to have been provided by the refugee experts, for example in art history, applied mathematics, applied social research, archival training, architecture, or Gestalt psychology. In most of the fields they chose to enter, refugee scholars of the older and younger generations took part in the explosive growth of higher education following World War II, and by the testimony of this *Dictionary*, joined their colleagues in advancing their disciplines through research and writing. It is the hope of the editors of this *Dictionary* that the labors of their dedicated research teams and co-workers on three continents over the last decade have prepared the ground for a comprehensive, worldwide accounting of the intellectual record of a period whose deep shadows are offset by the courage and humanity of these men and women whose achievements represent the will of the refugee community — of all religions, politics, or occupations — to assert life in the face of death.



## RADICALS AND REFUGEES: THE FOUNDATION OF THE MODERN LAW REVIEW AND ENGLISH LEGAL SCHOLARSHIP

A FIFTIETH anniversary is as good a time as any to reflect on an institution such as the *Modern Law Review*.<sup>1</sup> While the circumstances of its birth and upbringing may seem far less significant than the individual articles, notes and reviews which have appeared within its pages during the past five decades, many of those connected with its foundation and early years have had no doubts as to its importance. Theo Chorley, the General Editor from 1937-1971, came to regard his work for the *Review* as his most significant and enduring contribution to scholarship and learning.<sup>2</sup> Otto Kahn-Freund, long associated with the publication, has written of its general purpose as being, "... to stimulate the study of law as a social science and to pay the closest attention to the social forces which make the law and to law itself as a social force."<sup>3</sup> He believed that, "few things have done as much for broadening and deepening these legal studies" as the creation of the *Review* in 1937.<sup>4</sup>

In the 50 years of its existence, the journal has contained an extraordinary range of material, maintaining the very highest critical standards. Yet Kahn-Freund himself recognised that two issues were inextricably linked in the approach which he and his colleagues had pioneered. The first is the acceptance and implications of law as a branch of the social sciences. The second, and more important, is the relationship between the teaching and study of law, viewed as a social technique, and the role of the profession for which legal training is primarily intended.<sup>5</sup> The group of academics responsible for bringing the *Review* into existence did not regard these questions as abstractions, but as directly related to the context in which they lived and worked.

<sup>1</sup> Cf. a recent breezy dismissal of such occasions. "That the *Review* is 100 years old has no significance. Even the fact that I live in a house that is 82 years old has greater significance. It has implications for problems of maintenance and repair, and it tells one something about the architecture and structural features of the house. But as a journal has no natural life span, the fact that it is 100 years old should interest only people who have a superstitious veneration for round numbers. The reason the *Harvard Law Review* is 100 years old is that it was started 100 years ago; the law reviews of all the major law schools are still being published, and if they had been started 100 years ago they too would be 100 years old." R. Posner, "The Decline of Law as an Autonomous Discipline" (1987) 100 Harv.L.Rev. 761. For a contrary, and perhaps more authoritative, view, see Leviticus xxv.1,9-10.

<sup>2</sup> O. Kahn-Freund, "Lord Chorley 1895-1978" (1978) 55 L.S.E., 8, 9; Editorial, "Lord Chorley" (1978) 41 M.L.R. 121, 122.

<sup>3</sup> O. Kahn-Freund, "The Legal Framework of Society" in W. Robson (ed.), *Man and the Social Sciences* (1972), p.197, 202.

<sup>4</sup> *Ibid.*, p.219.

<sup>5</sup> *Ibid.*, pp.199-202.

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In a recent lecture on the establishment of the modern law faculties in London law faculties since the second world war, the results of the move from collegiate teaching to the different student societies at the University.<sup>6</sup> It was the result of two different groups of people. The British legal profession involved were not professional hegemony lawyers in general and the benefits to be derived from legal reasoning and social engineering. Since the status of law in the unsympathetic legal profession and their intellectual acceptance and admission has held good until 1950, Professor C. legal education is one of England in recent years is one of complacent

Jurists like Kahn-Freund have undergone a continuing sense of polite surprise at their adopted country between a liberal and a study of law was a relationship between such, it provided the practising lawyer. The perception of substance Professor Dahrendorf the "functional equilibrium in training their students. The inculcation of such had a direct result of a general approach intended to lead to and business decisions

<sup>6</sup> W. Twining, "1836 and (forthcoming).

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In a recent lecture, Professor Twining has described the establishment of the *Review* as exemplifying some remarkable achievements in scholarship emerging from the University of London law faculties in the years immediately preceding the second world war, the result of the harmonious and high level of inter-collegiate teaching by full-time professionals and of the effect of the different student constituencies on the teaching staff of the University.<sup>6</sup> It was the result, too, of a synthesis of attitudes held by two different groups of teachers concerned with legal studies. The British legal reformers and the German Jewish refugees involved were not political radicals, nor did they pose a threat to professional hegemony. Instead, they sought to persuade practising lawyers in general and the legal establishment in particular of the benefits to be derived from the explicit articulation of modes of legal reasoning and from the treatment of law as a method of social engineering. Such an approach, which would inevitably raise the status of law teaching, proved difficult to impress on an unsympathetic legal profession. Although the academics themselves and their intellectual style were to gain a much wider measure of acceptance and admiration, the conclusion by one of their number has held good until comparatively recently. Writing in the *Review* in 1950, Professor Gower sourly observed that, "The subject of legal education is one which has aroused singularly little interest in England in recent years and the general professional attitude to it is one of complacent apathy."<sup>7</sup>

Jurists like Kahn-Freund, Friedmann and Mannheim, who had undergone a continental training in law, seemed often to express a sense of polite surprise at the continuation of this state of affairs in their adopted country and at the antithesis apparently established between a liberal and a professional education. For them, the study of law was a broad academic pursuit designed to explore the relationship between social change and legal regulation and, as such, it provided the essential intellectual background for the practising lawyer. This attitude was derived from a quite different perception of substantive law teaching. With conscious exaggeration, Professor Dahrendorf has characterised German law faculties as the "functional equivalent" of English public schools, long involved in training their students for élite membership of the upper class. The inculcation of societal values in this way for such a group has had a direct result on the teaching process itself, concentrating on a general approach rather than emphasising a specific technique intended to lead to practice. The fact that a wide range of political and business decision-makers have had a legal education has

<sup>6</sup> W. Twining, "1836 and all that: Laws in the University of London 1836-1986" (forthcoming).

<sup>7</sup> L. C. B. Gower, "English Legal Training," (1950) 13 M.L.R. 137.



contributed to the comparatively low status of members of the German judiciary and the enhanced status of law teachers.<sup>8</sup>

Holdsworth attributed the different situation in England to the presence of a centralised judicial system, a group of learned lawyers, both at the Bar and on the bench, bound together by a common professional tradition, and an independent well paid bench, more able than the Bar on the whole.<sup>9</sup> The judiciary had become invested with a prestige and authority "unique, and perhaps comparable to those of the Roman *pontifices* prior to the Twelve Tables."<sup>10</sup> While an uncodified case-law remained supreme, the only way of becoming a practical adept was by study and practice at the Bar.<sup>11</sup> As a result, English legal education has been predominantly regarded as a preparation for legal practice.<sup>12</sup> The absence of a requirement of a law degree as a prerequisite for such practice, and the control exercised by the two branches of the profession over their own educational requirements, inevitably had a depressing effect on university law teachers who accepted an inferior status for themselves and were content to adopt a crude and uncritical pedagogic form of exposition. Even great legal scholars exhibited a marked lack of self confidence. Maitland called for a successor for his own subject to arise from the ranks of failed barristers.<sup>13</sup> In his inaugural lecture, Dicey felt impelled to answer the question as to whether English law could be taught in universities with an affirmation of the value of such academic training.<sup>14</sup> For whatever reason, however, many future judges, educated primarily at Oxford and Cambridge, chose not to study law. As late as 1929, Laski was wryly confiding to Holmes that, "... outside one or two posts like the Vinerian professorship the law teachers are a very inferior set of people who mainly teach because they cannot make a success at the bar."<sup>15</sup>

Solicitors had obtained a statutory monopoly of non-contentious work by the early nineteenth century. Advocacy in the superior courts was reserved for a small, highly centralised and socially cohesive Bar which alone supplied the recruits for the ranks of the judiciary. Financially secure, the profession saw little need to

<sup>8</sup> R. Dahrendorf, "The education of an elite: law faculties and the German upper class" (1964) reprinted in V. Aubert (ed.), *Sociology of Law* (1969) pp. 294-309. R. C. K. Ensor, *Courts and Judges* (1933) provides an excellent comparative survey of the position in England, France and Germany.

<sup>9</sup> W. Holdsworth, *Some Lessons from our Legal History* (1927) p.203.

<sup>10</sup> O. Kahn-Freund, "Reflections on Legal Education," (1966) 29 M.L.R., pp.121, 126.

<sup>11</sup> Ensor, *op. cit.*, pp.84-85.

<sup>12</sup> For an analysis of this development, see Max Weber, *Law in Economy and Society* (1954) Max Rheinstein (ed.), pp.198-205.

<sup>13</sup> "The day may come when in the bitterness of his soul he will confess he is not going to succeed, when he is weary of waiting for that solicitor who never comes, when the prolonged and costly education seems thrown away. That is the hopeful moment." F. W. Maitland, "Why the History of Law Is Not Written," *Collected Papers, Vol. I*, (H. A. L. Fisher ed.) (1911) p.480, 498.

<sup>14</sup> A. V. Dicey, *Can English Law be Taught at the Universities?* (1883).

<sup>15</sup> M. de W. Howe (ed.), *Holmes-Laski Letters* (1953), Vol. II, p.1156.

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expand its horizons or to eschew a particular form of pragmatic reasoning and decision-making through case law development. As laissez-faire gave way to collectivism as the dominant ideological form, judges and lawyers were increasingly removed from important areas of the decision-making process.<sup>16</sup> Some contemporary commentators saw the system of legal education as directly responsible for lawyers' satisfaction with legal institutions and their apathy towards reform in the face of public criticism.<sup>17</sup>

By the mid-1930s, discernible changes were taking place. A major cause was the desire by the Law Society to raise its own status and that of solicitors and to be seen to be providing services for non-London practitioners whom the Society wished to attract as members. After 1922, the academic standard for entry into the profession was raised and the holder of a law degree was allowed to avoid a whole year's compulsory attendance at lectures. The expansion in the numbers practising which went with successive building booms led to a demand for degree places resulting in the creation of a number of law schools within provincial universities, assisted with finance provided by the Law Society.<sup>18</sup> It is true that, for a considerable time, these schools were to be little more than a facility for the provision of a restricted intellectual background for vocational training, principally by the use of local practitioners as teachers on a part-time basis. But they did contribute to the growing feeling of enhancement of professional status on the part of law teachers. The Society of Public Teachers of Law had been founded in 1909 and publication of a Journal commenced in 1924. Between 1921-36, membership of the Society doubled and by 1938 had reached a total of 165 ordinary members.<sup>19</sup>

Law teaching in the University of London was long established and had never come under the domination of the Law Society. The atmosphere of the capital promoted an expansion in legal studies which was altogether different from developments in the provinces and law teaching at Oxford and Cambridge. Under the leadership of vigorous and long serving deans, a growing number of full-time teachers were recruited, whose teaching was supplemented by assistance from first class practitioners. There was an emphasis on the teaching of commercial law subjects for the various constituencies of students enrolled in the University.<sup>20</sup> From this process emerged an independently minded and critical group of academics interested in teaching and research in subjects which affected the everyday lives of the mass of the population. William Robson had published his seminal work, *Justice and Administrative Law*, in 1928 and he

<sup>16</sup> R. Stevens, *Law School* (1983) 132. For an extended discussion on this topic, see B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (1967) pp.111-134.

<sup>17</sup> A. M. Carr-Saunders and P. A. Wilson, *The Professions* (1933) p.53.

<sup>18</sup> B. Abel-Smith and R. Stevens, *op. cit.*, pp.180-183.

<sup>19</sup> (1938) J.S.P.T.L. 70.

<sup>20</sup> Twining, *op. cit.*, who has noted these as full-time day students, internal evening students and three classes of external students.



introduced and developed courses in administrative and industrial law.<sup>21</sup> Ivor Jennings produced a number of major works within a few years on subjects such as local government, housing, public health and constitutional law. Such teachers were interested in comparative law, in the process of law reform and in a descriptive analysis which went beyond the judgments in decided cases.

These progressive academics were now to be joined by a small but influential number of Jewish scholars who had come as refugees from Nazi Germany. Immensely hardworking, they were to demonstrate a remarkable facility in their use of the English language. Otto Kahn-Freund was not initially the most prominent amongst them, but he was to play a growing role in the expression of a new approach to the analysis of English law.<sup>22</sup> He had been born into a wealthy and sophisticated middle class family and, while still a law student, had joined the social democratic party, coming under the influence of Hugo Sinzheimer, a leading German labour lawyer. In 1928, Kahn-Freund entered the state judicial service as a junior judge in the Berlin labour tribunal and began to develop his own critical theory of labour law based on Sinzheimer's theories and a strong attraction to Marxist analysis, although he never became an orthodox Marxist. Interrogated and dismissed after Hitler came to power, he and his wife travelled to England in June 1933. After taking a graduate degree at the L.S.E., he became an assistant lecturer there in 1936, interesting himself in a wide variety of subjects, including labour, family and transport law. Unlike many others, Kahn-Freund did not develop into an uncritical admirer of the country which had given him haven. In his first few years here, his attitudes were more than reinforced by the "telescope" of the immigrant and were more than reinforced by the fact that he belonged to a minority which in some ways was discriminated against.<sup>23</sup> On the one hand, he admired what he saw as "... the omnipresent signs of an inherited political and social struggle in which everyone participated, including the workers in the unions ... and which resulted from something which I had thus far only been able to despise: tradition." On the other, he despaired of a general obtuseness, generally in all classes, as regards international affairs. The natural desire of the recently arrived foreigner not to take an active part in political matters was

<sup>21</sup> His courses in administrative law were at first given for students in the Government Department and not made available to law students until 1933: Kahn-Freund, *The Legal Framework of Society*, op. cit., p.212. See also, K. W. Wedderburn, "Great Britain: The present state of law teaching and of research into labour law and the law of social security," in *Report of Sixth International Congress of Labour Law and Social Security* (1966), p.26.

<sup>22</sup> Early biographical information about Kahn-Freund is drawn from O. Kahn-Freund, *Labour Law and Politics in the Weimar Republic* (1981) R. Lewis and J. Clark (eds.) pp.1-5 and pp.195-201. See also, Editorial Note, "Professor Sir Otto Kahn-Freund" (1979) 42 M.L.R. p.609.

<sup>23</sup> "You may find this a little staggering, but the fact that one is a Jew is the most important fact in one's life." *Ibid.*, pp.196-197.

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helped by the realisation that the cause was much larger than he was. He was a "bridge-builder," bridging the gap between the attempt to legalise the

The social and economic changes that had produced a radical new common cause through the union based working class movement of a variety of theoretical origins primarily to the Fabian thought rather than to the Fabianism. Nevertheless, there was a reluctance to which the ruling class acquiescence during the transition to a socialist society. The theory rejected the theory of the institutions of government and democracy secured a narrow box.<sup>25</sup> Many who eschewed a logic which embraced the Some despaired of the communists or fellow admirers of all the himself to be involved in other committed Labour able satisfactorily to analysis of a class based process of gradualism

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<sup>24</sup> Kahn-Freund, *Labour Law*

<sup>25</sup> See K. Harris, *Attlee's 1930s* (1977) examines the decade and their effect on P.

<sup>26</sup> For an account of the see K. Martin, *Harold Lasker Report*, *Daily Express* (n.d.)

<sup>27</sup> On this generally, see M.

<sup>28</sup> Lord Beveridge, *The* (1960) pp.52-58; Lord Robert J. Harris, *William Beveridge*



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helped by the realisation that the sphere of the "non-controversial" was much larger here than in Germany. He felt that he was a "bridge-builder," bringing as his contribution to this country an attempt to legalise the class struggle in a capitalist system.<sup>24</sup>

The social and economic upheavals caused by the first world war had produced a radical middle class intelligentsia which made common cause through the Labour Party with a growing trade union based working class movement. The Party embraced a wide variety of theoretical tendencies, but it owed its philosophical origins primarily to a form of pragmatic Christian socialism and Fabian thought rather than to the writings of Marx or Lenin. Nevertheless, there was always a vigorous debate as to the extent to which the ruling class would be prepared to cede power by acquiescence during the process of transformation towards a socialist society. The mainstream of the Party, led by Attlee, rejected the theory of a class war and aimed at capturing the institutions of government by means of a wider representative democracy secured through party political debate and the ballot box.<sup>25</sup> Many who espoused a Marxist rhetoric themselves shrank from a logic which emphasised the inevitability of violent revolution. Some despaired of the possibility of peaceful change and became communists or fellow travellers on a road which led to an admiration of all things Soviet. Unlike Kahn-Freund, who saw himself to be involved in a conscious attempt at legitimation, some other committed Labour Party members, like Laski, were never able satisfactorily to deal with the contradiction between their own analysis of a class based society and an advocacy of change by a process of gradualism.<sup>26</sup>

In the aftermath of the world depression, the intellectual debate about the future of capitalism had become polarised between the advocates of collectivism and of the free market.<sup>27</sup> In no academic institution was this debate sharper than at the London School of Economics, founded by a group of Fabians as a home for the social sciences. Under the strong but increasingly querulous directorship of William Beveridge, the School had become a world centre for teaching and research, with an undeserved reputation for being dominated by left wing thought, largely the result of the teaching and writings of Laski.<sup>28</sup> In fact, many members of the teaching staff were in ideologically opposed camps led by Laski

<sup>24</sup> Kahn-Freund, *Labour Law and Politics*, etc., *supra*, p.199.

<sup>25</sup> See K. Harris, *Attlee* (1982) pp.129-132. B. Pimlott, *Labour and the Left in the 1930s* (1977) examines the many strands of thinking within the Labour Party during this decade and their effect on Party policy.

<sup>26</sup> For an account of the libel action which centred round Laski's attitude to violence, see K. Martin, *Harold Laski* (1953) pp.163-169 and "The Laski Libel Action: Verbatim Report," *Daily Express* (n.d.).

<sup>27</sup> On this generally, see M. Stewart, *Keynes and After* (2nd ed., 1972).

<sup>28</sup> Lord Beveridge, *The London School of Economics and its problems 1919-1937* (1960) pp.52-58; Lord Robbins, *Autobiography of an Economist* (1971) pp.123-144 and J. Harris, *William Beveridge* (1977) pp.263-310.



and Robbins. Their mutual hostility had an increasing effect on Beveridge, who became obsessed with questioning the role of the social sciences and the issue of academic detachment.<sup>29</sup> He, himself, inclined towards a crude inductionism, a belief in a value free, empirically based research method and the need for university teachers to remain outside the political arena. In June 1937, these subjects were the basis for a bitter farewell speech to his colleagues after he had resigned to become Master of University College, Oxford.<sup>30</sup> Although the implication that some academics involved in social science teaching were incapable of teaching in an impartial manner was widely resented,<sup>31</sup> many teachers who were politically aligned must have felt pressure upon them to avoid disclosing their ideological preferences in the performance of their university duties.

Law had been taught at the L.S.E. from the School's beginning. Beveridge had taken a law degree himself and was particularly interested in building up a strong group of teachers in this field. In 1920, he contrived to have a chair endowed in commercial and industrial law to which Gutteridge was appointed. Three years later, he persuaded his old Oxford teacher, Edward Jenks, to accept the chair of English law, the first such full-time Professorship in the University.<sup>32</sup> Jenks took with him, from the Law Society's School, Theo Chorley, who succeeded Gutteridge in 1930 and quickly became the leading academic expert in banking and marine insurance law. A man of great modesty and self-effacement, Chorley belonged to what is sometimes referred to as "the great radical tradition"<sup>33</sup> of English social reform. A committed Labour supporter and social democrat, he had a passionate interest in professional development, law and penal reform, and civil liberties. For well over 30 years he remained a key figure in the promotion of progressive causes, both within and without the legal profession, and he was able to introduce other law teachers to a variety of outside influences, broadening their own views. Throughout his life he advocated a closer relationship between practitioners and academics, and an interest by both groups in subjects generally thought to be the exclusive preserve of the other.<sup>34</sup>

By the late nineteen-thirties, there were eleven teachers of law at the School. All but one could be described as advocating a more

<sup>29</sup> Beveridge made strenuous attempts to curb Laski's political activities and articles in the *Daily Herald*. In May 1932, the Court of Governors resolved that the staff should regard it as a personal duty to preserve in their writings or speeches a proper regard for the reputation of the School as an academic centre of scientific teaching and research. Beveridge, *op. cit.*, pp.54-56.

<sup>30</sup> W. Beveridge, "The Place of the Social Sciences in Human Knowledge," *Politica*, II, p.459. See also Harris, *op. cit.*, pp.309-310.

<sup>31</sup> Lord Chorley, "Beveridge and the L.S.E." (1973) 45 L.S.E., pp.5, 7-8.

<sup>32</sup> Beveridge, *The London School of Economics and its problems*, *op. cit.*, pp.83-84.

<sup>33</sup> Editorial, "Lord Chorley," *op. cit.*, p.122.

<sup>34</sup> See, for example, Lord Chorley, "Pleading: A Subject for Scientific Study." (1949) 12 M.L.R. 319, where he persuasively argued for the establishment of a chair in Procedure in this country.

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modern approach towards their respective subjects. These lawyers found themselves generally popular with their colleagues and they did a considerable amount of teaching for degree courses other than the LL.B., forging links in the process with members of other disciplines. Beveridge admired their interest in social issues, which they combined with an atheoretical and apolitical approach. Laski found their progressive attitudes congenial as well, although they were careful to distance themselves from his own gladiatorial style.<sup>35</sup> For all this, they still found themselves treated as a separate group, and the difficulty remained of persuading others to accept that law should be classified as a genuine branch of the social sciences. Kahn-Freund has carefully analysed the arguments for and against such a classification within a group of largely empirical disciplines dominated by factual investigation.<sup>36</sup> For the radical academic lawyers of the time, however, the debate was not simply a theoretical one. They were anxious to raise the status of law as an academic subject by locating it within a wider intellectual tradition.<sup>37</sup> To do this, they had to overcome crude inherited notions about the narrowness of legal technique held by non-lawyers and lawyers alike. Whilst laypeople and other academics did not find it difficult to appreciate that a written text, such as a poem or a play, might be the subject of varying interpretations,<sup>38</sup> they were unable to comprehend that the same might be true of a statute or a court judgment or to understand how empirical research might be applied to the study of law. Moreover, most practising lawyers and judges reacted unfavourably to any suggestion that they should bring a knowledge of social science to their own task.<sup>39</sup>

The sense of frustration which such responses inevitably produced in academics here was intensified when they viewed the ferment in legal education in the United States, where the debate over the so-called realist movement had engulfed the élite law schools in vigorous and sometimes bitter argument and discussion.<sup>40</sup> Whatever "realism" actually meant, it seemed to betoken a whole new approach to law by a group of younger teachers who showed a

<sup>35</sup> For Chorley's balanced summing up of Laski's sometimes mischievous attitude, see *Beveridge and the L.S.E.*, *op. cit.*, p.6. But he regarded him as a brilliant and devoted teacher and publicly defended him when he felt that his intellectual liberty was under attack. K. Martin, *Harold Laski*, *op. cit.*, p.87.

<sup>36</sup> O. Kahn-Freund, "The Legal Framework of Society," *op. cit.*, pp.199-201.

<sup>37</sup> A. Hunt, *The Sociological Movement in Law* (1978) traces the development of this tradition during the twentieth century.

<sup>38</sup> R. Dworkin, *Law's Empire* (1986) pp.44-86 shows the difficulties inherent in concepts of interpretation of law.

<sup>39</sup> "The learned Judge tells us that he is a student of sociology; I don't know what the word means, it sounds nasty—in my opinion the less a learned Judge knows about it, the better." *per* Scrutton L.J. in *Place v. Searle*, reported at (1932) 2 K.B. 497. There are several accounts of the words used, which were excised from the published Report. This version is taken from H. Slessor, *Judgment Reserved* (1941) p.251.

<sup>40</sup> See W. Twining, *Karl Llewellyn and the Realist Movement* (1973) pp.70-83; R. Stevens, *op. cit.*, pp.131-172.



heady scepticism about legal institutions and doctrines, saw the necessity for a changing legal process stimulated by a society in flux, were interested in fact finding about the legal system by scientific means and wove complex predictive theories about the behaviour of judges.<sup>41</sup> A philosophy of pragmatism and the rapid rate of economic and social change emphasised the divorce between the law in books and the law in action.<sup>42</sup> This debate had come to be developed within a cultural and professional context which had, arguably, made a conscious break with an English past. The law schools became the major beneficiaries of an atomistic approach to the common law<sup>43</sup> and the leaders attained an awesome prestige, teaching a graduate group of students who were responsible for editing the law reviews, the medium through which much legal discussion was conducted.<sup>44</sup> There was a constant interplay with members of the Bench. Professional lawyers played an increasingly important role in the commercial and political life of the nation and many leading academic lawyers went into government during the period of the New Deal, influencing social and economic policy as well as political strategy.<sup>45</sup>

British legal academics were kept abreast with events in the United States through a variety of ways. A large quantity of written material, including the leading law reviews, crossed the Atlantic. There was considerable personal contact. The editor of the *Law Quarterly Review*, Arthur Goodhart, was an American who had emigrated to England in the nineteen-twenties, but had retained a close connection with his native country and legal education there. Continental scholars here were in touch with colleagues who had emigrated to the United States.<sup>46</sup> Above all, Harold Laski was a constant advocate of the system of American legal education.<sup>47</sup> From the time he had taught at Harvard, he had cultivated a number of friendships amongst academics at Ivy League law schools, especially with leading teachers such as Felix Frankfurter. He had carried on a long correspondence with Holmes J., whose radical conservatism and sceptical views must have seemed revolutionary to forward looking legal academics here.

<sup>41</sup> "The English teacher emphasizes what the judge has said: the American professor explains what the judge should have said." A. L. Goodhart, *Essays in Jurisprudence and the Common Law* (1931) p.69.

<sup>42</sup> W. Twining, "Pericles and the Plumber," (1967) 83 L.Q.R. 396, 407.

<sup>43</sup> Stevens, *op. cit.*, pp.131-134.

<sup>44</sup> In 1937, 50 law reviews were being published across the country. J. McKelvey, "Law School Review 1887-1937" (1937) 50 Harv.L.Rev. 868.

<sup>45</sup> P. Irons, *The New Deal Lawyers* (1982). The leading recruiter for the Roosevelt administration was Professor Felix Frankfurter of the Harvard Law School. See *Roosevelt and Frankfurter. Their correspondence 1928-1945* (annotated M. Freedman) (1967) pp.303-310.

<sup>46</sup> Kahn-Freund's uncle, for example, was Professor Ernest Freund, a leading American administrative lawyer and civil liberties campaigner. Kahn-Freund, *Labour Law and Politics in the Weimar Republic*, *op. cit.*, p.4.

<sup>47</sup> For Laski's own view of the role of the judicial process in the modern state, see H. Laski, *The Grammar of Politics* (1930) pp.541-586.

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Laski was a constant populariser of Holmes' views and some of his most famous, if somewhat ambiguous, aphorisms and the appeal for the expression of the "inarticulate major premise"<sup>48</sup> in judgments soon became a shibboleth for reforming lawyers in this country.

Laski was also responsible for persuading Sankey to establish a legal education committee under the chairmanship of Lord Atkin, on which he, together with Beveridge and Gutteridge, served. He dreamt of procuring the development of the equivalent of a Harvard Law School in this country.<sup>49</sup> He particularly admired "... the open way in which the American profession examines its own behaviour and sets out directly to impress its character as a public service, as compared with the reticence and complacency of the British profession."<sup>50</sup> But he was no match for Schuster and the other conservative members of the committee and the Report when published<sup>51</sup> "had surprisingly little to say about the problems of legal education"<sup>52</sup> beyond recommending an advisory committee to co-ordinate teaching arrangements and the establishment of an institute for legal research. Abortive, too, was an attempt by Chorley, with Laski's assistance, to persuade Sankey to appoint an academic lawyer, Gutteridge, to the Appeal Court Bench.<sup>53</sup> This result was hardly surprising, as such an appointment would have been seen as directly attacking notions of professional supremacy. The traditional justification for the exclusion of academics from the ranks of the judiciary continued to be put by successive Lord Chancellors. "I do not want to see the judicial bench filled with people who are no doubt terrifically learned but are living in complete seclusion and have no contact with the world."<sup>54</sup>

By the beginning of 1937, a number of London University teachers were canvassing a proposal to establish a new periodical which would provide an academic forum, entirely lacking at the time, for the critical examination of contemporary legal issues. The leading legal academic journal was the Oxford based *Law Quarterly Review*. It specialised in articles on legal history and aspects of legal doctrine and rarely discussed recent legislation, committee reports or wider social issues.<sup>55</sup> The tone was classificatory and

<sup>48</sup> Holmes insisted that unconscious preferences and views were the basis for court decisions. "General propositions do not decide concrete cases. The decisions will depend on a judgment or intuition more subtle than any articulate major premise." *Lochner v. New York*, 198 U.S. 45, 76 (1905).

<sup>49</sup> *Holmes-Laski Letters, op. cit.*, Vol. II, p.1156.

<sup>50</sup> H. Laski, *The American Democracy* (1949) p.569. After the war, he was to describe the legal profession in the United States as "the essential mercenaries of the propertied classes." *Ibid.*, p.591.

<sup>51</sup> (1934) Cmd. 4663.

<sup>52</sup> Report of the Committee on Legal Education (1971) Cmnd. 4595, para. 33.

<sup>53</sup> An account of this approach is given in R. Heuston, *Lives of the Lord Chancellors 1885-1940* (1964) pp.523-4.

<sup>54</sup> Lord Simon, quoted in R. Heuston, *Lives of the Lord Chancellors 1940-1970* (1987) p.57.

<sup>55</sup> An exception was the anniversary number of the *Review* in January 1935, which was devoted to articles by distinguished contributors surveying the law in various fields over the previous fifty years.



reverential.<sup>56</sup> A new Review would not only be the means to advance progressive views and analysis by encouraging teachers to adopt a different approach, but might have a greater influence over members of the legal profession, the judiciary and legislators than the teaching process could achieve. Such a venture would also contribute to the raising of the status of the institution concerned. L.S.E. had already begun publishing journals in politics and economics and, from 1928, an *Annual Survey of English Law* prepared by law and international studies teachers. At a more general level, a group of interested academics, including Robson, had founded the *Political Quarterly*, which published articles on a variety of topics concerned with social policy and political organisation, including a series on legal reform.<sup>57</sup>

The debate about the nature and form of the projected magazine took place between like-minded members of staff at both L.S.E. and University College. Some favoured the long-standing proposal to found a Review on American lines through the medium of the London University Law Society. There was a precedent for this, as an annual *Cambridge Law Review* had been founded in 1921 with student editors, but with a considerable amount of faculty assistance. But there were only a small number of students, mostly undergraduates, who might have been able to undertake such a task in London.<sup>58</sup> The decision to make the new periodical a faculty one reflected the aspirations and needs of teachers for a voice of their own.<sup>59</sup> With the aid of a grant of £30.00 from the Behr Foundation, the *Review* was born.

Chorley seemed the natural choice as General Editor. An Editorial Committee was formed, consisting of members from the L.S.E. and University College.<sup>60</sup> A deliberate attempt was made to recruit an Editorial Board whose members would act as patrons of the *Review* and whose names would emphasise that the new journal was progressive but not revolutionary, academic but still of relevance to the practising profession. Four legal academics were chosen. Both Gutteridge and Sir Maurice Amos K.C.<sup>61</sup> were

<sup>56</sup> A. Paterson, *The Law Lords* (1982) p.15 states that Professor Goodhart was reputed to have had a policy of preventing stringent comment on the performance of the Law Lords on the grounds that it would offend the Law Lords.

<sup>57</sup> The series, published between 1933-35, had included articles written by Amos, Chorley, Jennings and Carr-Saunders on topics such as codification, a Ministry of Justice and the court system. W. Robson, "The Founding of the *Political Quarterly*" (1970) *Political Quarterly*, p.1, 33.

<sup>58</sup> During 1933-34, London University had 29 teachers and 307 students. E. Jenks, "English Legal Education," (1935) 51 L.Q.R. 179. Many of the students were part-time. In 1937, L.S.E. only awarded 17 LL.B. degrees. *L.S.E. Calendar 1938-39*, pp.471-472.

<sup>59</sup> Some, like Gower, did not regard the establishment of the *Modern Law Review* as obviating the need for a student sponsored Law Review which would play a vital part in legal education. L. C. B. Gower, "English Legal Training," *op. cit.*, p.191.

<sup>60</sup> Apart from Chorley, the first Editorial Committee consisted of George Keeton (Business Editor) who shouldered much of the administration work involved in starting the journal, Joseph Gold (Magazine Editor), L. C. B. Gower (Case and Statute Note Editor), Wolfgang Friedmann (Review Editor) and Joe Unger (Secretary).

<sup>61</sup> Quain Professor of Comparative Law at University College 1932-37, after a distinguished career as a British representative on many international committees and delegations and as Judicial Adviser to the Egyptian Government.

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distinguished teachers, associated with the London law faculty and well known outside it. Goodhart was generous in supporting the new venture,<sup>62</sup> although there appears to have been some soul searching as to whether the use of the word "Modern" in the *Review's* title would cause offence by appearing to be a slighting reference to his own *Review*.<sup>63</sup> John Foster, a fellow of All Souls, was Secretary to the Law Reform Committee. Two practitioners who had proved themselves friendly to academics at London, Leslie Burgin<sup>64</sup> and Richard O'Sullivan K.C., were also appointed. The only non-lawyer was the L.S.E. sociologist, Professor Morris Ginsberg.

The first issue of the *Review* was published in June 1937. Brought out as a quarterly, its form was much the same as other legal journals, although the sections for comment on statutes and the reports of committees, deliberately placed before the case notes, were novel and designed to emphasise the importance of legislation as a method of law making. The number also contained the expression of the general attitude of those who had founded the *Review* in the form of editorial notes which began with an "apologia" for the appearance of "yet another journal devoted to the discussion of legal topics." Almost the whole of these notes were taken up with a long extract from the circular which had previously been addressed to the profession and others who might be interested in subscribing to the new journal. The passage quoted has a close resemblance to the prospectus issued 10 years previously proposing the establishment of the *Political Quarterly*.<sup>65</sup>

"English legal periodicals have hitherto dealt almost exclusively with the technical aspects of the law treated from such varying points of view as the historical, analytical and descriptive. Although this approach is, and must always remain, indispensable, a group of lawyers, including members both of the teaching and practising branches of the profession, have for some time been thinking that it isolates the law too much from those contemporary social conditions in which it must always operate, and therefore cannot safely be used as an exclusive method of legal thinking. They have decided accordingly to start a new periodical to be called *The Modern Law Review*, which it is hoped will usefully supplement the existing periodical literature.

The *Review* deals with the law as it functions in society and primarily with English Law in its relation to contemporary English conditions and problems. For this purpose, however,

<sup>62</sup> See his Note at (1937) 53 L.Q.R. 470.

<sup>63</sup> Letter from Sir Joseph Gold to Secretary, *Modern Law Review*, April 9, 1987.

<sup>64</sup> A leading London solicitor and Member of Parliament who had previously been Director of Legal Studies to the Law Society. See Lord Fletcher, *Random Reminiscences* (1986) pp.17-22.

<sup>65</sup> W. Robson, "The Founding of the Political Quarterly," *op. cit.*, pp.5-7 where the prospectus is set out in full. Robson had taken advice from a colleague in the L.S.E. Law Department as to the establishment of a company to run the magazine and a similar course was taken with the *Review*.

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it will necessarily have to consider the treatment of similar conditions and problems in other countries, and especially those with closely related systems, such as the British Dominions and the United States. It will take as its field also those branches of scientific study in which law is an important but not the only factor. To take a few examples: problems of punishment and recidivism must interest the criminal lawyer as well as the criminologist; problems of monopoly are of primary interest to the economist, but they are closely affected and controlled by legal rules as to restraint of trade; the problem of adjusting the law of defamation to modern conditions with their enormous growth of newspapers and other printed matter calls for the careful consideration both of the lawyer and the legislator; the problem of how far the mass of industrial legislation actually affects the lives of the industrial population whose social and economic conditions it is intended to protect, and of its effect on economic conditions generally, is of importance to the lawyers as well as to the economist and sociologist.

Conversely it is important to be acquainted with the particular social conditions and ideas which produce the law, whether in statutes or cases. The inarticulate major premise is dominant not only in the judge but in the legislator and the administrator; all these are often faced with problems and decisions which demand a clear conception of the social basis of the law.

Again, the recent history of English Law has been one of continual reform and re-adaptation. This is a process which it is believed must go on for a long period. All projects of reform should be subjected to searching analysis and discussion in their early stages. In the past the legal journals have not taken a very prominent part in this necessary process, which has, for the most part, been left to the lay press. It is intended to make constructive proposals for, and criticism in connection with, legal reform a special feature of the *Review*.

These and many other aspects of the law will be regarded as within the scope of *Modern Law Review*."

The introduction thus went to considerable lengths to convince potential readers of the *Review* of its reformist nature and of its intention to support law reform within the context of a debate which emphasised the continuity of the development of English law. It stressed that the periodical was the product of a group of both teachers and practitioners who saw the need to encourage lawyers<sup>66</sup> and legislators to widen their field of vision, although the reference to Holmes' "inarticulate major premise" was not likely to win many professional friends.<sup>67</sup>

<sup>66</sup> A number of practising lawyers had written critically about the legal system during the 1930s. Examples included, C. Mullins, *In Quest of Justice* (1931); "Solicitor," *English Justice* (1932), C. Muir, *Justice in a Depressed Area* (1936). A. P. Herbert, *The Ayes Have It* (1937) demonstrated how a determined campaign by a parliamentarian could change the divorce laws.

<sup>67</sup> When taxed with the phrase by Laski, MacNaghten J. had replied that he had no such premise and that he "simply applied the law, looking neither to the right or the left." *Holmes-Laski Letters, op. cit.*, Vol. II, p.1412.

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In a further attempt to reassure possible subscribers, Lord Macmillan,<sup>68</sup> a Lord of Appeal in Ordinary, was asked to contribute a prefatory note.<sup>69</sup> After drawing attention to the magazine as providing the "hitherto voiceless" law faculty of the University of London with an outlook of its own, he believed it necessary to discuss the description of the magazine as "modern" which "may arouse some misgiving" and contrasted the impatience with which some viewed the doctrine of *stare decisis* with attempts to make the law the handmaiden of the executive. "And there is another aspect of modernity which is distasteful, a pert assumption that tradition and authority have nothing to teach us and that if we only use a new-fangled and sufficiently portentous vocabulary we are necessarily thinking new thoughts." Macmillan attacked the notion that tradition and authority were not adapting to new times, but concluded that, "To assist in the wise adjustment of the law to new needs and new conditions and in perfecting it as the instrument of justice between man and man would be a fine service to the law itself and to the State. I hope that *The Modern Law Review* will render it."

Macmillan's note must have been seen by Chorley as a price to be paid in establishing the credentials of the new *Review*.<sup>70</sup> But there was no compromise about the choice of the author of the article which would begin the first volume. Members of the Editorial Committee had been impressed by a recent article by Felix Cohen,<sup>71</sup> one of the most fluent members of the Realist movement,<sup>72</sup> and Joseph Gold was asked to approach him for a contribution. The result was an article on "The Problems of a Functional Jurisprudence,"<sup>73</sup> a bold attempt to make the argument for a reorientation of the philosophy of utilitarianism within a wider perspective which drew on the fruits of social scientific knowledge as an aid to law reform. Cohen's article perfectly captured the spirit of the new enterprise and was supplemented in the first issues with a number of contributions dealing with topics as diverse as "Modern Trends in the Law of Torts,"<sup>74</sup> "Child-Killing in English Law,"<sup>75</sup> "The Incidence of Jury Trial during the

<sup>68</sup> He had been a non-political appointee as Lord Advocate in the 1924 Labour Government and had served on many government committees. He was particularly involved in the work of London University. For a description of his life and interests, see Lord Macmillan, *A Man of Law's Tale* (1952).

<sup>69</sup> (1937) 1 M.L.R. 3-4.

<sup>70</sup> "Our wise Chorley got Macmillan to write a preface to reassure possible subscribers that although we were Modern we were not Radical." Letter from Sir Joseph Gold to Secretary, *op. cit.* In the same year, Macmillan had published a lecture in which he had suggested that the English genius "has always had a strong aversion for and distrust of theory and principle." Quoted by P. Atiyah, *Pragmatism and Theory in English Law* (1987) p.4.

<sup>71</sup> Almost certainly, F. Cohen, "Transcendental Nonsense and the Functional Approach," (1935) 35 *Columb.L.Rev.* 809.

<sup>72</sup> The son of the philosopher, Morris Cohen, he later became a New Deal lawyer and an expert on Indian affairs. On his theoretical views, see especially W. Rumble, *American Legal Realism* (1968) pp.138-186.

<sup>73</sup> (1937) 1 M.L.R. 5.

<sup>74</sup> W. Friedmann (1937) 1 M.L.R. 39.

<sup>75</sup> D. Seaborne Davies (1937) 1 M.L.R. 203 and 269.



past Century"<sup>76</sup> and "Theories of Law and Justice of Fascist Italy."<sup>77</sup> Taken together, the high standard of scholarship demonstrated by these articles, together with the case and statute notes which accompanied them, quickly established the critical reputation of the *Review*.

The first period of the *Review's* history could hardly have been more difficult, owing to the effects of war-time conditions, when there were problems in publishing the periodical regularly and the number of contributors was restricted. Nonetheless, a look at the early volumes<sup>78</sup> easily produces examples of excellent writing in fields as diverse as legal theory,<sup>79</sup> the administration of justice,<sup>80</sup> criminal,<sup>81</sup> monopoly and trade union,<sup>82</sup> banking,<sup>83</sup> company<sup>84</sup> and commercial law.<sup>85</sup> The *Review* also took an active part in the reconstruction debate<sup>86</sup> which followed the publication of the Beveridge Report<sup>87</sup> in December 1942, with major articles on the system of Workmen's Compensation, legal aid<sup>88</sup> and law reform after the war.<sup>89</sup> It remained relatively difficult, however, to attract relevant contributions from non-lawyers.<sup>90</sup>

Two articles particularly stand out for their conscious attempt to break away from the style of contemporary legal scholarship and to explore new approaches to their subjects. In the first volume of the *Review*, R. M. Jackson wrote on "The Incidence of Jury Trial during the past Century."<sup>91</sup> Jackson had been influenced by empirical studies carried out by some American Realists and he attempted to examine his own subject, not by carrying out

<sup>76</sup> R. M. Jackson (1937) 1 M.L.R. 132.

<sup>77</sup> J. Stone (1937) 1 M.L.R. 177.

<sup>78</sup> War-time volumes are sometimes dated a year earlier than the issues contained in them. I have adopted the official citation for the references given below.

<sup>79</sup> I. Jennings, "A Plea for Utilitarianism," (1938) 2 M.L.R. 22; J. Stone, "The Province of Jurisprudence Redetermined," (1943) 7 M.L.R. 97 and 177.

<sup>80</sup> J. Foster, "Law Revision," (1938) 2 M.L.R. 14; R. S. T. Chorley, "The Unpaid Magistrate and his Future," (1944) 8 M.L.R. 1.

<sup>81</sup> D. Seaborne Davies, "The Law of Abortion and Necessity," (1938) 2 M.L.R. 126; L. Radzinowicz, "The Evolution of the Modern English Prison System," (1939) 3 M.L.R. 121.

<sup>82</sup> W. Friedmann, "The *Harris Tweed* Case and Freedom of Trade," (1942) 6 M.L.R. 1; W. A. Lewis, "Monopoly and the Law," (1942) 6 M.L.R. 97; O. Kahn-Freund, "Collective Agreements under War Legislation," (1942) 6 M.L.R. 112.

<sup>83</sup> F. A. Mann, "Problems of the Rate of Exchange," (1944) 8 M.L.R. 177.

<sup>84</sup> E. Merrick Dodd, "Investor Protection by Administrative Agency: The United States Securities and Exchange Commission," (1941) 5 M.L.R. 174; O. Kahn-Freund, "Some Reflections on Company Law Reform," (1943) 7 M.L.R. 54.

<sup>85</sup> L. C. B. Gower, "Building Societies and Pooling Agreements," (1939) 3 M.L.R. 33; R. S. T. Chorley, "Liberal Trends in Present-Day Commercial Law," (1939) 3 M.L.R. 272.

<sup>86</sup> On this debate generally, see A. Calder, *The People's War* (1971) pp.607-631.

<sup>87</sup> *Report on Social Insurance and Allied Services*, Cmd. 6404 (1942).

<sup>88</sup> C. M. Schmitthoff and J. Terry, "Legal Aid and Social Security," (1943) 7 M.L.R. 138; E. J. Cohn, "The Political Parties and Legal Aid," (1944) 8 M.L.R. 97.

<sup>89</sup> C. P. Harvey, "Law Reform after the War," (1942) 6 M.L.R. 39.

<sup>90</sup> One such was a study by a sociologist, David Glass, "The Effectiveness of Abortion Legislation in Six Countries," (1938) 2 M.L.R. 97, a modified version of a memorandum submitted to the Inter-Departmental Committee on Abortion.

<sup>91</sup> (1937) 1 M.L.R. 132.

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fieldwork, but through a detailed analysis of the figures contained in the published judicial statistics in order to demonstrate trends. While accepting that such an analysis could not supply all that was needed in evaluating modes of trial and that there was no universal formula for dealing with social matters, he concluded that quantitative thinking was essential in examining features of the administration of justice.<sup>92</sup> In his seminal article on "Collective Agreements under War Legislation,"<sup>93</sup> Kahn-Freund drew on the legal sociology of Sinzheimer in order to revolutionise the analysis of the contractual relationship between employers and workers by the insight that collective agreements were not contractual in the legal sense.<sup>94</sup>

The end of the war and the return of a Labour Government had very little immediate effect on legal education,<sup>95</sup> as law faculties sought to reconstitute their teaching programmes. Chorley, however, was given a peerage and, after resigning his chair, entered the government with some responsibility for law reform. It says much for his character and talents that nobody seems to have thought that his new position was in any way incompatible with his retention of the general editorship of the *Review*.

In 1950, the *Review* published Professor Gower's inaugural lecture at L.S.E. on the subject of English legal education,<sup>96</sup> a long survey which needs to be read together with an earlier article by the same author on the future of the legal profession.<sup>97</sup> After noting that it was the first discussion ever published on the matter in the *Review*, he proceeded to mount a wholesale attack on almost every aspect of the subject and to call for an outside inquiry. He identified defects in the system of training for both barristers and solicitors, finding a lack of co-ordination between universities and professional bodies, and called for a requirement that every intending practitioner should take a university law degree. Concluding that there should be very considerable changes in the way law faculties recruited teachers and taught courses, he contrasted the position here unfavourably with that existing in the United States. The article is apolitical and atheoretical, deliberately so, but at the heart of Gower's argument is a plea for the raising of the status of legal academics and academic law teaching, which he always viewed, not as training designed to equip students for the practice of law, but rather to train them to think and reason and to

<sup>92</sup> *Ibid.*, p.144. Jackson published the first edition of *The Machinery of Justice in England* in 1940 in which he declared that "We should seek the nature of English law not in its substantive rules but in its machinery of Justice." *Ibid.*, p.20.

<sup>93</sup> (1942) 6 M.L.R. 112.

<sup>94</sup> R. Lewis, "Collective Agreements: The Kahn-Freund Legacy" (1979) 42 M.L.R. 613, 617.

<sup>95</sup> For the effects of the war on legal education, see "Review of Legal Education during the War 1939-45," (1947) 1 J.S.P.T.L. 23.

<sup>96</sup> L. C. B. Gower, "English Legal Training," *op. cit.*

<sup>97</sup> L. C. B. Gower, "The Future of the English Legal Profession," (1946) 9 M.L.R. 211.



instill in them an understanding of the basic principles of a legal system.<sup>98</sup> The article provided a manifesto for legal education which the *Review* had never contained, and its confident style is to be contrasted with the polite and cautious approach of the introduction to the first volume, 13 years before.

There can be little doubt that the status of academic lawyers has improved a great deal over the 40 years since Gower's lecture was published, although perhaps not as much as the founders of the *Review* might have hoped. The movement towards an all-graduate profession and a general expansion in university legal education in the post-Ormrod period has certainly contributed to a greater degree of independence on the part of teachers and a consequential willingness by them to adopt a more critical approach towards legal doctrine and their professional brethren, sometimes expressing their views in a manner which would have been unthinkable a generation earlier. Academic criticism of members of the judiciary can still occasionally engender a hostile reaction, as demonstrated by two incidents, both involving articles in the *Review*.

Although Professor Gower had acknowledged that individual academics and practitioners had criticised aspects of legal education and the legal system from time to time, he nevertheless had castigated the complacency of English lawyers generally and their ignorance about developments overseas. A particular target of his lecture was the attitudes of academics and the judges towards each other. Urging a greater willingness to engage in a critical discussion of law and law reform, he had condemned the "back-scratching prevalent in academic circles here"<sup>99</sup> and complained that published criticism by law teachers on decisions from the House of Lords downwards "are apt to be so moderate and humble that it is sometimes difficult to be sure that they are criticisms at all."<sup>1</sup> Further, "nothing is more nauseating than the patronising air of mock humility usually affected by one of His Majesty's judges when addressing an academic gathering. . . . It is my submission that English teachers of law suffer from an acute inferiority complex and that this is a bad thing for the profession as a whole."<sup>2</sup>

Gower's call for a complete overhaul of the English system of legal education and for a change towards a more critical approach by professionals and academics alike must have been a considerable culture shock for members of the legal establishment. Not only was the attack, made by a 36-year-old academic, unprecedented, but its tone of sarcasm and the self-confident manner with which the lecturer presumed to sit in judgment on professional lawyers and

<sup>98</sup> L. C. B. Gower, "The inter-relationship of academic and professional training," (1967) 9 J.S.P.T.L., p.434, 437.

<sup>99</sup> Gower, "English Legal Training," *op. cit.*, p.137.

<sup>1</sup> *Ibid.*, p.175.

<sup>2</sup> *Ibid.*, p.198.

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find them wanting, must have seemed little short of a revolutionary attack. After five years of welfare legislation by a Labour Government, the legal system seemed to be under attack from a number of directions. There were suspicions that the new legal aid scheme would lead to government control of the profession.<sup>3</sup> Both High Court and County Court procedures were under examination. Behind the scenes, Lord Jowitt bitterly attacked radical proposals for law reform<sup>4</sup> and there was criticism of a serving judge for publishing his views on the state of administrative law.<sup>5</sup> This atmosphere contributed to an extraordinary event involving Professor Gower's article, when the Law Lords chose to summon, not the author of the offending lecture himself, but his presumed commanding officer, Lord Chorley, to be solemnly reprimanded for ever allowing such criticisms to be published.<sup>6</sup>

Some 30 years later, an article by two young L.S.E. lecturers sought to copy and develop an annual feature in the *Harvard Law Review* by assessing the judgments given in the House of Lords during 1979-80.<sup>7</sup> The article focused on the logical form in which the language of the judgments were constructed and found that they were often superficial and over-simplified in their approach and the way in which they were "glued" together. The article can be seen, in part, as a modern reworking, in a more ambitious way, of the notion of the inarticulate major premise conditioning the way in which judgments are written. One commentator saw this analysis of the Law Lords' working methods as "... effectively challenging their professional reputation as judges."<sup>8</sup> This time, however, there was no question of calling in anybody to be ticked off. Instead, there was only a letter from a retired Law Lord to the newspaper which had run an article on the subject, making the ludicrous assertion that the *Review* was inherently leftish and anti-establishment and had been set up, "... because its instigators felt

<sup>3</sup> Abel-Smith and Stevens, *op. cit.*, pp.325-328.

<sup>4</sup> G. Drewry, "Lord Haldane's Ministry of Justice—Stillborn or Strangled at Birth?" (1983) *Public Administration* 408. LCO2 4115 contains a memorandum by Jowitt on the draft of the Haldane Society report. The manuscript, written by members of the Society, including Chorley and Kahn-Freund, was later published as a book, G. Williams (ed.), *Reform of the Law* (1951).

<sup>5</sup> Sir Alfred Denning, *Freedom under the Law* (1950), the first Hamlyn Lecture. Lord Jowitt wrote to Denning, "I always hold my thumbs as the children say, when I hear that a judge has written a book and am old fashioned enough to think the less they write the better it is for all concerned." December 7, 1949. LCO2 4617 where the view of a senior member of the Lord Chancellor's Office is also given. "Denning L.J. is wholly ignorant of the mechanism of administrative government . . . (He) seems to forget that there are a number of eminent lawyers in the Government service whose primary task is to do their utmost to prevent Ministers and lay officials exceeding their powers." Minute, G. Coldstream to H. Boggis-Rolfe, December 2, 1949.

<sup>6</sup> L. C. B. Gower, "Looking Back," (1978) 14 J.S.P.T.L. 155.

<sup>7</sup> W. T. Murphy and R. W. Rawlings, "After the Ancien Regime: The Writing of Judgments in the House of Lords 1979-80," (1981) 44 M.L.R. p.617. The concluding part of the same article was published in (1982) 45 M.L.R. 34.

<sup>8</sup> W. Merricks, "Do the Lords Make Good Law?" *Sunday Times*, December 8, 1981.



that the authoritative *Law Quarterly Review* was inadequately slanted."<sup>9</sup>

Chorley and his colleagues had founded the *Review* in circumstances which had brought together two very different groups of lawyers. The English radical academics attacked the conservative attitudes of the legal profession in the 1930s and wished to foster a notion of the legal system which concerned itself with the interests of the population at large in a modern democracy. The Jewish refugees sought to assimilate themselves intellectually into their new homeland and offered another view of the role of law in society. Both groups felt themselves to be outsiders to the caste mentality which had dominated legal thinking and had led to the exclusion of law from the mainstream of social scientific thought. The founders of the *Review* did not simply intend to provide London University law teachers with a medium to express their approach, and so reach a wider audience than through the teaching process,<sup>10</sup> but they were anxious that its pages would be open to all those who would share their attitude. Although they emphasised the interdisciplinary nature of the new enterprise, the *Review* remained a legal periodical, written by lawyers and addressed to lawyers. What was offered was not a new or different political ideology, but the advocacy of a technique which would enable the legal process to be modernised and law reform to be carried out.

It was to be over 25 years before these views were to be effectively heard. After a law reform campaign which preceded the general election of 1964<sup>11</sup> and the subsequent establishment of the Law Commission, a number of those who had been associated with the *Review* attained positions of some influence. Gower became a law commissioner. Kahn-Freund, whose approach to labour law was now widely acknowledged and accepted,<sup>12</sup> became involved with a new initiative by the Social Science Research Council in the social sciences and the law.<sup>13</sup> The most significant influence for change, however, was the movement for improved legal services which flourished in the late 1960s and early 1970s and was the product of the work of a number of academics, both lawyers and non-lawyers and some practitioners. Influenced by the work of

<sup>9</sup> Letter from Lord Simon of Glaisdale, *Sunday Times*, December 13, 1981. For the extent to which the Law Lords read and are influenced by academic comment and criticism in the legal journals, including the *Modern Law Review*, see A. Paterson, *op. cit.*, pp.14-20.

<sup>10</sup> At L.S.E., for example, only one student of the School over the last 50 years, Morris Finer, has become a High Court Judge.

<sup>11</sup> G. Gardiner and A. Martin (eds.), *Law Reform Now* (1963). A number of chapters were written by leading *Modern Law Review* contributors.

<sup>12</sup> See O. Kahn-Freund, *Labour and the Law* (1972). For a comprehensive appreciation of Kahn-Freund's work in the labour law field, see Lord Wedderburn, R. Lewis and J. Clark (eds.), *Labour Law and Industrial Relations: Building on Kahn-Freund* (1983).

<sup>13</sup> S.S.R.C. Newsletters (1975) No. 28, p.16 and (1976) No. 30, p.3. See also K. W. Wedderburn, "Law as a Social Science," (1967) 9 J.S.P.T.L. 335.

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<sup>15</sup> Atiyah, *Pragm*

<sup>16</sup> *Ibid.*, pp.34-4

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some of the *Review's* founders and their friends,<sup>14</sup> and with an interest in empirical investigation, a key feature of their campaign was an appeal made not just to the legal profession but to politicians and the public as well. This movement was to result in important extensions of legal services, to the establishment of the Royal Commission on Legal Services and the major reforms in the legal profession which have ensued.

The founders of the *Review* did not attempt to make their arguments to the public at large and the legal profession have proved themselves to be largely indifferent to them, feeling no pressure to change inherited attitudes and patterns of conduct. In a recent thorough examination of the modern relationship between academics and the legal profession,<sup>15</sup> Professor Atiyah has conclusively demonstrated the increasing importance of the work currently being done by law teachers in the development of the law and legal doctrine.<sup>16</sup> But he sees the modest role ascribed to academics as one of the reasons why "English law often seems to lack shape or structure or rational arrangement."<sup>17</sup> Like Gower before him, Atiyah sees the differences, for example, in status and remuneration between the judiciary and leading academics as of particular importance.<sup>18</sup> Whether a change in that relationship will come about will surely depend on the outcome of the deregulation of the legal profession which is currently taking place and its transformation in the commercial and public legal services spheres.<sup>19</sup> And that, in part, will depend on academic interest and involvement.

Just as the style of practitioners' journals has recently altered, so it is inevitable that both the format and content of law reviews, including the *Review* itself, will change as well to reflect the contemporary situation. Kahn-Freund was surely right in stressing the importance of the role of the *Modern Law Review*, but its influence has, and continues to be, an indirect one. The words used by the chronicler of the fiftieth anniversary of another great legal magazine seem particularly apt in this context. Although the language may seem florid and the imagery somewhat pedestrian for modern taste, its essence makes the justification for the foundation of the *Review*.

<sup>14</sup> Perhaps the most important of these was by a distinguished sociologist, O. R. McGregor, *Divorce in England* (1957), a blistering critique of the Report of the Royal Commission on Marriage and Divorce and, in part, a defence of Professor Gower's evidence before the Commission. Although Professor McGregor was not a contributor to the *Review*, he has long been associated with its general approach and is presently a member of its Editorial Board. For a recent assessment by him, see O. R. McGregor, *Social History and Law Reform* (1981).

<sup>15</sup> Atiyah, *Pragmatism and Theory in English Law* (1987).

<sup>16</sup> *Ibid.*, pp.34-42.

<sup>17</sup> *Ibid.*, p.39.

<sup>18</sup> In 1937, a London University Professor earned a salary about 20 per cent. that of a High Court Judge. Today, the proportion is about 40 per cent.

<sup>19</sup> For a prediction of likely developments, see R. Abel, "The Decline of Professionalism" (1986) 49 M.L.R. 1, 40-41.



"The reviews are like tiny pebbles thrown into a vast pool; their circles spread outward until they can no longer be seen, but who shall say to what distance their influence may spread before their vibrations are stilled."<sup>20</sup>

CYRIL GLASSER\*

<sup>20</sup> McElvey, *op. cit.*, p.886.

\* LL.M. Solicitor. Visiting Professor of Law, University College, London. I am very grateful to Professor L. C. B. Gower, Judge Benjamin Kaplan, Tim Murphy and Professor William Twining for discussing aspects of this article with me.

## LEGAL SCHOLARSHIP IN AUSTRALIA

IN this article, we examine legal scholarship in three stages: pre-1945, post-1945, and the future. We shall look at the professionally oriented research in the common law traditions, and at the "career academics" in law since the beginning of the 1960s. We shall also look at the interdisciplinary perspectives on the main features of legal scholarship in Australia at the present time, and at the developments that have had an effect on legal scholarship for this reason, scholarship has taken its own course independently.

### THE COMMON LAW TRADITION

Legal scholarship in Australia is a product of the English legal tradition in a country whose geographical location and history have at all times differed from those of the United Kingdom. The differences were most marked at the time of the penal colony established in 1788. It confronted a hostile continent, in which the population, to recent estimates, have been estimated to have Aboriginal land rights, many of which were much debated by administrators and the Australian colonies in the 19th century. The rights, nor the associated customary law, appear to have been recognized, and practitioners were aware of the effect that Australian law had on the white settlement and the development of the continent. The whole of the continent was subject to such modifications as were necessary.

As the white population increased, and the Aborigines were reduced in number only about 10% of the original number, they accepted this doctrine as orthodox. <sup>3</sup> Until the 19th century, it endured to the extent that

<sup>1</sup> P. White and D. Mulvaney, *Legal Scholarship in Australia*, Project, Vol. 1 (1987), Chap. 5.

<sup>2</sup> H. Reynolds, *Frontiers: Aboriginal Land Rights*.

<sup>3</sup> *Cooper v. Stuart* (1889) 14 App. Cas. 273.



From Weimar to Bonn:  
The Arts and the Humanities in Exile  
and Return, 1933—1980

Horst Möller

"Burn me (my books)!": Oskar Maria Graf protested in the Viennese *Arbeiterzeitung* of May 12, 1933 against his inclusion in a so-called White List of authors of the "New Germany" which, as he stated, could only be a "black list in the world conscience." This White List had been compiled by the National-Socialists on the occasion of their book-burning of May 10, 1933 on Berlin's Opernplatz. "After a life devoted to writing I have the right to demand that my books be surrendered to the pure flame of the stake, and not to the bloody hands and the deranged minds of the brown murder gangs. Burn the works of the German spirit! It will be as inextinguishable as your disgrace!" This bitter demand did not remain unheeded. In the main auditorium of Munich University students, in the presence of professors, burned the works of the "Bavarian Balzac," which the *Reichspropagandaminister* Goebbels had mistakenly left out of his autodafé. This book-burning which destroyed not only literary works of world fame but also numerous scientific and journalistic writings of older and recent date, was a public manifestation of a censorship policy that put about 3,000 works on the index of banned books by 1934. Within a few months public libraries were "purged" of writings that were classified as "degenerate" or that were written by authors of Jewish background, or by politically disagreeable persons, which was a priori the case for leftist authors.

In quick steps, the N.S. government had created the "legal" basis for its actions. It resorted to this device every time the use of "spontaneous" popular rage seemed to be an inappropriate means of terror, as, for instance, in the so-called *Reichskristallnacht* on November 9, 1938. The *Verordnung des Reichspräsidenten zum Schutz von Volk und Staat (Reichstagsbrandverordnung)* (Decree of the *Reichspräsident* for the Protection of People and State) of February 28, 1933 already abrogated the basic rights which the Weimar constitution had guaranteed, and allowed the persecution of political opponents and the restriction of the freedom of the press. The *Verordnung des Reichspräsidenten zur Abwehr heimtückischer Angriffe gegen die Regierung der nationalen Erhebung* (Decree of the *Reichspräsident* for Countering Treacherous Attacks against the Government of the National Revolution) permitted the punishment of critics of the N.S. government or the organizations supporting it (especially the N.S.D.A.P. or its sections) even when a German had committed the "deed" in a foreign country. The so-called *Schriftleitergesetz* (editors' law) of October 4, 1933 established the guidelines for "collaborating with the N.S. authorities in the programming of the intellectual content of newspapers and political journals edited in the Reich." In the case of professional journals, the *Reichspropagandaminister* decided,

in agreement with the highest national or "Land" authorities concerned, whether they were to be classified "political" or not. Persons who were "non-Aryan" or were married to a person of "non-Aryan" descent were excluded from being editors from the outset. This regulation alone deprived some of the most renowned publicists of the Weimar Republic of the possibility to work in their profession, among them Georg Bernhard, Theodor Wolff, Carl von Ossietzky, Siegfried Jacobsohn, and Alfred Kerr.

In addition, on the basis of this law, all editors were forced to join a professional organization whose head was appointed by the *Reichspropagandaminister*. From September 22, 1933 on, a *Reichskulturkammer* acted under him with sections for theater, the visual arts, music, radio and the press. Its task was supervision and guidance of cultural policy in the Reich. In addition to the *Reichskulturkammer*, there existed the *Reichsfilmkammer* which had already been founded on July 14, 1933 and was the first public institution of this kind. The fight against "degenerate" culture of every sort had assumed an organizationally tangible form in this way. With the aid of these organizations, a comprehensive supervision of the personnel policies followed by cultural institutions became possible. The *Preussische Akademie der Künste* had already been "purged" of representative artists and writers during the first months of the N.S. state; the greatest writers of the twenties, who belonged to its poetry section, — for instance, Thomas and Heinrich Mann — had been barred and were replaced by representatives of the "new Germany," without exception authors of a lesser rank.

Already during the first year of the N.S. régime, the *Gesetz zur Wiederherstellung des Berufsbeamtentums* of April 7, 1933, led to the dismissal of, or refusal to employ, civil servants who were Jewish or classified as politically incriminated, including those who worked in cultural fields as teachers or scientists. The so-called *Nürnberger Gesetze* of September 15, 1933, above all the *Reichsbürgergesetz* and the *Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre* led to further radicalization of anti-Semitic policies. They affected the entire part of the population which was either Jewish or declared as Jewish on biologic premises. The public cultural role of these persons, as far as it extended beyond Jewish communal activities, was thus ended. A further series of discriminatory laws and the individual terror of the S.A. against those who were politically or "racially" not in favor, which had already begun before 1933, had either reduced cultural work to a minimum or terminated it altogether for many of those who, in the widest



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sense, had been culturally active. The suppression of books, the demagogic criticism of writers, artists and scholars, and the spectacular expatriations of émigrés which occurred soon after their flight from Germany — all these facts must have been an obvious warning already during the first months of the “new Germany” to those who remained. Also those who did not have to feel included in the polemics against “corrosive Jewish asphalt literature” and in whom the régime had an interest — as long as they conformed to its aims — because it wanted to use them as world-renowned representatives of German culture, had to decide — as in the case of Thomas Mann — whether or not they should take the risk and remain in Germany and thereby reject the solidarity with esteemed colleagues and friends who had escaped from imminent danger. “Burn me,” for many reasons, was the motto not only of Oskar Maria Graf. To protest against violations of basic human rights which they considered a pre-condition for any viable cultural life, and to reject the barbarism visible even at this early stage, in addition to direct pressures due to political or “racial” persecution, were the main motives for the departure from the N.S. state also of the cultural emigrants. In numerous cases, several motives can be discerned: The date of emigration could be determined by the variety of these motives or by external factors, such as the “annexation” of Austria by the German Reich in 1938, or the Munich Pact of 1938 and the resulting destruction of Czechoslovakia in 1939, all of which caused a further wave of emigration. Finally, the impending or already existing German military occupation compelled further emigration after the initial emigration had taken place. For these reasons, many European countries were for most emigrants only intermediate stations of their Odyssey. Main centers of German-language exile like France, the Netherlands and Czechoslovakia were starting points for the New World; many did not succeed in getting there because the necessary visas were not granted: Anna Seghers has vividly described Marseilles as a transit center of emigrants. Individual life histories show how oppressive the uncertainty of escaping in time from the Germans or from the collaborating governments was. Walter Benjamin committed suicide in this predicament, and he was only one of many.

No matter how varied the motives for emigration may have been in the individual case, in a wider sense the cultural emigration deserves the rating “political,” as emigration was also an act of resistance against the totalitarian claim to power of the N.S. régime for most of the emigrating scientists, artists and authors. Of course, this statement must not lead to the misunderstanding, that the term “European resistance,” which is frequently encountered in emigrant circles, signifies a well-organized movement, reaching beyond the borders of, or existing in, individual countries and having a uniform objective and homogeneous structure. Although homogeneous points of crystallization for an organized resistance existed, for instance, in the constantly renewed threat of the expanding N.S. régime or the Spanish Civil War in 1936, the cultural emigrants were characterized by individualism and heterogeneity, frequently even by totally contrary attitudes in contrast to the political emigrants, who were organized in separate groups. The reasons for this were not only the different material and professional situations of those concerned, not only their pronounced individuality, but — also without party affiliation — their varied political attitudes. Numerous emigrants fell into

deep social and political disorientation: In this situation, they formed more or less formal circles, which were based, as a rule, on common convictions or old friendships, but were short-lived because of the extreme fluctuations of their membership. The varying degree of success in integrating themselves quickly (though superficially) into the host countries, which frequently accepted the emigrants only reluctantly and often only as transit travellers, reduced the feeling of solidarity. Klaus Mann described this lack of understanding which the emigrants often faced in his autobiography *Der Wendepunkt*, Lion Feuchtwanger the inner tensions besetting the cultural exiles in his novel *Exil*. In fact, contrary to what much secondary literature frequently maintains, no homogeneous German exile literature existed. Nor do other sectors of the cultural emigration show homogeneity in contents. The cultural emigration can only be defined precisely by its common elements: the resistance to the Nazi régime, the danger it represented to the émigrés and the material conditions of existence in exile.

For a definition of the term “cultural emigration” the following constituent factors are relevant, in addition to objectives set by individual emigrants and emigrants’ groups: the contours of German intellectual life after World War I, the cultural situation in the Third Reich and finally, the attempt of the emigrants to present German culture in exile as that of another, better, Germany with the help of writings, proclamations, and organizations of all kinds. This was common to most cultural activities if not in their respective contents at least in form. The positive cultural aim was common to all directions, it pointed back to the years prior to 1933 and at the same time to the time after 1945. The activities of the cultural emigrants took place “facing Germany” and were, at the same time, directed towards the respective host countries. But already at this point, new difficulties for a stringent definition become obvious. The reason for this heterogeneity of the cultural emigrants lies, on the one hand, in the basic structure of Weimar culture, which had been decisively influenced by later emigrants, and, on the other hand, in the contents of the N.S. polemics against this culture.

The reasons for the explosive cultural wealth of the Weimar years can hardly be reduced to a common denominator. Rather, they become more tangible with the aid of formal criteria, the most important of these being the general consciousness of crisis and the revolutionary impetus within the Republic, which has lately been analyzed by John Willet under the title *The New Sobriety. Art and Politics in the Weimar Period 1917–1933*. The general consequence of this culture was the erosion of the middle or, as Hans Sedlmayr puts it, the “loss of the middle.” This consciousness of crisis and the revolutionary elements originated long before World War I. Jacob Burckhardt’s cultural pessimism, the spirit of the *Fin de siècle*, the fascinated prophecy of threatening disaster by Friedrich Nietzsche, early expressionism: these are only a few of the influences. But the increase in, and cumulation of, these tendencies in the twenties was a consequence of the World War, characterized culturally by the development toward extremism. These extremisms professed to be revolutionary in an exclusive manner: the Conservative Revolution on the one hand, the Socialist Revolution on the other. In the view of either directions, the Weimar Republic never had a chance from the beginning, but bore the obvious features of transition and disso-



lution. In both camps, the keen perception of social, political, and ideological problems was joined to the defamation of the republican state and its political institutions. During this process, the new Republic shrank to a merely transitional form of government, no matter how many years it would survive. Past and future crushed it into an episode of insignificance. But the Conservative Revolutionaries were not only agents of restoration: Although their attitude was obviously marked by political reaction, they too strove toward new goals. Whatever the "Third Reich" of Moeller van den Bruck and his partisans may have been meant to look like, it was not meant to be a simple resurrection of the vanished monarchy. The Conservative Revolutionaries recognized, rather, as Carl Schmitt did, the symptoms of the political and constitutional crisis, and, as Oswald Spengler and Ernst Jünger pointed out, the importance of modern technology and the changes of life due to urbanization, and, finally, the fundamental structural social changes as well, which Ernst Jünger described in his novel-essay *Der Arbeiter*. The paradox extended also to the political form of organization of the future: despite all elitist disgust for the recognized mass character of modern society, some of these conservative-revolutionary enemies of the Weimar Republic supported a Caesarism whose plebiscitarian basis Carl Schmitt had recognized. But plebiscitarian Caesarism had nothing to do with the restoration of the Hohenzollern monarchy. It is fruitless to share still today this disastrously erroneous view of German nationalists and some other conservatives. Weimar democracy would hardly have succumbed to the anti-revolutionary and restorative tendencies of the twenties and early thirties alone, although the advocates of these goals belonged to its gravediggers.

And on the other end of the political spectrum? The intellectual left had no better intentions toward the Republic. Perhaps its attacks on the system were more varied in a few points, yet the fact that it failed in the face of the N.S. revolution, whose earliest victim it became, must be conceded. The Weimar Republic offered a home to the intellectual left — despite the embitterment of the latter; the Weimar government treated this opponent well; its rich culture resulted above all from this tolerance. But did the renowned analysts of the Frankfurt Institute for Social Research — who were, after all, a product of capitalist patronage and intellectual open-mindedness — really have a personal reason to fight the political and socio-economic system of Weimar? Did Carl von Ossietzky and Siegfried Jacobssohn really have reason enough to condescendingly mock the Social-Democratic *Reichspräsident* Ebert, or to, as it were, posthumously accuse Otto Wels of opportunism, as described by Hans Mayer in the first volume of his memoirs, *Ein Deutscher auf Widerruf?* It was that same Otto Wels, who, as speaker of the S.P.D. representation, courageously justified his party's refusal to vote for the *Ermächtigungsgesetz* in the German *Reichstag* on March 22, 1933, and thus gave one of the most important, although unsuccessful, speeches in the history of German parliamentary democracy! However this may have been: the University of Frankfurt cooperated with the Institute for Social Research, whose members were almost exclusively leftists, and whose director became concurrently a full university professor. The City University of Cologne, under the auspices of mayor Konrad Adenauer, pursued a liberal appointment policy. For instance, it appointed a Socialist specialist in public law and a representative

of the *Reine Rechtslehre*, Hans Kelsen, from Vienna and, with his support, the juristically ingenious but politically disastrous Carl Schmitt. The later co-creator of the social market economy, Alfred Müller-Armack, together with Helmuth Plessner and the political economist and sociologist, Erwin von Beckenrath, held seminars on Marxism: Hans Mayer, who, as *roter Kämpfer* was able to obtain his doctor's degree in Cologne under the Prussian constitutional lawyer and counselor to Adenauer, Fritz Stier-Somlo, has recently described this intellectual life in great detail.

Certainly there is no reason to idealize the appointment policy of Weimar universities — which thwarted the careers of many renowned scholars for political or other reasons that had nothing to do with their professional competence. Too many examples demonstrate to what little extent the universities, as institutions, i.e. professors and students, were a bastion or, at least, a refuge of Weimar democracy. At one point, the rector of the Berlin University even objected to the presence of the Social-Democratic *Reichspräsident* at a festive event! Still, the numerous leftist scholars, authors, artists, writers, and publicists who dominated the capital — although not the universities — had ample opportunities to express their interests. Yet they did not thank the Republic for this, as little as did the adherents of the Conservative Revolution.

For those who still hoped for the Socialist Revolution and frequently held these hopes to be scientific gospel, the state of Weimar was seen as a despicable product of an unfinished revolution and merely transitory. On the other hand, these leftist intellectuals contributed to the founding of modern sociology through their keen analyses of social problems. One need only remember Siegfried Kracauer's essays *Über die Angestellten*, which appeared as a series in the liberal *Frankfurter Zeitung*, Theodor Geiger's analyses of *Die soziale Schichtung des deutschen Volkes*, Siegfried Neumann's analyses of Weimar political parties, Emil Lederer's, Carl Grünberg's and many other sociologists' works on problems of social development, for instance, the *Darstellung des gewerblichen Proletariats* by the liberal Goetz Briefs. No less sharp-witted were the commentaries on, and criticism of, daily politics, which Kurt Tucholsky and others published in Ossietzky's periodical, *Die Weltbühne*, as well as other kinds of diagnoses of the times. Hermann Broch described the "dissolution of values," and Lion Feuchtwanger and Oskar Maria Graf the social breeding ground for National Socialism. The *Politisches Theater* of Erwin Piscator and Bertolt Brecht influenced the opinion of the intellectual community. The high level of daily journalism, for instance of the *Berliner Tageblatt*, the *Vossische Zeitung* and the *Frankfurter Zeitung*, was marked by a liberal spirit, and treated the new Republic with more respect than the sharp-tongued left, but on the whole it can be stated that the Republic had no good press on either side. The politically moderate journals and newspapers without party affiliation, which had either a liberal or Social-Democratic character, or those which were oriented towards political Catholicism, remained in a minority, as did the parties that had founded Weimar democracy in 1919 — S.P.D., Zentrum and D.D.P. — and, since the first election to the *Reichstag* in 1920, remained in the minority.

Peter Gay called his book on the intellectuals of the Weimar Republic *Weimar Culture. The Outsider as Insider*. And,



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indeed, the Weimar state was a republic of outsiders, but in regard to the intellectuals, it was hardly a government-imposed outsider position. Rather, the "new" intellectuals of the left and right did not accept the Republic, and the old cultural elites of the empire usually did not know what to make of the Republic. *Vernunftsrepublikaner*, i.e. those who accepted the Republic for mere pragmatic reasons, existed among the scholars, e.g. Friedrich Meinecke, and among authors and artists, e.g. Thomas Mann and Max Liebermann. Certainly this list could be enlarged with well-known names, but how representative was this group for the spirit of the era? This spirit was, generally yet concretely stated, for the most part critical of the times, analyzed society and politics with great intellectual acumen, wanted to be political and yet cared little for the political consequences of its behavior. George Grosz drew the "ruling class" in biting caricatures; *Reichspräsident* Ebert, *Reichsaussenminister* Stresemann — to name only these two pioneers of the Weimar Republic — appeared in the same light as the "pillars of society" of before 1918. John Heartfield depicted upcoming National-Socialism in his photomontages and buried his criticism in his hatred of capitalistic society, of which he considered National-Socialism to be a product. He did not recognize, and did not want to recognize, the difference between the Nazis and the Weimar democrats whom he also fought, until the N.S.-revolution of 1933 made it clear to everyone how the critics had identified and fought enemies and friends alike without differentiating between the two. Intellectualism of this kind was a symptom of the crisis and, at the same time, the most keen-eyed diagnosis of the crisis. In the short time of its existence, the critics of the Republic did not give it enough time. They criticized not as democrats, not with critical sympathy, but with hostility.

Weimar intellectuals, as Walter Laqueur has rightly remarked, were in a certain way unable to carry on a dialogue: Leftist intellectuals took no notice of the intellectuals of the right, and vice versa. The old cultural elites, for their part, did not know how to deal with the revolutionary spirit of this culture. This is also true for the art of those years. They rather knew what to do with Conservative Revolutionaries like Oswald Spengler, but also in this case much leads us to assume that individual catchphrases — like the title of his historical-philosophical main oeuvre, *Untergang des Abendlandes*, had more influence than the frequently vague political ideas of the author. On the left as well as on the right wing, there existed such a polarity that no communication took place. Indeed, they ignored one another. There was a circular movement of ideas that always led to renewed cell divisions: The line of demarcation was usually the attitude towards official party communism, the orthodoxy of which the most renowned heads of the intellectual left rejected sooner or later, since it threatened to paralyze their critical thought. By the end of the twenties and the beginning of the thirties more and more humanitarian motives, as well as political and scholarly reasons for the rejection of the K.P.D. were brought forward. The Stalinist show trials of the thirties and the Hitler-Stalin Pact of 1939 brought disillusionment to many. And thus it is revealing that the majority of the cultural emigrants, even those who were leftists, did not emigrate to the U.S.S.R. In regard to the Frankfurt Institute for Social Research, Martin Jay has remarked: "The Marxist and anti-capitalist-oriented Institute, characteristically enough, did not emigrate to the communist Soviet Union,

but to the center of the capitalist world, to New York." And this at first sight specific observation is true for the general state of affairs. The critical intellectuals were in a strict sense dependent on the crisis-shaken, imperfect, criticizable Republic of Weimar, on its social problems, on its capitalist economic system, even on the colorlessness of its political leadership. The critical faculties of these intellectuals were made keen by this world, they became brilliant in their polemics against the Weimar state beyond justice or truthfulness. Their quality lay in the accuracy of their social criticism, not in constructive politics; the political sphere, as a result of Marx's model of interpretation, was relatively neglected anyhow, in comparison to the social and the economic spheres. It is not by chance that, neither during emigration nor after 1945, a similar highly developed journalism, which was at the same time politically destructive, could develop. The fatal blow which Goebbels gave to this Weimar brand of journalism was successful not because its protagonists had been driven away, incarcerated, forbidden to work or murdered, but because the N.S. revolution had removed the breeding ground which had nourished this critical potential, the state of Weimar.

In a different way — and in regard to developments after 1945 much more effectively, the N.S. regime removed the Conservative Revolution: This was achieved primarily through the establishment of a radical dictatorship, which fundamentally discredited the similar aims of the Conservative Revolutionaries, and which made visible the devastating effect of such ideas, even if they only appeared identical with National-Socialist rancour and the ideological components of its state. Spengler's postulate of a master race, which was not based on biological arguments, as that of the National-Socialists, serves as an example. In addition, National-Socialism effected a radical restructuring of the social hierarchy, a social revolution and mobilization of the masses, which ran counter to the elitist thinking of the Conservative Revolution. This social revolution forced the conservatives either to change their thinking, to turn to opportunism, to "inner emigration," or to actual physical emigration, above all, when they realized the basically inhumane and anti-intellectual character of the régime and its ideology. Therefore, members of the political right, even former National-Socialists, were among the emigrants. At the end of this social revolution, any social basis for the Conservative Revolutionaries had disappeared. In this case, too, N.S. rule had removed the breeding ground of Weimar, from which the rightist intellectuals had drawn their strength.

National-Socialism was also a product of instability, of a fundamental shock and social, political, and moral disorientation, but it was not an intellectual reaction to them, as was the case with the programs promoted by intellectuals of the left and the right. It did not parallel the humane, moral protest that more or less motivated the intellectual left. It was, rather, of a socio-psychological order, thriving on anti-intellectual, anti-bourgeois prejudice and fundamentally questioning the principles of traditional morality. But it shared the contempt for Weimar democracy with the revolutionaries on both sides. It pursued, with anti-Semitic emphasis, anti-capitalism — although in an unreflected, not rationally programmatic, form as is characteristic of the varieties of Marxism. National Socialism was, in a different sense than is usually assumed, the mass movement of a center driven to extremism. In the field of cul-



ture it propagated a taste for simple-minded, harmonizing, "natural" mediocrity. This "völkisch" realism was in certain respects related to the socialist realism of Soviet origin. Apart from this, there existed, however, Hans Grimm's *Volk ohne Raum*, which was characterized by expansionism, or the self-aggrandizement of the monumental "master architecture" — for instance, of the buildings for the Nuremberg party rallies or the plans of Albert Speer for the capital Berlin.

A comparison of the inexpressive nudes by N.S. painters with those of the Weimar period or by exiled artists shows how strongly mediocre taste was liable to agree with the attacks of official N.S. "cultural policy" against "decadent" and "degenerate" art. Those painters who broke new ground in the fields of color and space, like Max Beckmann and Ernst Ludwig Kirchner, were too critical for such "art policy" and taste, too aggressive, too problem-oriented. But it would not necessarily have led to the destruction of Weimar culture or to emigration, if N.S. cultural policy had simply replaced diversity by a mindless simplicity. The fundamental animosity arose, because cause and effect had been confused. The diagnosticians of this crisis were blamed for the crisis of their times, for the shock that went to the roots of bourgeois life and security. It was easy to blame them since their caustic criticism went hand in hand with their wish for the downfall of capitalist society. Without distinction, Communists, Marxists, Social-Democrats, Liberals, and Jews were considered exponents of the Bolshevik revolution. The problems of modernity were comprehended as the political challenge of the Soviet revolution and thus minimized. All those considered enemies were called adherents of Bolshevism. And enemies were fought to their physical destruction. The N.S. régime tried to overcome the uneasiness and dreariness of the modern world with the aid of anti-intellectual and racial prejudice. In their "back to nature" slogan they set the metaphysics of "blood and soil", which offered a "natural identification" for the people, against the "labyrinth of the cities," against urban forms of life, in which art and artificiality were united. Among the "asphalt" authors of this acrimonious, homeless, intellectualism, the Nazis singled out many Jews. They embodied the foreign, the uncanny, which had not grown on native soil, the city against the country: the city which as a rule was the political stronghold of Social-Democrats and Communists, if it was not, for regional and religious reasons, dominated by political Catholicism.

The National-Socialists set the total claim of their resentments and ideology against the liberalism and pluralism of Weimar cultural policies. This total claim to power corresponded to that of the main enemy who was no less totalitarian: the Bolshevik ruling system in Russia, whose supposed exponents were to be destroyed in Germany. The general claim to humanitarianism advanced by leftist intellectuals served, paradoxically, to re-enforce National-Socialist animosity, which consciously employed biological and barbaric accents in their ideological conceptions. Prior to 1933, their language and their practice of terror showed this all too clearly — in an ideological sense, analogies could be found in many adherents of the Conservative Revolution. The basic animosity of National-Socialism toward liberalism, pluralism, and Bolshevism forced many to emigrate, but the structure of intellectual life during the Weimar Republic sketched above also brought about a continuing pluralism among the "cultural" emigrants, with their

numerous ideological shadings, including the intellectual left — not to mention the differences between Catholic, conservative, liberal, social-democratic, and communist emigrants. The relatively short span of time of actual exile, which lasted for fifteen years and, of course, seemed to be long and had severe personal consequences for the survivors, suggests that we should not separate the term "cultural" emigration completely from its history before 1933 and its history after 1945. In so far, "cultural" emigration does not constitute an independent period of cultural history; its establishment and its impact must accordingly be taken into account. On the other hand, "cultural" emigration can neither be separated from the régime which caused it, nor from the conditions they met during their exile, or the possibilities for acculturation in their host countries and the mostly overseas countries where they finally found themselves. This aspect of their history will be analyzed by H. A. Strauss elsewhere in this introduction. We will only marginally touch upon it here.

A few remarks are necessary at this point on the relationship of émigrés towards the N.S. state and those among the cultural elite who did not emigrate. In this context, the question has to be answered to what extent the "cultural" emigration was "Jewish," as N.S. propagandists suggested. The question is important, since there is more to it than National-Socialist defamation. It has left traces in the self-perception of the Jewish "cultural" emigrants, as considerable segments of this group returned to their Jewish tradition only as a result of N.S. threats and the exile that followed. In other words, the consciousness of Jewish cultural identity among these groups was for many Jews not the cause but a consequence of the threat that all of them had to deal with.

The general assertion that among the emigrated cultural elite there were — in comparison to the whole population — a proportionately large number of persons of Jewish background, is indeed true. This statement applies especially to the field of social research which has already been mentioned. It was, indeed, not by chance that Theodor Wiesengrund Adorno was asked to omit the Jewish-sounding part of his name (Wiesengrund) when he joined the Frankfurt Institute for Social Research in New York, because the Institute already had "too many Jewish names." Adorno complied with this wish of the directorate of the Institute, which was by no means anti-Semitic, but itself mainly of Jewish background.

Most of the members of the Institute were also Marxists, although they usually were not actively engaged in party activities. The majority were unorthodox, but orthodox C.P. members also existed among them. Both Jewish background and political conviction have to be considered here. Being Jewish in the sense of being of the Jewish religion was for many members of the Institute not a realistic factor; they were probably — like the Marxists of protestant or Catholic background — frequently atheists. Max Horkheimer's religiosity asserted itself only during his last years. He had grown up in a consciously Jewish home, but during his early and middle years the Jewish religion was not important enough for him to be concerned with his parents' disapproval of his marriage to a non-Jewish wife. Others, for instance Adorno, had either only one Jewish parent, or their ancestors had been integrated into German culture and society long ago. These facts also reduce the possibility to speak of Jewish culture in regard to the German-



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speaking cultural elite. This is true especially when socialization is considered as the determining factor. The majority of the members of the Institute for Social Research mentioned here, for example, were influenced by the philosophy of German idealism, above all by Hegel. The philosophers who influenced Horkheimer's thought were, apart from Hegel, primarily Kant to whom he dedicated his dissertation and his habilitation thesis, Schopenhauer, and Marx — that is, only one philosopher, Marx, was of Jewish background, and his polemics against Jews are notorious. The point here is not to analyse who was influenced by whom, but to point out that a large part of the German émigrés of Jewish background mentioned above were influenced by the culture of their home countries just as much as by genuine Jewish traditions. Although these traditions stimulated their thought as well, they were only one factor of their cultural identity.

Those Jewish emigrants of the cultural elite who consciously adhered to their religion and Jewish cultural traditions prior to 1933 or were Zionists like Martin Buber or Gershom Scholem, constituted a special group. Scholem has described his personal discovery of Zionism in the German environment prior to the N.S. dictatorship in two books, *Von Berlin nach Potsdam* and *Walter Benjamin — die Geschichte einer Freundschaft*. Such persons were, without doubt, part of the "cultural" emigration but did not constitute the entire group. The "cultural" emigration, despite its high percentage of people with Jewish or partly Jewish background, was not simply Jewish emigration in the sense of having had a common cultural or national identity, and cannot be considered so in light of what caused so many of them to emigrate. In a biological sense — which, paradoxically, would be in line with the *Nürnberger Gesetze* — we cannot talk of "Jewish culture" in this context anyway.

Nevertheless, the high percentage of émigrés with Jewish background needs to be explained. The explanation has to be sought in two directions: First, in the N.S. threat, and second, in the special direction scientific interests had been pursued by the émigrés. Due to the fanatical anti-Semitism of the N.S. dictatorship, all Jews were sooner or later threatened, especially those who were considered exponents of the hated Weimar Republic, even if they had been opposed to it because of their communist or German-nationalist convictions. This applied even to the Jewish veterans of World War I, who were mostly patriotic and frequently nationalistic as well. But the N.S. politicians in charge of cultural policy did not understand this paradox. In other words: Jews, or those who were declared Jews because of their names or descent were endangered to a much greater degree than those who were classified as belonging to the "Aryan" part of the cultural elite.

Those whom the National-Socialists did not count as "cultural Bolsheviks" were among the least threatened. This was hardly considered a compliment, as the appeal by Oskar Maria Graf at the beginning of this essay shows, but this fact must not lead to the conclusion that only those belonged to the cultural elite who were defamed by the new rulers as "cultural Bolsheviks." Even after 1933 certain sectors of cultural life existed over which the N.S. rulers had little or no influence. Due to these circumstances, and especially due to the acute danger they faced, the percentage of those "cultural" émigrés who were Jews or were declared Jews by the Third Reich was

bound to be larger than the percentage of Jews in the population as a whole.

The second reason for the high percentage of Jewish "cultural" emigrants is harder to define. It remains necessarily speculative as far as it claims to evaluate scholarly and artistic creativity. Two points have to be considered: First, the occupational discrimination against Jews which had lasted for centuries had resulted in a concentration in certain professions, among others in a high percentage of academically trained Jews in intellectual professions. Second, the unequal chances for employment which existed in the German *Reich* until 1918 and which had affected not only Jews but also Catholics and Social Democrats, had strengthened the trend toward intellectual professions not covered by civil service employment for non-assimilated Jews. In this context, it has to be kept in mind that many intellectuals of Jewish background came from wealthy urban manufacturers' and merchants' families. To break out of this family tradition, which was frequently considered to be specifically Jewish by their social peers, did not necessarily signify social advancement, but it was an escape from a world which was from the start identified as a Jewish ghetto. This experience of life and family history and a latent and at times open anti-Semitism (which was, however, not restricted to Germany) increased the tendency to reflect on the nature of one's own social existence and aroused interest in social problems in general among those whose assimilation had not taken place generations earlier. In other words, it heightened the social sensitivity of those who had had the personal experience that they or their ancestors had belonged to a social minority — especially when they had to fear discrimination. Such effects have to be considered, although a large part of these Jews had been integrated into the upper middle class of society during the 19th and early 20th centuries and had more or less adopted its national and bourgeois systems of rules, i.e. had adopted a German identity.

This interpretation is supported by the autobiographies of numerous members of the cultural elite with Jewish background. It is very plausible but cannot claim sociological validity since its evidence is based on the perception of those who interpreted their own education under the impact of being totally uprooted by the National-Socialist danger. And here lies a possible answer to the question for the identity of German-speaking "cultural" emigration: It certainly had identity patterns, but these patterns were, with one exception, not overarching but competing. These competing identities could be of a religious or political nature, could be based on universal humanitarian ideals as an answer to ultranationalism, and could find their expression in nationalism, as for instance, in Zionism. They frequently had the aim of representing the cultural and humanitarian values of the "other Germany," in contrast to the barbarism of National-Socialism. But for most of the scientists, artists and writers, their rootedness in the German language and culture remained during exile. It is true that to this day some emigrants strictly refuse to use the German language because they see in it the language of Hitler — who really did not master it well — yet the majority of emigrants of Jewish background declined to let the National-Socialists deprive them of the language of Goethe and Heine. For this reason, Horkheimer flatly refused to publish the *Zeitschrift für Sozialforschung* in English. English contributions remained the



exception until 1940. But also those authors who viewed the German tradition from which they came more critically, in many respects could not escape from it. Theodor W. Adorno's remark, he did not return to Germany because he loved it, but because his philosophizing was dependent on the German language and because he could therefore only count on reception, resonance and dialogue in Germany, is characteristic. Naturally this statement was true to a greater extent for those sectors of the "cultural emigration," whose productivity was related to language, i.e. philosophy and literature. Of course, there were the exceptions of those who had learned to express themselves in both languages, more in the sciences than in literature. Taking all the above facts into consideration, we can conclude the following: The cultural identity of the émigrés was fractured in many ways, it cannot be clearly identified as "Jewish" or anything else, the common cultural tradition of the German-language countries remains as the single unifying factor, although Weimar had already been characterized by manifold cultural diffractions and competing identities. The backward-looking orientation to German culture on the one hand, and the necessity and frequently also the desire to become acculturated in the host country on the other, a process during which new national identities had to be found, became deciding factors when, at the end of the N.S. dictatorship, the question of return arose. However, this was not only a question of cultural identity, but frequently a question of professional opportunities, of age etc. The question "return — yes or no —" could not only be answered by considering what the émigrés had done during exile. Just as important was the answer to another question: What was cultural life in the N.S. state like? Did there exist anything else besides the government-decreed "*Unkultur*", besides literature more or less strongly influenced by National-Socialism? Finally, what was the attitude of those members of the cultural elite who had remained at home towards the emigrants?

It was doubtless the aim of the N.S. régime to replace the hated Weimar culture with the "*gleichgeschaltete*" N.S. ideology. N.S. policy led logically to the displacement of considerable sections of the cultural elite active after World War I. The damage to German cultural life consisted of the replacement of intellectual brilliance with ideological narrowness and dogmatic triviality. However, despite their claim to wield absolute power, the rulers never did actually have complete control over everything they aspired to dominate. For reasons of international prestige and as a defense against sharp criticism by German emigrants, the N.S. state needed to keep scholars and artists of rank in Germany who could be shown off abroad. For this reason, they were granted a certain amount of freedom. In addition, even Joseph Goebbels placed great value on artistic quality in certain genres useful for his propaganda, primarily in the motion picture industry. Aside from their propagandistic intent and disastrous political bias, one cannot deny that some films of high artistic quality were produced. In addition to the more or less dictated conformity and opportunism that were prevailing and the activities of convinced party members as well as the more or less "unpolitical" holdovers in several fields of scholarship, one is able to observe some resistance, a more or less secret or indirect opposition, the activities of persons who had found refuge in one of the several forms of "inner emigration" within the culture of the N.S. state. In addition, quite a few members of the cultural elite, as

the elites of other fields, remained in their positions in order to keep up "cultural activities" which deserve this name to the largest possible extent. This perception of their task may have sprung at times from their desire to justify their behavior, at other times from an honest conviction that they had acted properly. Politically their attitudes acted in favor of the N.S. régime and were thus disastrous — even when, in the individual case, the desired goal was achieved in this manner.

In those fields in which the National-Socialists or their cultural functionaries developed ambition for ideological or personal reasons, there usually remained little room for free art and literature. Certainly there existed possibilities for withdrawal, as in music or the theater. Even after 1933, great art was still possible in these fields, when the régime was interested in outstanding artists for propaganda purposes, and these artists used their chances cleverly. One famous example is the actor, stage manager and state theater director, Gustaf Gründgens. Others, who had similar success, let themselves be forced to greater compromises than Gründgens without using their position to help those persecuted by the N.S. régime, for instance, the composer Richard Strauss and the conductor Wilhelm Furtwängler. Still, quite a few of the artists who made their career during the N.S. dictatorship were driven by ambition or opportunism. But the problems that especially actors had to face abroad due to their inability to function in a foreign language must also be taken into consideration. One frequent consequence was the decision to avoid emigration at all costs. In addition, the temptation was great to remain in a state which offered considerable chances to talented actors by the masterly use of the film for ideological purposes — chances which were an artistic challenge, as the achievements of Heinrich George and Emil Jannings demonstrate.

In regard to literature, similar examples can be cited although the possibilities were in several respects more limited. To stage German classics, for instance dramas by Schiller, whose criticism of tyranny could be understood by the audience as an allusion to current events and therefore as hidden criticism, was more easily possible than to write similar plays and criticism in a contemporary setting and thus provoke the suspicion of Nazi cultural functionaries and risk suppression by the régime. Nevertheless, a number of important writers of non-Jewish background remained in the Third Reich, some with at least a temporary sympathy for the régime, like Gottfried Benn, who was all the same forbidden to publish on March 18, 1938, as believing National-Socialist. Still others, for instance Gerhart Hauptmann, succumbed to being honored by the N.S. cultural establishment. Again others, who, like Ernst Jünger, had been bitter enemies of the Weimar Republic as partisans of the Conservative Revolution, did not accept a compromise with the régime after 1933. Finally, those authors should be mentioned who did not leave Germany, but felt themselves to be in a sort of "inner emigration" under the totalitarian régime: Elisabeth Langgässer, Gertrud von Le Fort, Erich Kästner, Frank Thiess, Oskar Loerke, Werner Bergengruen, Reinhold Schneider, Jochen Klepper, to mention only a few. Open criticism was impossible for them if they did not want to endanger themselves. Many of those who remained and did not sympathize with the régime published only little, or only harmless works during the twelve years of the dictatorship. Works which could be read as veiled criticisms of the régime,



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regardless of whether they were intended to be so or not, appeared rarely. One exception was Ernst Jünger's *Auf den Marmorlippen*. With regard to the numerous younger authors who began to write only after 1933, the assessment is more complex. They profited from being unknown and it was assumed that their experiments were merely aesthetic and not recognizable as critical political statements. They grew up from the beginning with a "split consciousness" (*gespaltenes Bewusstsein*), as Hans Dieter Schäfer has recently remarked. In any case, those non-National-Socialist authors who remained in N.S. Germany gave expression to other trends in the German literature of the 20th century in aesthetic and thematic respects than had the exiled authors who had been formed, on the one hand, by their Weimar cultural background, and on the other, by their exile and in some cases by style and subject matter adapted from other national literatures.

In principle it can be stated for literature and art that the characteristic traits of Weimar cultural life existed with typical limitations in the culture of the exile, but not in the N.S. state. The latter took little or no notice of the exiled authors and their literature. The statement of that usually very perceptive man of letters, Wilhelm Hausenstein, "I doubt whether much has been written in exile that equals in rank this narrative" (Stefan Andres' *Wir sind Utopia*), reveals how those who remained in Germany viewed their accomplishments. Hausenstein would hardly have drawn such a conclusion, had he read the works of Thomas and Heinrich Mann, or of Bertolt Brecht and Anna Seghers, written in exile. But his opinion shows once more, that the above mentioned incapacity to carry on a dialogue beyond the limits of like-minded friends, which had characterized the Weimar Republic, was continued in another manner. By the way, not only in creative writing, but also in the humanities and the social sciences, similarities can be observed: There was quite a number of scholars, who, although they loved to decorate their works with numerous references to other experts, only cited those scholars whose political and scholarly attitudes they shared. This explains, in part, why the scholarly works of emigrants received only partial and belated recognition (as did the works of scholars staying behind in the Third Reich).

In any case, aside from the defamations by N.S. functionaries, exile literature was much less discussed than more or less important contemporary French and American authors who were translated and published in the N.S. state until the end of the thirties: In the beginning, Sinclair Lewis, later William Faulkner, Ernest Hemingway, Thornton Wilder, Thomas Wolfe, as well as numerous authors of the better light fiction. French authors of rank also were published in German translation: André Maurois, Henry de Montherlant, Jules Romains, Georges Bernanos, Paul Claudel, Antoine de Saint-Exupéry, to mention only a few of the most important authors.

The claim of the National-Socialists to total power also had limits in other respects. Until 1935, four of the six volumes of Franz Kafka's *Gesammelte Schriften* could still be published. After its prohibition, Schocken published the two other volumes as well under the cover name of a publisher in Prague. This list of examples could be expanded. Defamed or unwanted authors were still published in Germany for a number of years, remaining copies of books printed before their prohibi-

tion could frequently still be bought on the market. Nevertheless, phases can be discerned: In addition to the intensified persecution and further wave of emigration of people with Jewish background which followed the terror of the so-called *Reichskristallnacht* of November 9, 1938, the cultural controls became tighter and censorship more strict. In 1937, Hitler delivered two programmatic speeches on cultural policy in Munich and Nuremberg, in which he once again proclaimed his "unalterable decision:" He would, "just as he had ended political confusion . . . now also do away with the clichés in German cultural life." In the following years 1938/39, N.S. control over literary magazines and literary production was tightened. The result was anxiety among many authors, a more limited selection of titles offered, and caution on the part of the publishers.

A number of younger authors, who were to play an important role in German postwar literature and who were able to remain abroad during the N.S. rule for a shorter or longer period without being classified as exiles, avoided political themes anyhow. They withdrew to classical subjects, books of travel, the description of emotional life apart from its social background. Hans Dieter Schäfer has recently examined the literary position of these authors. Among them were Marie Luise Kaschnitz, Stefan Andres, Felix Hartlaub, Eugen Gottlob Winkler, Hans Erich Nossack, Günter Eich, Peter Huchel, Johannes Bobrowski, Karl Krolow, Erhart Kästner, Gustav René Hocke and others. "While in exile the satire, commentaries and the pamphlet in the tradition of Weimar lived on, in Germany National-Socialist and religious authors used speeches, war reports, or sermons and legends" (Schäfer). Naturally certain genres of writing which were common to exiled and non-exiled authors alike continued to be produced, but self-chosen or imposed restrictions existed nonetheless: Although important literary achievements were obtained during the Third Reich, they could only be created if the régime tolerated them, or illegally. Sociocritical or political statements which ran counter to the official ideology, could at best be written in extremely veiled language. The existence of literary or other artistic achievements does not invalidate N.S. claim to totalitarian controls, nor do these works change the fact in any way that this claim was asserted with utter brutality when it was of vital importance for the régime to do so. In this regard, phases of intermittent intensification of a radical cultural policy, or simple technical problems having consequence for cultural politics can also be observed. Among the latter was the scarcity of printing paper during the war, among the first were programmatic attempts at *Gleichschaltung*, as, for instance, in the above mentioned Hitler speeches, or through the exhibition *Entartete Kunst* in 1937.

In certain fields of scholarship we find considerable complexity although the totalitarian grip on cultural life was just as firm. Above all, the displacement of scholars of Jewish background or of politically "undesirable" scholars must be mentioned. They were usually replaced by party members and functionaries of N.S. university organizations. Comparatively harmless, although characteristic, were measures of a purely demonstrative character, for instance the abrogation of Thomas Mann's honorary doctor's degree by the University of Bonn. Paul Egon Hübinger has described this embarrassing incident in detail. The number of those who were dismissed and thus forbid-



den to work, and of those who were driven to their death by individual acts of terror, can only be estimated. According to a compilation assembled by the exiled sociologist, Emil J. Gumbel, *Freie Wissenschaft*, edited in Strasbourg in 1938, the N.S. government had dismissed about 1,500 scholars by the end of 1936; for the time up to the *Anschluss* of Austria in March 1938, Gumbel estimated their number at 2,000.

Aside from "racial" persecution, the already mentioned *Gesetz zur Wiederherstellung des Berufsbeamtentums* permitted the removal from the universities of practically any political opponent of the régime, or of scholars who had been denounced as unreliable. Seemingly minor infractions, such as vaguely defined "malicious" behavior toward the N.S. movement or the "abuse" of an official position to the detriment of "national-minded" officials, sufficed as grounds for dismissal. For an assessment of the political attitude of the accused it was permitted to consider retroactively his record during the Weimar Republic. This law was certainly the most hostile to the civil service ever, according to the classical rules of German administration. The abuses of the civil service system during the Weimar Republic, which had led to accusations of political favoritism by conservative and liberal civil service associations, cannot be compared to those committed under the new N.S. act.

Self-determination and autonomy of the university, a classical axiom of academic freedom which had often been used as political weapon against the fledgling democracy during the Weimar years, were abolished with the introduction of the *Führerverfassung*. The rectors of the universities who were appointed by the minister, in turn appointed the deans who were also in charge of the university budget which had formerly been the prerogative of the senate. In order to obtain a lectureship, "character aptitude" had to be tested, an examination, which the candidates had to pass after six weeks' training in an "educational" camp. In addition, the applicant had to prove that he was a member of the National-Socialist Party. As in other sectors of social life, a number of organizations served as additional devices for political surveillance, in this case the *NS-Dozentenbund*. According to the contemporary calculations of Gumbel, the following number of members of the teaching staff at the University of Heidelberg, to take just one university, had been dismissed for political reasons by 1936 (comparison with 1932): Altogether 56 of 215 (= 25%) professors had to give up their positions for political reasons during these four years. Gumbel considers this as the lowest possible number because other cases cannot be definitely clarified, since premature retirement and "voluntary" resignation are not included. A breakdown shows that these 25% are distributed rather unevenly among the different departments. The law school had the highest percentage (37%) of dismissals for political reasons, the natural sciences had the lowest percentage with 20%, in between lay the philosophy department with 30% and the medical school with 29%.

The positions of the dismissed were not given to members of the younger generation or to university lecturers but to new members of the teaching staff who were party functionaries of local N.S. organizations. During the five years ending in 1938, 21 of 50 full professors, 28 of 71 assistant professors and lecturers were appointed at the University of Heidelberg. In 1936 the total teaching staff consisted of 178 teachers, of which 81 had been appointed between 1933 and 1936. Nearly half of

those teaching at the University of Heidelberg in 1938 had served less than four years at the university — in other words, they had come from the outside.

This fluctuation of personnel, which was similar at the other universities, is significant. In many disciplines which were not of primary interest to the National-Socialists, many "unpolitical" scholars of non-Jewish background remained more or less undisturbed. But a considerable part of the teaching staff behaved in agreement with the system out of conviction or out of opportunism. Open opposition against the régime remained the exception at the universities as well as in other sectors of society. This was probably more wide-spread than the anti-republican attitudes of many university teachers in 1933. Yet, it must be considered overall that the majority of possible opponents of Nazism had been dismissed from the universities. One partial consequence of the change of personnel, but also of opportunism, were the changes inserted in the curricula of numerous courses which had little or nothing to do with the subject matter, but were pure N.S. propaganda. According to the university catalogue for the summer of 1935, the then most renowned German university, Berlin, offered not less than 28 "courses" on "ethnology" (*Rassenlehre*); with the number of lectures and exercises in military science not far behind. If one adds those courses which were directly devoted to political subjects or were politicized in line with N.S. ideology without acknowledgement, the degree to which the universities were "gleichgeschaltet" and the susceptibility of certain fields of scholarship to N.S. ideology becomes evident. The results were less willingness to study, a decline in excellence and the indoctrination of the students.

The censorship by the *Reichsstelle zur Förderung des deutschen Schrifttums* was headed by the Fuehrer appointee and N.S. ideologist Alfred Rosenberg — the author of *Mythos des 20. Jahrhunderts*. This organization had local branches throughout the *Reich* and forced even those authors who did not sympathize with the régime to write prefaces to their books that seem embarrassing today, or to make other gestures of submission. Nevertheless, it has to be stated in this case as well, that even in those areas of the humanities which the rulers considered politically sensitive, a number of important works appeared, and in all disciplines scholars existed who did not make concessions to the ruling "spirit" of the times. In some areas of scholarship, free and undisturbed research was still possible. But even the natural sciences were affected by N.S. cultural policy. One example was the absurd effort to establish an "Aryan physics."

Still, even some of the functionaries responsible for this trend, whose main representatives were the Nobel Prize winners Philipp Lenard and Johannes Stark, kept enough sense of reality to understand the material significance of scientific research for the N.S. state. High priority research, if it was to be used, for instance, for military purposes, could not be replaced by ideology. Thus, despite the removal of leading natural scientists for "racial" or, to a lesser degree, for political reasons, numerous leading representatives of the discipline still had possibilities to work, in physics, for example, Max Planck, Otto Hahn, Werner Heisenberg, and Fritz Strassmann.

Alan D. Beyerchen states in his monograph on *scientists under Hitler: Politics and the Physics Community in the Third*



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*Reich* that the cautious conformity of many physicists to the N.S. state soon gave way to increasing alienation. In addition, one important factor in their outwardly conforming to the state carried with it some advantages for physics. German scholars soon became more and more isolated internationally — an isolation which increased after the outbreak of the war. But certain research institutions, for instance, the Kaiser-Wilhelm-Gesellschaft (today the Max-Planck-Gesellschaft), succeeded in protecting themselves to a great extent from political interference and to restrict N.S. interference by making certain concessions. Alan Beyerchen called this procedure *Selbstgleichschaltung*. Although an exception, N.S. policy in regard to the sciences was at times openly criticized by scientists; in the field of physics the Nobel Prize winner Max von Laue deserves to be mentioned here. He did not leave Germany because he wanted to fight against N.S. rule *there* and be available at its demise, which he hoped would come soon. He remained unyielding, helped persecuted colleagues, deplored openly as early as September 1933 the losses which German science suffered through emigration, and delivered a public eulogy for Fritz Haber, who had to leave Germany because of his Jewish background.

The majority of the emigrating scientists was of Jewish background. This means, that the larger part of the scholars leaving Germany had to anticipate danger to their lives and limbs through the régime. Only a few not threatened in this way left Germany. The decision to emigrate was always the exception, unless it was absolutely necessary.

The number of scientists, especially of younger age, who decided not to pursue a scientific career in the N.S. state, was rather large. On the other hand, there were always cases where scientists managed in the end, to continue their work despite sharp attacks from N.S. organizations. This was true of Werner Heisenberg who faced a precarious situation when he was attacked by representatives of "Aryan" physics and members of the S.S. on the occasion of his appointment to the University of Munich. His international reputation convinced Rosenberg that it was inopportune to remove him. Above all his personal connections to Himmler's family and other important leaders, in addition to a number of vehement protests by renowned physicists enabled Heisenberg to continue his work. He had fallen out of favour with party and science functionaries by refusing to issue a loyalty declaration to the *Führer* by the employment of Jewish co-workers during the Weimar period, by respectfully referring to Einstein, and similar acts. As a representative of theoretical physics and the theory of relativity, he was a thorn in the side of the advocates of "Aryan" physics. The "Aryan" physicists succeeded in preventing Heisenberg's appointment to Munich and to appoint instead a physicist, who was not experienced in theoretical physics, but had written a polemical tract against the "Jewish" relativity theory under the title *Judentum und Wissenschaft*. Nevertheless, the years of "Aryan" physics during the Third Reich can be counted. In 1942/43, the end of this pseudo-scientific movement began after renewed public controversy. Its more alleged than actual importance to the German wartime economy led to the re-establishment of scientific autonomy in physics (Beyerchen).

After having sketched its political preconditions, the cultural losses and the literary, artistic and scientific character of these losses can be described. "Cultural" emigration was an impor-

tant, in some sectors the most interesting, part of German-language culture after 1933. But it was only a part, not the whole. This observation does not lessen the barbaric atrocity of the expulsion nor its cultural stupidity, but aims at a realistic assessment of the problem.

Can the cultural losses which Germany suffered after 1933 at the hands of the N.S. dictatorship be measured? The number of those emigrants who belonged to the "cultural" emigration is not exactly determinable, even under a strict definition — the more so as the criteria of definition are fluid and lead unavoidably to inaccuracy. Still, it is possible to estimate the approximate number, and it is appalling. Of the 104,098 emigrants of Austrian and German origin who emigrated during 1933 and 1941 to the United States, 7,622 (=7,3%) had an academic or artistic profession, and 1,090 of them were scientists, mostly professors. Included in this broadly defined academic emigration, which naturally consisted not only of members of a cultural elite which had published their own works, were 811 lawyers, 2,352 physicians, 682 journalists, 645 technologists, 465 musicians, 296 artists, and 1,281 following other professions (numbers according to R. Davie and D. Kent).

Doubtless the United States was the most important country of immigration, especially after the occupation of their European neighbors by the National-Socialists. One fourth of all German-speaking emigrants went to the U.S. after 1933, some immediately, most by detours through European host countries. Other states, too, offered a refuge to emigrating scholars, for instance Latin American countries and Turkey, frequently because of their own political interest in science. What was a loss to the German *Reich*, became a gain for Turkey, for example. The number of academic emigrants to the United States and other countries is greater than the number of the cultural elite in a narrower sense. The present second volume of this work lists 4,600 emigrants who originated in Germany, Austria, and other centers of German culture, for example Prague. These emigrants were full professors at universities and academies before or after their emigration, had distinguished themselves through scientific publications, literary, journalistic, or artistic achievements in the arts, architecture, music, theater, and film.

To this number have to be added those emigrants who have been included in Volume I because of their political activity, who also made significant contributions to culture. In addition, those persons have to be considered who were not included in the handbook because of the standards of inclusion dictated by the limits of space in such a reference work. The biographies are on file in the archives of the Institut für Zeitgeschichte, Munich, and of the Research Foundation for Jewish Immigration, New York. On the basis of these files, the total number of emigrants who belonged to the cultural elite during the thirties and forties, can be estimated with considerable accuracy: It amounts to about 5,000—6,000.

What were the fields of activity of these "cultural" emigrants? One of the qualitatively and quantitatively most important groups of German-speaking "cultural" émigrés after 1933 were doubtless the writers. The number of authors, journalists, and publicists in this group amounts probably to about 2,500 people. The greater part of the most important, most creative and original German-speaking writers emigrated already during



the first weeks or months of the régime, in the case of Austria frequently only in 1938. The emigrated writers are listed in this handbook. Without regard to differences in quality the most important shall be mentioned here: Bertolt Brecht, Herman Broch, Johannes R. Becher, Martin Beheim-Schwarzbach, Bernhard von Brentano, Max Brod, Ferdinand Bruckner, Elias Canetti, Alfred Döblin, Lion Feuchtwanger, Bruno Frank, Leonhard Frank, Richard Friedenthal, Stefan George, Curt Goetz, Oskar Maria Graf, Walter Hasenclever, Ödön von Horváth, Hans Habe, Julius Hay, Georg Hermann, Stephan Hermlin, Stefan Heym, Fritz Hochwälder, Hans Henny Jahn, Hermann Kesten, Anette Kolb, Georg Kaiser, Irmgard Keun, Alfred Kantorowicz, Else Lasker-Schüler, Emil Ludwig, Thomas Mann, Heinrich Mann, Klaus Mann, Robert Musil, Walter Mehring, Peter de Mendelssohn, Ludwig Marcuse, Alfred Neumann, Theodor Plivier, Alfred Polgar, Joseph Roth, Gustav Regler, Ludwig Renn, Erich Maria Remarque, René Schickele, Anna Seghers, Hilde Spiel, Nelly Sachs, Kurt Tucholsky, Gabriele Tergit, Max Tau, Ernst Toller, Friedrich Torberg, Fritz von Unruh, Johannes Urzidil, Jakob Wassermann, Franz Werfel, Armin T. Wegner, Ernst Weiss, Peter Weiss, Friedrich Wolf, Franz Carl Weiskopf, Karl Wolfskehl, Stefan Zweig, Arnold Zweig, Paul Zech, Carl Zuckmayer. Some of those mentioned, for instance Peter Weiss, began to publish much later than 1933, since they were still quite young at the time of their emigration.

Certainly, this enumeration contains authors of different literary significance, but there are leading representatives of German literature among them who enjoyed a very good reputation in Germany and abroad, or acquired it during their emigration. Several Nobel Prize winners and several later winners of the *Friedenspreis des deutschen Buchhandels* are also among the above mentioned emigrants. A comparison with the authors who remained in Germany, on the whole turns out in favor of the emigrants in regard to quantity and quality. Only few of those writers who remained in Germany acquired an international reputation. To a large part, they were younger authors, who reached the peak of their literary career only after the war.

The definition of the term "exile literature" is difficult. Attempts to define it by its subject matter or by the formal criteria of a theory of creative writing are hardly convincing. For instance, some observers have tried to show that the sonnet was the characteristic poetic form of exile literature. Besides the fact that the sonnet has a long history and had reached its height as a poetic form during the baroque period, such a genre-specific limitation would exclude just those forms, which the exiled writers used with great virtuosity and which helped to inform a large circle of readers about the conditions of existence in exile: the political essay, the feuilleton, and, above all, the epic form of the novel. In any case, the exiled authors employed the genre of the novel much more than the authors who lived in the N.S. state, among whom were, of course, also novelists of rank. Yet many German writers of these years preferred the shorter literary forms, for instance the novella.

This fact should not lead to the opposite and false conclusion to employ the term "exile novel" as an exclusive definition of the term "exile literature." Nevertheless many works of emigrated authors deal with the exile as their subject, for instance

Lion Feuchtwanger's novels *Exil* and *Geschwister Oppermann*, Bruno Frank's novel *Der Reisepass*, Anna Segher's novels *Transit* and *Die Toten bleiben jung*, Klaus Mann's novel *Der Vulkan* and his autobiography *Der Wendepunkt*, finally in a more intellectually challenging, indirect way, also Thomas Mann's trilogy *Joseph und seine Brüder*. Other novels of rank, Heinrich Mann's *Henri Quatre* or Alfred Döblin's *Hamlet oder die lange Nacht nimmt ein Ende*, which were written in exile, could not be called "exile literature" from a narrow thematic point of view — that is, if one considers the overt contents of a work as a criterion for its inclusion in "exile literature." In addition, several authors tried to continue works of highest literary value in exile, but did not succeed to do what they had intended. For instance, Hans Mayer recently said of Robert Musil's *Mann ohne Eigenschaften* that Musil, whom he knew personally, was not able to conclude the novel because of the conditions of his exile. Karl Corino described this fact with the words "*Reflexionen im Vakuum*." Aside from the well known limitations of this approach to the field of literary criticism as a whole criteria of literary theory are, in any case, too narrow to help us formulate a definition of the term "exile literature." The broadest definition of the term would include all literary productions, the feuilleton, the theater review, the political essay, and the traditional genres of literature which were used in exile as exile literature. Such a definition is without doubt rather vague, but the approach is justified if we consider the special conditions under which these writings took form. A specific and precise literary definition which would consider the poetic form, the immanent character of the work, the personal history of its author, stylistic and other techniques of literary analysis, is not excluded by this definition. This kind of approach is, however, not specific to exile literature. Only a recourse to the conditions of origin of the concerned works can be a valid criterium of definition. Exile literature comprises those writings which were written in exile. However, such a broad definition — Manfred Durzak, for instance considers it too broad — includes literature which contains neither in form nor content any recognizable constituents of the experience of exile. This corresponds to the statement Werner Berthold made at the symposium on exile literature in Copenhagen in 1972: "We are speaking today of exile research, and consciously no longer of research on exile literature . . . exile is interesting as a total phenomenon." Nevertheless, a closer look at the "cultural emigration" will reveal to what degree writers reflected upon the experience of life in exile. The authors belong to those groups of the "cultural emigration," whose works were most decisively marked by exile. This is not surprising since literature is always the expression of its times. In addition, writers with political commitments always wished to draw attention to the fate of the exiled, and the political situation in their home countries. The more politically motivated and realistic this commitment was, the less it aimed at artistic perfection. This characterization was particularly valid for genres whose form was not standardized by poetic rules and was therefore more flexible, i.e. essays, feuilleton, and topical reports. Within the whole of exile literature, there existed a sector which left behind the above-sketched common tradition and subject matter of the Weimar culture in reflecting and representing the situation of the exiled.

This widening of the former literary spectrum did not, however, create new forms: Most novels dealing with exile are rath-



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er traditional in their narrative character; their subject matter is original, not their form. The literary avant-garde, expressionism, and playful or problem-oriented experiments were of secondary importance in comparison to the traditional, straightforwardly realistic forms. Markedly political works, especially in the broad genre of functional literature, were an answer to the political displacement caused by the N.S. régime. This political purpose of many writings and articles published in exile continued one of the Weimar traditions, and can be explained as a reaction to the N.S. dictatorship, but led in numerous publications to a strong overemphasis on current topics. The endeavor to attain literary levels in their works was frequently superseded by the political and moral interests of the authors. Not many writers succeeded, like Thomas Mann, in integrating the demands of both the literary and the political dimension in their life's work, or to realize both aims simultaneously.

A further problem for the transformation of the problems of exile into literature was the change of the reading public and thus the conditions of reception. German readers were usually no longer available to the exiled authors; the readaptation to foreign-language readers required changes in style and form, and frequently dictated simplification. The challenges of the new, often uncomprehending, cultural environment were not conducive to the writing of literary masterpieces within a few months or years — rather, they were a heavy burden. Begging for understanding, autobiographical accounts of self-justification, written to secure short-term financial rewards, were further factors liable to impede literary excellence. The loss to German-language culture is not only ascertainable in the usual sense. The extreme worsening of living conditions also impaired the possibility of carefree literary work for most exiled authors. The living conditions of exiled writers have to be taken into consideration to a greater degree than usual in the interpretation of their works. Ernst Loewy explains their partly "emphatic-antifascist" character thus: "The best part of German literature had been forced into the role of resistance, for which it had been subjectively prepared only to a limited degree; objectively such a role had lost almost all foundation. It accepted the challenge without being able to cope with it, partly with very modest, partly with surprising, although in their immediate effect rather inconspicuous results . . . Thus the history of exile literature remains primarily — although again and again interrupted by great individual achievements — a chain of hopes, errors, and disappointments."

Aside from the necessary distinction of phases in exile literature, two contrasting assessments by Klaus Mann should be kept in mind. In his autobiography *Der Wendepunkt*, he had stated: "Especially during the first years of exile, from 1933 to 1936, the feeling of solidarity was strong and genuine. Yes, the 'burned writers' were something like a homogeneous elite, a real community within the whole, indistinct, amorphous emigration." A little later, he published a retrospective account which was probably more realistic in regard to this presumed homogeneity: "The majority of our emigrants consisted, after all, of honest citizens, who saw themselves primarily as 'good Germans,' only secondarily as Jews and last of all, or not at all, as anti-fascists." The last part of this statement may be exaggerated, however, since there is no doubt that the majority of the emigrants perceived themselves definitely as anti-

fascists. The question was, rather, how explicit this anti-fascism was, and, above all, through which positive political conviction it expressed itself. And in this respect, the political partisanship and differences of Weimar continued to exist. The homogeneity of the writers, as stated above, existed only seemingly, or in small circles, for instance in the "P.E.N. Club of Exiled German-Speaking Writers," which was the theme of an exhibition in Frankfurt in 1980, or in political and literary groups centered around the numerous exile periodicals, which Hans Albert Walter has described comprehensively. These periodicals partly continued the tradition of before 1933, for instance, *Das neue Tage-Buch* and *Die neue Weltbühne*. Some of these new established programs like the journal *Die Sammlung* edited by Klaus Mann, the *Neue deutsche Blätter* edited by Oskar Maria Graf, Wieland Herzfelde, and Anna Seghers, or *Maß und Wert* which was published by Thomas Mann and edited by Golo Mann. Finally, the journal *Das Wort* has to be mentioned. It was later on published in Moscow by Bertolt Brecht, Willi Bredel, and Lion Feuchtwanger, and replaced the *Sammlung* and the *Neue deutsche Blätter*. It propagated popular front ideas more strongly than any other journal, but published not only communists but also writers of other political persuasions.

However, such collaboration independent of political opinions could not prevent many disagreements. Some might have had personal reasons, like the quarrel between Klaus Mann and Leopold Schwarzschild, but the ways of life of these exile journals contained a good deal of explosive materials. Lion Feuchtwanger has described the *Pariser Tageblatt* in his novel *Exil*. The short lives of the publications of the exile press as well as their great number — which Lieselotte Maas has recorded — are an indication of the difficulties with which the "literary" or "political-literary" journalism of the German-speaking exile was confronted, but they are also an indication of the heterogeneity of the "political" and "literary" exile as a whole. All authors also had to fight a basic problem that Theodor W. Adorno defined concisely in his *Minima Moralia* in 1951: "Every intellectual in exile, without exception, is injured and had better recognize it himself, if he does not want to be cruelly disillusioned behind the tightly closed doors of his self-respect. He lives in an environment which must remain incomprehensible to him . . . His language is expropriated, and the historical dimension from which his thought drew its strength is cut away . . . The isolation gets worse, the more closed, politically controlled groups are established, suspicious of their own members and hostile toward outsiders. The percentage of the national income that falls to the foreigner's share will not suffice and drives him into a hopeless secondary competition with other émigrés in addition to the general market competition . . . Escaped from the disgrace of the immediate *Gleichschaltung* in Germany, he wears just this escape as his distinguishing mark, an illusory and unreal existence within a living and alive society . . . All weights are shifted, and perceptions become blurred."

Within the "literary" emigration, two groups are included in these volumes that were of major importance: We have already mentioned one of them in this essay, the journalists, who seem to represent all that was characteristic of Weimar culture. The qualitative and quantitative range of what this group produced should come as no surprise. Its members reflected in



a most direct way political developments in Germany, and they could not help commenting on them, neither before nor after 1933. For this present volume, in which only journalists engaged in the cultural sector are included, the I.f.Z. chose nearly 250 persons according to its criteria for inclusion. To this have to be added the "political" journalists of Volume I, as well as those whom the R.F.J.I. has listed. Within the "literary" emigration, journalists of all kinds comprised a considerable group of several hundred persons. Among the publicists writing on cultural topics the following famous names are to be found: Jean Améry, Max Beer, Walter Benjamin, Julie Braun-Vogelstein, Martin Esslin, Heinrich Fraenkel, Erich Franzen, Eduard Fuchs, Willy Haas, Werner Hegemann, Jakob Hegner, Konrad Heiden, Rudolf Hirsch, Artur Holscher, Wieland Herzfelde, Robert Jungk, Alfred Kantorowicz, Richard Katz, Harry Graf Kessler, Fritz Landshoff, Erwin Leiser, Ernst Loewy, Valeriu Marcu, Max Osborn, Curt Riess, Harry Schulze-Wilde, Max Tau, Georg Stefan Troller. However, these publicists different from the great representatives of "political" journalism, are only typical for the Weimar intellect in individual cases. Thus they could resume their work more easily after 1945. Many of those mentioned here returned therefore to journalism in Germany.

The second group which shall only be mentioned briefly here, is smaller in size, but was of greater importance, for some of its members succeeded in founding their own publishing companies in the United States. This group was important for the rest of the emigrants simply because the newly-founded publishing companies became points of attraction for them and offered the authors the readership they depended on. However, the most important European publishing companies for exile literature, for instance Querido or Allert de Lange in Amsterdam and Oprecht in Zurich, were not owned by émigrés. At any rate, without their publishers, the emigrated authors would have literally become speechless; their material existence, their being accepted, and their effectiveness crucially depended on their ability to find a publisher. Without these exile publishers, who were established in Prague, Amsterdam, Paris, and Zurich immediately after the N.S. seizure of power, the emigrated authors would have hardly been able to meet with any kind of response. "Who will publish our works?" was the urgent question with which German writers-in-exile took up their work again. They received a "surprisingly fast answer," wrote Wieland Herzfelde in 1937 in appreciation of the first four years of exile publishing later described in detail by H.A. Walter. Their work was carried out under the most difficult of conditions, and depended to a large degree on the ability to improvise. Frequently, authors acted as their own publishers and book dealers, and sold their mimeographed manuscripts themselves after holding readings or lectures. Others were published by emigrated publishers, for example, the Marxist-oriented Malik publishing company of Wieland Herzfelde, or the literary publishing company of Gottfried Bermann-Fischer, who published the great Stockholm edition of Thomas Mann's works-in-exile. Kurt Wolff's Pantheon Books, Martinus Nijhoff in the Hague, the left-wing Editions du Carrefour in Paris, where Dimitroff's *Brownbook* on the burning of the *Reichstag* was published, and smaller publishers also offered a home to exiled authors. However, there also existed German publishers like Schocken or Julius Springer in exile, who published little or no exile literature. The most im-

portant exile publishers — Querido, de Lange, and Oprecht — did not only act out of financial interest. Publishing exiled authors without a guaranteed reading public was a considerable risk, but, as Klaus Mann and others reported, done for political and humanitarian reasons, i.e. because the publishers opposed the N.S. régime. Querido had to pay with his life for this in 1942. The Dutch publishers employed capable persons formerly active in German publishing companies as heads of their exile departments, e.g. Hermann Kesten, Fritz Landshoff, and Walter Landauer, all former readers of the publisher Kiepenheuer in Berlin. The two Amsterdam publishers issued almost 200 titles by more than 100 authors by the spring of 1940 (A. Stephan).

The publishing activity of Emil Oprecht in Zurich was comparable. After the occupation of Prague in 1938 and of the Netherlands in 1940, he remained the only large exile publisher in German-language countries. These three publishers and Bermann-Fischer had published nearly 500 works of exile literature by 1946 which had reached a total circulation of about 1.75 million copies with an average of 3,000—4,000 copies per title (A. Stephan). Their number is only exceeded by the books published by Soviet publishers for foreign-language literature or for national minorities, which reached a total of two million copies (H. Halfmann). The disappearance of the exile publishing companies from central and Western Europe following the occupation of these countries was a heavy blow to the exiled authors. The Aurora publishing company in the United States and El libro libre in Mexico could not completely fill in this gap despite their successful activities. The "literary" emigrants are the qualitatively and quantitatively most impressive part of the "cultural" emigration. Their productivity was extraordinary; the special compilation of the German national bibliography issued in Leipzig in 1949 lists 12,717 titles which could not be published in Nazi Germany. This quantitative weight of the "literary" emigration and the well-advanced research of exile literature must not lead to an underestimation of other groups in the "cultural" emigration. A large number of important painters, sculptors, architects, musicians, and theater artists left National-Socialist Germany or fled from N.S. terror after 1933. The emigration archives compiled by I.f.Z. and R.F.J.I. list more than 3,000 artists and theater people among its 25,000 persons, of whom about 600 were included in this second volume. The ratio of representational artists remaining in the N.S. Reich to their ratio in the "cultural" emigration is comparable to the situation in the literary field. Outstanding painters and sculptors did remain in Germany during the dictatorship, but sooner or later they had to discontinue their public appearances. Neither attempted conformity nor retreat into private life protected numerous famous artists from being defamed as "degenerate," and thus losing the possibility of making their works available to the public. State museums and exhibitions remained closed to them. Emil Nolde, who had been declared "degenerate" in 1933, was forbidden to paint in 1941. He shared this fate with Karl Hofer and Karl Schmidt-Rottluff. Other painters had already been dismissed from their positions at academies of art in 1933, for instance, Otto Dix, Max Pechstein, Willi Baumeister, Oskar Moll and Oskar Schlemmer. Still others, like Ernst Wilhelm Nay, were forbidden to exhibit their works in 1936.

Among established painters who remained in N.S. Germany but whose effectiveness was considerably reduced, in addition



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to those already mentioned, were Ernst Barlach, Friedrich Ahlers-Hestermann, Erich Heckel, Werner Heldt, Georg Meistermann, Otto Modersohn, Gabriele Münter, Franz Radziwill, Georg Scholz (who was also labelled "degenerate"), Fritz Winter, and a number of younger artists, whose works surfaced mostly after 1945. Max Liebermann, who was already 86 years old when the Nazis seized power, remained in Berlin until his death in 1935. The number of those prohibited to paint and exhibit, of dismissals and other measures which amounted to a professional ban, show how little freedom of movement visual artists enjoyed. The losses to German art through these discriminations were high and, in many cases, resulted in emigration. Again, many of the emigrants had contributed to the reputation enjoyed by German art during the Weimar years, as had those defamed after 1933. The most prominent émigrés are: Josef Albers, Max Beckmann, Lyonel Feininger, George Grosz, Thomas Theodor Heine, Paul Klee, Oskar Kokoschka, Wassily Kandinsky, Anna Mahler, Max Oppenheimer, Hans Purrmann, Hans Richter, Emy Roeder, and Kurt Schwitters. In addition, those have to be mentioned who had left Germany before 1933, and were forced to flee before the Germans occupied France and forbidden to exhibit their works in Germany during the N.S. dictatorship: they include for instance Max Ernst and Otto Freundlich, who did not survive his deportation.

Outstanding architects left National-Socialist Germany as well. The best known were Walter Gropius, Ludwig Mies van der Rohe, Bruno Taut, Erich Mendelsohn, and Ernst-Georg May. One of the few internationally known architects who remained and whose career was not impaired by N.S. rule, was Peter Behrens, in whose office some of the most famous architects of the 20th century had worked prior to 1933, e.g. Le Corbusier, Gropius, and Mies van der Rohe. Behrens was epoch-making primarily through his industrial and office buildings as well as his housing developments, but his most prominent buildings originated in the decades before 1933. The silencing and the professional banning of the artists remaining in Germany must be seen in relation to emigration. Although their number were smaller than those of the writers who emigrated, there were parallels. The most modern and exciting part of German art, which marked the first decades of this century, was banished by N.S. rule. In hardly any other field is more obvious how much N.S. cultural policy was a reaction to the rationalism of modernity. This was even the case in regard to those principles which N.S. functionaries were paradoxically not entirely opposed to, for instance, elements of the new functionalism that among others the Bauhaus architects had propagated.

For artistic schools like the *Deutscher Werkbund*, the *Bauhaus* and the *Blauer Reiter*, which were epoch-making in the history of art, there remained no room in the N.S. Reich. New functionalism, expressionism, surrealism, and abstract art were equally fought as "unnatural" and "degenerate." The artistic character of these trends contradicted the naive, "völkisch" realism, in demand after 1933. These tendencies ran counter to artistic conventionalism as well as to architectural monumentalism. They contrasted with the monotony of N.S. housing developments which contained no room for individualists. The dictatorships of the 20th century were similar in their art policy: "The official artistic style of totalitarian countries is

everywhere the same" (Werner Haftmann). Political utilitarianism, "popular" realism — a form of democratization of art, an adaptation to the "sound popular instinct" — supervision of art through functionaries of state and party — these are only a few of the common characteristics of such art policy. Germanic and "blood and soil" mythologies and anti-Semitism were additional factors in the N.S. Reich. The fight against "Cultural Bolshevism" and against art that served to "corrode" "popular instinct" and "state-supporting" N.S. ideology was aimed at representational art as well as at literature. The above mentioned steps in defamation are applicable here, too: Programmatic Hitler-speeches, for instance, in Nuremberg in 1934, the obligation to obtain permission for each exhibition from the "Reichskunstkammer" from 1935 on, the confiscation of "degenerate art" after 1937, the confiscation and squandering of valuable works of art starting in 1938/39. This fight was by no means directed against the living, the German, or the emigrated artists alone. Here too, the observation holds that art in Germany could — as far as it was modern — survive only in niches, in "inner emigration." "Art became a means of propaganda" (H. Weigert). German artists were cut off from trend-setting traditions and from the international art market. In this field, the loss was much higher than the prominence and number of emigrants suggests. In addition, a national, "völkisch" art was propagated which was characterized in subject and form by clichés corresponding to the alleged or real taste of the masses. The representational architecture of the party state, with its depressing monumentalism and its empty, declamatory classicism, completed the picture.

The most renowned emigrated architects succeeded in establishing themselves in the United States. Gropius taught at Harvard and founded The Architects' Collaborative, a firm in which a number of younger architects could work together in complete freedom and artistic self-realization according to his principle of teamwork. This team built, for instance, the Harvard Graduate Center in 1949 and erected an apartment building in the new Hansa section in Berlin at the international *Bauausstellung* in 1957, many years after the end of N.S. rule in Germany. Generally, the work of some of the emigrated architects became more international after the end of World War II. Gropius built the U.S. embassy in Athens from 1957 to 1961 and the Rosenthal china factory in Selb/Upper Palatinate in 1964. Mies van der Rohe, who taught at the Armour Institute of Technology in Chicago after 1968 and designed some buildings there, returned to his former productivity only after 1945. In a number of important designs, which continued his earlier period of "revolutionary glass skyscrapers" (N. Pevsner), he planned private houses, apartment blocks, and office buildings in New York, Toronto, Chicago and other North American cities. Finally, he built the glass-wall National Gallery (1962–68) in Berlin. Pevsner remarked that the style of these buildings was in the tradition of the twenties and thirties but not characterized by the trends of the last one-and-one-half decades in which they were built. Erich Mendelsohn, too, who emigrated via England and Israel to the United States, successfully realized his architectural plans. He had already been in the U.S.A. during the twenties. This visit had influenced his architectural style in the same way as the contact with architectural trends in the U.S.A. had prepared the ground for both of the above-mentioned architects to design their visionary buildings.



On the basis of this affinity, it was possible for architects of rank to gain considerable reputations in the United States and in other countries — as the example of Bruno Taut in Japan and Turkey shows — and even to influence the architectural development in their host countries. It has to be kept in mind here that architecture of this rank was also utilitarian art. Its utility, which was of benefit to the host country in a direct and visible way, considerably increased the chances of émigrés of continuing to work as artists during their emigration. The number of visual artists included in this volume amounts to nearly 250 — not only quantitatively but also qualitatively an important part of the “cultural” emigration. The less verbal and representational a work of art was, the less it was suspected by the N.S. rulers of being oppositional, and the higher became the number of those who had to leave Germany not on account of their “degenerate” style but in the face of a direct threat, i.e. because they were “Jews” as stipulated by the broad interpretation of the Nuremberg laws.

In the field of music, apart from artists of Jewish background, the N.S. régime again defamed those who were radical and experimental innovators, although there were exceptions. While the twelve-tone musician Arnold Schoenberg emigrated, Anton von Webern, who had used twelve-tone techniques since 1924, remained in his Austrian home country even after the *Anschluss* of 1938. He died there in 1945. He achieved his greatest fame only several years after the end of N.S. rule, not the least because of his inspiring influence on composers like Boulez, Stockhausen and Ligeti. Alban Berg, however, was spared the decision to leave his homeland since he died a few years before the German invasion of Austria. His art had also been rated “degenerate” by N.S. cultural policy.

In the field of music the number of emigrants is lower, although a respectable number of them were musicians of rank, in addition to Arnold Schoenberg for instance Paul Hindemith, Kurt Weill, and Hanns Eisler, as well as the conductors, Bruno Walter and Otto Klemperer. Nevertheless, musicians of high rank remained in the N.S. Reich, like Richard Strauss — whose unpolitical egocentrism Klaus Mann denounced in his *Wendepunkt* — Carl Orff, and Werner Egk, as well as the conductor Wilhelm Furtwängler. The latter two, in fact, accepted government assignments after 1933. Those musicians who were forced to emigrate had to do so less because of their work but because of their Jewish background or political convictions. These great interpreters were able to continue working comparatively undisturbed during the dictatorship because they had not been classified as enemies of the régime from the very beginning. Music could hardly be understood as a criticism of the régime even when it did not hue to the prevailing taste. A pianist, for example, could use classical compositions or those of the baroque or romantic periods in his repertoire, as long as they had not been classified as “Jewish.” In this respect, a musician was able to survive the N.S. régime more easily without loss of quality than painters or writers. For these reasons, the majority of the 465 academically trained musicians mentioned earlier who emigrated to the United States did so because they were of Jewish background.

Although persons active in theater and film were equally able to retreat to interpreting literary classics, these fields of art remained dependent on communicating verbal content and,

thus, liable to give offence to official N.S. cultural policy. Of course, the N.S. state emphatically rejected “political theater” like Erwin Piscator’s and Bertolt Brecht’s. The difficulties encountered especially by actors and, on the other hand, the opportunities which the N.S. state offered them, have already been mentioned. The more remarkable was the number of persons active in the theater who emigrated. 320 biographies of actors, directors, dramatic producers, theater managers, stage designers, dancers, cabaretists, choreographers, theater and music critics were selected for inclusion in the handbook. The greater part of the emigrants in these fields were personalities who had made the German-language theater of the twenties world-famous, or who had broken new ground in the field of theater or film by bold and original productions or acting performances. The most renowned directors among the emigrants were: Max Reinhardt, Erwin Piscator, Fritz Kortner, Leopold Lindtberg, Fritz Jessner, Leopold Jessner. Helene Weigel, Bertolt Brecht, Peter Beauvais, Ernst Hausserman, Falk Harnack, Kurt Hirschfeld, Fritz Lang, Heinrich Schnitzler, Leonhard Steckel, George Tabori, Berthold Viertel, Wolfgang Heinz, and Peter Zadeck, who only became active after 1945, also have to be mentioned. From the great number of emigrated actors the following shall be named here: Elisabeth Bergner, Ernst Deutsch, Tilla Durieux, Therese Giehse, Marlene Dietrich, Albert Bassermann, Maria Becker, Curt Bois, Ernst Busch, Eva Busch, Alexander Granach, Johanna Hofer, Lotte Lenya, Peter Lorre, Lucie Mannheim, Valérie von Martens, Grete Mosheim, Carola Neher, Max Pallenberg, Peggy Parnass, Karl Paryla, Maria und Maximilian Schell, Lotte Stein (who became known after the war), Helen Vita, Kadidja Wedekind, and finally the dancers, choreographers and dance teachers, Yvonne Georgi, Valeska Gert, and Hans Züllig, as well as the stage designer, Theo Otto. As in the case of the writers, the motives of the emigrants were more or less the same. Besides Jewish background, political reasons were often decisive for emigration, since the theater, as an integral part of Weimar culture, had a great share in its political vigor and many of the actors and directors were leftists.

In the realm of the theater, many of the most inspiring and provocative artists of the Weimar era were driven out of the country. It took many years until these traditions could be re-established after the end of N.S. rule. The Theater am Schiffbauerdamm in East Berlin — where Bertolt Brecht and Helene Weigel directed and performed, the Freie Volksbühne in West Berlin, where Erwin Piscator had worked until his death, the other stages in Berlin and Munich to which Fritz Kortner and Ernst Deutsch returned — all were part of this tradition. The Schaubühne am Halleschen Ufer in West Berlin, which recently moved to a building by Erich Mendelsohn on the Kurfürstendamm, in addition to the stages in Bochum and Bremen, has continued this tradition of the political theater since the sixties.

The renaissance of theatrical life after the end of the Second World War took place under a double precondition: The return of many theater people to Germany, and the above-mentioned theater tradition during the Third Reich which especially Gustaf Gründgens was able to uphold in Düsseldorf and Hamburg. The extremely innovative results documented in this volume permit a total representation of the history of the emigrated theater people for the first time and on the



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strength of reliable information. It forms an important basis for a history of the German theater from the Weimar Republic to the postwar period.

The situation of the scientific and legal disciplines during the N.S. dictatorship and the specific preconditions for the emigration of their representatives cannot be described here in detail. Its most important aspects have been mentioned at the beginning of this essay.

A few of the most important reasons for the emigration of the scientists may be listed here. There was hardly a field of learning which did not suffer heavy losses through emigration. This is true also for fields that remained comparatively undisturbed, or survived the attacks of the cultural functionaries relatively well during the N.S. Reich. The number of the scientists and legal experts filed in the archives of I.f.Z. and R.F.J.I. amounts to about 6,250 — or more than one fourth of the 25,000 documented emigrants!

Among these émigrés were some of the most famous scientists of the 20th century: the physicists Albert Einstein, Max Born, James Franck, Lise Meitner and Erwin Schrödinger; the chemist Fritz Haber; the mathematician Arthur Pringsheim. Outstanding jurists to be mentioned were Karl Löwenstein, Hermann Heller, Ernst Fraenkel, Hugo Sinzheimer, Franz Lehnhof, Otto Kahn-Freund, Arthur Nussbaum, Hans Kelsen, Fritz Morstein-Marx, Ernst Heinitz, Hans Nawiasky, Oscar Gans, Hermann Kantorowicz, Gerhard Leibholz, Werner von Simson, Hans von Hentig, and Fritz Pringsheim. Among the jurists were well-known constitutional lawyers or specialists in public law, while some of those named were experts in labor law. Emigration promoted comparative law approaches. Thus, Loewenstein and Fraenkel carried out fundamental analyses on the English and the American systems of government respectively, and Kahn-Freund did research on labor law and industrial relations in England, comparative studies of international civil law as well as of the methodology of the comparison of different legal systems.

These jurists are impressive examples for the way in which confrontations with legal developments in host countries was advantageous to emigrants. International discussion received a strong impetus from emigration. The documentation of lawyers in the present volume will make it possible to describe the internationalization of research related to constitutional, civil, and labor law which the émigrés helped bring about. Such analyses have influenced the legal discussion in the Federal Republic of Germany and the reception of comparative constitutional law in a political science that is situated between legal and historical scholarship.

Among the emigrated political economists were also some outstanding personalities whose work achieved similar international recognition, for example the legal theoretician on trade unions Goetz Briefs, whose fundamental analysis on the industrial proletariat appeared already in 1926. During his American emigration, he taught at first at Georgetown University, Washington D.C., then at Columbia University, New York. In the United States, he wrote further studies which advanced the industrial sociology he had founded, and continued his research on the social position of the unions for which his new experiences were of great advantage to him. Alexander Rüstow, author of the great work *Ortsbestimmung*

*der Gegenwart* (1950—56), Wilhelm Roepke, and Friedrich August von Hayek are other representatives of the socio-philosophical economic neo-liberalism in exile which never broke its intellectual links with the Ordo-liberalism of Walter Eucken in Freiburg. Franz Oppenheimer, a teacher of the later Minister for Economic Affairs and Federal Chancellor Ludwig Erhard, also sought a way between capitalism and communism in his sociologically influenced system of political economy and propagated a "liberal socialism."

A look at the organization of the economic life of the Federal Republic of Germany shows to which degree the economic principles of the Freiburg School, which were developed during the last years of the war (Ludolf Herbst), were related to the reflexions on economic and social questions of the above-mentioned emigrants who became co-founders of the reconstruction of West Germany in this way. Thus, the experiences of German economic history after 1919 as formulated in the socio-economic analytic systems of the emigrants in the United States affected the direction of West German postwar economic policy in a decisive manner.

The Austrian Joseph Schumpeter, who taught at the University of Bonn until 1932 and then at Harvard University, also belonged to the political economists in American exile. Besides macro-socio-economic interpretations of the present which had a considerable impact in the United States and in Europe, he wrote *Capitalism, Socialism und Democracy*, which appeared in 1942 in New York and in a German translation in 1950, and fundamental analyses on the theory of business cycles. In his numerous works, Schumpeter advocated a highly individualistic socialism. He combined the "scientific methods of the German with the Anglo-American approach" and thus delivered "the first comprehensive and, at the same time, theoretical, historical, and statistical analysis of capitalist development" (Edgar Salin on Schumpeter's main work *Business Cycles*, 2 vols, New York 1939).

Because of their experiences in economic policy between the wars and their political impact after 1945, "economic" journalists like the Austrian Gustav Stolper also have to be added to this group of emigrants. As a political figure, Stolper was included in Vol. I of this Dictionary. As an economic historian and pure theoretician of economic liberalism, he also belongs into Vol. II. Stolper had close contact with important politicians; he helped to influence the revision of the extreme policy towards defeated Germany considered in the United States after World War II. In 1947, he became a member of the Hoover Mission. In 1966, Hans Peter Schwarz pointed out the positive influence of emigrants like Stolper and Roepke on public opinion in the U.S.A. and on its policy toward Germany. "Thus the comparative analysis of the development of ideas within and outside of Germany will have to acknowledge the important contribution of the emigrants, a contribution which was not only in the ideological realm but frequently of a very practical nature as well some emigrants performed important functions as mediators in one way or another — something which has not been appreciated enough so far."

The political economist Moritz Julius Bonn, who lived in England during his exile and who had played an important role in establishing international economic relations during the Weimar period, had a comparable influence. In 1919, he was



a member of the German delegation in Versailles, and afterwards an expert on reparations in the *Reichskanzlei* and a German member of delegations at important international economic policy conferences. At the same time, he was a full professor and, for a time, rector of the *Handelshochschule* in Berlin. After 1933 he began a second academic career at the London School of Economics and was invited repeatedly as guest professor at North American and Canadian universities between 1939 and 1946. After 1945 he proved to be one of those emigrants who had warned against equating Germany with the N.S. dictatorship and used his many international contacts in this direction. He had indirect influence on the economic and social policies of West Germany through friends and former students. Among his closer circle of friends were Theodor Heuss, Anton Pfeiffer, and Wilhelm Vocke, the president of the *Bank deutscher Länder*. Fritz Neumark, finally, was one of those political economists who returned from exile to assume important positions in Germany. He has described his experiences in Turkey in a very informative book.

Comparable to the above mentioned political economists are the social scientists in exile, although they did not exert as much influence on practical developments in West Germany and her relations to the Western democracies. A deep loss to research and teaching is to be noted especially in this field. Besides the already mentioned members of the Frankfurt Institute for Social Research — who represented a socio-philosophical and socio-critical method within the social sciences — a number of sociologists of other directions also emigrated. They represented one of the most important part of the emigration which occurred under the already discussed double impact of, first, political "undesirability" because of affiliation with the political left, and second, because of Jewish background.

Among the social scientists were Theodor Geiger, Emil Lederer, Emil Grünberg, Friedrich Pollok, Karl Mannheim, René König, Paul Lazarsfeld, Fritz R. Behrendt, Emil J. Gumbel, Norbert Elias, Siegfried Landshut, Helmuth Plessner, Otto Neurath, Alphons Silbermann, Karl August Wittfogel, Hans Speier, Hans Gerth, Rudolf Heberle, Reinhard Bendix, Ernst Manheim. Depending on how broadly the terms "sociology" or "social sciences" can be interpreted, further persons can be counted among this group. M. Rainer Lepsius has pointed out in a recently published article on the "sociological" emigration, that the disciplines of sociology and political science were by no means clearly defined during the twenties, and that of the 151 members of the German Association of Sociology only a third can be called sociologists by a generous interpretation of the term. Indeed, the confrontation with American social scientists probably contributed to a clarification of the term. In any case, it is possible to include cultural sociologists and art historians like Arnold Hauser, or the German-speaking Hungarian philosopher and literary sociologist Georg Lukács, in this group. Erich Fromm and Bruno Bettelheim can be entered as psychologists or as sociologists. In the case of the social philosopher, Herbert Marcuse, the terms sociologist and philosopher are equally applicable. The differences in methods and approaches of the social scientists just mentioned point to a more general conclusion which has already been stated in respect to the emigration as a whole and its groupings. The "sociological emigration does not represent a homogeneous whole; it is heterogeneous by age, background,

professional and political orientation. It exists only through one common biographical experience, the politically induced, if not compulsory emigration or flight from the sphere of the National-Socialist régime" (R. M. Lepsius).

Lepsius has analysed the consequences of emigration for German-language social science. Due to the emigration of socialist intellectuals, the macro-sociological structural analysis of capitalism, which had been characteristic for German sociology before World War I, was broken off and was only revived by the Frankfurt School during the sixties. In Nazi Germany, a sort of *Volkssoziologie*, in which not the "artificial" concept "society," but the "natural," "organic" forms, the people itself, had become the object of study, had been in vogue during the N.S. dictatorship. A flight into pre-industrial social forms and opposition to industrialization, urbanization, and the legalistic definition of social relations were characteristic for "German" sociology after 1933.

This regression conforms to the National-Socialist reaction to the Weimar Republic which has already been described. A number of emigrated sociologists distinguished themselves with empirical analyses of social stratification. These studies were aimed at a rational social analysis which was diametrically opposed to the harmonistic and integrationist social ideology of National-Socialism. The Frankfurt School analyzed the hierarchical structure of National-Socialism and its social patterns of identification. For this approach alone it was hated by the N.S. rulers.

Analyses of National-Socialism and its rise at the beginning of the thirties originated with the circle of emigrants. They were in the form of "diagnoses of the period," but to these were soon added empirical studies on its social history. Works of a very different character but of high interest for contemporary history were written at that time.

The analyses of Hitler and National-Socialism by Hermann Rauschning were critical of the period and N.S. ideology and belong to this category. He was a former intimate of Hitler and later wrote *Revolution des Nihilismus: Kulisse und Wirklichkeit im Dritten Reich*, which appeared in Oprecht's Europa publishing company in Zurich in 1938. In 1940, he published his *Gespräche mit Hitler* which have been translated into many languages at the same company. To this genre also belong the Hitler biography of the journalist Rudolf Olden which appeared at Querido in Amsterdam in 1935, the Hitler biography by Konrad Heiden published in Zurich in 1936/37, as well as his different works on the history of National-Socialism which had already been published in 1932.

On the other hand, sociologists tried to search for the causes of National-Socialism using sociological tools and methods. Their pioneer work in methodology has been well received in West Germany since the sixties. Among the earliest analyses of this kind was Rudolf Heberle's book *Landbevölkerung und Nationalsozialismus am Beispiel Schleswig-Holsteins 1918—1932*, which had been finished already in 1932 and which the I.f.Z. published in German in 1963. Further examples are Theodor Geiger's analyses of social strata and of *Panik im Mittelstand* which appeared already prior to 1933, Hans Speier's work on *Soziologie der deutschen Angestelltenschaft* (1933) which was published completely in the Federal Republic only in 1977 under the title *Die Angestellten vor dem Nationalsozialismus*.



## LVIII Introduction

Of a completely different kind, but of great methodological interest, are the *Studien über Autorität und Familie*, on the „authoritarian character” by the Frankfurt Institute (then in Paris) of 1936, which initiated a sociological behavioral branch of learning on this subject. The study by Erich Fromm *German Workers 1929. A Survey, its Methods and Results*, which combined the socio-critical approach of the Frankfurt School with socio-psychological concepts, has only recently been published in the Federal Republic. In a broader sense, the first great structural analyses of the N.S. rule by political scientists, which were published in the United States first and then, in the sixties, in the Federal Republic, also belong to this subject: Franz Neumann's *Behemoth* and Ernst Fraenkel's *The Dual State*. The latter has been instrumental in providing a framework for research on National-Socialism. The questions posed were marked by the shock of personal experiences; the experiences of having lived in the socio-political systems of Western Europe and the U.S.A. benefited these analyses.

Work on methods of empirical and applied social research, which had begun at the end of the twenties, was broken off permanently in Germany and Austria by the emigration of its leading exponents. German sociology was cut off from this core of the modern social sciences. The results of the emigrants' research have not been systematically acknowledged, as Lepsius observes: “The sociological emigration is not only an exodus of persons but also an exodus of specific sociological paradigms.” It is not surprising that the reverse side of this loss has been a tremendous influence of the innovative ideas of the emigrants on the American social sciences following the reception of Max Weber's thought as introduced by Talcott Parsons in the twenties. The description of this impact, which also occurred in other fields, is not the task of this part of the introduction. Instead, we refer to studies whose empirical basis has been broadened by the documentation of the professional careers and the lists of publications of the exiles. In the future it will be possible to examine the benefit to the host countries in a systematic way, encompassing all important representatives of a discipline, and to undertake a historical comparison of the individual disciplines on the basis of this *Dictionary*. The cultural gain for the host countries has doubtless been very large — at least for those states which opened themselves to the scholarly work of the immigrants. In some countries, the activities of emigrants led the way to the establishment of new scholarly disciplines, for instance, of musicology and art history in the United States. In the English and American understanding of social science, the influence of the “logical positivism” of the *Wiener Kreis*, to which many emigrants belonged, is still to be felt today. The theories of the philosopher Karl R. Popper — who at present lives in London — came into being as a result of the critical discussions of this school, and enjoy worldwide recognition to this day. Some of the natural Sciences, especially nuclear physics, were similarly influenced. The same is true for the psychoanalysts, almost all of whom were forced to leave Germany. Although these scientific disciplines had of course already been received into English and American culture before 1933, their importance increased through emigration. One immeasurably positive consequence of emigration, which the N.S. rulers had by no means desired, was the internationalization of science, especially in sociology, political science, psychology, law, and art history, to the detri-

ment of scholarship in Germany and at the price of two decades of provincialism.

Proof of this can be found in the names of some of the most outstanding representatives of these fields: Among emigrated psychologists, aside from the psycho-analytical school of Sigmund Freud and his daughter, Anna Freud, mentioned earlier, other directions represented were: William Stern, Karl and Charlotte Bühler, Wilhelm Reich, Theodor Reick, Bruno Bettelheim, Erich Fromm, the former psychoanalyst and later founder of individual psychology Alfred Adler, and the Gestalt psychologists Wolfgang Köhler, Kurt Lewin, and Max Wertheimer.

The bloodletting of German philosophy was also quite considerable as far as number and rank of the emigrated scholars are concerned. In this field, many directions can be found, too, as only a few representative names will document: Ernst Bloch, Ernst Cassirer, Karl Löwith, Hans Jonas, Herbert Marcuse, Ludwig Marcuse, Theodor W. Adorno, Max Horkheimer, Georg Misch, Paul Ludwig Landsberg, Ludwig Landgrebe, Helmut Kuhn, Theodor Lessing, Arthur Liebert, Julius Lips, Arnold Metzger, Hans J. Wolff, Fritz Heinemann, Felix Kaufmann, Walter Kaufmann, Ulrich Sonnemann, Felix Weil, Julius Kraft, Richard Kroner, Hannah Arendt, Leo Strauss, E.F. Podach, Hermann Schmalenbach, Kurt Riezler (formerly on the staff of Reichskanzler Bethmann-Hollweg), and the logical positivists, Rudolf Carnap, Otto Neurath, and Karl R. Popper, and, finally, the internationally recognized Renaissance scholar Paul O. Kristeller. Kantians, Hegelians, Marxists, positivists, phenomenologists, Nietzscheans and existentialists from the schools of Martin Heidegger and Karl Jaspers, as well as individualists belonging to no school, and historians of philosophy; to most emigrating philosophers, the threat resulting from being of Jewish background was the factor deciding their leaving Germany or Austria. And yet, it has to be stated here, too, that outstanding philosophers remained in Germany during the Nazi dictatorship. Heidegger may have been politically one of the most problematical among them, but he was certainly the most important philosopher writing in Germany during these years. A whole range of behavior is encountered among the philosophers in the N.S. Reich: conformity, “inner” emigration, and more or less open opposition.

The philosophers in exile continued their work in their former ways as far as their professional and financial situations permitted. Thus, the continuity of philosophical thought was upheld much more in Germany after the war than the traditions of some other fields.

Among emigrating art historians were first-class scholars. One of them was Erwin Panofsky, who published his Dürer biography in Princeton in 1943 (it was translated into German only in 1977) and an impressive number of other works on Gothic architecture, the Renaissance, early Dutch painting, iconography, tomb sculptures, and, finally, art theory. From his American exile, he firmly established his worldwide reputation as the head of the Hamburg *Schule der Kunstwissenschaft* which had been founded by Aby Warburg. Another art historian of rank who becomes increasingly known in the Federal Republic was Ernst H. Gombrich — like Panofsky, author of many works on the history of art and member of the order “Pour le Mérite.” Among the older generation of important



art historians in exile were also Hans Kaufmann, Rudolf Wittkower, and Arnold Hauser — the latter a highly educated, independent-minded art sociologist influenced by Marxism, whose books *A Social History of Art*, *Methoden moderner Kunstbetrachtung* as well as *Der Manierismus — Krise der Renaissance und Ursprung der modernen Kunst*, interpreted art in its social environment. An unquestioned pioneer of architectural history was Nikolaus Pevsner — like the other art historians mentioned here a scholar with a broad grasp of his field, encompassing not only German and European but also non-European art history. Otto von Simson whose scientific renown was established only after World War II belongs to a younger generation. He wrote his study *The Gothic Cathedral. Origins of Gothic Architecture and the Medieval Concept of Order* in exile, and, after his return to Germany, published a comprehensive medieval art history among other publications. In addition, he has rendered great services to his home country in the diplomatic and cultural field.

The list of important art historians can easily be expanded, for instance, by Walter Friedländer, Max J. Friedländer, Hans Huth, or the architectural historian, Julius Posener (Berlin), to mention only a few. Even this short list conveys an idea of the innovative significance of German art historians. They were not committed in method or contents to any single line of interpretation in art history.

A similar observation holds true for the theologians. The protestant emigrants Karl Barth and Paul Tillich, the Catholic emigrants Hubert Jedin, Hugo Rahner, Walter Mariaux, and the theologian Edith Stein — originally an important philosopher and student of Husserl — were very different personalities, although the two first-mentioned protestant theologians were influenced by "religious socialism" and influenced it in turn. In the case of the Catholic theologians, the possibility existed that, as members of a universal Church, they could be transferred to a foreign country when political difficulties arose. An appointment to an office at the Vatican, however, was not formally considered as emigration. Thus, the last chairman of the German *Zentrumspartei*, prelate Ludwig Kaas, did not return from Rome after the signing of the *Reichskonkordat* in 1933. Until his death in 1952, he held high office in the Vatican and served as secretary to the Congregation of Cardinals at St. Peter's. In addition, many theologians stayed in the N.S. Reich to care for their parishioners and enjoyed a certain institutional protection through their churches if they expressed limited opposition to the government. When difficulties arose, they did not have to face the régime alone. The churches, in turn, were required to make concessions to the government in order to retain their relative independence. Nevertheless, there were churches that openly objected to the church policy of the Third Reich, for instance the Confessional Church, which was established to oppose the "Deutsche Christen" of the *Reichsbischof* Ludwig Müller. The latter had been dependent on the N.S. régime, but was deprived of all real power in 1935.

One of the academic disciplines that was most susceptible to ideological tampering was German philology. Thus, the number of emigrants who were not Jews or of Jewish descent as defined by N.S. legislation was rather small. Although this generalization holds, there were still renowned scholars in this field who were forced to leave Germany. Walter A. Berend-

sohn was one of them, yet his emigration showed him a new purpose in his life's work: He became the pioneer of research on the "literary" emigration. Others included an expert on Novalis and expressionism, Richard Samuel; a researcher on Jean Paul, Eduard Berend; Richard Alewyn, an expert on the baroque period, and Hofmannsthal; a scholar of Old German, Friedrich Ranke; and literary scholars still working today, like Erich Heller, Oskar Seidlin or Käthe Hamburger, who writes, among other subjects, about Thomas Mann and romanticism and does methodological studies as well. Among the most famous of the literary scholars or critics were the following: the scholar of romance languages and literatures Erich Auerbach, the chronicler of literary expressionism Kurt Pinthus; the theater critic Alfred Kerr; and, above all, Walter Benjamin whose rich work has greatly influenced literature and the humanities in the Federal Republic for the past two decades. Classical scholars and archeologists of rank also emigrated. We cannot generalize here about the nature of their work, as it was quite varied. The one unifying common denominator was the threat posed by the N.S. régime. The following shall be named here as being representative: Fr. M. Heichelheim, Werner Jaeger, Paul Maas, Kurt von Fritz, Eduard Fraenkel, Hermann Fraenkel, and the archeologist, Karl Schefold.

History and political science are, by nature, disciplines closely related to politics. The proximity is greater the more the political history of the most recent periods becomes of central interest. Some of the political scientists have already been mentioned before, as many of them were originally lawyers or sociologists and political science was even less defined than sociology before 1933. Some of the emigrants who later became outstanding political scientists had originally been journalists; still others emigrated with their parents and were children at their time of emigration. This group became important only after the war. Among these political scientists of different backgrounds and, in part, of different political directions were: Ernst Fraenkel, Richard Löwenthal, Arnold Bergsträsser, Arnold Brecht, Ferdinand A. Hermens, Carl J. Friedrich, Karl J. Newman, Joseph Rovin, Kurt L. Shell, Franz Neumann, Ossip K. Flechtheim, Emmerich K. Francis, Eric Voegelin, Wolfgang Hirsch-Weber and Alfred Grosser, whose scientific and publicistic career began only in the fifties. Among this group was also a pioneer of research on political parties, Sigmund Neumann, whose diagnosis of the party system of the Weimar Republic of 1932 is to this day among the best books written on the subject. Neumann's experiences in exile are reflected in comprehensive works of comparative party research (*Modern Political Parties*, 1956). His own personal history and his having witnessed the N.S. seizure of power produced his powerful work as well as his analyses of the totalitarian N.S. dictatorship, *Permanent Revolution* (1942), and his interpretation of the world-political situation, *The Future in Perspective* (1946). The questions posed, the topics treated, and the methods applied by political science in exile have influenced this discipline in the Federal Republic for years.

There exists no systematic description of the emigration of historians. The present volume will make it possible to investigate this field in the future. After 1933, history was in a similar situation as the other disciplines. Among the emigrants there were a large number of people of Jewish background. During N.S. rule, highly sophisticated research in specialized fields



## LX Introduction

was continued in Germany. These were mostly in areas that, because of their specialist character, lay outside the interests and horizon of N.S. functionaries, or in fields which could avoid the direct influence of the régime. Conformity, withdrawal into private spheres, the dismissal of many scientists, resistance — this was the series of experiences that appeared with changing emphasis in all disciplines. Besides ideological, pseudo-historical concoctions, numerous works of high quality appeared, for instance Otto Brunner's *Land und Herrschaft* (1943), which influenced research on late medieval constitutional history and the social history of concepts which is particularly topical today. Despite the fact that a number of prefaces were written by renowned historians that can only be read with embarrassment today, scholarly judgement has to concentrate on the actual value of these works. Here it can be shown frequently that formal gestures of submission to the régime which can be encountered in all totalitarian dictatorships do not necessarily prejudice the academic rank of a work. Disregarding the National-Socialist historian Walter Frank, whose *Reichsinstitut für Geschichte des neuen Deutschlands*, Helmut Heiber has described in a comprehensive book, the following historians of high reputation lived in the N.S. Reich: Friedrich Meinecke, Otto Hintze, Percy Ernst Schramm, Heinrich Mitteis, Franz Schnabel, Karl Hampe, Johannes Haller, Gerd Tellenbach, Walter Kienast, Friedrich Baethgen, Hans Herzfeld, Karl Brandi, Willy Andreas, Fritz Hartung, Walter Goetz, Hermann Oncken, Johannes Ziekursch, Carl Erdmann (who was prevented from accepting a professorship by being drafted into military service), Gerhard Ritter, who belonged to the conservative resistance against Hitler — to mention only a few. None of these men were National-Socialists, but some of them shared the tradition of a national ideology of German medieval history, or had a strict "national" way of thinking which had a certain affinity to N.S. ideology. This does not mean that they supported an interpretation of history as promoted by the National-Socialist rector of Heidelberg University Ernst Kriek. To him, "race" and "blood" were the driving forces in history. The majority of history professors did by no means agree with the historian Karl Alexander von Müller, either. He had become a full professor of medieval and modern history only after 1933, and belonged to the historians who remained unwavering National-Socialists till the very end. This did not prevent him from writing brilliant biographical essays on non-European history, however.

In most history departments the outright National-Socialists remained a minority. Walter Frank himself remained an outsider of the learned fraternity. In January, 1933, no full professor of medieval and modern history in Germany was a member of the N.S.D.A.P. Besides Heiber, primarily Karl Ferdinand Werner and, under different aspects, Gerhard Ritter, Theodor Schieder and — from a very critical point of view — the American, Georg Iggers, as well as the Marxist historian, Hans Schleier, contributed to the clarification of the wide range of attitudes among German historians during the N.S. dictatorship. If one disregards those areas of the discipline that were of special interest to N.S. propaganda, including as Werner Philipp has shown, the considerably *gleichgeschaltete* presentation of Eastern European history, then it becomes obvious where the problem lay, that is, less in the number of opportunists or convinced partisans of the régime than in a *deutsch-*

*national* way of thinking of a number of historians who had rejected Weimar democracy. Still, "between the conservative historians and the Nazis there existed basic *weltanschauliche* differences. The conception of history Hitler presented in *Mein Kampf*, or Alfred Rosenberg in *Der Mythos des 20. Jahrhunderts*, was determined by race, that of the historians by the state. The former was Pan-German, the latter dedicated to the continuity of Prussia" (G. Iggers). That was, by the way, one of the reasons why quite a few Austrian historians were susceptible to "Pan-Germany" N.S. ideology.

The majority of the best of German historians were not National-Socialists. However, their concepts of history coincided, in part, with those promoted by N.S. historians, and found common areas of agreement with them. At times, this was true even for those who distinctly protested against the influence of N.S. ideology and its functionaries in other areas of scholarship. The less nationalistic their concept of history was, and the more they thought and worked in European contexts, the less susceptible even conservative or liberal-conservative historians were to N.S. ideology. Examples of these are Gerhard Ritter and Percy Ernst Schramm.

The prominence of the above-mentioned historians demonstrates that in this discipline, in contrast to the social sciences, no extensive emigration of innovative, creative, and original scholars can be observed. On the contrary, many historians remained in the Third Reich and contributed to the advancement of the discipline, for instance in constitutional history. Otto Hintze had combined it with social history long before 1933. How did emigrated historians rate in comparison to historians who stayed in Germany? A great number of the emigrated historians had very different political convictions. Next to conservatives stood liberals, social democrats, and communists, next to Marxist-oriented scholars like Arthur Rosenberg — the first historian of the Weimar Republic, who was originally a specialist in classical history and had been politically active in the K.P.D. — stood historians from the school of thought of Friedrich Meinecke, or scholars whose main field of study was political history, international relations, or economic and social history. A single common denominator of these emigrants is again the fact that they were mostly of Jewish background. The names of the most renowned historians indicate once again the extraordinary loss that German culture suffered after 1933: Veit Valentin, Ludwig Quidde, Felix Gilbert, Hans Rothfels, Dietrich Gerhard, Gerhard Masur, Francis L. Carstens, Hans Kohn, Robert A. Kann, Ismar Elbogen, Alfred Vagts, Gustav Mayer, Erich Eyck, Hajo Holborn, Ernst Kantorowicz, Walter Ullmann, Helmut Georg Koenigsberger, Viktor Ehrenberg, Eugen Taeubler, Simon Dubnow, Leonard Krieger, Ernst Simon, Arnold Berney, Heinrich Benedikt, Hans Ehrenberg, G. W. Hallgarten, Golo Mann, Gustav Mayer, Werner Richter, Guido Kisch, Carl Landauer, Selma Stern, Hans Liebeschütz, Hans Mottek, Jürgen Kuczynski, Karl Obermann, Walter Markov, Wolfgang Steinitz, Ernst Engelberg, Edgar R. Rosen, Albrecht von Mendelssohn-Bartholdy, Friedrich Engel-Janosi, Paul Isaac Bernays, Otto Maenchen-Helffen, Fritz T. Epstein, as well as the historian of civilization and sociologist, Alfred Weber. Among those emigrants who had to leave Germany or Austria at an early age and began their academic career only after the end of the N.S. rule were Fritz Stern, Carl Schorske, Klaus Epstein, Peter Gay, Georg Iggers, Werner T. Angress, Klemens von Klempe-



rer, Walter Laqueur, George Mosse, Walter Grab, Shlomo Na'aman, Walter Michael Simon, Uriel Tal.

The fields of research of the emigrants were far-reaching. In many cases they had already written important books before the Nazi seizure of power. Veit Valentin, for instance, had completed his history of the revolution of 1848, still considered a standard work. Gustav Mayer had written his great biography on Friedrich Engels and Ernst Kantorowicz his on the Staufen emperor, Frederick II, which had been influenced by the circle around Stefan George and which Hitler liked particularly well, much to the chagrin of its author. Arnold Berney also had finished the first volume of his biography of Frederick the Great. During emigration, new works were published. Among the important books of Erich Eyck, those that should be given special mention here are his critical Bismarck biography and his history of the Weimar Republic, which remained for many decades the only larger comprehensive description of the Republic. Hans Rosenberg's critical book on the history of the Prussian Civil Service since the 17th century and his work *Grosse Depression und Bismarckzeit*, Hajo Holborn's three volumes of *Deutsche Geschichte*, Rosenstock-Huessy's individualistic studies of the character of the European nations and their revolutions, Gerhard Masur's biography of Simon Bolivar — the list of impressive works with different themes and methods could go on and on.

But the studies done by the emigrated historians were not basically different from those of their colleagues living in Germany. Historiography of great style, profound knowledge of the sources, the formulation of new questions — all this can be found in Weimar as well as among the historians who lived under the N.S. dictatorship and among the emigrants too, yet really outstanding performances were the exception in all groups. Thus, the situation of the historians differs from that of the social or political sciences, where the innovative achievements in these fields were nearly without exception made by emigrants, either before or after 1933.

The reason for this was not only that the last-mentioned disciplines were closer to politics, or that there were more Jews in them, but also because of the political attitudes of the majority of historians before 1933. Although few historians of first rank conformed to the system after 1933 in a strict sense, many were skeptical of, or openly rejected, Weimar democracy. Before 1933, the majority came from the liberal-conservative or the *deutschnational* spectrum. Leftist liberals or even Social Democrats were the exception. Zentrum-affiliated historians were rare outside of the circle of Catholic church historians or the *Konkordatslehrstühle*. Despite some informative analyses of the political behavior of historians after World War I, more detailed studies of the whole group are necessary.

Apart from the few critics of *deutschnational* or monarchical tendencies, the historians did not count as a particularly endangered group if they were not of Jewish background. It has to be kept in mind that political attitudes and methodological principles are by no means the same. There were conservative historians who did pioneer work in methodology and in certain subject matter areas, and politically "progressive" historians who did traditional work. The same can be said of historians who emigrated. The whole political spectrum of Weimar was represented among them, albeit with characteristic differ-

ences. Among the emigrated historians were comparatively few Marxists, considerably less than in the other sectors of the Weimar cultural elite that had been compelled to leave Germany. With a predominant affiliation to the conservative-nationalist, but not yet National-Socialist political camp, the extremes which typified Weimar culture as a whole were not found among the historians. They were atypical in the academic scene of the N.S. dictatorship and atypical for the political structure of the "cultural" exile. The majority of the leading historians in Germany kept their distance from the *Zeitgeist* more rigidly than scholars in many other areas. If this was a disadvantage for the new Weimar democracy after 1918, it was by no means an advantage for the N.S. dictators after 1933. After 1945 this fact helped in the development of new historical research in the Federal Republic of Germany. Of course, there were exceptions to this generalization. There were also exceptions in certain fields of history which deviated from the average behavior of the historians, for instance the — paradoxically — better adaptation to "N.S. modernity" of many ancient historians, some of them renowned.

History may also serve to clarify additional aspects of the question "return to Germany (and Austria) — yes or no?" In regard to the historians, Georg Iggers has concluded that only a few of the emigrants returned to Germany or Austria. This appraisal is at first sight correct, as the rate of return is considerably lower for historians than for some other disciplines. Yet, this observation refers to only one side of the problem. Thorough study will show that besides formal return, other criteria have to be considered to receive a satisfactory answer to the original question. Above all, it is necessary to include the influence of the emigrants on Germany after the end of N.S. rule in the evaluation. To influence the thought of a country does not necessarily require an actual physical presence. Prior to a quantitative analysis of the number of those who returned in the legal sense, the broader question of influence has to be considered.

A satisfactory assessment of the impact which the emigrated scientists had on Germany after the end of the N.S. dictatorship requires us to answer some basic questions. Was it possible to pick up the pieces of Weimar culture after 1945, was it possible to call back some of the "cultural émigrés?" Or is Carl Zuckmayer's depressing dictum valid that "the journey into exile is 'the journey of no return?' Who ever sets out on it and dreams of return is lost. He may return, but the place which he then finds is no longer the same as it was when he had left it, and he is no longer the same person who had left. He may return to the people he missed, to places which he loved and did not forget, to his language which is his own. But he never returns home." No doubt the psychological problems which impeded a return from emigration are expressed in these sentences by Zuckmayer. Certainly a number of further reservations existed, among them the mistaken, although understandable identification of the German people with National-Socialism. Finally, it seemed uncertain, what would await the emigrants at their return. A number of external factors played a role, as, for example, to which degree a particular emigrant had succeeded or not succeeded in gaining a foothold in his host country in exile. In addition, it was of importance to which degree the opinion of many emigrants during the first years that the N.S. dictatorship would not last long had given way to a consciousness of the permanency of exile.



## LXII Introduction

For emigrants of Jewish background much more was at stake than coming to terms with emigration than for non-Jews. Their shock about the mass murder of the Jews was more existential and more personal. A person's motives for emigration also influenced his decision whether to return to Germany or not in a special way. The more politically-motivated he had been after 1933, the more likely was the possibility of his re-migration. Particularly the politicians among the emigrants usually wanted to return, especially when they continued to have political aspirations. Similarly, many communist intellectuals went to the Soviet-occupied zone of Germany, the later G.D.R. In regard to other groups of the "cultural" emigration, especially for emigrants who did not have any party affiliations, the picture was more complex and cannot be painted with a few strokes. Remigrants of this kind, especially writers, were confronted with prejudices or had, at least, to reckon with the alienation of their former colleagues and friends. After 1945, a sharp controversy began, for which the public correspondence between Walter von Molo and Frank Thiess on one side, and Thomas Mann on the other, was symptomatic.

The central point of the controversy was the definition of the relationship between exile and "inner emigration." The request issued to the emigrants to return to Germany was accompanied by a description of the sufferings under the Nazi dictatorship to which those writers who did not emigrate also had been exposed. These letters intimated: "We, who remained at home, have suffered the most." Thomas Mann's moving description of existence in exile, his statement, that it had been impossible "to make culture" in Germany after 1933, his announcement that he did not wish to return — all this seemed self-righteous and unjust to authors like Frank Thiess. He wrote a "farewell to Thomas Mann" in which he contrasted the misery of life in Germany to the life of luxury Thomas Mann had led, who now lectured the Germans on their fate from the American West Coast. Others, who did not have to reproach themselves for any collaboration with the N.S. régime and had been forbidden to publish, equally concluded, like Elisabeth Langgässer: "I believe that the despair of inner emigration has not been inferior to that of the outer emigration, no matter of what nature it may have been."

Regardless of how one judges this post-war controversy, the relationship to remigrants, especially to "political" remigrants, in the Federal Republic of Germany has without a doubt been a problem for a long time. Each side had reservations toward the other. In addition, numerous left-oriented emigrants were reproached because their animosity toward Weimar democracy had contributed considerably to its downfall. This political destructiveness — despite their brilliance — of left and right prior to 1933 has already been touched upon previously, as was the inherent impossibility of continuing the cultural traditions of the Weimar period after 1945, as if nothing had happened, for instance in journalism.

But "intellectual" emigration and remigration also had another side. Through the emigration of so many intellectuals, the internationalization of science and culture was greatly advanced. "Cultural" emigration has not remained the one-way street which it seemed to be in the beginning and as it still appears as an "irreversible loss" today. Very early, many emigrants had tried to arouse attention in their home countries

through publications and radio programs in order to counter N.S. cultural policy. After World War II, many intellectual emigrants eventually returned into German language areas. The remigrants — the majority of whom became "normal" citizens again — brought numerous experiences and new knowledge back to Germany and frequently retained their worldwide contacts. The result was a lasting intensification of exchange among scientists and scholars and of cultural exchange as a whole.

The effects of return and internationalization and their benefits to the cultural reconstitution of Germany after 1945 were much larger than the actual number of emigrants suggests. Numbers do not reveal that many emigrants — without formally returning — were present in the German-language world of their disciplines once again, through private visits and appointments as Honorarprofessors, lecture tours, and research projects. The policy of the Federal Republic on the arts and sciences has promoted this process of intellectual reintegration for decades, with great success. The works of emigrated scholars have been published in Germany to great effect. One example: The historian Hans Rosenberg was for a long time at Brooklyn College before he became a professor at the renowned University of California at Berkeley where he worked until his retirement.

Only after his return to Germany in the middle of the seventies was he appointed *Honorarprofessor* at the University of Freiburg. Yet, he had actually been present in his field and in Germany since the beginning of the fifties, at first as a visiting professor at the Free University of Berlin, and then, and most importantly, as the leading exponent of the new social history area of research. Rosenberg established a school of thought, and a number of his (in the broader sense of the term) students received history chairs at universities in the Federal Republic. Indeed, one can say that he had reached his greatest influence in the Federal Republic while he was still teaching primarily in the United States.

Other historians who did not return also made their mark on postwar German thought, for instance Arthur Rosenberg. His critical interpretation of the revolution of 1918/19 has inspired numerous re-interpretations and monographs on the structure and the political function of workers', soldiers' and factory councils written by historians of the Federal Republic of Germany since the sixties. The books of leading emigrants were usually translated into German, and were thus accessible to a wider academic and historically interested public. There were surprising exceptions to this positive reception, for instance Hans Rosenberg's much discussed, much criticized, and much praised book, *Bureaucracy, Aristocracy and Autocracy. The Prussian Experience 1660—1815* (1958), or Leonard Krieger's *The German Idea of Freedom. History of a Political Tradition* (1957). These exceptions should not lead to the premature conclusion that books critical of German history written by emigrants have not been published in Germany. On the contrary, a number of such works were sooner or later translated, among them studies by Hans Rosenberg, Hans Kohn, Fritz Stern, G.W. Hallgarten, and others.

Some of the remigrated historians became quite famous in German-language countries for their work. Above others Hans Rothfels should be mentioned here, who had helped to begin West German research on contemporary history during



the early fifties. He not only influenced it in the sense of the research he himself did, in connection with additional work on his book *Deutsche gegen Hitler* which he had written in exile, but through his organizational activity which he grounded on programmatic-methodological reflections on the possibilities and necessities of contemporary history. As chairman of the advisory board of the *Institut für Zeitgeschichte* and co-editor of the *Vierteljahrshefte für Zeitgeschichte*, he had lasting national and international influence on this discipline and taught as a full professor at the University of Tübingen. Another emigrant, for whom it is hard to decide whether he should be classified as "returned" or not, since he lived at times in the Federal Republic and at times in the United States, established a new school of thought through the advancement of an important historical discipline, although he is probably known to specialists only: Dietrich Gerhard became one of the founders of early modern historical research on the estates (*Stände*) which has had considerable influence on the present understanding of European absolutism. Gerhard was able to inspire, or carry out by himself, numerous studies on this subject while he was the director at the Max-Planck-Institute for History in Göttingen.

Golo Mann had the greatest public success among remigrating historians. Although he lived in Switzerland most of the time, he worked part-time in Stuttgart fulfilling his duties as a full professor of political science, and was constantly present on the German cultural scene. His great books on German history of the 19th and 20th centuries (1958), and his biography on Wallenstein (1971) became standard works and bestsellers of their kind because of his profound knowledge of the sources and his problem-oriented style.

A look at the development of historiography in the G.D.R. shows a similar strong influence of remigrating historians. The *Geschichte der Lage der Arbeiter unter dem Kapitalismus*, a many-volume work written by the economic historian Jürgen Kuczynski (East Berlin), has become a basic work of G.D.R. historiography. The second most important G.D.R. economic historian was also an emigrant: Hans Mottek, author of an economic history of Germany in three volumes. Among historians analyzing revolutions, Karl Obermann, a specialist on 19th century German history, and Walter Markov, whose research was primarily devoted to the French revolution of 1789, as well as the methodologists Ernst Engelberg and Wolfgang Steinitz also played leading roles in their fields. The cultural-political activity of emigrants in the G.D.R. linked up with the ideas of some of the historians who had survived the N.S.-dictatorship in Germany, and with the ideas of a younger generation that had begun their careers only after the war. In contrast to the situation in the Federal Republic, the political orientation of the remigrants to the G.D.R. was homogeneous. Almost exclusively, communist historians went to the G.D.R. whereas conservatives, liberals, and Social Democrats — the latter few in number, as there were only very few Social Democratic historians before 1933 — returned to the Federal Republic.

In other disciplines, too, the impact of those who returned, or of those who did not return to Germany but whose works were read there, can be established. To mention only a few examples: The ideas, which political scientists like Ernst Fraenkel and Richard Löwenthal brought back with them from emi-

gration to the *Deutsche Hochschule für Politik*, (later renamed Otto-Suhr-Institut) in Berlin, influenced a whole generation of political scientists. The Frankfurt School also returned to its original city, and individual members, like Herbert Marcuse, influenced the intellectual atmosphere of the Federal Republic from abroad from the mid-sixties on. Literary critics, like Hans Mayer, or art historians, like Otto von Simson, who had returned, also had a considerable impact beyond the limits of their particular disciplines. The remigrated constitutional lawyer, Hans Nawiasky, not only worked within his own discipline but put his mark on the constitution of the *Freistaat Bayern*; Gerhard Leibholz became a lawyer at the Federal Constitutional Court. More visible than in the Federal Republic is the political effect of the remigrés in the G.D.R. where they influenced the reconstitution of the state from the beginning and where their ideology became part of the controlling state dogma. Those remigrants who went to the G.D.R. were usually communists. In contrast to this, the pluralism of the cultural life of the Federal Republic of Germany has resulted in part from the diversity of thought of those emigrants who returned there.

The question how many persons returned from the "cultural emigration" to the successor states of the German Reich may be answered in different ways depending on the criteria on which the evaluation of the material is based. The following considerations are limited to those scientists, artists, writers, and publicists who have been included in vols. I and II of the *International Biographical Dictionary of Central European Émigrés 1933—1945*, and therefore encompass the cultural elite in its widest sense. The actual number of those emigrants belonging to the "cultural emigration" is much higher, but a precise determination of their number is not possible for the time being. Thus, with regard to the total "cultural emigration" the following determinations represent only trends. With regard to the cultural elite the figures given here are — *cum grano salis* — precise. This cultural elite is not limited to persons included in the present second volume of the dictionary, since volume one contains political publicists as well as a number of scholars and cultural publicists who were also politically active, for instance Richard Löwenthal, who later on became professor of political science but who had to be included in volume II because of his non-political research. For these reasons, the following evaluation has to consider both volumes. The question of numbers can only be answered sufficiently when the possibility of returning and the desire of returning as expressed by émigrés are included in the interpretation. For this reason, the age of the émigrés as well as the date of their death had to be considered where necessary.

A differentiation between the first and the second generation of émigrés is useful, because the acculturation of both generations in the last country of refuge differed significantly: While the first generation usually had completed their schooling or professional training in the German cultural sphere, most members of the second generation emigrated already at an age in which education and professional activities were still ahead. Therefore, learning the new language was not as problematical either for the second generation since they learned the language of the host country already in school. Thus to which generation an émigré belonged frequently had a decisive influence on the possibility or desire to return. Who had grown up in



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the host country, who had mastered its language, who had no difficulty in entering professional life due to his being educated in the new country and, in addition, only had little personal recollection of his country of origin usually had only little interest in returning.

Although some émigrés, by these criteria, were, so to speak, between the generations, a quantitative evaluation cannot do without limiting values. A possible inaccuracy through this limitation must be accepted in favor of the verification of the procedure and the categorization of the results.

Since in those times, an academic education, the most time-consuming of all forms of education, could be absolved by the age of 25, and emigration from the German Reich began in 1933, those émigrés who were born prior to 1908 are counted among the first generation. As far as Austria and the German speaking areas of Czechoslovakia are concerned, a later birth date has been used since these states fell under the National Socialist sphere of power only in 1938 resp. in 1939.

The "possibility to remigrate" after the end of the N.S.-dictatorship implies that an émigré was still alive. Those who had died during their exile therefore have to be excluded from the reference group in this context. The year 1948 has been chosen as fixed date for the return.

Immediately after 1948 also those willing to return were frequently faced with obstacles. They often had to wait for visas which were granted slowly by the Western allies. In addition, the émigrés did not know what would become of Germany. Quite a few persons willing to return thus delayed their decision. They also had to wait whether they would be able to find appropriate work in their homeland. Quite a few needed time to overcome the psychic barriers to return. In any case, during the first years after the end of the N.S.-dictatorship, many émigrés who had decided to return could not or did not want to act on their decision, especially since to many who were politically motivated, the complicity of large parts of the German population in the crimes of the régime was beyond question. To émigrés of Jewish background Germany was, after all, not only the land of their fathers, but primarily the country, in which their fathers had been murdered.

On the other hand reservations, frequently also open rejection of the émigrés existed in parts of the German population during the first post-war years, for instance when the émigrés returned as officers of the occupying forces like Alfred Döblin. These and similar considerations suggested the use of a later year than 1945 for date of return. From the group of possible returnees those were excluded who had died prior to 1948. We cannot decide for them whether they would have returned or not.

In the first volume of the *Biographical Dictionary*, approximately 940 persons have been entered including rabbis and priests, who besides their political work were also engaged as scholars, artists, or publicists and therefore belong to the émigrés of the cultural sector. About 645 of them were born before 1908 resp. 1913 and still alive in 1948. About 245 returned to the German successor states, that is about 38%. About 2% went to Switzerland. Of those who returned, about 60% went to the Western occupied zones, resp. the Federal Republic of Germany, 21% went to the Eastern occupied zone, resp. the German Democratic Republic, about 19% to Austria.

Approximately four fifth of this group of returnees may be assigned to the publicists in the widest sense, the rest are scholars, theologians, and (very few) artists.

This ratio of return is clearly a result of the political activity of the biographees of volume I. The return quota among "political" émigrés is very high because their political creativity from the beginning had been connected with the will to return to a Germany that had been delivered from N.S.-dictatorship. For this reason, the return quota even in the second generation was very high. About half of this age group contained in volume I returned to the German cultural sphere. Many of these political rémigrés reached great influence and important positions, as Hartmut Mehringer, Werner Roeder, and Dieter Marc Schneider have shown in a 1981 study.

Of the about 4,600 members of the cultural elite included in volume II of the *Biographical Dictionary*, about 2,500 were born before 1908 and 1913 respectively and still alive in 1948, and about 26% returned to the successor states of the German Reich. However, only 8% of the members of the second generation of émigrés who were not politically active returned. The distribution as to the countries of return corresponds to that part of the emigration of volume I which was culturally as well as politically active. About four fifth, close to 80%, went to the Federal Republic of Germany resp. to Austria, one fifth to the German Democratic Republic.

The rémigrés of the cultural emigration portrayed in volume II belong to the following disciplines: The humanities as well as writers and artists are the largest group with 27% each, followed by actors and theater directors with 24%. 12% of the rémigrés were scientists, engineers, and medical scientists, 9% were publicists.

The cultural remigration of the G.D.R. differs insofar from its Western counterpart as artists and writers had the highest share and ranked before actors and theater directors. The pronounced leftist orientation of many artists and writers already before their emigration, as discussed above in the context of the political situation of the Weimar Republic, explains this concentration.

The differences in the distribution of returnees among the individual disciplines is based on professional facts: scholars and artists whose work was dependent on language usually had a greater interest in returning to the German cultural sphere. What Theodor W. Adorno stated in a lecture on philosophy is, mutatis mutandis, also valid for other sectors of cultural life: "Language is essential to philosophy. Philosophical problems are to a large extent problems of its language, and the distance of its language from the thing, which you find in the so-called positive sciences, does not hold true in the same way for philosophy."

Scholars are much more dependent on the expressive possibilities of their language than scientists, engineers, and medical specialists. Similar differences as in the sciences exist in the arts: An actor or writer needs a perfect mastery of his language for performing in his profession, while a painter, composer, or pianist may be great in his field without being dependent on his language. It is therefore not by chance that creative bilingualism among the emigrated writers remains the exception — as in the case of Stefan Heym, for instance.



A summary of the cultural emigration of the first generation included in the two volumes of the *Biographical Dictionary* shows that among this group of persons — for whom the possibility and an interest in returning existed — the total of *rémigrés* was almost one third (32%). This percentage is much higher than so far assumed, but implies, on the other hand, that about two thirds of the members of the cultural elite forced to emigrate did not return permanently to the successor states of the German Reich, be it because they did not want to return, be it because a return was little attractive to them due to successful acculturation in the host country and in their professional careers. It was also of importance whether in case of their return they would encounter adequate professional possibilities which were at least equal to their career in the host country.

In this context it should be remembered that, in general, non-Jewish *émigrés* decided more often to return. It had to be more easy for them than for *émigrés* of Jewish background: To many of them, being Jewish meant an existential and social identification due to the barbarism of the N.S.-dictatorship, while to numerous non-Jewish *émigrés* the national identification with Germany remained decisive.

The return to the German cultural sphere after the end of the N.S.-dictatorship requires, of course, not only quantitative but also qualitative research, requires research on individual phases of emigration which cannot be accomplished in this framework. The results presented here refer to the total period, i.e. to the editorial deadline of the *Biographical Dictionary*. A more specialized study would certainly reveal a different impact of *rémigrés* on individual sectors of cultural life, as already mentioned above.

But also disciplines which have not been listed separately were able to re-integrate famous *rémigrés*, for instance the theater directors Erwin Piscator and Fritz Kortner, the actors Ernst Deutsch, Helene Weigel, and Therese Giehse, the choreographer Yvonne Georgi, the physicists Erwin Schrödinger and Max Born, the mathematician Carl Ludwig Siegel, the Germanist Richard Alewyn, the philosophers Ernst Bloch, Karl Löwith, Georg Misch, and Helmut Kuhn, the sociologists René König and Helmuth Plessner, the political economist Erich Schneider, the theologians Hubert Jedin and Hugo Rahner, to mention only a few. There was probably no sector of cultural life, no scientific discipline, without *rémigrés* making important contributions to it. In the G.D.R numerous *rémigrés* achieved similar recognition and influence, for instance Bertolt Brecht, Johannes R. Becher, and others.

If one asks about the willingness to receive the *rémigrés* in the successor states of the German Reich about the recognition of their achievement, one will have to differentiate between different phases and disciplines here, too. The frequently heard Marxist claim, that in the Federal Republic of Germany usually politically motivated prejudices had been prevalent towards the *émigrés*, cannot be upheld. The actual share of *rémigrés*, which is, as has been shown, much higher than in the G.D.R., the careers of those who returned and only a few of which have been enumerated here, but also other evidence, for instance honors and awards, contradict this argument. In the place of others, the "Orden pour le mérite für Wissenschaft und Künste" shall be named here. It was newly founded

by Theodor Heuss and is sponsored by the Federal President. No doubt, it represents an elite association. Aside from the physicist Albert Einstein, who had been added to this organization already in 1923, and the chemist Richard Willstätter who joined it in 1924, there were between the years 1952 and 1980 not less than 25 *émigrés* among its 153 members. Ten of these *émigrés* returned to the German cultural sphere after the end of NS-rule. The order appointed the following emigrated scientists, writers, and artists since 1952:

- 1952 the lawyer Erich Kaufmann and the composer Paul Hindemith;
- 1955 the writer Thomas Mann, the classical philologist Werner Jäger, and the painters Hans Purrmann, and Oskar Kokoschka;
- 1956 the physicist Erwin Schrödinger and Lise Meitner;
- 1957 the architect Ludwig Mies van der Rohe;
- 1961 the historian Hans Rothfels;
- 1963 the mathematician Carl Ludwig Siegel;
- 1966 the writer Anette Kolb;
- 1967 the art historian Erwin Panofsky, the conductor Otto Klemperer and the writer Carl Zuckmayer;
- 1970 the theater director Fritz Kortner;
- 1972 the biochemist Sir Hans Adolf Krebs;
- 1973 the historian and writer Golo Mann;
- 1974 the biochemist Fritz Lippmann;
- 1976 the art historian Richard Ettinghausen;
- 1977 the painter Hans Hartung;
- 1978 the art historian Ernst H. Gombrich;
- 1979 the physicists Victor Erich Weiskopf and Felix Bloch;
- 1980 the philosopher Sir Karl Popper.

Three *émigrés* who did not return but had nevertheless great influence on cultural life in the Federal Republic as representatives of their disciplines shall be named here in place of others: the cultural sociologist and historian Eugen Rosenstock-Huussy, the architect Walter Gropius and the writer Jean Améry. Rosenstock-Huussy was visiting professor at the universities Göttingen (1950), Münster (1957), Cologne (1962–63), director of the America-Institute of the University Cologne (1961–62), became Dr. h.c. of the universities Münster (1958) and Cologne (1961) and received the Great Federal Service Cross (1960).

Walter Gropius designed the apartment houses in the Berlin districts Britz-Buckow-Rudow from 1959 on. He received the Goethe Prize of the City of Hamburg (1956), the Ernst-Reuter-Medal of the City of Berlin (1956), the Great Federal Service Cross (1958) and the Great State Prize for Architecture in Düsseldorf (1960), the award of the German Academy for Municipal and Regional Planning (1962).

The Viennese writer Jean Améry, who emigrated to Belgium after 1938, worked regularly for German language radio and periodicals after 1945, became member of the PEN-Center of the Federal Republic of Germany, honorary president of the Austrian PEN, received the German Critics' Prize for literature (1970), the Literary Prize of the Bavarian Academy of Fine Arts (1972), the Lessing Prize of the City of Hamburg, the Prize of the City of Vienna for Journalism (1977). Similar



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awards were given to Nelly Sachs, Max Tau, Walter Mehring, to mention only these.

These persons represent the 8—10% of those émigrés who belong to the group of potential returnees, but did not return permanently. Nevertheless they were represented in the cultural life of Germany and won influence. Visiting professorships, memberships in academies, invitations, regular lecture tours, permanent work in German or Austrian newspapers and magazines, exhibitions and other activities were characteristic for these émigrés.

Those émigrés who went to Switzerland during NS-rule or — like Thomas Mann — lived there after 1945, also influenced cultural developments in Germany or Austria. Clearly the intellectual reintegration of this group has to be considered too. The literary and artistic works of most émigrés have been published in numerous single editions or as collected works in the Federal Republic and in the G.D.R. during the fifties, the sixties, the seventies and eighties, even if at times with considerable delay, as in the cases of Lion Feuchtwanger or Oskar Maria Graf, yet with great expenditure and success.

The combination of the facts enumerated here — share in re-migration, organizational influence without return, intellectual reintegration of the work — suggests a revision of the opinion prevailing so far, that the extremely severe loss to German

culture through the emigration of large parts of the cultural elite after 1933 has been completely irreversible also after the end of the N.S. dictatorship: A considerable part of the cultural loss, which N.S. rule has caused through its persecution of Jewish but also non-Jewish members of the cultural elite since 1933, could slowly be restored during the decades after 1945, although with interruptions and delays. Numerous émigrés have sooner or later contributed to the reconstitution of the successor states of the German Reich after the end of N.S.-rule. It is time to recognize their achievement. This conclusion does not mean, that all losses could be reversed after 1945. The displacement had meant too many personal sacrifices. It should be remembered here that many persons committed suicide during exile, and that many did not succeed in settling down permanently and in continuing their scientific or artistic work. The above modification of the previous assessment of the cultural loss must not lead to a minimization of the barbarian injustice of the displacement, or the terrible and generally hard lot of the émigrés.

Our result rather means that the displacement of the German spirit which the N.S.-dictatorship began ended after 1945. Despite the fundamental interruption of major scholarly literary, and artistic traditions of German cultural life, N.S. cultural policy gained its objective only in part, and, in many sectors of cultural and scientific life, only for a limited time.

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By H. Stuart Hughes

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THE MIGRATION OF  
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To the memory of  
Hans Meyerhoff



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## Preface

THIS study concludes the investigation which I began with *Consciousness and Society* and which subsequently, as I explained in the preface to the second volume of the series, *The Obstructed Path*, developed into a trilogy. Like its predecessors, it is a free-standing work that can be read independently of the others. And as with them, I have followed my by now habitual procedure of writing throughout in the past tense and dispensing with a bibliography.

Two portions of Chapter 3 have earlier figured as follows: the section on Salvemini was given as a Lauro De Bosis Memorial Lecture at Harvard University in October 1971 and was repeated the following May (in Italian) before the Circolo Italiano di Boston; the section on Neumann (in slightly different form) was published in 1969 in *The Intellectual Migration*, edited by Donald Fleming and Bernard Bailyn.

My work on this book confronted me with a new and perplexing problem: here, as opposed to the earlier volumes of the trilogy, I was personally and sometimes even closely acquainted with a number of the protagonists. I hope that the survivors among the cast of characters—and they are lamentably few—will not be too grievously wounded by my critical comments.

During my last year of writing, death carried off three people whose reading of the book would have been particularly important to me: George Lichtheim, who so notably enriched my knowledge of Marxism in all its guises; Karl Loewenstein, the last direct link to Max Weber's circle, who first introduced me as a senior at Amherst College to the universe of German social thought; and



Inge Werner Neumann Marcuse, the widow of one and the wife of another leading figure in this study, who never allowed friendship to stand in the way of expressing the full vigor of her beliefs.

My gratitude goes first to Dorothy Skelley, who typed the successive installments of the manuscript with meticulousness and unfailing good humor; second, to two of my Ph.D. students, Martin Jay and Paul A. Robinson, whose books *The Dialectical Imagination* and *The Freudian Left* I have tried to acknowledge amply in the footnotes to Chapters 4 and 5; and third, to those whose conversation sustained my spirits and contributed to my thoughts in ways of which I suspect they were mostly unaware—Lewis A. Coser, Henry Hatfield, Gerald N. Izenberg, David S. Luft, and John E. Toews.

My wife, Judy, besides giving me constant intellectual companionship, added to her customary and indispensable critique of my reasoning a more specific contribution to my understanding of ego psychology without which the latter part of Chapter 5 would have come out in a far weaker and more tentative form.

THE  
SEA  
CHANGE



## CHAPTER

# I

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### *The Great Migration*

IN THE PERSPECTIVE of the 1970's, the migration to the United States of European intellectuals fleeing fascist tyranny has finally become visible as the most important cultural event—or series of events—of the second quarter of the twentieth century. Why it took until then to recognize so obvious a phenomenon is something of a mystery. Perhaps it was that the presence of émigrés on the American scene was so much a part of our daily lives that we were unable to see it as “history.” Perhaps it required a certain time for the individual aspects of the great migration to sort themselves out: after the passage of three decades and the restoration of European culture, it became apparent that the older generation of the émigrés had died, that those who had returned to their lands of origin had been re-Europeanized, and that the majority who had chosen to remain in their adopted country had been absorbed into American society—in short, that the emigration experience was over.

Some such recognition prompted the almost simultaneous publication of three works on the subject at the end of the 1960's.<sup>1</sup>

1. Laura Fermi, *Illustrious Immigrants: The Intellectual Migration from Europe 1930-41* (Chicago, 1968); Donald Fleming and Bernard Bailyn, eds., *The Intellectual Migration: Europe and America, 1930-1960* (Cambridge, Mass., 1969); *The Legacy of the German Refugee Intellectuals* (special number of the review *Salmagundi*) (Fall 1969-Winter 1970). For an assessment of these studies, see my review article “La grande emigrazione intellettuale,” *Rivista storica italiana*, LXXXII (Fasc. IV, 1970), 951-959. One should fur-



From them we have learned a great deal about the scope of the emigration and the activities of its leading personalities. We now have a clear idea of the approximate number and national distribution of the intellectuals who left Europe for the United States. We know that nearly half of them were Germans (or, if one adds the Austrians, two-thirds) and that a corresponding (and overlapping) two-thirds were of Jewish origin. We have had our earlier impression confirmed that French émigrés were comparatively few and that still fewer of them chose to remain in America. And we have discovered—rather more surprisingly—that Italians accounted for only a small percentage of the emigration, their eminence and their success in their new country compensating for the thinness of their ranks.<sup>2</sup>

Beyond the matter of numbers, we have repeated evidence of the intellectual stimulus that emigration provided, of how the experience of living suspended between two cultures fostered rather than confined the flowering of talent. This "creative force of an interstitial situation" was not without precedent.<sup>3</sup> We may think of such illustrious exiles as Thucydides and Dante, or Joseph de Maistre meditating the fate of postrevolutionary Europe in the snows of St. Petersburg. A geographical and emotional displacement has often provided the shock that has set the mind off its familiar course and turned it toward introspection and social or psychological probing. Yet the emigration of the 1930's went beyond any previous cultural experience: in its range of talent and achievement it was indeed something new in the modern history of Western man. The émigrés themselves were "astounded at how much they accomplished" and were "the first to assert that they would not have accomplished as much had they remained in their

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ther note two earlier, briefer works, Franz Neumann et al., *The Cultural Migration: The European Scholar in America* (Philadelphia, 1953), and Helge Pross, *Die Deutsche Akademische Emigration nach den Vereinigten Staaten 1933-1941* (Berlin, 1955), and the sociological and psychological study by Donald Peterson Kent: *The Refugee Intellectual: The Americanization of the Immigrants of 1933-1941* (New York, 1953).

2. Fermi, *Illustrious Immigrants*, pp. 13, 95, 122. The usefulness of Fermi's statistical analysis of some 1,900 émigrés is limited by the fact that she has cast her net very wide, including, for example, Poles and Russians in addition to her main category of victims of fascism.

3. Editors' introduction to *The Intellectual Migration*, p. 8.

homelands."<sup>4</sup> Of course there were exceptions: older men too weary and disillusioned to adjust to American life, those so wedded to their native languages as to be unable to recast their work in English, the proud and the inflexible who refused to accept positions they thought unworthy of them. Yet the predominant impression they made was one of triumphant achievement in a new land.

How are we to account for this success—and in an America where economic depression and a scarcely concealed anti-Semitism all too often set limits to the welcome the émigrés received? No single explanation or combination of explanations suffices; we have only to recall an Einstein or a Schönberg to realize that the quota of genius among the émigrés was once again unprecedented. Yet there were in addition certain characteristics of America in the 1930's and 1940's that made it receptive of foreign talent to an extraordinary degree. The society was open—far more inclined than that of Germany or Austria or Italy to the recognition of individual merit irrespective of birth or class. Beyond that, it was a pluralist society in which an alien accent occasioned little comment and in which the majority of the citizenry that was not of Anglo-Saxon origin was in these very decades breaking through to positions of leadership. Quite specifically, the institutions of higher learning were more varied and less rigid than the European: in a situation in which individual professors enjoyed little power or prestige, it was comparatively easy to add the foreign-born to their number. And when the Second World War broke out, the government itself proved willing to put into positions of trust men whom it might well have considered enemy aliens. Finally, the very anti-intellectualism of so many Americans challenged the newly arrived Europeans to put their thoughts in a form that the wider public could understand: the theologian Paul Tillich has spoken of this experience as having "deprovincialized" him, to which the philosopher Theodor W. Adorno adds that he became "inclined . . . toward critical self-scrutiny" when he saw that "in America . . . no reverential silence in the presence of everything intellectual prevailed."<sup>5</sup>

4. Fermi, *Illustrious Immigrants*, p. 16.

5. "Scientific Experiences of a European Scholar in America," *The Intellectual Migration*, p. 367.



More particularly, those branches of American activity that were on the verge of making a great leap forward could profit to the full from the arrival of the refugees from Europe. Atomic physics and psychoanalysis offer the two major examples of fields of endeavor in which the émigrés came just at the critical moment—when the native-born, already professionally prepared, were eager for the advanced training and direction that Europeans could give them. These two disciplines, in which the center of gravity definitively crossed the Atlantic during the war years, suggest the extent of a shift in intellectual weight that made the former pattern of deference toward the Old World no longer necessary or appropriate.

This much we now know about the great migration. Its general outlines have been established, and its contributions to American culture have been fully recognized. But the other side of the process is less well understood. It is here that the difficulties begin—and specifically in the sphere of the social thought that underlay and buttressed so much of the work of the emigration. We know that the arrival of the émigrés enriched American intellectual life; we know that it meant a loss for Europe from which the Continent took decades to recover. But what of the refugees themselves? If it is true that they accomplished more than they would have if they had remained at home, did this mean an increase in their own understanding or simply a diffusion of that thought to the larger audience their hosts provided? In widening its influence, did Central European sociology or psychology become shallower? Or did its “sea change” give it a bite and specificity that it had lacked before? In short, how did the experience in America alter the character of thought itself? We can approach this range of questions by going beyond chronicle or external biography to a psychosocial analysis of that experience as a major intellectual drama in its own right.

### 1. *Lands of Origin*

At the end of the 1920's, Benito Mussolini had already governed Italy for seven years. For the last three of them, his power had stood virtually unchallenged. Italian Fascism had won acceptance

### 1. *The Great Migration*

at home and abroad as a new form of rule, despotic to be sure, but one which seemed suited to the presumed political immaturity of its subjects. Through his agreement with the Vatican in 1929, the Duce had settled to the satisfaction of the vast majority of his countrymen the quarrel of Church and state that had bewildered the Italians and divided their loyalties for two full generations. So popular indeed was this accord that by 1931 the opposition to the regime was growing weary and demoralized. And in that same year, when an oath of Fascist allegiance was demanded of Italy's 1,250 university professors, only a dozen refused.

These latter, however, were almost all scholars of distinction. And among those who took the oath it was an open secret that hundreds had settled their struggles of conscience by putting ahead of abstract principle their duty to support their families. Such behavior was thoroughly in accord with Italian practice. Most of what Mussolini had done was not. “None of the principal concepts and aspects of Fascism was in harmony with Italian traditions and predilections.”<sup>6</sup> Its ruthless application of police power threatened ancient habits of indiscipline and tenacious local pride. Its efforts at ideological indoctrination flew in the face of an age-old skepticism about political formulas of all descriptions. Its self-centered national assertiveness vulgarized and perverted the Italians' proudest claim—that they exemplified the values of a universal humanist culture. With so much to his discredit, it is curious that Mussolini succeeded in winning over to his side the greater part of Italy's intellectuals.

The tradition of skepticism itself prompted a disabused acceptance of the latest political novelty that the turn of fortune had brought to a much-trying people. Beyond that, Fascism both profited by and intensified a drawing inward of Italian culture that was already becoming manifest in the immediate postwar years. Italy's participation in the First World War had brought to a halt the effort at “deprovincialization” associated with the work of Benedetto Croce; for Croce and his like, the rupture with Germany marked a cruel hiatus in their closest philosophical affilia-

6. Leonardo Olschki, *The Genius of Italy* (New York, 1949), p. 455.



to each other they had discerned the same four groups as the central contenders for power in the fascist systems—the army, the civil service, big business, and the party—that they had alike particularly stressed the relationship between the third and fourth, and that they had agreed in recognizing that whatever the limitations under which it operated, the party leadership in the end had the decisive say.

This last consideration should have been enough to give pause to those who labeled *Behemoth* or *Under the Axe of Fascism* as mere leftist interpretations. And in Salvemini's case such a reminder usually sufficed; his reading of Italian Fascism met little serious opposition in the postwar period. Neumann's similar interpretation, however, of the German fascist experience was repeatedly called into question. Subsequent research suggested that the number of German businessmen who remained free of Nazi involvement was greater than he had supposed; and this numerical rectification seemed to cast a retrospective doubt on his whole enterprise. But the same postwar years in which Neumann's work came under assault also demonstrated that the major German capitalists had ridden through the Hitler era virtually unscathed. And it was difficult to see how they could have accomplished such a feat in the absence of substantial accommodation with the regime. This Neumann's critics or the defenders of German big business never satisfactorily explained.

The most general way in which a Marxist or left interpretation of the socioeconomic bases of the fascist systems might be phrased was Max Horkheimer's lapidary formula: "Whoever is unwilling to speak of capitalism should also keep silent about fascism." Any such interpretation presumed a significant connection between the economic structure of the one and the political organization of the other.<sup>70</sup> But in its notion of the tightness of that connection it could and did take three distinct forms. The most extreme asserted that the big businessmen ran the show—that fascist leadership was no more than a façade for the rule of monopoly capitalism. A

70. See the introduction by Kurt Kliem, Jörg Kammler, and Rüdiger Griepenburg to the anthology ed. by Wolfgang Abendroth, *Faschismus und Kapitalismus* (Frankfurt and Vienna, 1967), pp. 5–8.

second and more moderate variant of the thesis argued merely that the system intentionally and systematically worked for the benefit of big business. A corollary of both these variants was that fascism was the appropriate expression of monopoly capitalism and that those major industrial states which had not yet "gone fascist" were in imminent danger of doing so. The third and final variant limited itself to asserting that the big businessmen, after certain initial hesitations, for the most part supported the fascist leaders, once the latter were installed in power, and that they received in return substantial favors from the fascist regimes. This was all that Salvemini ever argued and what Neumann argued *most of the time*.

Neither suggested that fascism was the sole or necessary expression of monopoly capitalism. They simply maintained that in Italy as in Germany big business did very well under fascism, that most of the major capitalists were only too happy to cooperate in fascist rule, that as such regimes went on, there occurred a kind of symbiosis between top leadership in business and top leadership in the party, and that this interaction gave the key to the functioning of the entire system. Thus the greater capitalists—almost alone among their countrymen—were able to ride through the fascist experience virtually unscathed, while the members of the lower middle class who had put their trust in the rhetoric of a Mussolini or a Hitler found themselves sacrificed to the "higher" exigencies of a nation girding for war.

#### iv. *Hannah Arendt and the "Totalitarian" Threat*

For a half-generation following the end of the Second World War no important general or comparative works on fascism appeared—neither in the former fascist countries themselves nor in the Anglo-American world. At the same time the years 1945–1960 saw the unearthing of a mass of documentation that confirmed or corrected hypotheses at which Salvemini or Neumann had been obliged to guess and the corresponding publication of a host of



monographs and articles on individual aspects of the Italian or German experience. Indeed the flood of this material was so great as to daunt scholars from attempting a new synthesis—witness Neumann's inability to revise his *Behemoth* or to write his projected study of dictatorship. In the absence of such a synthesis, the term "fascism" itself began to lapse; the word currently in style among historians and political scientists, as among journalists and makers of public policy, was "totalitarianism."<sup>71</sup>

In retrospect it seems clear that the vogue of "totalitarian" explanations, more particularly in the United States, was a by-product of the cold war.<sup>72</sup> In the late 1940's and early 1950's, the term served to ease the shock of emotional readjustment for Americans or Englishmen—or émigrés—who had just defeated one enemy and were now called upon by their governments to confront another. If it could be proved that Nazism and Communism were very much the same thing, then the cold war against the late ally could be justified by the rhetoric that had proved so effective against the late enemy. And by the same token Fascist Italy ceased to be of much interest: if it was the comparison between Nazi Germany and the Soviet Union that had now become crucial, Mussolini's looser rule could logically be dismissed as nothing graver than a dramatic manifestation of the already familiar phenomenon of pretotalitarian tyranny. A work such as *Behemoth* did not fit the new intellectual conformism: its line of analysis jarred the comfortable convictions of the cold war at its height. Neumann had in fact used the word "totalitarian"; but he had resorted to it sparingly and only when the context was clear.<sup>73</sup> He never exploited it, as the cold war apologists did, to blur the

71. Ernst Nolte, ed., introduction to the anthology *Theorien über den Faschismus*, 2d ed. (Cologne and Berlin, 1970), p. 65; Wolfgang Sauer, "National Socialism: Totalitarianism or Fascism?" *The American Historical Review*, LXXIII (Dec. 1967), 405-407.

72. In Carl J. Friedrich and Zbigniew K. Brzezinski, *Totalitarian Dictatorship and Autocracy* (Cambridge, Mass., 1956), compare the statement in the original edition (p. 7): "The . . . view, that communist and fascist dictatorships are wholly alike, is presently favored in the United States" with that in the revised edition (1965) (p. 19), where the phrase "is presently favored" has been changed to "was during the cold war demonstrably favored."

73. *Behemoth*, e.g., pp. 49-50, 67, 261.

distinction between fascist and Communist society. This was still another reason for the post-1945 denigration of his work.

Both the most erudite and the most emotionally compelling of the books in the new vein, Hannah Arendt's *The Origins of Totalitarianism*, appeared in early 1951 at the zenith of the cold war. A few weeks earlier, the American and South Korean armies had been hurled back from the Yalu River by the Communist Chinese; Stalin was in the grip of the homicidal madness that Alexander Solzhenitsyn was to depict so chillingly in *The First Circle*; never before—or subsequently—had the United States and the Soviet Union seemed so close to war. It was on such a charged ideological atmosphere that *The Origins of Totalitarianism* impinged. Its author, up to then unknown, soon became an intellectual celebrity. Born in 1906 and a favorite pupil of the philosopher Karl Jaspers, Hannah Arendt brought to the study of twentieth-century tyranny, along with the heavily freighted terminology of existentialism, a tone of ethical revulsion that reached a higher pitch than had been true of any of her predecessors.

Her method of attack was threefold. In the late nineteenth century, she argued, three movements, apparently unrelated, were converging to produce the type of mind and political activity which was to evolve into totalitarianism only after the First World War. What these movements had in common was that they all reflected—and accelerated—the collapse of the European class structure and nation-state concept. Class and nation-state had alone given reality to the rights of man. In their default, these rights were reduced to mere abstractions. With the dissolution of the basic institutions of European society, no barriers remained against what "became this century's curse only because it so terrifyingly took care of its problems."<sup>74</sup>

The first of the preparatory movements was anti-Semitism. Refusing to accept the usual explanation that the Jews served as scapegoats for unscrupulous demagogic agitation, Arendt tried to find reasons why they offered the logical target. It was their intimate connection with the nation-state, she found, that marked the

74. *The Origins of Totalitarianism* (New York, 1951), p. 430.



Jews for destruction. As financiers of the European governments, they had incurred the hatred of the political movements which saw in the state the enemy to be conquered. But the irony of the case was that the real growth of anti-Semitism should have come only after the Jews had ceased to be influential. With the flood tide of imperialism in the late nineteenth century, they had lost their near-monopoly of state business. European Jewry, Arendt surmises, had become "an object of universal hatred because of its useless wealth, and of contempt because of its lack of power."<sup>75</sup>

Meantime the second movement, overseas imperialism, had sapped the foundations of the nation-state. As a doctrine of "expansion for expansion's sake," imperialism brought under the control of the nation-state backward areas that could not be integrated into the European political framework. Moreover, the novel experience of confronting vast assemblages of "primitive" and totally alien human beings taught the Europeans to forget their moral scruples, to indulge with a good conscience in mass murder and unspeakable brutality. For the first time in history, racism attained the status of self-conscious doctrine and practice. And it was racism—with its "contempt for labor, hatred of territorial limitation, general rootlessness, and . . . activist faith in one's own divine chosenness"—that was most deeply to mark the movements of the future.<sup>76</sup>

Overseas imperialism had one saving grace. It at least drew a sharp line between colonial methods and policy at home. With the third movement—what Arendt called "tribal nationalism"—the line disappeared. In Pan-Germanism and Pan-Slavism, the "concept of cohesive expansion" did not "allow for any geographic distance between the methods and institutions of colony and of nation."<sup>77</sup> Under the ostensible aim of uniting all individuals speaking a common language, this new form of nationalism in fact preached the world supremacy of a master race. To those whose national and personal ambitions had been frustrated, it gave the consoling assurance of their own superiority.

Out of these three movements, Arendt concluded, came totali-

75. *Ibid.*, p. 15.

76. *Ibid.*, pp. 131, 197.

77. *Ibid.*, p. 223.

tarianism—the unprecedented madness of the "mob," the "refuse of all classes," which had coalesced at the turn of the century under the leadership of déclassé intellectuals. With the subsequent declassing of entire categories of the population, the "mob" dissolved into the "masses." The masses—the "superfluous men" of the era—had nothing to lose by following their leaders into the most irrational and reckless of ventures. All they sought was to merge with something larger than themselves, to give up their useless individualities to a movement that in the words of Cecil Rhodes "thought in continents and felt in centuries." And their leaders stood ready to offer them a fictitious world which could "outrageously insult common sense" by imposing its own crazy consistency upon a real world in which common sense had ceased to count.<sup>78</sup>

Overwrought, highly colored, and constantly projecting interpretations too bold for the data to bear, *The Origins of Totalitarianism* recalled Borgese's *Goliath* in its historical amateurishness and its striving for shock effect. Yet the intellectual demands it made were far sterner: Hannah Arendt offered no concessions to her readers; they were obliged either to follow to the end the tortuous but relentlessly consistent line of her thought or to give up the effort entirely.

Those who fought their way through her book might not notice how much they had accepted along the way that was either doubtful or positively mistaken. At the very start, for example, she had assured her readers without proof that the great financiers had served both as the leaders and as the symbols of the European Jewish communities, and on this insecure foundation her entire interpretation of anti-Semitism rested.<sup>79</sup> Similarly she never explained the relevance of dwelling at length on British imperialism, when she herself was quite ready to grant that twentieth-century Britain, even overseas, stood for "moderation in the midst of plain insanity." Gravest of all, however, was her insistence on slurring over or belittling the differences between the Nazi and the Soviet

78. *Ibid.*, pp. 309, 342.

79. Benjamin I. Schwartz, "The Religion of Politics: Reflections on the Thought of Hannah Arendt," *Dissent*, XVII (March-April 1970), 154.



forms of the "totalitarian" phenomenon by treating the two as "essentially identical."<sup>80</sup>

Obviously Arendt knew more about Germany than about Russia, and she frequently seemed to be extrapolating from Hitlerian to Soviet experience. For Nazism she provided a full ideological background; in the case of Bolshevism she jumped over a quarter-century from the agitation of the Pan-Slavists to the triumph of Stalin. She confronted her readers with Soviet Communism as the ideological equivalent of Nazism without any adequate account of how it got to be that way. The fate of classic Marxism in Russia, the complex process by which Pan-Slavist elements fused with it in the Stalinist credo—all this she telescoped into a few sentences. Still more, her basic equation of totalitarianism with madness blinded her to the economic rationale of Communist practice; Soviet realities cut across her generalizations by being at once more rational and more totalitarian than Nazi methods. Thus her account lacked any assessment of the distinctions between the two systems that had given Russian Communism its greater resilience and durability.

The basic difference, of course, lay in economic organization and the power relationships deriving from it on which Salvemini and Neumann had put such stress. Hannah Arendt's account, in line with her previous training, was almost entirely innocent of economics—hence her readiness to dismiss Soviet industrial planning as a further example of "insanity." This, like so much else in her book, bore the imprint of the era in which it was published; and, curiously enough, it dated faster than did the analyses of fascism written closer to the event.

In the preface to her work, Hannah Arendt had herself referred to the circumstances of its composition, to the experience of living "in the anticipation of a third World War between the two remaining world powers."<sup>81</sup> Such a catastrophic assessment was not uncommon around 1950; as little as a half-decade later it was already sounding exaggerated. And in a broader sense the same was true of the entire "totalitarian" interpretation. An "ideal type,"

80. *Origins of Totalitarianism*, pp. 221, 429.

81. *Ibid.*, p. vii.

although one that Weber would have found lamentably imprecise, the term began to dissolve as the 1950's came to a close in an ideological situation whose complexities defied any simple scheme of classification. The notion of a bipolar world lapsed; so too did the clear contrast between freedom and totalitarian rule. By the 1960's it was becoming apparent, particularly with reference to the "Third World," that there were infinite gradations between the two and that it was more illuminating to speak of a continuum extending without sharp breaks all the way from the most authoritarian to the most liberal attitudes and practices.

The "totalitarian" interpretation focused on techniques of control—the horrifying surface of life—rather than on underlying social realities. It took at its face value Hitler's or Stalin's claim to complete power over the lives of his subjects, despite the evidence in the concentration camp literature itself that even within those hellish confines one could discover tiny islands of autonomy.<sup>82</sup> In retrospect totalitarianism loomed as an ideal, an aspiration, and not as a historical reality—witness the fact that the term had been coined by Mussolini to describe a regime which never came close to its attainment. The final irony of the study of totalitarianism was that it led to the neglect of its Italian inventor and of the style of rule which rather more than Hitler's had been admired and imitated in the fascist era.

#### v. "Radicalism of the Right"

In the 1960's a new generation of scholars, unscarred by the ideological battles of their elders, returned to the study of fascism with fresh eyes and a willingness to examine without fixed preconceptions both recently discovered data and old interpretations. They not only rehabilitated the term "fascism" itself; they attempted to redefine it in a fashion that would accommodate national variations while maintaining a minimum of conceptual unity. In the former fascist countries these efforts chiefly took the

82. See, for example, Eugen Kogon, *Der SS-Staat* (Munich, 1946), trans. by Heinz Norden as *The Theory and Practice of Hell* (New York, 1950).



lives from the inroads of popular culture. Shielded by the ramparts of traditional status and respect, they had been able to keep at a safe distance the grosser and more offensive manifestations of mass taste. With the move to America, these walls collapsed: a flood of vulgarity struck the new arrivals in the face. And correspondingly their mood became more embattled: what in Europe had been no more than "vague disdain" in the United States turned into an "elaborate loathing."<sup>5</sup>

Yet in this respect, as in so many others, Adorno and his friends viewed the combat they were waging as an ambiguous two-front struggle. In the task of subjecting to unsparing criticism the tastes and attitudes of the masses, they found it patently insufficient merely to defend the values of traditional "high culture." For one thing, it was not really the masses' fault if they behaved so disappointingly. It was rather the fault of the economic relationships that dominated their existence or, in more personal terms, of those who systematically manipulated the lives of others. Perhaps it was for this reason that Adorno and Horkheimer did not use the term "mass society"; they preferred to speak of the *verwaltete Welt*—"the world of the administered life." Within such a world, they thought, it would be reactionary to join the run of critics whose conservatism expressed itself in a frantic attempt to cling to bits and pieces of the cultural values of the past. Unaware of the social processes from which true culture sprang, critics of this sort were guilty of a special and insidious kind of "fetishizing": in handling art and literature as prized "goods," they tore them from their spontaneous context and rendered them lifeless. Under such circumstances, the authentic and fully conscious critic could not side with those who made a cult of the mind or spirit. Nor could he enroll in the far more crowded ranks of the enemies of traditional civilized values. Still more, it was questionable whether there was any high culture left to defend: its purveyors had so dressed it up and "neutralized" it as to reduce it to "trash." "Self-sufficient contemplation" would not do; even to speak of what had gone wrong ran the risk of degenerating into mere chatter; "after

5. Shils, "Daydreams and Nightmares," p. 258.

Auschwitz," Adorno concluded, in his most poignant cry of despair, it was "barbaric" to go on writing poetry.<sup>6</sup>

### 1. The Return to Hegel

The major presupposition behind the émigré critique of mass society was a view of the world that to Americans was alien and virtually unknown—a Marxist doctrine renewed by a return to its Hegelian source. Beginning with the appearance of Lukács's *History and Class Consciousness* in 1923, there had occurred within the "ancient Central European heartland of the Marxist tradition" a "revival of metaphysical idealism." Communist party discipline had forced Lukács to repudiate his youthful aberrations. For all practical purposes he had subscribed to the "orthodox" view of dialectical materialism as the mechanical working out of fixed economic laws.<sup>7</sup> But he could not prevent his writings from leading a life of their own; the underground reputation of *History and Class Consciousness* continued to grow; and the publication in the early 1930's of the *Economic and Philosophical Manuscripts* in which the young Marx had gropingly formulated his original conception of human society had given Lukács a retrospective validation—it was now apparent that the Hungarian literary critic turned revolutionary had divined by a process of sympathetic reconstruction what his ideological master had written nearly eighty years before.<sup>8</sup>

Adorno and Horkheimer referred only rarely to Marx's Paris manuscripts. Their relations with Lukács were distant and for the most part hostile. They also denied that they were idealists. Despite their disclaimers, a wider view of their work suggests that

6. "Kulturkritik und Gesellschaft" (originally published in 1951), *Prismen* (Frankfurt, 1955), trans. by Samuel and Shierry Weber as *Prisms* (London, 1967), pp. 22-23, 33-34.

7. See the qualified retraction of his original retraction in the preface to the new edition (1967) of *Geschichte und Klassenbewusstsein*, on which the English translation (Cambridge, Mass., 1971) is based.

8. On this whole topic, see George Lichtheim, *From Marx to Hegel* (New York, 1971), pp. 2, 19-21, 38.



they too exemplified the subjectivist reinterpretation of Marxism which in the four decades from the 1920's to the 1960's gave that doctrine a new and enhanced philosophical standing. In such a view, Antonio Gramsci ranks as an isolated Italian precursor and Maurice Merleau-Ponty as a belated and quasi-liberal French propagator of twentieth-century neo-Marxism—a Marxism stripped of its late-nineteenth-century scientific pretenses and thrown back on its early-nineteenth-century Hegelian base. For ideologists of this stamp, the concept of alienation offered the key to social analysis. It was the guiding term which bound together the most diverse thinkers. (The discussion of alienated labor was after all the centerpiece of Marx's own early manuscripts.) Originally employed by Hegel, with its range expanded through the work of Nietzsche and Freud, the word "alienation" eventually took on universal connotations as an overarching characterization of contemporary existence. It carried the promise that those who had been reduced from "ends" to "means," who had even lost all feeling for the wrong that had been done them, could be restored to full humanity through a laborious process of bringing into consciousness the dismal contrast between men's current behavior and the potentialities that lay within them unused.

Max Horkheimer was the dominating figure in the Institut für Sozialforschung (Institute for Social Research) founded in Frankfurt in 1923. Privately endowed and loosely affiliated with the city's university, which was itself less than a decade old, the Institut insisted on and managed to maintain its intellectual and ideological independence. Marxism—variously understood—was the common denominator that linked the Institut's associates. Indeed, it was for reasons of prudence alone that the word was not included in its title. As the Institut's researches developed, however, and competing intellectual influences impinged upon it, this original identification was to become ever more nuanced.<sup>9</sup>

A second point of common experience was Jewish origin. Nearly all the Institut's leading members came from prosperous, assim-

9. The early history of the Institut and the biographies of Horkheimer and Adorno are fully detailed in Jay, *Dialectical Imagination*, Chapter 1.

lated Jewish families. Yet as was so often the case with German Jews, they preferred most of the time not to speak of the matter or to speak of it with a certain embarrassment. Not until the advent of Hitler and the Institut's move to America did the question of anti-Semitism come to rank high among their concerns. Meantime they were distinguished as particularly outspoken representatives of the cosmopolitan and freethinking minority within the German academic community—a minority whose tendency to look to France for inspiration dated back to Heine and to Marx himself.

The beginnings of the extraordinary collaboration between Horkheimer and Adorno are difficult to establish with precision. They made each other's acquaintance in 1922—the year before the Institut was founded—but it was not until a decade and a half later that Adorno became formally associated with that body. The coalescence of their minds seems to have been a gradual process which eventually reached a point of such fusion that Horkheimer could flatly refer to their philosophies as "one."<sup>10</sup> A symbiosis of this sort is extremely rare in intellectual history: the parallels that most readily spring to mind are the collaboration between Tocqueville and Beaumont and that between Marx and Engels. But in these earlier cases it was apparent who was the junior partner: both at the time and in the view of posterity one mind clearly dominated the other. Adorno and Horkheimer's relationship was less simple: while the former wrote much more and became far better-known, the latter was the man who organized their common projects and the one to whom his partner deferred. The secret of their untroubled friendship—which went as deep personally as it did in the intellectual sphere—apparently lay in a happy contrast of temperaments and a largely fortuitous division of responsibilities.

Horkheimer was eight years Adorno's senior. Born in 1895, the son of a prosperous Stuttgart manufacturer, he had just completed his graduate studies in philosophy when he served as one of the Institut's founding associates. Hence his whole mature life was bound up with that body, and the history of its migrations was identical with his own. It was not until 1930, however, when he

10. Preface to *Eclipse of Reason* (New York, 1947), p. vii.



became its director and was named to a new chair in "social philosophy," that Horkheimer took his place as the Institut's tenured representative on the University of Frankfurt faculty and the leading spirit within the Institut itself. As the title of his professorship suggested, his understanding of philosophy was broad and unconventional. It also involved a passionate commitment to social change. Although Horkheimer lost his ideological model with the murder of Rosa Luxemburg in 1919 and never discovered another political leader toward whom he could feel entire sympathy, his adherence to a Marxist interpretation of events and a Marxist stress on the unity of theory and practice remained unwavering.

As a young man, Horkheimer seems to have been moody and diffident. By the 1930's he had gained a self-confidence which apparently got sturdier as his life went on. Perhaps the change was associated with a brief but apparently helpful psychoanalysis that he underwent in 1928-1929. In any case the personality which came to the fore in exile was that of a strong and even ruthless organizer—what in the United States would be called a promoter—with something of a Mephistophelean manner. As he gained in personal force, however, the matter of putting his thoughts on paper, which had never been easy for him, grew still more troublesome. Thus it was that he increasingly served as the protector and fosterer of the cherished friend who by the same token became the one who usually gave the final form to what they had talked out in common.

"Teddie" Adorno has been described by a younger associate as an "unguarded" human being who was constantly in need of human shelter. "Unguarded," that is, in the sense of never learning to play the game of being an adult and never seeing through the petty stratagems by which others lived and took advantage of him. He joined the Institut late and stayed clear of its organizational struggles. When at the end of his life he became a professor, he did not behave in the accepted academic fashion and seemed ill at ease in his new role. Although he achieved eminence in at least four fields—philosophy, musicology, literary criticism, and sociology—it was only in the last of these that he received full recognition by the professional guild. (When as an elderly man he was

chosen president of the German Sociological Association, he was overcome by a childlike joy.) Throughout his career Adorno figured as an "eccentric," on the margin of corporate intellectual endeavor.<sup>11</sup>

In his writings from exile, Adorno more than once referred to the "damaged" (*beschädigtes*) life. But it was not necessarily his own that he had in mind. The offspring of wealthy parents—his father was a Frankfurt wine merchant—he had had a happy childhood and youth in which his every taste was indulged. Music and cosmopolitanism were in the air he breathed. (He was eventually to prefer his mother's exotic-sounding name, that of a Corsican-French army officer who had married a German singer, to his paternal name of Wiesengrund.) Having already studied composition at home and taken his doctorate in philosophy, he was turning twenty-two when he went to Vienna in 1925 to work under Arnold Schönberg's disciple Alban Berg. There he frequented the circle around Schönberg, with whom he was to renew his acquaintance in California many years later. Although Adorno returned in 1928 to Frankfurt and to philosophy, he remained, as had been true of Nietzsche, a philosopher whose life was suffused by music. In this sense the damage wrought him by external events could always find an inner compensation. Never lacking for money, enclosed by the devotion of his great friend and his utterly loyal wife, Adorno managed to live a rare and uncompromisingly intellectual existence right up to the bizarre tragedy with which his life ended.

Horkheimer and Adorno described their work as "critical theory." By this they meant a style of thought that proceeded from negation to negation until its subject matter had been bounded or pierced by a series of devastating cross-fires. Unsystematic by definition and practice (Horkheimer almost invariably preferred the essay form to the organized treatise, and Adorno did so most of the time), critical theory was necessarily hostile to every sort of closed philosophical structure. Thus its debt to Hegel lay more in its method of attack than in its ultimate development. Like most twentieth-century neo-Hegelians, Adorno and Horkheimer

11. Jürgen Habermas in *Die Zeit*, September 12, 1969.



esteemed the author of the youthful, intellectually open, and potentially revolutionary *Phenomenology of Mind* rather than the established Berlin professor who had composed *The Philosophy of Right* and *The Philosophy of History*. In thus discriminating between the early and the later Hegel, they were following in the path of the original Left Hegelians and of Marx himself. But they were not returning simply to the idea-world of the 1840's. Too much, both in social change and in the history of ideas, had happened in the meantime. The moment of consciousness of the European proletariat had come and gone, and a host of new philosophies had crowded Hegel from his erstwhile lonely eminence. Horkheimer's earliest philosophical enthusiasm had been for Hegel's deadly enemy Schopenhauer, whom he was to celebrate nearly a half-century later as the unsparing destroyer of human illusions and the ancestor of psychoanalytic theory. And of course beyond Schopenhauer lay not only Freud but Dilthey and Weber and Mannheim, the whole new German intellectual pantheon, most of whom had had little use for Hegel.<sup>12</sup>

Critical theory, then, found itself obliged to integrate with the Hegelian inheritance the social thought of the succeeding century. In its unremitting process of negation, it was led to employ "the Hegelian method beyond and against Hegel's own system." The result was a new type of dialectic, methodologically still more subversive than that of Marx, a "dialectic without synthesis."<sup>13</sup> In common with Marx, Adorno and Horkheimer detested the abstractions in which German metaphysics and philosophical idealism had veiled the real world; they similarly reproached Hegel with the primacy he had conferred on the thinking subject. But they refused to fall into what they regarded as the opposite error of vulgar materialism or pseudoscience. Their theory hung precariously between a down-to-earth insistence that "things" took priority over one's perception of them and a rarefied form of expression

12. Jay, *Dialectical Imagination*, pp. 41-44; Max Horkheimer, "Die Aktualität Schopenhauers" (originally published in 1962), trans. for *The Critical Spirit: Essays in Honor of Herbert Marcuse*, ed. by Kurt H. Wolff and Barrington Moore, Jr. (Boston, 1967), pp. 64, 71.

13. George Lichtheim, "Adorno" (originally published in *The Times Literary Supplement*, LXVI [Sept. 28, 1967]), *From Marx to Hegel*, p. 140; Gian Enrico Rusconi, *La teoria critica della società* (Bologna, 1968), p. 245.

#### 4. The Critique of Mass Society

which was itself abstract in the extreme. In this latter sense they remained in the idealist and metaphysical mold. Moreover, in maintaining even more rigorously than Hegel that nothing could be known directly, that everything in the natural or human universe was "mediated" by something else, critical theory was as many-sided, as elusive, and as bewildering as the thought of the late Wittgenstein.

The two key terms—one favorable and one pejorative—which regularly recurred throughout Horkheimer and Adorno's writings were "reason" and "positivism." The former carried the traditional Hegelian meaning of a quality that subject and object potentially had in common: "a principle inherent in reality"; the latter served as a catch-all for a number of intellectual tendencies which critical theory opposed. If the social thinkers of the turn of the century had already been inclined to lump their dislikes under the word "positivism," Adorno and Horkheimer's usage was looser still. The two Frankfurt philosophers not only dismissed as positivist the materialism and "scientism" that had been the particular targets of the critique of the 1890's;<sup>14</sup> they included along with them the whole nominalist, empiricist tradition. Thus at their hands the logical positivism or logical empiricism of the 1920's and 1930's fared no better than the cruder forms of such doctrines whose errors these twentieth-century philosophies had tried to correct: all figured alike as enemies of "reason," since all of them had reduced it to a merely "subjective faculty of the mind."<sup>15</sup>

Frank irrationalism, one scarcely needs add, stood condemned before critical theory as worse still. And where the self-declared foes of reason had come to power—notably in Nazi Germany—Adorno and Horkheimer's attitude was necessarily one of passionate revulsion. Here once more they found themselves in a war on two fronts: German "thinking with the blood" they loathed with a hatred even mightier than that they directed against Anglo-American empiricism. At the same time they suspected that these two views of the world were not in as total contradiction as was commonly assumed. One was perhaps the historical result of the other. The most original and jarring feature of Adorno and

14. See my *Consciousness and Society* (New York, 1958), Chapter 2.

15. Horkheimer, *Eclipse of Reason*, p. 5.



Horkheimer's thought was the conviction which gradually settled upon them that twentieth-century neobarbarism was the direct heir of the eighteenth-century Enlightenment.

All the foregoing figured in embryo in a programmatic essay entitled "Traditional and Critical Theory" that Horkheimer published in 1937. Here the word "traditional" did service in much the same inclusive fashion in which "positivism" usually made its appearance. In the study of society, Horkheimer explained, empiricists and traditional theorists were only superficially at odds: basically they held to the same theoretical model—a model derived from natural science and primarily from mathematics. This "eternal Logos" determined the way they conducted their own work; they isolated themselves from the life about them, parceling out their investigations as the specialized division of labor dictated. Critical theory, in contrast, tried to understand the human universe "in the context of real social processes"; it was "dominated at every turn by a concern for reasonable (*vernünftig*) conditions of life."<sup>16</sup>

As opposed to the "aimless intellectual game, half conceptual poetry, half impotent expression of states of mind"—which was all that in Horkheimer's view traditional social theory amounted to—he urged his fellow intellectuals to direct their thought toward the emancipation of mankind and "an alteration of society as a whole." "Reason," he explained, could not "become transparent to itself" as long as men acted "as members of an organism" that was lacking in reason. Thus, in terms of critical theory, the distinction between the scholar's "scientific" role and his role as citizen on which Weber had insisted so strenuously made no sense at all. It sundered the human unity of intellectual labor: "in genuinely critical thought," research and value, knowledge and action, were inextricably entangled; here explanation signified "not only a logical process but a concrete historical one as well. In the course of it both . . . social structure . . . and the relation of the theo-

16. "Traditionelle und kritische Theorie" (originally published in *Zeitschrift für Sozialforschung*, VI [1937]), *Kritische Theorie*, II (Frankfurt, 1968), trans. by Matthew J. O'Connell for *Critical Theory* (New York, 1972), pp. 191, 194, 197–199. The translated volume is a selection from Horkheimer's two-volume collected essays.

retician to society" underwent alteration; the explainer changed along with the matter he was explaining.<sup>17</sup>

In another essay published earlier in the same year, Horkheimer had stressed more bluntly the interconnectedness of the thinker's two roles:

When an active individual of sound common sense perceives the sordid state of the world, desire to change it becomes the guiding principle by which he organizes given facts and shapes them into a theory. The methods and categories as well as the transformations of the theory can be understood only in connection with his taking of sides. This, in turn, discloses both his sound common sense and the character of the world. Right thinking depends as much on right willing as right willing on right thinking.<sup>18</sup>

This activist definition of the intellectual's task condemned as an "evasion of theoretical effort" the sentimental leftism which was "satisfied to proclaim with reverent admiration the creative strength of the proletariat." A "professional optimism," a "happy feeling" of finding oneself "linked with an immense force," might well turn to despair in "periods of crushing defeat" such as that in which Horkheimer himself was writing. It was better for the social critic to face being thrown "back upon himself" in ideological isolation. Nor should the thought which derived from a withdrawal into theory be confused with "an abstract utopia." Whatever it might have "in common with fantasy," it rested on the bedrock conviction that there was "only one truth" and that "the positive attributes of honesty, internal consistency, reasonableness, and striving for peace, freedom, and happiness" could not be ascribed "in the same sense to any other theory and practice."<sup>19</sup>

Such a conviction, Horkheimer recognized, meant that to an important extent mind (*Geist*) was "not liberal." The fact that it was "not cut loose from the life of society," that it did "not hang

17. *Ibid.*, pp. 208–211.

18. "Der neueste Angriff auf die Metaphysik" (originally published in *Zeitschrift für Sozialforschung*, VI [1937]), *Kritische Theorie*, II, trans. for *Critical Theory*, p. 162.

19. *Ibid.*, pp. 214, 219–220, 222.



suspended over it," precluded the notion, dear to the "liberalist intelligentsia," of a "detached" (*freischwebend*) role. The mediating function which Mannheim had assigned to social thought was patently incompatible with the formulations of critical theory. At the same time Horkheimer was prepared to say that mind was indeed liberal in the sense of tolerating "no external coercion, no revamping of its results to suit the will of one or another power."<sup>20</sup> Throughout the next three decades of their intellectual labors he and Adorno were to wrestle with the dialectical relationship between the liberal and the illiberal aspects of their thought, as they stoically accepted the isolation which events forced upon them.

II. Max Horkheimer and Theodor W. Adorno:  
*The Years in America*

When these preliminary definitions of critical theory were elaborated, the Frankfurt philosophers had already been four years in exile. The advent of Hitler had doomed the Institut für Sozialforschung: as a Marxist-oriented body, consisting almost entirely of scholars of Jewish origin, it was doubly anathema to the Nazis. In March 1933 its activities in Germany came to an end; Horkheimer escaped to Switzerland; and in the following month his name appeared among the first batch of university professors whom the new regime had dismissed from their posts.

After a brief sojourn in Geneva, the Institut moved in 1934 to the United States, where Columbia University had offered it hospitality. Here Adorno—who had spent a half-decade in Oxford and London—officially joined its ranks in 1938. The fact that the Institut had its own private endowment (prudently transferred abroad in time to escape seizure by the Nazis) gave it a mobility which comparable organizations lacked. But this ease of travel did not mean a corresponding adaptability to a new environment. On Morningside Heights Horkheimer and his associates remained stubbornly European; indeed a number of the latter tarried across

20. *Ibid.*, pp. 223–224.

the Atlantic until the last possible moment. A branch office continued to exist in Paris, and it was from there that the Institut's publications—still in German—regularly appeared.

The fall of France in 1940 and America's entrance into the war a year and a half later changed all that. Now that the tie with Europe had been severed, Horkheimer and his colleagues reluctantly decided to publish in English. Shortly thereafter the Institut underwent a series of internal crises. High costs and unsuccessful new investments forced it to cut its staff and curtail its activities. Fortunately, the American government's wartime need for expertise on Germany helped to solve the Institut's personnel difficulties. A number of its members left for Washington, first among them Franz Neumann, who had joined the group in the mid-1930's. Although the author of *Behemoth* was a new recruit, he had apparently soon taken a leading role in its discussions. As a man of forceful temperament who differed with Horkheimer in his interpretation of Nazism, Neumann had almost inevitably become the director's ideological and organizational rival. His departure for Washington served to head off the clash of two indomitable personalities.

Meantime Horkheimer himself had felt obliged to leave New York. Persuaded by a heart condition to seek a milder climate, he had moved in 1941 to southern California—more precisely to Pacific Palisades, where Thomas Mann had just settled. Here Adorno loyally followed him, as the rump of the Institut which remained on Morningside Heights slowly withered and died.<sup>21</sup> Hence it was in California, where German culture in exile established its most substantial beachhead, that Horkheimer and Adorno were to write the works for which they would be chiefly remembered.

In view of the tenacity with which they clung to their European inheritance and the virulence with which they assailed American mass culture, one might be tempted to conclude that they regarded their experience in the United States as totally negative. Yet such was not Adorno's final judgment. In a reminiscence

21. On all the foregoing, see Jay, *Dialectical Imagination*, pp. 29–31, 37–40, 113–114, 167–169, 172.



published a year before his death—perhaps tempered by the passage of time—he stressed the things he had learned from his hosts that had corrected an imbalance in his intellectual preparation. Although he had arrived, he recalled, “free from nationalism and cultural arrogance,” his previous work had been “thoroughly speculative”—directed exclusively toward interpretation. In America he found that people kept asking him for “the evidence” for what he said, and he in turn began to acquire greater respect for empirical methods. Still more, the first assignment that came his way was a study of jazz which was quite at variance with his own intensely cultivated musical tastes. From it, however, he was able to derive such concepts as “pseudo-individualism” and spurious “personalization” that were later to take a prominent place in his social theory. More broadly he discovered—and here his view paralleled Neumann’s—that in the United States, as opposed to Weimar Germany, “democratic forms” had “penetrated the whole of life.” Beyond that recognition, he naturally questioned the extent to which these forms mirrored the underlying realities—and this was to be the central concern of his years in exile. Yet when all the negative features had been noted, the intellectual debt remained: it was “scarcely an exaggeration to say that any contemporary consciousness” which had not “appropriated the American experience, even if in opposition,” had “something reactionary about it.”<sup>22</sup>

The book in which these new concerns surfaced was *The Authoritarian Personality*. Although it was the last in point of composition of Adorno and Horkheimer’s major writings in exile, it was the first to come to the attention of the wider American public. It was also the one that clashed least with the American intellectual tradition. Thus it makes sense to analyze these writings in reverse order and to work only gradually toward their most challenging formulations.

22. “Scientific Experiences of a European Scholar in America,” *The Intellectual Migration: Europe and America, 1930–1960*, ed. by Donald Fleming and Bernard Bailyn (Cambridge, Mass., 1969), pp. 339–340, 351, 367, 369–370.

Launched in 1944 and published in 1950, *The Authoritarian Personality* formed part of a wider collaborative project entitled “Studies in Prejudice.” This sort of venture was already familiar to the Institut’s associates: its single largest effort in the 1930’s had been a series of extended essays on problems of authority and the family. What was new about *The Authoritarian Personality* was its juxtaposition of American and émigré authorship and of empirical and speculative method. While Horkheimer had been its original moving spirit, he did not participate in the actual research and writing; this devolved, for the quantitative analysis of test and interview material, on a team of native-born psychologists based in Berkeley, California, and, for the “qualitative” interpretation, on Adorno himself. Adorno was later to recall that the “cooperation in a democratic spirit” which characterized the work, “in contrast to the academic tradition in Europe,” had been “the most fruitful thing” he had experienced in America, and he paid particular tribute to one of his collaborators, R. Nevitt Sanford, who had painstakingly edited his own English prose.<sup>23</sup>

The basic assumption behind *The Authoritarian Personality* was that there existed in the United States—and presumably throughout the Western world—a “fascist potential” which could be isolated in specific individuals. Such men and women manifested what might be called in psychoanalytic terms an “authoritarian syndrome.” Deriving from a “somasochistic resolution of the Oedipus complex,” this syndrome betrayed an unconscious “hatred against the father . . . transformed . . . into love” for those perceived as the strong and directed against the weak and defenseless. In its psychic economy, the Jew frequently became “a substitute for the hated father.” And so, predictably, anti-Semitism figured as its key symptom. Among the others was a tendency to think in stereotypes and to be taken in by the facile “personalizing” of public rhetoric, whether in politics or in advertising, along with a stubborn rejection of any utopian vision.<sup>24</sup>

23. *Ibid.*, p. 358.

24. T. W. Adorno, Else Frenkel-Brunswik, Daniel J. Levinson, R. Nevitt Sanford, *The Authoritarian Personality* (New York, 1950), pp. 1, 664–665, 695, 759–760.



*The Authoritarian Personality* was widely read and commented upon by the American social-science community.<sup>25</sup> Even those who found fault with its methods and conclusions acknowledged its suggestive power. Yet there was something bewildering about the book that eluded nearly all its readers. It had been six years in the making—and it might have taken still longer had Adorno not decided to return to Germany and thereby obliged his colleagues to hurry it to completion without the overhaul and shortening by which it could have profited. In a quieter period, such a lapse of time would have made little difference. In this case, the book was published in an ideological atmosphere sharply at variance with the one in which it had been projected. As David Riesman complained, it addressed itself to the problem of twenty years ago. Anti-Semitism was no longer the issue. Although *The Authoritarian Personality* appeared in the very year in which Joseph McCarthy launched his campaign of defamation, it dealt only tangentially with the mass fears on which the Senator played with consummate skill: its frame of reference was still a European-style fascism markedly different from what was currently threatening the United States.<sup>26</sup>

From the methodological standpoint critics noted mistakes that the authors had made in sampling techniques, their tendency to disregard the educational level and social situation of those they interviewed or tested, and a certain arbitrariness in the handling of qualitative material. The more discerning surmised that these failings derived at least in part from the "marriage" of two disparate research styles. Although a common allegiance to Freudian categories bound together the émigrés and the native-born who collaborated on *The Authoritarian Personality*, it had not sufficed to close the gap between data gathering and speculation. In the end, Adorno stood out as the intellectual virtuoso of the team. "Quantitative statistical method" was "all too often cast in the

25. See, in particular, Richard Christie and Marie Jahoda, eds., *Studies in the Scope and Method of "The Authoritarian Personality"* (Glencoe, Ill., 1954).

26. David Riesman, *Individualism Reconsidered* (Glencoe, Ill., 1954), pp. 476-477.

role of the stodgy husband" answering "'Yes, dear' to . . . the bright suggestions made by the wife."<sup>27</sup>

Underlying and overlapping this imperfect fusion of method was an unrecognized divergence in ideology. *The Authoritarian Personality* used the word "democratic" as the antithesis to "fascist"; such presumably was the spontaneous vocabulary of its American-born authors. But the term did not come so naturally to Adorno: he would more likely have spoken of "socialist" or "revolutionary." The Institut für Sozialforschung had always been sparing in its reliance on Marxian expressions. After its transfer to the United States, its tendency to write in "Aesopian" language became even more marked.<sup>28</sup> Impelled by what seems in retrospect an excessive caution, Adorno and Horkheimer and their colleagues tried to conceal their true ideological affiliation. No wonder that American readers found the implicit argument of *The Authoritarian Personality* confusing and had trouble in detecting its latent drift.

The clue, of course, lay in the works in German on which Adorno had been simultaneously working. There was also one other book in English that might have dispelled some of the misunderstanding. In 1947 Horkheimer published under the title *Eclipse of Reason* a revised version of a series of lectures he had given at Columbia University three years earlier. *Eclipse of Reason* went over much of the same ground that its author had covered in his major essays of 1937. But it did so in a flatter and less arresting manner: in passing from German to English, Horkheimer's style lost its verve and its polemical force. *Eclipse of Reason* impressed neither the critics nor the public; its effect on American intellectuals was almost nil.

Perhaps with his new audience in mind, Horkheimer concentrated his fire on those targets which were particularly prominent in the United States. Warning of "the tendency of liberalism to

27. Herbert H. Hyman and Paul B. Sheatsley, "A Methodological Critique," *Studies in the Scope and Method of "The Authoritarian Personality,"* pp. 69-71, 91, 102-104, 114-115.

28. Jay, *Dialectical Imagination*, pp. 226-227.



tilt over into fascism and of the intellectual and political representatives of liberalism to make their peace with its opposites," he noted that a merely "formal" or "subjectivist" view of reason could be of no "help in determining the desirability of any goal." The liberal empiricist, he argued, was at sea in dealing with the problem of values; under contemporary conditions, people were "living on the residue of . . . ideas" which had once embodied "elements of truth" but which were now "gradually losing their power of conviction." From assertions such as these it was only a short step to a full-scale assault on pragmatism, America's sole home-grown philosophy. Pragmatism, Horkheimer alleged, tried "to model all spheres of intellectual life" on "the techniques of the laboratory"; it was "the counterpart of modern industrialism, for which the factory" offered "the prototype of human existence." As the American variant of the pervasive positivist outlook, it gave "a censorial power" to science, transferring "the principle of the closed shop to the world of ideas." The open-mindedness on which it prided itself proved in practice to be no different from the intellectual absolutism of other positivist philosophies: "in a way, even the irrational dogmatism of the church" was "more rational than a rationalism so ardent" that it overshot "its own rationality."<sup>29</sup>

Thus in its current guise positivism figured rather as a symptom than as a corrective in a general cultural "failure of nerve." The "objective mind"—the spirit pervading "social life in all its branches"—worshiped "industry, technology, and nationality without a principle that could give sense to these categories"; it betokened "the pressure of an economic system" that admitted of "no reprieve or escape." Still more, the world of nature itself was becoming "the object of total exploitation" which had "no aim set by reason, and therefore no limit." This emphasis on conflict between man and nature—on the unprecedented domination of one species over all the others—was a new element in Horkheimer and Adorno's thought, an element that suffused much of their work in America and that received a triumphant vindication two

29. *Eclipse of Reason*, pp. 7, 20, 34, 50, 71, 77-79.

decades later with the widespread awakening to the ecological facts of life toward the end of the 1960's.<sup>30</sup>

Meantime Adorno had been sporadically at work on a book which led an even more obscure existence. Composed in fragments over the years 1944-1947, *Minima Moralia* was to see the light only in 1951—and then only in German. Adorno's immediate occasion for putting his private reflections into some tentative order was Horkheimer's fiftieth birthday and the accompanying realization that their labors in common had been broken off by his friend's organizational responsibility for "Studies in Prejudice." And so it was to Max—using only his first name—that Adorno dedicated his book in "gratitude" and "fidelity." *Minima Moralia* he characterized as a *dialogue intérieur*: the French expressions scattered through it suggested its debt to the Gallic tradition of the short essay or aphorism on which Nietzsche had also drawn. If it had a central theme, it was the "damaged" life referred to in its subtitle. Of this, Adorno explained, the intellectual émigré possessed a knowledge that was peculiarly painful. Whether he knew it or not, every such émigré was damaged and would do well to recognize the fact himself before being taught it "cruelly behind the tight-shut doors of his self respect." However he might come to feel at home in his professional guild or in driving a car, he would always go astray. His sole source of help lay in a "steadfast diagnosis of himself and others"—an analysis that could at least save him from "blindness" to his misfortune. "Where everything is bad," Adorno quoted the English Hegelian F. H. Bradley, "it must be good to know the worst."<sup>31</sup>

As he plumbed the depths of his anguish, a new word had crept into Adorno's vocabulary: "redemption" (*Erlösung*), which carried Christian overtones. It had been prefigured at the very start of *Minima Moralia*, where the author had announced his intention of exploring what had once been the true sphere of philosophy but had since fallen into "disregard" and "forgetfulness," the precepts of "right living." Year after year his search for such precepts had led him through the twisted, broken, and overgrown paths of his

30. *Ibid.*, pp. 85, 108-109, 154; Jay, *Dialectical Imagination*, pp. 256-257.

31. *Minima Moralia*, pp. 14, 44-45, 145.



own inner reflections. In the end he had emerged with the conviction that in the face of despair, it was the responsibility of philosophy to present matters "from the standpoint of redemption"—and that in this light "the question of the reality or unreality" of redemption was "almost immaterial."<sup>32</sup>

The task which Adorno and Horkheimer had shared before their conflicting responsibilities separated them was the work entitled *Dialectic of Enlightenment*. Begun in 1941, with their move to California, and substantially completed in 1944, it marked the climax of their intellectual collaboration. No other of their books gave so clear a notion of the farthest reaches of their thought: picking up where their essays of the 1930's had left off, *Dialectic of Enlightenment* mercilessly spelled out the half-concealed assumptions underlying *The Authoritarian Personality* and *Eclipse of Reason*, finally providing the key to what its authors really meant. Yet for the first decade and a half of its existence, the book was known only to small circles of specialists and enthusiasts. Originally published in German in Amsterdam in 1947, it did not become widely available in Germany until its reissue in 1969, and in the United States until an English translation appeared three years later.

From the text itself it was impossible to tell which parts each author had composed. According to their own account, Horkheimer and Adorno "jointly dictated lengthy sections" of it. Yet readers might guess that where the prose came in hammer blows, it was the work of the older man, and where it was more nuanced and involuted, it bore the mark of Adorno's discriminating intelligence. The book's organization suggested a series of linked essays—first a treatment of the concept of enlightenment itself, then an "excursus" on Homer and another on the Marquis de Sade, followed by the detailed examples of the main theme that the "culture industry" and anti-Semitism provided, the whole concluded by a set of "notes and drafts" which might well have found a place in *Minima Moralia*. The argument, while sometimes repetitive, was continuous and cumulative. The authors' view of

32. *Ibid.*, pp. 7, 480-481.

the Jewish question—highly idiosyncratic and the explanation for much that was puzzling about *The Authoritarian Personality*—could be appreciated only in the light of the reasoning which had gone before.

Horkheimer and Adorno's aim was to discover "why mankind, instead of entering into a truly human condition," was "sinking into a new kind of barbarism." More specifically it was to determine why enlightenment had succumbed to "self-destruction." In employing this term, the authors meant something wider than the progressive thought of the eighteenth century: they meant the whole process of rationalization or "disenchantment" in the modern world which Weber had defined in classic fashion. The enlightenment, Horkheimer and Adorno argued, had striven to shatter myths; in the course of so doing, it had in turn become a myth—the myth of "false clarity." "The only kind of thinking . . . sufficiently hard" to break the hold of superstition was ultimately led to direct its weapons against itself. Thus it was incumbent on the contemporary intellectual, if men were "not to be wholly betrayed," to *redeem* "the hopes of the past," through rethinking the concept of enlightenment.<sup>33</sup>

Considered in its broadest contemporary manifestations, enlightenment proved to be the equivalent of manipulation. According to the scientific-positivist vocabulary, knowledge meant the power to manipulate things; in the course of understanding them, "abstraction, the tool of enlightenment," liquidated its objects. Its simple, harsh terminology expressed the realities of domination; it converted the world into "a gigantic analytic judgment," in which the "brute facts" constituted a "sacred . . . preserve" impervious to criticism.<sup>34</sup>

All this could be found elsewhere in the writings of Horkheimer and Adorno. But never before or subsequently was it expressed with greater intransigence. Moreover, the two digressions that immediately followed the introductory statements gave them the living actuality which critical theory so often lacked. The first

33. *Dialektik der Aufklärung*, new ed. (Frankfurt, 1969), trans. by John Cumming as *Dialectic of Enlightenment* (New York, 1972), pp. ix, xi, xiii-xv, 4.

34. *Ibid.*, pp. 9, 13, 27-28.



excursus retold the story of Odysseus sailing past the island of the sirens. At Horkheimer and Adorno's hands, the Homeric legend became a prophetic "allegory of the dialectic of enlightenment." Odysseus, well aware that the charm of the sirens' song was irresistible but wanting to hear it nonetheless, had had himself bound to the mast of his ship; his oarsmen—his "pliable proletarians"—with "stopped ears" and all unknowing had doggedly rowed past the danger. And so it had been in the subsequent experience of humanity: the majority of mankind had been denied the knowledge of beauty and love; the minority who had won the right to leadership had gained it "at the price of the abasement and mortification of the instinct for complete, universal, and undivided happiness." The history of civilization was the history of "man's domination over himself," a "history of renunciation."<sup>35</sup> What Weber had accepted with stoic resignation, what Freud in his *Civilization and Its Discontents* had reckoned as the inevitable cost of curbing men's destructive drives, Horkheimer and Adorno were determined to protest with all the dialectical skill they could muster.

The second excursus introduced the Marquis de Sade, not, as Albert Camus was to do a few years later, in the guise of prefiguring the world of concentration camp torture, but in a more provocative incarnation as "the bourgeois individual freed from tutelage." The eighteenth-century Enlightenment, Horkheimer and Adorno maintained, had been incapable of finding a basis for ethical judgment; while its overall theory might be "firm and consistent," when it came to formulate "moral doctrines," it succumbed to propaganda and sentimentality. Kant himself, despite the care with which he had approached his task and the "sublime and paradoxical" nature of his results, had failed in his effort "to derive the duty of mutual respect from a law of reason." He and his fellow rationalists had bequeathed to the nineteenth-century bourgeois order no ethical sanction beyond convention and fact. This Nietzsche had revealed: he had "trumpeted far and wide the impossibility" of basing on reason as his contemporaries understood it "any fundamental argument against murder." And with it

35. *Ibid.*, pp. 34-36, 54-57.

he had rejected the facile moral optimism of the bourgeoisie, the "assurance" that sought "only to console." Whatever else Horkheimer and Adorno might mean by "redemption"—and the term remained shrouded in obscurity—it was apparent that consolation formed no part of it: they preferred the "merciless doctrines" which proclaimed the "identity" of domination and enlightenment.<sup>36</sup>

After this second excursus had probed the relationship between enlightenment and morality, the main argument resumed with a discussion of the "culture industry" in which enlightenment manifested itself as "mass deception." Horkheimer and Adorno quite consciously chose to speak of mass culture as an industry in order to suggest that what was popular about it was spurious and contrived.<sup>37</sup> Far from being democratic, it too expressed the realities of domination. While the great art of the past had embodied "a negative truth"—while even classical music tested the dictates of a "flawless and perfect style"—the contemporary culture industry reduced art to "absolute . . . imitation." It impressed "the same stamp on everything"; it provided for everyone, discarding tragedy and purveying in "fun" a "self-derision of man" or "parody of humanity."<sup>38</sup> It was here that the mark of their residence in America showed most clearly in Horkheimer and Adorno's work. When they wrote *Dialectic of Enlightenment*, they were living close to Hollywood and associating with fellow émigrés from Germany who had ties to the entertainment industry. In these circumstances, it was only natural that the cinema should offer them their finest examples of the covert coercion which underlay "the world of the administered life."

If the culture industry demonstrated how enlightenment had turned to deception, anti-Semitism betrayed its limits. Horkheimer and Adorno's treatment of this subject was both the most subtle and the most shocking to come out of the emigration; it surpassed even that of Hannah Arendt in its challenge to the comfortable convictions of the liberal intelligentsia. For the Frankfurt philosophers argued in effect that the conventional bourgeois had

36. *Ibid.*, pp. 85-86, 118-119.

37. Jay, *Dialectical Imagination*, p. 216.

38. *Dialectic of Enlightenment*, pp. 120, 130-131, 141, 149, 153.



"good," if unacknowledged, reasons to hate the Jew. By his mere existence the Jew reminded his fellow citizens of what they had lost in the act of self-domination; by his ambiguous marginal status he recalled the possibilities which had been cut off when men had renounced their claim on happiness. "Liberalism had allowed the Jews property, but no power to command." In place of authority it had left them free to indulge the "expressiveness" that others had curbed—"the painful echo of a superior power . . . voiced in a complaint." The Jew's eternal lamentation was like a woman's: as those who had not ruled "for thousands of years," women and Jews, out of "their fear and weakness," had retained an "affinity to nature which perennial oppression" had granted them. They had kept alive the memory of "happiness without power." And to those who were neither Jews nor women the thought of such "true happiness" was "unbearable." Thus when the Nazi derisively mimicked the Jew, he was in fact projecting upon his imagined enemy the longing for a more natural and expressive life that he had tried to stifle in his own soul.<sup>39</sup>

Anti-Semitism, then, was simply the most readily identifiable manifestation of the dehumanizing ideology into which enlightenment had degenerated. It suggested obedience to "social mechanisms in which the experiences of individual persons with individual Jews" played no part. In their all-or-nothing quality, anti-Semitic judgments had regularly "borne witness to stereotyped thought." And herewith came at last the explanation for why hatred of the Jews had figured so prominently in *The Authoritarian Personality*. Anti-Semitism, Horkheimer and Adorno had discovered, offered the clearest possible evidence of the "ticket" behavior—the inclination to accept a program in toto—which characterized not merely those of authoritarian bent but even the ordinary victims of the administered life. Yet the very fact that it occurred "only as part of an interchangeable program" gave "sure hope" that it would "one day . . . die out."<sup>40</sup> It was on this unanticipated note of optimism that *Dialectic of Enlightenment* closed.

39. *Ibid.*, pp. 112, 172, 182, 187.

40. *Ibid.*, pp. 200-201, 207.

When it was republished in 1969, its authors could perhaps have said that they had been right in predicting a waning of anti-Semitism. More broadly they claimed that their "prognosis of the . . . conversion of enlightenment into positivism" and the accompanying "identification of intellect" with what was "inimical to the spirit" had been "overwhelmingly confirmed." Faced with the apparently irresistible "advance toward an administered world," Horkheimer and Adorno could only demand "support for the residues of freedom," even if these seemed "powerless in regard to the main course of history."<sup>41</sup>

### III. *Max Horkheimer and Theodor W. Adorno: The Postwar Polemic*

Despite their hostility to American mass culture and the depth of their European allegiance, Horkheimer and Adorno's decision to return to Germany after the war was not as easy as might be supposed. Their work on "Studies in Prejudice" had finally given them a stake in American-style research, and it proved hard to disentangle themselves from this commitment. Three years passed before Horkheimer made his first postwar visit to his native land. The centennial of the 1848 Frankfurt Parliament provided the occasion: the director of the Institut für Sozialforschung received a warm reception and an invitation from the University of Frankfurt to move that body back to the city in which it had been founded a quarter-century earlier. Besides this official recognition, the new generation of students seemed eager to learn about critical theory: the imaginary audience for which Horkheimer and Adorno had continued to write in German had at last become a reality. In 1949 Horkheimer's university chair was restored to him; his lectures quickly became a thunderous success. A year later the Institut—the "Café Max," as the students nicknamed it—reopened in Frankfurt, with Adorno now in the position of assistant director and subsequently professor of philosophy and sociology. Although during the next decade the two friends returned at

41. *Ibid.*, preface to the new ed., pp. ix-x.



intervals to the United States, their center of gravity had definitively shifted back across the Atlantic. Their Institut had successfully accomplished what no other organized German intellectual group had managed to do—to bridge the gap of exile between the culture of Weimar and the new post-Nazi culture that was beginning to unfold.<sup>42</sup>

In 1951, Horkheimer was chosen rector of Frankfurt University, the first Jew ever to have been elevated to such a position. His election by his colleagues signified something more than a decline in anti-Semitism. It underlined Horkheimer and Adorno's new position as "official" ornaments of culture in a Federal Republic which could as yet boast of few intellectual luminaries. As the cold war passed its height, their critics found evidence of an unwonted ideological caution in the critical tone that the Frankfurt philosophers adopted toward the Soviet Union and China. But this was no real novelty: Horkheimer and Adorno had never equated Stalinist or Maoist despotism with their notion of Marxist practice and had long denounced Communist terror in the name of freedom. What was actually new about their writings of the 1950's and 1960's was that they now focused their generic antipositivism on specific, concrete problems of social-science method.<sup>43</sup>

Adorno and Horkheimer had always thought of their work as at the very least a two-front combat. After the midcentury, however, they began to reckon with a shift in the opposing forces. Abstract idealism was no longer a potent foe. In the intellectual void left by the discrediting of conventional German thought, the Frankfurt philosophers were in an optimum position to teach their postwar students what they had learned of empirical social science in the United States. Yet only up to a point—as American techniques caught on and threatened to sweep the field, Horkheimer and Adorno found it necessary to call a halt. They felt it incumbent on them to restate more fully the basic precepts of critical theory and to delimit the respects in which it was compatible with other types of social thought and the respects in which it was not. The task

42. For full particulars, see Jay, *Dialectical Imagination*, pp. 281–282, 285–288, 298.

43. Rusconi, *Teoria critica*, pp. 207–208.

devolved mainly on Adorno: with Horkheimer engrossed in administrative responsibilities and writing even less than before, the younger man was obliged to speak for both of them. And in so doing he became the most prestigious intellectual on the German scene. This last phase of Adorno's life—his two decades of postwar polemic—falls outside the scope of the present study. But a summary treatment of its main features is essential to an assessment of critical theory as it emerged from its period of intellectual obscurity and ideological concealment in the United States.

In 1966 Adorno published what many took to be his philosophical summa—a substantial volume entitled *Negative Dialectics*. But far from being a systematic treatise, it developed once again as a succession of extended essays. It embodied Adorno's final reckoning with his philosophical predecessors and more particularly with the idealist tradition which he had assailed all his life while remaining true to its metaphysical rhetoric and arcane form of expression. Indeed, from the standpoint of style, *Negative Dialectics* was as difficult a book as Adorno had ever written. Its argument did not unfold: it was "hurled at the reader in an unbroken sequence of staccato affirmations whose precise and lucid phrasing" failed to "make up for the absence of a discernible logical skeleton."<sup>44</sup> It offered, Adorno announced, on the model of the "anti-drama" or "anti-hero" of contemporary literature, an "anti-system" that with the "strength" of the subjective itself would "break through the fallacy of . . . subjectivity."<sup>45</sup>

"Philosophy, which once seemed obsolete," lived on, "because the moment to realize it was missed." With these words Adorno said the farewell to Marxist practice that had been in the making ever since the great disappointments of the 1930's. The proletariat had not reaped the inheritance of classical philosophy which Marx and Engels had promised it; what had happened instead had been the advent of the administered life. Thus philosophy was still needed—but a philosophy that would "disenchant" the whole

44. Lichtheim, "Adorno," *From Marx to Hegel*, p. 141.

45. *Negative Dialektik* (Frankfurt, 1966), trans. by E. B. Ashton as *Negative Dialectics* (New York, 1973), p. xx.



process of conceptual thinking. Nor—despite its total lack of fixed concepts—would it resemble the sociological relativism of a Mannheim or the desperate plea for “engagement” of a Sartre. Relativism Adorno dismissed as a “popularized” form of materialist thought. Existentialism in its French guise he found—as Sartre himself had eventually recognized—still “in idealistic bonds.” The author of *Being and Nothingness*, in propounding the notion of absolute freedom of choice, had against his own intention condemned his philosophy to irrationality: the Sartrean individual was obliged to make a choice without knowing the reason which determined that choice. It was to Sartre’s honor, Adorno added, that in the plays which were supposed to embody his formal philosophy the protagonists behaved not as free subjects but as though they were in chains.<sup>46</sup>

The existentialists, of course, in common with Adorno, had gone back to Hegel, and by preference to the Hegel of the *Phenomenology*. In this last assessment of the Hegelian legacy, Adorno did not repudiate his philosophical debt; but he underscored those aspects of it which confined rather than inspired the course of the dialectic. These he discovered more especially in Hegel’s notion of a world-spirit and the “mythical,” if secularized, teaching of an immanent “logic of things” that accompanied it. The result, Adorno contended, had been a stress on the general at the expense of the particular—an overemphasis which was eventually to lead to the worship of society itself. By reasoning in similar fashion a positivist such as Durkheim could “overtrump” Hegel in substituting for the metaphysics of the world-spirit the spirit of the human collectivity. The author of the *Phenomenology* had “abhorred . . . insipid edification”; but in his *Philosophy of History* he had lapsed into precisely what he had earlier condemned. Through his insistence on the independent status of a “people’s spirit” (*Volksgeist*), he had legitimized despotism over individual human beings—just as Durkheim was later to do with his notion of “collective norms” and Spengler with his theory of the “souls” of different cultures. Hegel, in short, had fought the historiographic battle on the side of what was immutable and identical in

46. *Ibid.*, pp. 3, 13, 36, 49–50.

its action, a “totality” in which he had found salvation. For this he stood accused of having fabricated a “mythology of history.”<sup>47</sup>

Yet Adorno did not deny that history had a course which the philosophic mind could discern. He simply maintained that Hegel had used categories such as freedom and justice in a generic and potentially reactionary fashion. A speculative philosophy of history Adorno apparently considered an intellectual enterprise worth attempting, but with results quite different from what Hegel had imagined. In a passionate outburst in one of the drafts appended to *Dialectic of Enlightenment*, he and Horkheimer had in fact sketched their own vision of past and future.

In the sense of . . . serious history, all ideas, prohibitions, religions, and political faiths are interesting only in so far as they increase or reduce the natural prospects of the human race on earth or in the universe. . . . Reason plays the part of an instrument of adaptation. . . . Its cunning consists of turning men into animals with more and more far-reaching powers, and not in establishing the identity between subject and object.

A philosophical interpretation of world history would have to show how the rational domination of nature comes increasingly to win the day, in spite of all deviations and resistance, and integrates all human characteristics. . . . Either men will tear each other to pieces or they will take all the flora and fauna of the earth with them; and if the earth is then still young enough, the whole thing will have to be started again at a much lower stage.<sup>48</sup>

When these words were written, the first atomic weapon had not yet been exploded and the public consciousness of ecological peril was still more than two decades away.

Besides putting his formal philosophy in final order, Adorno also found it necessary to defend and explain his critical theory in the new professional guise of sociologist he had acquired in America.

47. *Ibid.*, pp. 316, 319, 326 n., 337–338, 357. I have altered the translation slightly.

48. *Dialectic of Enlightenment*, pp. 222–224.



His sense of intellectual responsibility led him into the sort of elaborately arranged confrontations that German scholarship delighted in—notably with the philosopher and social-science methodologist Karl Popper—and into assessments of such eminent “positivists” as Weber and Wittgenstein. Adorno’s lofty and intensely committed polemic can be followed in a series of essays on the theory of society extending over the years 1955–1969 and published shortly after his death.<sup>49</sup> Here the traces of his stay in the United States were everywhere apparent—and not least of all in the Anglicisms or Americanisms with which his prose was strewn.<sup>50</sup>

It was only natural that positivism, as in the past, should figure as the chief target of Adorno’s polemic. But in this respect too, the decade spent across the Atlantic had left its mark: in these essays of the 1950’s and 1960’s the judgments on individual figures were more nuanced than had been true of the Frankfurt philosophers’ earlier programmatic pronouncements. Thus a new respect for Weber accompanied the reiteration of a profound disagreement on the problem of values. The notion of ethical or aesthetic value, Adorno pointedly observed, was modeled on an economic exchange rate. The whole problem could be dismissed as useless “ballast” which sociology had been dragging along with it; the “dichotomy of is and ought” was as “false” as it was “historically constraining”; a judgment about something was “always . . . prescribed” by that thing and did not “exhaust itself in a subjectively irrational decision” as Weber had imagined. The abstract knowledge of society, Adorno predictably added, could “crystallize . . . only around a conception” of what “a correctly-constituted society” might be; it arose from criticism, “from a social conscious-

49. *Aufsätze zur Gesellschaftstheorie und Methodologie* (Frankfurt, 1970). These essays were subsequently republished in Adorno’s *Gesammelte Schriften*, VIII (*Soziologische Schriften I*) (Frankfurt, 1972). For the context of the polemic, see George Lichtheim, “Marx or Weber: Dialectical Methodology” (originally published in *The Times Literary Supplement*, LXIX [March 12, 1970]), *From Marx to Hegel*, pp. 200–218.

50. A cursory inspection turns up the following: “healthy sex life,” “some fun,” “go-getters,” “social research,” “team,” “middle range theory,” “trial and error,” “administrative research,” “common sense,” “fact finding,” “statement of fact,” “case studies,” “facts and figures,” “nose counting,” “likes and dislikes.”

ness of contradiction and necessity.” Yet despite these strictures, he was ready to grant that when one looked at Weber’s own writings, the “disjunction of objectivity and value” appeared “more qualified” than the sociologist’s “battle-cry” might “lead one to expect” and that they could serve as a starting point for rethinking categories which had hardened into dogmas.<sup>51</sup>

Similarly in regard to Wittgenstein, Adorno recognized the “pain” that the Viennese philosopher had experienced in trying to meditate on logic with the intellectual tools which logic itself provided. This “most reflective of positivists” had demonstrated his superiority over those of the Vienna Circle by becoming “aware of the limits of logic”—and therewith had reached “the threshold of a dialectical consciousness.” What he had not seen, Adorno maintained, was that everything which went beyond pure sense experience had “an aura of indeterminacy,” that “no abstraction” was “ever entirely clear,” and that every such abstraction was “indistinct . . . through the multiplicity of its possible content.”<sup>52</sup> But this last was precisely the purport of Wittgenstein’s *Philosophical Investigations*, a work which Adorno apparently never read; the references in his essays clearly indicate that he knew only the early Wittgenstein of the *Tractatus*. If Adorno could speak with such respect of a book which its own author had half-repudiated, how would he have written if he had been familiar with the later works in which so much that was dogmatic or limited in the *Tractatus* was refined and put into a new context? One may conclude that in Adorno’s failure to come to grips with the *Philosophical Investigations*, an enormous intellectual opportunity was missed—the chance to associate two of the finest intelligences of the century in the enterprise of bridging philosophical traditions which Wittgenstein’s death had cut off in midcourse.

In the absence of a full reckoning with the author of the *Philosophical Investigations*, Adorno was thrown back on the dialectical base that he had maintained intact during his years in America.

51. “Zur Logik der Sozialwissenschaften” (originally published in *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, XIV [1962]), *Aufsätze zur Gesellschaftstheorie*, pp. 122–124.

52. “Der Positivismusstreit in der deutschen Soziologie” (originally published in 1969 as an introduction to a volume with the same title), *ibid.*, pp. 169, 189–190, 228.



Idealism, he explained, "which once glorified speculation," might have "passed away," but the speculative "moment" that critical theory exemplified remained "indispensable." Curiously enough, although it was the positivists who believed they had done the job of discrediting the idealist way of thinking, in their stress on the "perceiving subject" these same positivists remained far closer to idealism than was true of critical theory. His own position, Adorno kept insisting, had a concreteness that the conventional sociology of the midcentury lacked. Its very cast of sentences suggested it: in place of the usual scientific formulation of a law in terms of an eternal "whenever—then," dialectical thinking spoke in historically specific terms which could be expressed as "after this happens—that must follow." Even the critical theorist's stubborn conviction that beneath "appearance" (which was all that positivism recognized) there lay something else which could be called "essence" (*Wesen*)—even this apparently most traditional and abstract category betokened an effort to reach the concrete reality below or beyond the world of surface manifestations. It made a difference, Adorno explained, whether one subsumed human phenomena (as in the sociological tradition stemming from Weber) under such words as "prestige" and "status," or whether one sought as he himself did "to derive them from objective relationships of domination." An ostensibly "value free" debate over selecting a "system of coordinates" in fact went to the heart of conflicting concepts of society: within the "logical-scientific" style of thought, the real social antagonisms could not become visible. As had always been true of Adorno and Horkheimer's polemic, the Hegelian-Marxist notion of a potential truth embedded in the data of economic existence had the last word: "the idea of scientific truth" was "not to be split off from that of a true society."<sup>53</sup>

In 1958 Max Horkheimer retired as director of the Institut für Sozialforschung, thereafter to spend most of his time in Italian Switzerland in a house overlooking Lake Lugano until his death in 1973. Adorno naturally succeeded him—and at a most difficult

53. "Zur Logik der Sozialwissenschaften," *ibid.*, p. 118; "Der Positivismusstreit," *ibid.*, pp. 172, 175, 179, 197–198, 214.

moment when pressure from the German radical left was mounting. The newest student generation had no use and even less understanding for the Frankfurt philosopher's upper-bourgeois fastidiousness and intellectual discrimination. After repeatedly occupying the building of the Institut, in April 1969 the young militants invaded Adorno's classroom; three girl students bared their breasts and mockingly overwhelmed him with flowers and kisses. Thereupon, with characteristic cruelty, they declared him dead "as an institution." For one so vulnerable, the experience must have come as a fearful shock; apparently he never fully recovered. Five months later he died of heart failure.<sup>54</sup>

Not until he was gone did the wider public outside Germany begin to appreciate the loss that Western intellectual life had sustained. And this was in part Adorno's own fault in insisting on a mode of expression which was "mannered, hermetic and remote from ordinary discourse." It was not merely that the Gallicisms of his early work and the Americanisms of his postexile writings raised special linguistic hurdles. It was that he consciously chose "a style refined and formalized to the point of complete artificiality." At least one critic has found in this "density" a necessary expression of Adorno's intellectual "intransigence," characterizing "the bristling mass of abstractions and cross-references" as "precisely intended to be read . . . against the cheap facility" of its surroundings and as "a warning to the reader of the price" he had "to pay for genuine thinking." More commonly, even sympathetic commentators have noted a contradiction in the fact that so musically inclined a philosopher should have written a prose so lacking in music. They have similarly remarked on the discrepancy between Adorno's championship of the ordinary suffering human being and "his inability to cast off a stylistic armature impenetrable to all but an elite of readers." This "discordance between the medium and the message" was the first of two baffling problems that Adorno left behind him.<sup>55</sup>

The second—and here he shared responsibility with Hork-

54. Martin Jay, "The Permanent Exile of Theodor W. Adorno," *Midstream*, XV (Dec. 1969), 66–67.

55. Lichtheim, "Adorno," *From Marx to Hegel*, pp. 132, 137; Fredric Jameson, *Marxism and Form* (Princeton, N.J., 1971), p. xiii.



heimer—concerned the extent to which the Frankfurt philosophers still adhered to the Hegelian style. In their vocabulary and cast of sentences, they unquestionably remained rooted in the Hegelian tradition. Moreover, they drew on the best of that tradition in passing effortlessly back and forth from philosophy to history or aesthetics—while adding to them a more than respectable competence in such newer disciplines as psychology and sociology. Only in economics did the writings of Adorno and Horkheimer betray a certain amateurishness. Moreover, in their application of the dialectical method the Frankfurt philosophers had tried to cast off what was stiff and schematic in the way it was conventionally understood. Scarcely less conscientiously than Wittgenstein, they had striven to think in terms of a universe of fluid relationships. Yet once more only up to a point. Despite all that they had renounced in the Hegelian or Marxist tradition—despite the intricate many-sidedness of their perceptions—one aspect of their philosophical inheritance they steadfastly refused to give up: “the conviction that an all-embracing or fundamental structure of being could be discovered.”<sup>56</sup>

This conviction was held even more strenuously by their former associate Herbert Marcuse, who had made the opposite choice from theirs in staying after the war in the United States. Whereas Adorno was utterly serious and uncompromisingly intellectual in nearly everything he wrote, Marcuse preferred to indulge a playfulness of manner. He also stuck more closely than Adorno to strict Hegelian categories. The question of Adorno and Horkheimer’s Marxist-Hegelian allegiance can be further illuminated by considering the work of a man whose ideological origins were almost identical with theirs but who diverged increasingly from them as his life went on.

#### iv. Herbert Marcuse’s Vision of Happiness

Born in Berlin in 1898 and thus between Horkheimer and Adorno in age, Marcuse came as they did from a well-to-do, assimilated Jewish family. He too had sympathized with the left wing of the

56. Horkheimer, *Eclipse of Reason*, p. 12.

Social Democratic party, from which he had resigned in 1919 following the assassination of Rosa Luxemburg. Thereafter he remained a critic outside the ranks of organized German socialism, in notable contrast to the course pursued by Franz Neumann, who tried to change Social Democracy from within and who in the years of exile was to become Marcuse’s closest friend.

When Marcuse joined the Institut für Sozialforschung in 1933—which by this time meant assignment to its Geneva office—he had behind him more than three years of formal philosophical study at Freiburg with Husserl and Heidegger. The latter in particular seems to have exerted a strong influence on Marcuse’s thought, and it was under his guidance that the young philosopher produced his first book, a study of Hegel’s ontology. Indeed, it may have been to Heidegger that Marcuse owed his ineradicable hostility to modern technology.<sup>57</sup> But by 1932, with his mentor moving toward collaboration with the Nazis, whose accession to power was now looming, Freiburg no longer afforded Marcuse a congenial intellectual environment. In this precarious situation, the Institut offered a welcome haven.

Marcuse brought into its ranks, besides his exposure to phenomenology and existentialism and a Hegelian expertise surpassing that of any of his colleagues, a difference of temperament which was to become more marked with each passing decade. He took his stand far closer to both utopia and anarchism than did either Horkheimer or Adorno; he tried to envision, as they did not, what the new postrevolutionary society would actually look like. And in so doing he made it his particular province to give substance to the notion of personal happiness—to define what Stendhal and Nietzsche had meant in referring to beauty as *une promesse de bonheur*, a theme to which his co-workers constantly returned but which they preferred to leave in a state of misty abstraction.

In the summer of 1934 Marcuse was among the first of the Institut’s members to reach its new headquarters in New York. From here he published—in Paris and in the German language—a series of major essays that remained almost totally unknown to

57. Martin Jay, “Metapolitics of Utopianism,” *Dissent* XVII (July–Aug. 1970), 343.



## CHAPTER

# 6

### *Conclusion: The Sea Change*

#### *1. The Emigration and the Cold War*

By the early 1950's, with living and working conditions in Europe restored to something approaching their prewar level, the intellectual émigrés faced the question of "going home." But after a decade or more of residence in the United States, it was often far from clear where home was. In certain cases the choice was apparent: for younger people who had found a secure position in American society and whose English-speaking children felt and behaved like Americans, it made sense to stay on; for the more elderly—particularly for writers who had experienced the agony of being cut off from their native language—the emotional pull of the old country might be irresistible. In between came those who hesitated, who made frequent trips back and forth across the Atlantic before reaching a final decision; and among these were some of the most eminent. Each case was distinct; each individual tried to sort out a different mix of considerations, whether sentimental or practical. In the end, Salvemini and Borgese, Horkheimer and Adorno, returned to Europe; Neumann and Marcuse, Hartmann and Erikson, remained in the United States.

Besides the usual and predictable arguments of cultural loyalty or economic well-being, there was a further and more special situation which impinged on the émigrés at the midcentury—the cold war and the accompanying wave of "McCarthyism." Those

#### *6. Conclusion: The Sea Change*

who have written on the emigration have had little to say about this concatenation of events: perhaps the subject has proved too delicate and embarrassing for full exploration.<sup>1</sup> Moreover there is no statistical method of determining how heavily ideological considerations weighed in tipping personal decisions in one or the other direction. Yet it is unquestionable that fear of an American brand of fascism gave the final push to a number who had hesitated to go back and that at a time when most native-born intellectuals either supported their government or fell silent, leading figures among the émigrés who stayed on protested vigorously against the course of American policy, both at home and abroad.

After the American declaration of war against Germany and Italy in 1941, the newcomers had shared with their hosts an attitude of solidarity in the antifascist effort; no more than a tiny minority of either group had taken a pacifist stand. In the late 1940's, this alignment began to fall apart: the émigrés were less prepared than the native-born to mobilize their energies once more for an ideological engagement. With a few notable exceptions such as Hannah Arendt, they refused to equate Communism with Nazism as alike "totalitarian" or to view Stalin as Hitler's counterpart. And for this reluctance there were compelling psychological reasons. Fascism, after all, had served as the precipitating force that had dissolved the attitude of ethical relativism or suspended judgment so many of them had entertained in the 1920's; in presenting them with an image of evil, it had led them to acknowledge their own sense of what was good. Thus while they viewed the Nazi record as totally negative, they tended to concede to Communism—even as deformed by Stalin—some glimmer or memory of the Enlightenment in its origins and potentialities for the future.

More broadly, the fifteen years from 1930 to 1945 had given the émigrés a moral base-point. The threefold combat which those years had witnessed—against economic depression, internal tyranny, and "racial" conquest—remained with them for the rest of their lives as their central ideological experience. Hence their

1. See, however, the brief comments by Laura Fermi in *Illustrious Immigrants: The Intellectual Migration from Europe 1930-41* (Chicago, 1968), p. 388.



inability to react as sharply to the new threat from the East—frequently accompanied by the conviction that the Western remobilization, this time against Stalinism, lacked the admirable qualities of its predecessor. “Hitler,” Thomas Mann wrote, “had the great merit of producing a simplification of the emotions, of calling forth a wholly unequivocal No, a clear and deadly hatred. The years of struggle against him had been morally a good era”—an era followed by a fall in ethical level.<sup>2</sup> By 1947 or 1948 an émigré, whatever his sufferings had been, might recall his immediate past with a peculiar kind of nostalgia. How different the verdict of a native-born critic who could speak of the 1930's as a “low dishonest” time and dismiss such nostalgia as “a sentiment possible only to the very young or the very old!”<sup>3</sup>

Two examples out of many, one of a man who stayed in America, the other of the most famous of those who returned, may suggest the anxieties of the émigrés during the McCarthy years. In 1950, Erik H. Erikson, in throwing his support to colleagues at the University of California unwilling to take the anti-Communist oath—whose roster, incidentally, included a high proportion of Central Europeans—gave moral rather than strictly ideological reasons for his act. While alert like others of German birth to the menacing parallel with familiar events in his original home, he chose to stress the repercussions of compliance on the professors' own students. To “acquiesce in an empty gesture,” he conceded, might save “the faces of very important personages.” But it would “hurt people”—the students—who were “much more important.” “Young people,” he added, were “rightfully suspicious and embarrassingly discerning.” What older people could “laugh . . . off,” he noted, in a striking prediction of the temper of the 1960's, could bring about “a dangerous rift” between the generations—a rift “between the ‘official truth’ and

2. *Die Entstehung des Doktor Faustus* (Amsterdam, 1949), trans. by Richard and Clara Winston as *The Story of a Novel* (New York, 1961), p. 163.

3. Irving Howe, “The New York Intellectuals” (originally published in *Commentary*, XLVI [Oct. 1968]), *Decline of the New* (New York, 1970), p. 221.

those deep and often radical doubts” which were “the necessary condition for the development of thought.”<sup>4</sup>

Thomas Mann's struggles of conscience were better-known and more prolonged. Secure like Erikson in a California where he enjoyed acceptance and respect, Mann reluctantly decided to return to Europe two years after the Berkeley oath controversy. The beginnings of his doubts about the United States dated from President Roosevelt's death. He had been happy, he recalled, to have become an American citizen—with Max Horkheimer serving as one of his witnesses—while the leader he revered was still in command. In this period, the unfavorable remarks he directed at his hosts had been limited to the ironic, veiled references in *Joseph the Provider* and to an occasional witticism about “good-natured barbarians.” But by 1946 his mood had grown more somber. He felt it his “task” to oppose the coming of a third world war; and in so doing he lent his name to a number of “front organizations,” a stand which in the inflamed atmosphere of the times led to the suspicion that he was pro-Communist. He received abusive mail and phone calls; he feared that his passport would be withdrawn or that he might be summoned before a congressional investigating committee. “Why can't they let me sit in peace in my garden,” he lamented, “doing the work for which I am equipped, instead of throwing stones at me and . . . forcing me to interrupt my work and defend myself?” At the midcentury he was close to despair. The cold war, he wrote, was “destroying democracy and leading to general madness.” And his “depression” had been “intensified by all the final partings in a single year”—by the suicide of his son Klaus and by the deaths both of his older brother Heinrich and of his youngest brother who had remained in Germany.<sup>5</sup> The variegated circle of talented countrymen in southern California that had earlier sustained his spirits was shrinking: some had died; others had gone home.

4. Statement of June 1, 1950, quoted in Robert Coles, *Erik H. Erikson: The Growth of His Work* (Boston, 1970) p. 157.

5. *Story of a Novel*, p. 82; to Klaus Mann, March 9, 1943, to Agnes E. Meyer, January 7, 1944, March 27, 1950, *Letters of Thomas Mann 1889–1955*, selected and trans. by Richard and Clara Winston (New York, 1971), pp. 416, 433, 597; Klaus H. Pringsheim, “Thomas Mann in Amerika,” *Neue deutsche Hefte*, XIII (1966), 28, 32, 36–39.



Among the latter, of course, was Adorno. Mann found it "significant" that the philosopher turned sociologist was "feeling so energetic back . . . in our alien homeland." For precisely here was the rub; Mann was convinced that the Germans had become estranged from him. "An abysmal gulf," he wrote, lay between his "experience and that of the people who remained behind in Germany." His wartime "political" writings he recognized—with a touch of exaggeration—had been "felt as comforting and strengthening only outside" the Reich. How then, he asked, could he "make much of a contribution toward raising up out of their deep abasement" those who had reviled him? By 1947 he was ready to visit Europe: he spent the late spring and summer in Britain and Switzerland and the Netherlands without ever entering his native country. Not until two years later did he venture inside Germany; and by this time the hostile demonstrations he had dreaded were totally absent. The chief criticism he incurred was for having crossed the demarcation line to the Eastern Zone and participated in a Goethe bicentennial celebration at Weimar.<sup>6</sup>

But to return to Germany as a traveler was quite another matter from moving there permanently. This was a prospect which Mann still could not entertain. At the same time, with each successive postwar journey to the Old World—he went back again for long stays in both 1950 and 1951—he felt his early ties to Europe gripping him ever more firmly. In 1952 he took the plunge: the prospect of Eisenhower's election as president, incongruously enough, seems to have tipped the balance.<sup>7</sup> Characteristically Mann left the United States with only his light baggage and with most of his acquaintance unaware that it was a final goodbye.

In Europe the resolution of his dilemma came to him at last. He found a way of living outside Germany in a place where his own language was spoken and whose citizens combined cosmopolitanism with respect for German civilization. For the last three years of his life he made his home near Zürich—the city he loved the best and of which he had written with a sympathy that was

6. To Walter von Molo, September 7, 1945, to Manfred George, March 11, 1947, to Paul Olberg, August 27, 1949, to Theodor W. Adorno, January 9, 1950, *Letters of Thomas Mann*, pp. 479, 522, 582–583, 590.

7. Pringsheim, "Mann in Amerika," pp. 42–43.

amply returned. A year before his death he enjoyed a final reunion with Hermann Hesse in Nietzsche's celebrated retreat of Sils Maria in the Engadine. Despite Mann's disillusionment after 1945, he had learned in Roosevelt's America, in common with Adorno and Neumann and so many others, to experience democracy as an everyday reality, and in the end, by settling in Switzerland, he discovered how he could combine his democratic loyalty with his abiding attachment to the cultural tradition of the Europe in which he had grown to manhood.<sup>8</sup>

## II. From the Demonic to the Banal: *Faustus* and *Eichmann*

Three months before embarking on his first postwar trip to Europe, Mann had completed the novel that was to embody his final retrospective judgment on his own country. Sixteen years later another émigré, a full generation younger than he, was to offer an equally stark indictment of the nation which had driven them both into exile. In style and content Mann's *Doctor Faustus* and Hannah Arendt's *Eichmann in Jerusalem* may appear totally unrelated. Yet to juxtapose them is to suggest the urgency of coming to terms with their native land that so many of the émigrés felt without quite knowing how to formulate it and the startling difference that a decade and a half made in the way such an assessment might be drawn up.

The fourth and last of Mann's major novels, *Doctor Faustus* marked the closest he ever came to a literary and intellectual summa. He aimed to compose "nothing less than the novel of" his "era, disguised as the story of an artist's life, a terribly imperiled and sinful artist." This "kind of ideal figure" would emerge as "a 'hero of our time,' a person who bore the suffering of the epoch." The novel's "central idea" combined in a single tormented existence "the flight from the difficulties of the cultural crisis into the pact with the devil, the craving of a proud mind, threatened by

8. Henry Hatfield, "Thomas Mann and America," *The Legacy of the German Refugee Intellectuals* (special no. of the review *Salmagundi*) (Fall 1969–Winter 1970), pp. 184–185.



**(The Legacy  
of the  
German Refugee  
Intellectuals)**

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edited by  
**Robert Boyers**

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With the exception of the article "Moholy-Nagy: The Risk and Necessity of Artistic Adventurism," by Richard Kostelanetz, which has been omitted, this book is a reprint of the Fall 1969–Winter 1970 issue of *Salmagundi*.

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FOR MY GRANDFATHER  
Meyer Busell  
(1891-1969)

"he did meet the terms of his contract. The terms which, in his inmost heart, each man knows."

—Saul Bellow, *Mr. Sammler's Planet*



## Otto Kirchheimer

BY JOHN H. HERZ

OTTO KIRCHHEIMER'S life as a "German refugee intellectual" was perhaps typical, but also paradoxical in its impact. He came to the United States as one of a group of social scientists who were all deeply steeped in the neo-Marxian tradition of the Central European 'twenties, and with whom he shared the insights and the prejudices. He arrived at a time when Karl Marx, a bit belatedly, had likewise "arrived" in America, and so one might have assumed that his and his group's impact upon the intellectual life and even on the practical politics of the United States would have been considerable. In reality there was nothing of the sort. The practical effect that Marxism might have had was dissipated in the sectarian quarrels of the 'thirties, while in regard to theory the German group at first had to learn more from its American experience than it could contribute to it. What it did contribute at that time was understanding of what had happened in Germany. In this respect, Kirchheimer proved to be very close to Franz Neumann, who, in his *Behemoth*, provided the first, and still outstanding interpretation of the German version of fascism. Kirchheimer wrote searching analyses of the legal system and of social developments under Nazism. He had previously analyzed the Weimar system and the stages of its disintegration. At that time, already, his genius of understanding the typically "political," the peculiar constellation of social and political forces in its impact on system and structure of government, had been clearly revealed. With his Marxism he had combined the insights and methods of his principal teacher, Carl Schmitt, who, with his habit of always penetrating to the exceptional, extreme, "emergency" situation, had frequently been able to extract more understanding of the normal as well as the abnormal than the professional dissectors of the "typical" or "average" had been.

But in American social science the trend was away from the area

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in which the German intellectuals could make their contribution. It went in the direction of making social science more "scientific" in the quantifying and conceptualizing sense. That a group of Marxians would find itself outside the stream of a conceptualizing social science was certainly paradoxical. The reason was that their concepts did not fit those of the new American "scientists." They were too "sociological," derived as they were from tradition, from history, from philosophy, while those of the "modernizers" were adapted from engineering, mathematics, economics, and cybernetics. Hence "alienation" between them and the refugee scholars.

With the advent of the war came the practical problems of how best to serve the task of defeating fascism and rebuilding, or building, a democratic society in its stead. The "Central European Section" of OSS, where Otto Kirchheimer worked together with Franz Neumann, Herbert Marcuse, and others, of all places turned out to be the place where the left-Hegelian *Weltgeist* was to find its temporary abode. An interesting example of the convergence of theory and practice, this office served as crucible for German postwar revival as well as academe for an entire generation of younger American social scientists and historians who this way were saved from military service for intellectually more fruitful purpose. After the war Kirchheimer proved to be one of those whose efforts in the cause of German democratic reconstruction were tireless and unceasing. It was not their fault that in many areas "restoration" (that is, of pre-Nazi authoritarianism) rather than democratic or socialist reconstruction was the ultimate result.

The greatest paradox of Kirchheimer's career was that it began to bear its chief intellectual fruits toward its very end, that is, at a time when "social scientism" seemed victorious all over the place but when those in the forefront of intellectual endeavor came to realize its shortcomings and to accept the value of the approach and the insights of men like Otto Kirchheimer.<sup>1</sup> In the last decade and a half of his life Kirchheimer had concentrated on two topics, each vast but clearly defined, each particularly well suited to his background, training, and analytical power: the field of what he called, felicitously, "political justice," and the area of political parties and their impact on the political life of European postwar society.

His occupation with the first yielded his one major work, *Political Justice* (Princeton, 1961) (almost everything else he left scattered in periodical articles and the like, a vast agglomeration of writings

<sup>1</sup> Cf. following page.



only now to be collected and published in posthumous volumes).<sup>2</sup> It constitutes a great intellectual achievement. The peculiar European habit of training political scientists (who only in the postwar period emerged as a professional group apart) in the law, which frequently accounted for poverty of results and formalism of approach, in Kirchheimer's case meant that he was able to subject the law, that is, the normative aspect of government and politics, to an encompassing and penetrating political analysis. It served him to subject vast stretches of the history of man, the most varied structures of political and legal systems of past and present, of constitutionalism and democracy as well as of authoritarianism and totalitarianism (in both its Communist-Stalinist and fascist versions), to questioning in regard to what he defined as "political justice": the uses and abuses of legal procedure for political ends. Political crime, political criminal, political trial here have found their classical treatment.

The second major area of his interest and research, that of party developments, proved to be particularly rewarding because it happened to fall into an era of fundamental change, a transformation of the structure and the functions of political parties which Kirchheimer, with his almost uncanny sense for the new and coming and for the specifically "political," forecast and analyzed in its essentials at the earliest point of this development. He was the first to point out the change of the ideological, class- or religion-oriented party of mass-integration, and especially the leftist, workers-class-based party of "opposition of principle," into the "catch-all" "people's" party, a type of party which more and more tends to dominate the political landscape of Europe. With "moderation" and "deideologization" of parties there goes hand in hand the development of a political system where the classical "game of alternation" of government and opposition in the traditional parliamentary fashion gives way to what Kirchheimer called the "waning of opposition," the vanishing of the role-function which "opposition of principle" or any other meaningful opposition had played in the game of democratic politics. Kirchheimer discovered and analyzed the first model of the new system in its Austrian version, where "government by party cartel" had replaced the alternation of

<sup>2</sup> It is strange that he began to come into his own exactly at a time when his friend and collaborator, Herbert Marcuse, suddenly began to achieve fame not only as an author and scholar but, above all, as leader of the radical movement of young people all over the world. Just now Kirchheimer, too, emerges posthumously as one of the intellectual beacons of the neo-socialist left, in particular in Germany. The reason, perhaps, lies in the indebtedness of the group of which Kirchheimer was a member to the young, "humanist," anti-alienation and anti-establishment Marx, the Marx whose rediscovery in the 'Twenties had been one of the lasting impressions that group had undergone.

rulers and opposition. He did not live to see, although he would not have been surprised by, the application of the model to West Germany under the "grand coalition" of the two major political groups. He did foresee the consequences of the new politics, such as the emergence of "extraparliamentary opposition," depolitization, anomie, conformism, but his criticism was by implication rather than by express exploration. There are situations which, as the saying goes, are "more easily deplored than described." Kirchheimer described.

Here he was, as usual, at the frontiers of knowledge, making it his business, as he once had put it, "to uncover the basic mechanisms of political order and disorder," making use of Marxism, no longer to build a utopia of things to come but still as "the best method of analyzing reality." "Opposition of principle" and "catch-all party," "game of alternation" and "waning of opposition," "political justice" and "judicial space" (the latter a term he coined for that realm of judicial discretion left to the judge in certain *Rechtsstaat* systems) — expressions like these not only testify to Kirchheimer's felicity in coining fitting terms but to a power of conceptualization infinitely more fruitful, because more "political," infinitely more pregnant with concrete significance than that of the input-output, "feedback," "civic culture" conceptualizers of the new "science" of politics. Kirchheimer's "political science," remaining in the great tradition of the Tocquevilles and the authors of the "Federalist," of Marx and Lorenz van Stein, of Georges Sorel and Carl Schmitt, is genuine "political" science rather than pseudo-political "science." As such it is beginning to influence the thought and approach of political scientists all over the world, and especially in this country. Kirchheimer, to be sure, was not a "systematic" thinker. He did not found a "school." He was above all an initiator, but his specific talent, his sensitivity to the historically relevant and to the uniquely political, taught many in many fields how to understand, analyze, and criticize political phenomena. Like his friend Franz Neumann he died too early, still pregnant with ideas and projects. We do not know to what kind and what areas of investigation they would have led him. What he contributed during his lifetime, however, constitutes a legacy which places him safely in the first rank of that group rich in talent and achievement which is the subject-matter of this issue of *Salmagundi*.



18.

## Cassandras with a German Accent

ANTHONY HEILBUT

IN THE HISTORY OF EMIGRATION TO AMERICA, no other group has had so large and immediate an impact as the German-speaking people who fled Hitler. It is also arguable that no other group tried so hard to maintain its cultural legacy. Yet these refugees would offer a very mixed benediction on a collection that commemorates three hundred years of German-American relations. Unlike the group Leo Schelbert characterizes as a "people of choice," they did not want to come here; as Brecht's poem "Hounded out of Seven Nations" implies, America was not the first choice of most artists and intellectuals.

Upon their arrival, some refugees strove valiantly to become more American than the Americans, veritable chameleons, unwittingly attesting to Heinrich Mann's cynical observation that the actor was the perfect modern type. Others, particularly the artists and intellectuals, remained more loyal to their history, although this loyalty would cause Americans to regard them with extreme suspicion, as Cassandras in spite of themselves.

Although most refugees were Jewish, they were also, as Paul Breines notes, so assimilated and secularized that something other than religion had to provide a common bond of identity. Because there were numerous political disagreements among them, this bond was to become the great tradition of German culture, albeit a tradition continually interrogated and revised by people who were accomplished modernists. While in transit, the émigrés sustained themselves with prodigious feats of memory. We know that in the internment camps there flourished a veritable epidemic of quotations. This was not mere nostalgia; it was also a deliberate assertion that the émigrés were the last, best heirs of Goethe, whose immense range of inquiry and enthusiasm was the model for their own versatility, or of Heine, whose witty depictions of the bourgeoisie and obsessive interest in a Germany he



both revered and despised resembled their own ambivalence. Homage to the German language, as well as to German philosophy, led the émigrés to cite Goethe and Heine, Marx and Nietzsche as commentators on their own fate.

Culture worked overtime, in lieu of politics or religion, to provide a common element. But culture was not exclusively the classics; popular culture provided a comparable source of energy, especially for those who had been young in Berlin, growing up amid the literary cafés and movie studios. This is one reason why Brecht became the supreme poet of the emigration. He often noted that a poor refugee could not lug along too much baggage. Thus he sang about the emigration in lyrics as breezy, idiomatic, and disposable as popular songs; in fact, in internment camps such as Gurs in France, Brecht's poems provided the quick charge, the emotional refill one expects from popular music. Refugees turned to lyrics redolent of the streets not in place of but as companions to the poems of Goethe and Heine. They recognized that the culture they brought with them now embraced all forms of modernism, most particularly popular culture. Thus, for such artists as the great film directors, it was a given that American culture comprehended blues, jazz, and gospel music as much as it did Melville, Whitman, and Twain.

The émigrés' alertness to excesses of *Schmus* (sweet-talk) and *Quatsch* (babble) complemented the irreverence inculcated in the Berlin of the 1920s. Max Ophuls's son reports that these words were his father's favorite terms of dismissal, although burghers and bohemians alike used them to deplore a universal atmosphere of banality and deceit. This made them an immensely spirited and engaging group, one superbly equipped to master novelties without losing their bearing. It also made them appear daunting and supercilious: irreverence is not easily dissociable from contempt.

While the refugees maintained this firm if unacknowledged cultural identity, a more circumscribed identity was imposed from without. Hitler's book-burning and dismissal of Jewish scholars served to link radicals and intellectuals. Thus by the time they reached America, refugees found that their representative figure was an unemployed left-leaning college professor, unlike the potato farmers or factory workers who had symbolized earlier emigrations. In America, most of the identifications imposed on them by Jew and Gentile, Left and Right alike, were negative. As a result, refugees often felt themselves endangered on all sides.

During the 1930s, American officials such as the infamous Breck-

inridge Long had made emigration to this country extremely difficult, predicated on written proofs of character and financial solvency. For the writers particularly, this reduction of a life's meaning to codes and slogans was galling. Long's offenses did not stop in the 1930s; in 1943, he helped suppress reports of the death camps as diversionary and insignificant. But Eleanor Roosevelt's commitment to the refugees was never in doubt; as a result, the émigrés briefly yielded their skepticism and regarded the Roosevelts as idols despite the president's lethargy in attending to their plight: it was not until January 1944 that he set up a War Refugee Board. Political conservatives were never sympathetic to the refugees, whom they saw alternately as fifth columnists, international Jewish conspirators, and unfair competition for American labor. But the left was not much more trustworthy. The Stalinists abandoned the fight against fascism for two years, and during the war Trotskyists opposed the participation of American workers in an "interimperialist conflict." Even American Jews were considered dubious allies. The enduring feuds between East and West European Jews did not help matters. Many American-Jewish leaders feared that an influx of refugees would inflame native anti-Semitism and were perhaps excessively cautious in soliciting assistance for the newcomers or in demanding rescue of those imprisoned in Hitler's camps. In addition, during the war, many émigrés considered Zionism an unconscionable distraction from the European fates of their relatives.

I stress this unhappy history both to suggest that the émigrés' more manic responses were sometimes indistinguishable from simple good sense and to offer a context for the few but provocative assertions of identity provided by émigré writers. As if to confound their enemies, they accepted the full implications of the terms "rootless Jew" and "vanguard intellectual" by conflating the two. Thus during the 1940s, under California skies, three disparate émigré writers arrived at similar conclusions. Theodor Adorno, in *Dialectic of Enlightenment* (*Dialektik der Aufklärung*, 1947), said the Jews' curse and triumph was to represent "happiness without power, wages without work, a home without frontiers, religion without myth." The first three conditions apply to only some Jews, but absolutely to Adorno and his fellow intellectuals for whom, since work is play in the good Germanic double sense of art and leisure, it cannot be remunerated or translated into power. In Thomas Mann's *Doktor Faustus* (1947), the concert promoter, Saul Fitelberg, begs to be the composer-hero's Jewish mediator between his homeland and the world. He is uniquely able to serve both because as a Jew he is both "international" and "pro-German," although his best



attributes are the non-German traits of tolerance and good humor. Otherwise, Fitelberg warns, the self-contained Germans will find themselves in "real Jewish trouble." And the novel ends with the image of an ostracized Germany shut off from its neighbors "like ghetto Jews."

Alfred Döblin, that anomalous combination of fellow traveler and Catholic convert, had a similar vision. In *A People Betrayed* (November 1918, 1948–50), he argued that Jews would be the "race of the future" by providing the apparently "useless" ideas that transformed the Gentiles' lives. Adorno was part Jew (a part he may have deliberately obscured by using his mother's maiden name), Döblin a convert, Mann a Gentile with an early history of anti-Semitic remarks—which he later disowned—now married to a Jewish woman and thus the father of half-Jewish children. They are certainly not the most impeccable arbiters of Jewish identity. But given the peculiar history of German Jews, who could be? The point is that World War II had shocked them all into a common position: the refugee Jews would be vanguard figures, models of postwar life. Hannah Arendt, a most unlikely addition to this already vexed trio, would concur. She believed that the exiled Jews had learned earliest, though not through any luck or talent of their own, that everything had changed in politics and the academy. Thus, logically, she identified herself as a political scientist. To paraphrase Brecht, who now knew whether the "useless" was not in fact the most truly "useful": an insight already granted to the scores of refugees who had kept themselves sane through the repetition of ancient texts.

With this background, the postwar history of émigrés in America becomes more resonant. For the public issues they addressed were invariably linked to their own histories and the political facts of their exile, as well as to philosophical matters that had absorbed their attention in Berlin, Frankfurt, or Vienna. Fritz Lang once declined any prophetic status for having directed *Doktor Mabuse*; it was no pleasure for him that he had guessed the future. Likewise, when refugees criticized elements of postwar American life, it was with deep unhappiness: most of them had once loved the country to excess, and all of them knew that they remained extremely vulnerable, with their most famous figures Einstein and Thomas Mann condemned in the press and Congress. Cassandra is no comedy act.

Elsewhere I have noted that in one of the most exorbitant occupational demands ever placed on immigrants, refugee social scientists were expected to master American life and make sense of it for the natives. Impressionistic writers like Adorno were horrified by our popular culture; and even more objective scholars discovered traces of fascistic

propaganda in the mass media. Their conclusions might have been questionable. More interesting is the paradox that their occupation was to explain American leisure. The émigrés were virtually the first scholars to attend to American fantasies (although a few smart-alecks might have declared that "homemade" was usually the same as "store-bought"). As well, and even more ironically, people living on borrowed time became the professional observers of other people's free time. Their agitation over such frivolous matters as radio serials and magazine biographies were not overblown: they anticipated the great modern dilemma of free and wasted time, precisely because it was spectacularly inapplicable to their own condition.

Although Albert Einstein and Thomas Mann had been the leading intellectual opponents of McCarthyism during the 1950s, the fullest opposition of refugee intellectuals to the American government occurred during the Vietnam War. Once again, there were strong echoes of the past. For example, Herbert Marcuse was identified as the intellectual guru of the American student movement, although his works were filled with allusions to that German literary culture I described earlier. His rare and late references to American soul music scarcely balanced the numerous citations of Schiller and Hegel, Walter Benjamin and Karl Kraus. Marcuse's most famous formulation, "repressive tolerance," baffled many Americans. In fact, as Frankfurt School paradoxes go, this was a model of precision. Earlier in Europe, Benjamin and Kraus had observed that the cacophony of the newspaper page, with its noisy collage of text, photo, and advertisement, drowned out any sustained argument. Many refugees were initially bemused at finding that talk in America did not change matters; whatever arguments were advanced and tolerated, the relations of power remained the same. Marcuse was simply giving a left-wing gloss to a universal perception.

Perhaps the most astonishing insertion of refugee conflicts into American public life occurred with the publication of Hannah Arendt's *Eichmann in Jerusalem* (1963). Arendt's famous phrase and subtitle, "the banality of evil," would not have shocked the countless refugees who had discovered vast resources of evil in their neighbors and friends, nor should it startle Americans who have had ample evidence of political corruption attended by platitudes and clichés. Arendt's greatest offense, one for which she has never been forgiven, was her refusal to countenance *Schmus* and *Quatsch*. She vastly offended Germans by dismissing their postwar attitudes as stupid and self-serving: as she saw it, the older, culpable generation had not come clean, and the



younger innocents were masochistically relishing an artificial guilt. To Arendt, Adolf Eichmann was both horrible and uproarious when he sprinkled his testimony with references to "geflügelte Worte" (literally "winged words" but also the title of a collection of aphorisms). Her amusement appeared heartless but surely some Americans would laugh if a mass murderer were to interpolate *Bartlett's Familiar Quotations* into his confession.

Ironically, Arendt's most controversial remarks were prompted by the demands of accurate reporting. The Israeli prosecutor brought up the impotence of European Jewish leaders; Arendt believed he did so for tendentious purposes. She regretted his comments but felt obligated to elaborate on them: all over Europe, Jewish leaders had cooperated with the authorities; whether their motives were altruistic or selfish, the results were the same. Arendt was at her boldest and most radical—and also at her most European, for these were arguments familiar to all German-Jewish intellectuals—in rooting the problem in the very nature of an establishment. She deplored privileged categories, whether of national origin, military rank, or education; she was one German Jew who abominated the old "yid versus yekke" feuds. She also may have remembered that some prominent rabbis had written in the early 1930s that they admired the Nazis' dedication to German culture and Hitler's vehement opposition to atheistic communism.

This is not the place to examine Arendt's analysis or the astonishing public attacks that have continued even after her death—these matters are discussed in detail in my *Exiled in Paradise* (1983). But what should be emphasized is that Arendt's case anticipated many subsequent controversies. For daring to question the Jewish establishment, she was regarded as, at best, lacking in "Herzenstakt" (Gershom Scholem), at worst, a traitor. The experience of this public conflict probably enabled her to criticize the American establishment in later years—she had been much more circumspect during the McCarthy era—particularly over its conduct in Southeast Asia. In 1982, when Israel invaded Lebanon, there was much wider resistance by American Jews to the establishment. One of the first to voice his opposition was Arendt's friend Hans Jonas. Yet again, those Jews who opposed establishment policy were condemned as traitors: the accusers were largely drawn from among Arendt's critics. Somewhat earlier, when Jacobo Timerman had described the ineffectual response of Argentine Jewish leaders, he was dismissed by American neoconservatives as hysterical, as if Argentine anti-Semitism were a chimera. Arendt had seen it all: one either attacked the authorities or one identified with them; either

position allowed one a distinctive vocabulary and means of explaining history. (The impudent Brecht might have noted traces of conventional class conflict, made clearer by the right-wing nature of the Israeli and American establishments.)

Apart from Arendt and Marcuse other refugees were active in antigovernment protests, including the politically moderate Hans Morgenthau. In recent years, scientists actively opposing the spread of nuclear weapons have been led by the émigrés Hans A. Bethe, Victor F. Weisskopf, and Konrad E. Bloch. Einstein's role in American politics was extraordinary, whether in his public defenses of political heretics or in his ceaseless agitation for nuclear disarmament; the recent citation of Einstein as an advocate of nuclear strength by the French "nouveau philosophe" André Glucksmann is a scandalous misreading.

Although there were fewer refugee conservatives, they too had a disproportionate impact. The divisions between Right and Left had begun in Europe, frequently as internecine squabbles among left-wing splinter groups. The extremes met most dramatically in one family, the Eislers. When the House Committee on Un-American Activities resumed hearings in 1947, it presented the extraordinary spectacle of Ruth Fischer publicly accusing her brother Gerhard Eisler of monstrous crimes performed in the service of Soviet Russia. Four years later, another former communist, Karl August Wittfogel, testified before the McCarran Committee. Both Fischer and Wittfogel declared that they were finally calling the Stalinists to account for numerous betrayals of their German comrades. America thus became the ground for settling European scores. Likewise, Willi Schlamm, an Austrian ex-Marxist, became a zealous *Time-Life* cold warrior and a presiding intelligence of *National Review*. During the Vietnam War, such refugee intellectuals as Bruno Bettelheim compared the student protesters to young Nazis. Indeed the impact of disillusioned European socialists on American conservatism has not been fully revealed. The close reasoning, the aggressive tone, the merciless attacks on deviationists that once characterized European leftist discourse are all echoed in the contemporary language of American conservatism. What is missing, however, is the historical context that gave those arguments their particular dignity; what remains usually sounds wrongheaded and shrill.

My point is not which side got matters right, but rather that émigré critics helped set the tone and agenda for political argument in postwar America. Their influence has not waned, despite the ravages of age and the continual changes in fashion: witness the continuing



debates over Israel or nuclear weapons. Émigrés such as Einstein insisted that their criticisms of America were inseparable from their love of the country and its best institutions, notably the Constitution. Often refugees became fanatic patriots; for them America was right always, wrong never, although a few continued to despise everything about the country, from its financial arrangements to its popular culture. Some chameleons declared that a second nature had replaced their first one; a number of these even insisted that they had stopped dreaming in German.

But the Cassandras lived and died upholding a European cultural tradition. In 1939, Thomas Mann wrote his brother Heinrich that old age "in the Goethean sense belongs to our tradition alone; it is less a matter of vitality than of intelligence and will." Mann neglected to add that in his old age, Goethe delighted in the prospects of an "alleviation of humanity" ushered in by the American Revolution; the idea of a New World revived him. So, too, although America gave such people as Mann grounds to feel like demoralized prophets, it also allowed them the freedom to step forward and declare themselves, Cassandras with a German accent. A surprising result of this German-American relation was that it offered an unprecedented instruction in new ways of growing old.



19.

## Neither State nor Synagogue: The Left-Wing German-Jewish Emigré Intellectual as Representative Jew

PAUL BREINES

AMONG MANY JEWS TODAY, the reputations of German-Jewish intellectuals generally and their left-wing circles in particular have fallen on hard times. In their quests for assimilation as "German citizens of the Jewish faith" or for humanist cosmopolitanism outside religion and nationalism, they appear to exemplify what Jean-Paul Sartre called the inauthentic Jew, that tragic specialist in self-evasion. Today's prevalent image of German Jews as Jews is tarnished when placed alongside our highly romanticized pictures of pre-Holocaust *Ostjuden* and post-Holocaust Israelis. Compared to the former's natural *Yiddishkeit* and the latter's hardy Zionism, the *yekkes* (German Jews) look for all the world like Jewish *goyim*.

The main reasons for this poor image are not hard to find. It is, for example, obviously conditioned by Nazi mass murder. The dreams of emancipation and assimilation did, after all, burst horribly in the nightmare of the Final Solution; the Jewish *goyim* turned out to be just Jews, forced to flee or to die with the rest. It is not surprising that, in the aftermath, we take a more critical, often more hostile view of those dreams. But it is not only in relation to the Holocaust that the various Jewish-German programs of minimal Jewishness appear, through the lens of the present, so tragically futile. Today's American context, with its chorus of celebrations of ethnic roots, be they black, Italian, Polish, Jewish, and so forth, also plays a part in the judgment. In this context, the German Jews' failure to announce and affirm their Jewishness more assertively looks unfashionable.



These evaluations do not suffice. I want to try here to defend at least part of the Jewish legacy of German-Jewish intellectuals, echoing some of the impulses of several recent revisionist historians, among them George L. Mosse, Peter Gay, and Michael Marrus, who have argued that it is neither enough nor entirely just to read post-Holocaust perceptions back into the nineteenth and early twentieth centuries in Europe. Before proceeding, though, it is worth lingering another moment, not without sympathy, on the prevalent view. The horrible facts of the Nazi assault on Jews and the quiescence of much of the Christian West do seem to render naive at best and suicidal at worst the hopes of the assimilationist and cosmopolitan Jewish Germans. One could argue plausibly, but, I believe, wrongly, that such events have reduced to rubble cosmopolitanism as such. In any case, although there were some tangible gains for German Jews, they ought to have known better, to have been more clever, to have seen the danger signs, even in the most hopeful years of the early nineteenth century.

Real Jews, more Jewish Jews would have done so. More Jewish Jews did, say the Zionists, who, of course, offer the main case against the assimilationists and cosmopolitans. Thus Gershom Scholem has commented astutely and bitterly on Jewish enthusiasm in the early and mid-nineteenth century for the "German-Jewish Dialogue": "The unending Jewish demand for a home," he has written, "was soon transformed into the ecstatic illusion of being at home"—at home in Germany, amid the culture of *Bildungsidealismus*, of Schiller and of the ideal of humanity. The well-known critical Jewish spirit, Scholem noted further, seemed to vanish when German Jews came to speak of their own situation. As to the outcome of the "ecstatic illusion," Scholem cites an example he considers unsurpassed in its grotesque self-denial. It is from Margarete Susman in 1935, when the poet was aware of the Jewish Germans' desperate straits. "The vocation of Israel as a people," Susman wrote, "is not self-realization, but self-surrender for the sake of a higher, transhistorical goal."

It appears sufficient merely to refer to Auschwitz to reduce to pathos or worse Margarete Susman's program. But it is not sufficient. Susman's 1935 idea has had a recent, tragicomic echo in America. Jewish self-surrender is the subtheme of *Zelig*, a film directed by and starring Woody Allen. The hero, Leonard Zelig, of central European Jewish extraction, suffers from an astonishing psychosomatic disorder—a lack of identity so extreme that it transforms him physically as well as emotionally into whatever person he happens to be in contact with at any moment. He is the assimilationist Jew gone hay-

wire, one whose craving for acceptance and affirmation shoots beyond the point of self-surrender to total self-effacement. His malady begins during grade school years, when, the better to integrate himself among neighborhood youths, Leonard Zelig transforms himself into an Irish Catholic boy, complete with the stereotypical equipment: red hair, green eyes, and a small, turned-up nose. Later he will become a chubby Negro, an Indian chieftain, a professional baseball star, a psychiatrist of great skill and learning, a Chassidic rebbe, and finally a Nazi.

Among the film's various themes there is the Jewish one. Gershom Scholem, in his essay "Germans and Jews," has perceptively and angrily gone near the core of the significance of the character of Zelig by referring to the "widespread current appreciation of Jews as classic representatives of the phenomenon of man's estrangement or alienation from society"—an appreciation, Scholem adds, from which the Jews have never benefited. In Scholem's terms, Leonard Zelig represents the Jew as pure estrangement and self-estrangement. I propose that Zelig is also more than what Gershom Scholem's perspective will allow. As in Margarete Susman's idea of Jewish self-surrender in the cause of a transhistorical goal, Zelig, in his extreme insecurity, lack of identity, and deformity embodies the values and needs which the power of national, religious, and ethnic passions has severely weakened in this century: empathy, fellow-feeling, recognition of the self in the other and of the other in oneself. This psychic wreck is a utopian figure, bedraggled and beleaguered like every utopian image today.

Let me try to squeeze one more drop from Woody Allen's film. The utopia buried in Leonard Zelig is that of humanity, of the *Humanitätsideal* of the German Enlightenment and of the problematic German-Jewish dialogue. To be sure, critics of the dialogue are right on several counts. From the late eighteenth century (after Lessing and Kant) through 1933 and beyond, it was largely a Jewish monologue; non-Jewish German participation was always weak. Renunciation, moreover, was nearly always the Jewish, not the German task. Finally, the actual historical framework of Jewish German self-surrender was not transhistorical but narrowly national; Jewishness was to be given up, and often was given up, not for humanness but for Germanness, resulting in many cases in the sad figure of the Jewish German nationalist.

Such criticisms cannot be ignored or even momentarily shelved. But once again, they are not the final word. For example, several wings of the German-Jewish dialogue, small and weak as they may have been, were not circumscribed by the sharp limits outlined by the dialogue's later critics. One of these was the leftist, antinationalist wing,



with figures from Karl Marx through Rosa Luxemburg and Paul Levi standing among its representatives, speaking not only of Jewish but of universal self-surrender, of a common renunciation of states and gods, and thereby of an affirmation of common or collective self-realization. But the Marxists are neither the sole nor the most interesting representatives. The ethical, libertarian current from Heinrich Heine, a forerunner, through Gustav Landauer and Erich Mühsam is more interesting because it is more complex, more sunk in ambiguities. They aimed at a path between Zionism on one side and assimilation on the other; they amounted to noble fragments and strands rather than a movement. Politically, they failed.

Among the leftist German-Jewish émigré intellectuals we find some of the finest as well as some of the saddest expressions of this type of Jew. And my point is that it *is* a Jewish type; it is a way of being a Jew in the modern world. But what distinguishes this way of being a Jew is that its representatives embraced and sustained central ideals of the German Enlightenment: the importance of *Bildung*, as George L. Mosse has vividly shown, the primacy of culture over politics and economics, the importance of friendship, dialogue, and tolerance. These German Jews or Jewish Germans helped to preserve the sparks of the "other Germany," Mosse notes, and in doing so they stood, in relation to the religious and nationalist Jews, as the other Jews. Consider, for example, the following words from Ernst Toller, who as a youth in Germany had passed through the unlit tunnel of Jewish self-hatred:

Is blood to be the only test? Does nothing else matter at all? I was born and brought up in Germany; I breathed the air of Germany and its spirit had molded mine; as a German writer I had helped to preserve the purity of the German language. How much of me was German, how much Jewish? I could not have said. All over Europe an infatuated nationalism and ridiculous pride was raging—must I too participate in the madness of this epoch. . . ? The words "I am proud to be a German" or "I am proud to be a Jew" sounded ineffably stupid to me. As well say, "I am proud to have brown eyes. . . ." Pride and love are not the same thing, and if I were asked where I belonged I should answer that a Jewish mother had borne me, that Germany had nourished me, Europe had formed me, my home was the earth, and the world my fatherland.<sup>1</sup>

These lines were written nearly a decade before the Holocaust, which Ernst Toller did not live to witness. He took his life in 1939. But I would not accept the claim that the Holocaust refutes Toller's words or renders them un-Jewish. They are Jewish, that is, German-Jewish or Jewish-German words primarily in their ambiguity, in their insis-

tence on multiple definitions of self, and in their humane and desperate cosmopolitanism. In the same spirit are the words of another leftist German-Jewish émigré intellectual, Albert Einstein, who in 1948 rejoiced in the founding of Israel but noted that "my awareness of the essential nature of Judaism resists the idea of a Jewish state with borders, an army, and a measure of temporal power no matter how modest. I am afraid of the inner damage Judaism will sustain—especially from the development of a narrow nationalism within our own ranks."<sup>2</sup>

In their reckonings with the dialectic of universal (human) and particular (Jewish, German, émigré), the Tollers, Einsteins, and their scattered kindred spirits recognized that self-surrender cuts several ways; that just as the consistent assimilationists repressed their Jewish particularity, the more Jewish Jews who opted for the synagogue or for Jewish statehood repressed some of their universal humanity. Here, however, a familiar voice enters; it speaks in annoyed tones, saying, your left-wing German-Jewish intellectuals, after all, have no monopoly on cosmopolitanism. This is true, but for Jews and non-Jews alike, it is not a simple truth but a *verité à faire*, a historical truth, to be made, shared, and lived.

In the 1930s, 1940s, and after, the German émigré intellectuals, Jews and non-Jews, leftists and others, had their dramatic encounter with America, which has become the subject of a growing body of memoirs and analyses, including Anthony Heilbut's excellent *Exiled in Paradise* (1983). Among the numerous chapters of this story which await their interpreter, one is the specific encounter between German-Jewish émigré intellectuals on the left and their approximate counterparts among some mostly younger Americans. The encounter took place around Columbia University, the New School for Social Research, and the Smaller Institute for Social Research. I refer to the Americans involved as approximate counterparts not merely because of differences in age but because the ethnic heritage of most of the Americans—for example, Daniel Bell, Alvin Gouldner, and Seymour Lipset—was not German but East European. The class background, too, differed, with the Marcuses, Horkheimers, and Neumanns having come from commercial bourgeois families, whereas the Americans who had contact with them generally came from poorer, artisanal circumstances.

Perhaps there are some among us who could elucidate the inner thoughts of the participants in this intriguing gathering of displaced persons. Did the upwardly mobile Americans, fresh from the New York City Jewish ghettos, envy even as they resented the nonchalantly as-



simulated bearing of the Hegelian-Marxist *yekke* refugees from Hitler? And did the Frankfurt émigrés admire even as they were made uneasy by the apparently more Jewish-American Jews whose parents had likely fled from a czarist pogrom? Did they both ask themselves: I came here to find *this*?

While awaiting the history or the historical novel of this Jewish-German-American story, let me note that it is not only a thing of the past. It is part of a legacy with some contemporary merits. The Jewish-German leftist émigré idea meandered through the larger histories of the New Left movements in both West Germany and America in the 1960s, and it has cropped up more clearly and consciously among the group of Americans and Germans gathered around the leftist journal of Germanistik, *New German Critique*. In its pages one can find among other things lively discussion and reconstruction of the question of Germans and Jews, *yekkes* and *Ostjuden*, cosmopolitanism and nationalism. All these little chapters are, of course, part of a history of defeat. Alternatively, I would rather speak of the history of a small seed, which as always needs more nurturance than it can find. In the Tricentennial commemoration, we are likely to pay homage merely to two historic nationalisms, the American and the German, which, as nationalisms, have contributed little to the blossoming of a humane community. We would do better to join and encourage the Margarete Susmans, Ernst Tollers, and Leonard Zeligs, pushing with them beyond the narrow and devastating limits of religion, nation, and blood.

### Notes

1. Ernst Toller, *I Was a German*, trans. Edward Crankshaw (New York: Morrow, 1934), 285-86.
2. Frederic Grunfeld, *Prophets Without Honor: A Background to Freud, Kafka, Einstein and Their World* (New York: Holt, Rinehart, Winston, 1979), 183.



- 12 Kurt Kersten: Emigration, Ms., 2. Kersten rezensiert hier Johannes C. Maier-Hultschin: Struktur und Charakter der deutschen Emigration, Politische Studien VI, 1955, H. 67.
- 13 Aus einer im Leo-Baeck-Institut vorliegenden biographischen Skizze Elisabeth Babs: Aus zwei Jahrhunderten, unveröff. Ms., 194.
- 14 Die Lesung fand im Deutschen Haus der Universität statt. Den Vorsitz führte der Germanist Gustave B. Mathieu.
- 15 Julius Bab: Amerikas Dichter der Gegenwart, Berlin 1951.
- 16 Zitat aus Johannes Urzidil: Bekenntnisse eines Pedanten. Erzählungen und Essays aus dem autobiographischen Nachlaß, Zürich-München 1972, 194. Urzidils Leo-Baeck-Vortrag (Nr. 11, 1968) heißt »The Living Contribution of Jewish Prague to Modern German Literature« und wurde von Michael Lebeck übersetzt.
- 17 Vera Macháčková-Riegerová: Nachwort, in: Urzidil: Bekenntnisse, 214.
- 18 Alle Mss. im Besitze des Leo-Baeck-Instituts (Urzidil-Nachlaß). Geschrieben waren sie (auf deutsch) für die in London erscheinende tschechische Wochenschrift »Čechoslovak«. Bezüge auf Whitman finden sich z. B. in »Amerika wird Europa kulturell restaurieren« (1941).
- 19 Brief vom 3. April 1969. Der vertraute Briefwechsel mit Winifred Bryher (geb. 1894) ist besonders aufschlußreich.
- 20 Urzidil berichtet darüber in: Väterliches aus Prag, Handwerkliches aus New York, Zürich 3. Aufl. 1972, 46-53.
- 21 Darüber berichten ein Brief von Urzidil vom 20. August 1955 und Adams' Antwort vom 10. September 1955.
- 22 Siehe Anm. 1. Meine Unterhaltung mit der Lyrikerin Gertrude Thieberger-Urzidil (1898-1977) fand bei einer Veranstaltung 1975 im Leo-Baeck-Institut statt.
- 23 Johannes Urzidil: Einleitung, in: Reclams Literatur-Kalender IV, Stuttgart 1958, 97.
- 24 Der Aufsatz erscheint in: John Spalek u. Joseph Strelka Hg.: Deutsche Exilliteratur seit 1933, Bd. 2, New York 1981.
- 25 Siehe Toni Cassirer: Aus meinem Leben mit Ernst Cassirer, unveröff.; das 332 Seiten umfassende Ms. befindet sich im Leo-Baeck-Institut, New York.
- 26 Bezeichnenderweise wird Weill in Desider Stern: Werke jüdischer Autoren deutscher Sprache, München 3. Aufl. 1970, 364 f. angeführt.
- 27 Das 1979 in New York gegründete Weill-Archiv wird von Lys Symonette, Professorin am Curtis Institute of Music, geleitet.
- 28 Korrespondenz und weitere Einzelheiten in Gustave Mathieu u. Guy Stern: Ein Broadway-Drama wird geboren, in: dies.: In Briefen erzählt, München 1965, 134-40.

Konrad Feilchenfeldt

### Amerikanismus und Rußlandsehnsucht Von der Regionalität des »Anderen Deutschland«

#### Voraussetzung

Der folgende Beitrag versteht sich als Versuch einer Synthese. Als Beitrag zur Integrationsproblematik deutscher Emigranten in den Niederlassungsländern will er nicht etwa verleugnen, daß es für die deutschen Emigranten nach 1933 in den verschiedenen Staaten unterschiedliche Asylbedingungen gab. Er versucht jedoch jenseits dieser Bedingungen eine sinnbildliche Bedeutungsschicht zu isolieren, an der das Leben in den Asylländern als ästhetisches Problem sichtbar werden soll. Es ist naheliegend, daß unter dieser Voraussetzung zunächst einmal nicht Emigranten generell, sondern emigrierte Künstler, d. h. aus literaturwissenschaftlicher Sicht Autoren (Dichter), berücksichtigt werden und die Vernachlässigung asylrechtlicher Gegebenheiten vor allem die Auswertung und Betrachtung der Exilwerke betrifft.<sup>1</sup>

Unter dem hier vorgezeigten Aspekt der Integrationsproblematik ist auch eine Formulierung im Titel dieses Referats, nämlich »Regionalität des »Anderen Deutschland« als Synthese gemeint, nämlich als Versuch, die übertragene Bedeutung des politischen Schlagworts vom Anderen Deutschland auf örtlich/räumliche Voraussetzungen zurückzuführen oder umgekehrt die Regionalität in ihrer sinnbildlichen Funktion zu erhellen. Daß es sich dabei um ein Problem literarischer Bildlichkeit handelt, das älter als die deutsche Exilliteratur nach 1933 ist und deshalb über diese Zeitmarke hinausweist, läßt sich beispielsweise an der Geschichte des Italienbildes kurz belegen. Zwar nicht in Italien selbst, aber außerhalb dessen, was wir heute Italien nennen, figurierte seit Machiavelli der Italiener in der Dichtung als Inbegriff des Intriganten und politischen Drahtziehers. Dieses kulturhistorische Faktum ist jedoch zu modifizieren, sobald es nicht um die Geschichte des Italienbildes geht, sondern um Italien als modernen Nationalstaat und um seine Geschichte. Aus dieser – man möchte sagen: staatengeschichtlichen – Perspektive kann vor 1861 von Italien nicht die Rede sein und ist auch Machiavelli nicht Repräsentant eines Italienbildes, sondern nur der Florentiner, der er historisch seinem Herkommen nach gewesen ist.<sup>2</sup>

Dies sind Reflexionen, an denen ansatzweise die hier anvisierte Problematik der Länderbildlichkeit aufgezeigt werden soll, d. h. als Differenz zwischen einem literarischen Befund wie dem Italienbild einerseits und der historischen Realität andererseits. Daß dafür ein Rekurs auf Machiavelli und seine Nachwirkung erfolgte, mag im Zusammenhang des Rahmenthemas Exilliteratur nach 1933 abwegig erscheinen. Es ist jedoch darauf hinzuweisen, daß in der Emigration in der Schweiz der Kölner Soziologe René König 1941 ein Machiavelli-Buch veröffentlichte und dieses Buch nicht nur die Aktualität Machiavellis für einen deutschen Emigranten dokumentiert, sondern auch eine Auffas-



sung vom Staat, den zumindest der florentinische Theoretiker als »Bewegung einer raffinierten Kalkulatorik« begriff.<sup>3</sup> Der Rekurs auf Machiavelli zeigt, daß es in der Emigration selbst Belege einer Staatsauffassung gab, die nicht staatengeschichtlich begründet war, sondern am Staat primär eine »Artistik des politischen Spiels« beobachtete,<sup>4</sup> und unter dieser Voraussetzung formuliere ich als *These I*:

Ländernamen sind literarisch mit einer Bedeutung belegt, die über den staatsrechtlichen Begriff des einzelnen Landes hinausweist. Ein Land, aber auch ein Kontinent als Handlungsschauplatz oder Abstammungsmerkmal einer Werkfigur dienen der Versinnbildlichung literarischen Geschehens. Für die Intensität einer solchen Versinnbildlichung sind ausschlaggebend a) die Historizität des »landesgeschichtlichen« Stoffes in seinem zeitlichen Verhältnis zur Gegenwart des Autors, b) das historische Land, in dem das Werk entsteht, c) die Nationalität der Leserschaft, an die es sich wendet, und d) die Nationalität des Autors selbst.

#### *Voraussetzungswandel*

Die Tatsache, daß das artistische Staatsinteresse in der Emigration von einem Fachwissenschaftler wie dem Soziologen König – also keinem Dichter – geteilt wurde, darf natürlich den anderen Aspekt, die staatsrechtliche Seite des Problems, nicht in Vergessenheit geraten lassen. Das Schicksal des einzelnen und insbesondere seine Stellung zum Staat erklärt sich nicht allein aus der Perspektive des einzelnen selbst, sondern unterliegt ebenso dem zeitlichen Ablauf staatengeschichtlicher Entwicklungen. Das Verhältnis des einzelnen zum Staat ist als Reflex der geschichtsphilosophischen Frage nach Freiheit und Notwendigkeit bekannt.<sup>5</sup> An der Geschichte des Staatensystems als übergeordnetem Prinzip ist aber nicht nur das Engagement des einzelnen zu messen, sondern auch eine veränderte Bedeutung, wie sie sich mit der sinnbildlichen Verwendung eines Landes als literarischer Stoffquelle verbindet. Die Relation, in der sich der Autor zur staatengeschichtlichen Entwicklung eines Landes befindet, sowie die sinnbildliche Bedeutung der Länder bzw. ihr Wandel sind Gegenstand der *These II*:

Sofern der Autor nicht die Nationalität verliert oder wechselt, sofern er nicht das Land, dessen Nationalität er hat, verläßt und seinen Wohnsitz in ein anderes Land verlegt, sofern die dem Autor durch gemeinsame Nationalität verbundene Leserschaft nicht abnimmt und sich eine neue Leserschaft findet, ist die literarische Bildlichkeit der Länder oder Kontinente einem welthistorischen Wandel unterworfen. Unabhängig von den aufgeführten Möglichkeiten eines spezifischen Voraussetzungswandels ändert sich das zeitliche Verhältnis des »landesgeschichtlichen« Stoffes zur jeweiligen Gegenwart kontinuierlich. Innerhalb dieser kontinuierlichen Veränderung kommt es *dann* zu einem abrupten Bedeutungswandel in der literarischen Bildlichkeit der Länder, wenn diese Länder als staatsrechtliche Gebilde einen innenpolitischen Umsturz erleben.

#### *Amerikanismus und Rußlandsehnsucht*

In der Vielzahl jener Länder, in denen deutsche Emigranten nach 1933 Aufnahme und Asyl fanden, sind die Vereinigten Staaten von Amerika und die Sowjetunion zwei Sonderfälle. Beide Staaten waren als kriegführende Mächte am Sieg über Deutschland beteiligt, und ihre Beteiligung war für den Ausgang

des Weltkriegs entscheidend. Soweit ist die staatengeschichtliche Bedeutung der beiden Mächte vergleichbar. Vergleichbar ist bei beiden Staaten aber auch die Bildlichkeit der Ländergeschichte. Mit Amerikanismus – wie Helfried Seliger diesen Begriff verwendet<sup>6</sup> – und Rußlandsehnsucht sind zwei vergleichbare Strömungen zu betrachten, von denen hier die literarische Auswirkung interessiert.

Auch in diesem Fall ist die Zeitmarke des Jahres 1933 natürlich ohne Einfluß auf die Ausbildung eines Amerikanismus oder einer Rußlandsehnsucht als literarische Strömungen. Während Rußland im Zeitalter des Zarentums gelegentlich als Ort der Unterdrückung in die deutsche Literatur sinnbildlich eindringt, z. B. in Freiligraths Gedicht »Eispalast«,<sup>7</sup> oder russische Emigranten in Dichtungen auftreten, wie bei Thomas Mann in »Tonio Kröger« Lisaweta Iwanowna, die Freundin des Titelhelden,<sup>8</sup> ist Amerika seit »Wilhelm Meister« spätestens Bildelement einer Romantradition, die durch den Amerikaroman von Charles Sealsfield bis Karl May weit verbreitet wurde.<sup>9</sup>

Das heißt natürlich nicht, daß es im Verlauf des 19. Jahrhunderts in der deutschen Öffentlichkeit an Interesse für Rußland gefehlt hätte oder keine Zeugnisse einer deutschen Rußlandrezeption überliefert seien. Der entscheidende Unterschied zur gleichzeitigen Entwicklung des Amerikaromans lag in der sinnbildlichen Funktion eines poetischen Amerikabildes, demgegenüber sich das »Rußlandinteresse«, wie bei Ernst Moritz Arndt oder Varnhagen von Ense, als Auseinandersetzung mit der russischen Literatur und Kultur artikuliert, jedoch nicht in poetischer Absicht, und dies gilt mehrheitlich auch für Thomas Mann und sein Verhältnis zu Rußland.<sup>10</sup>

Daß – ähnlich wie beim Beispiel Machiavellis – auch dieser zeitliche Rekurs auf das 19. Jahrhundert nicht völlig abwegig ist und keineswegs aus dem Zusammenhang des Rahmenthemas Exil herausfällt, ist schon aus der Figur der russischen Emigrantin Lisaweta Iwanowna im »Tonio Kröger« ersichtlich. Der Rekurs ist jedoch nicht nur für den Fall der Rußlandsehnsucht berechtigt, sondern auch für den des Amerikanismus, bezeichnete doch in der Fontane-Forschung Hans-Heinrich Reuter Fontanes Roman »Quitt« – übrigens einen Amerikaroman – als den »ersten Exilroman der modernen Literatur«, und war einer der bedeutendsten Vertreter des Amerikaromans, Charles Sealsfield, selbst Emigrant in den Vereinigten Staaten.<sup>11</sup>

Die literarische Bedeutung Amerikas datiert von der Unabhängigkeitserklärung des Jahres 1776 bzw. der 1783 völkerrechtlich anerkannten Unabhängigkeit der Vereinigten Staaten. Mit dem Umsturz der Oktoberrevolution gewinnt Rußland als Ländername eine literarische Bedeutung, die unter der Chiffre Sowjetunion ein politisch-ideologisches Programm beinhaltet. Zusammenfassend ergibt sich als *These III*:

Amerika und – wie noch auszuführen sein wird – Rußland verdanken ihre vergleichbare sinnbildliche Bedeutung für die deutsche Literatur weltgeschichtlichen Umstürzen, die in der Geschichte der beiden Länder jedoch durch mehr als ein Jahrhundert getrennt sind. Der Begriff Amerikanismus ist der Brecht-Forschung entnommen. Als literarische Bildtradition ist die Nachwirkung Amerikas vom Zeitalter Goethes über den Amerikaroman des 19. Jahrhunderts bis ins zwanzigste feststellbar. Die literarische Auseinandersetzung mit Rußland ist in Deutschland bis 1917 vor allem durch die Rezeption russischer Literatur, nicht durch Rußlanddichtungen gekennzeichnet.



## Das Andere Deutschland

Von der Länderbildlichkeit des Amerikanismus, aber auch der Rußlandsehnsucht ist der Begriff des Anderen Deutschland unterschieden.

Im Jahr 1925 erschien die erste Nummer einer Zeitung, die bis dahin den Namen »Der Pazifist« getragen hatte und von nun an »Das Andere Deutschland« hieß. In ihrer Sondernummer vom 1. August 1931 feierte sie das Jubiläum einer zehnjährigen Kampfgemeinschaft, deren unverändertes Programm die »Erstrebung einer Einheitsfront aller ehrlichen Friedenskämpfer« geblieben war, d. h. »ohne Unterschied der Partei oder der Religion, gegen Imperialismus, Chauvinismus und Militarismus: für Wahrheit, Freiheit und Weltfrieden!« Mit diesem »Satz« empfahl sich das Andere Deutschland als politische Bewegung, deren öffentliche Rolle auch ein Jubiläumsgedicht von Adolf Wurbach in der Sondernummer von 1931 umschrieb:

...  
Zehn Jahre haben es bewiesen  
Der Menschheit, die nach Frieden strebt  
Daß eine schönere Zukunft winket,  
Daß noch ein »Andres Deutschland« lebt!<sup>12</sup>

Nachdem »Das Andere Deutschland« als Zeitung schon vor dem 30. Januar 1933 vorübergehend verboten worden war, begann 1937 im argentinischen Exil die Zeitung »La Otra Alemania/Das Andere Deutschland« zu erscheinen, deren Herausgeber August Siemsen bereits zu den Kreisen des ehemaligen Anderen Deutschland Beziehungen unterhalten hatte. Am 1. August 1947 feierte die Exilgruppe des Anderen Deutschland wiederum in einer Sondernummer ihrer Zeitung das zehnjährige Bestehen, und im selben Jahr begann auch »Das Andere Deutschland« auf deutschem Territorium wieder zu erscheinen.<sup>13</sup>

1947 war schließlich auch das Jahr einer Kontroverse, die im Anschluß an die ein Jahr davor veröffentlichten Tagebücher Ulrich von Hassells zwischen Rudolf Pechel und Hans Bernd Gisevius um die Bedeutung des innerdeutschen Widerstands ausgetragen wurde. Daß die Tagebücher des nach der Verschwörung vom 20. Juli hingerichteten Diplomaten unter dem Titel »Vom Andern Deutschland« erschienen waren, führte zu einer Begriffsdiskussion, bei der Pechel grundsätzlich nur den sogenannten Solf-Kreis und dessen Gesinnungsfreunde dem Anderen Deutschland zugerechnet wissen wollte.<sup>14</sup> Die von Friedrich Krause veröffentlichten »Dokumente vom Anderen Deutschland« identifizierten dagegen das Andere Deutschland im weitesten Sinne mit der Inneren Emigration, und auch Max Frisch zählte Ernst Wiechert und Werner Bergengruen zu den »Stimmen des Anderen Deutschland«.<sup>15</sup>

Gemessen an der sinnbildlichen Bedeutung Amerikas und Rußlands ist mit dem Anderen Deutschland eine *deutsche* Bildlichkeit gemeint, soweit sie sich im dichterischen Werk deutscher Autoren nicht als charakteristisches, landschaftliches Kolorit manifestiert. Mit dem Anderen Deutschland ist ein gemessen an der jeweiligen Realität des Staatswesens anderes Deutschland und damit ein politisches Programm gemeint, dessen Formulierung unter dem gleichnamigen Schlagwort vor allem im Exil eine Herausforderung an die übrigen europäischen Staaten darstellte. Wenn das Andere Deutschland im Exil trotz

seines sozialistischen Konzepts eine Bedeutung gewann, die jenseits der von ihm vertretenen Ideologie ein individuelles Interesse verdient, so lag dies daran, daß es sich als Exilgruppe in Argentinien in heftigem Konflikt mit dem in Mexiko gegründeten Freien Deutschland befand, einer nach Moskau hin orientierten Gruppe deutscher Exilkommunisten. Das Freie Deutschland in Mexiko antizipierte eine Entwicklung, die nach 1943 mit der Gründung einer weltweiten Freideutschen Bewegung den Aufbau eines neuen und sozialistischen Nachkriegsdeutschland einzuleiten versuchte. Die Gründung des Nationalkomitees Freies Deutschland in Moskau im Sommer 1943 war der erste Schritt zur Etablierung eines Sozialistischen Staats deutscher Nation, und gegen diese unter sowjetischer Aufsicht vollzogene Weichenstellung für ein künftiges Deutschland opponierte vor allem »Das Andere Deutschland«, das dahinter – wohl nicht zu Unrecht – einen machtpolitischen Schachzug Stalins erkannte.<sup>16</sup>

Ebenso umstritten war die Gründung des Moskauer Nationalkomitees aber auch unter einzelnen deutschen Emigranten, die – wie Thomas Mann und Brecht – unter den Einfluß der Freideutschen Bewegung gerieten. Zwischen Brecht und Mann kam es im Anschluß an die Manifeste des Moskauer Nationalkomitees zu einer Kontroverse, die ebenfalls zur Diskussion um den Begriff des Anderen Deutschland gehört, auch wenn in den Zeugnissen dieser Kontroverse selbst nie zentral davon die Rede war. Thomas Mann lehnte nämlich die Tätigkeit des Freien Deutschland insofern ab, als es durch seine prodeutschen Manifeste vor allem die westlichen Alliierten bei der Niederwerfung des nationalsozialistischen Staates kriegspsychologisch behinderte. Während sich Thomas Mann, auch im Hinblick auf sein eigenes öffentlich-literarisches Verhalten, an der amerikanischen Staatspolitik und ihrer Maxime von der bedingungslosen Kapitulation orientierte, verstand sich Brecht als Repräsentant eines anderen Deutschland, das von der amerikanischen Kriegführung verschont bleiben sollte. Brecht unterschied zwischen einem faschistischen und einem antifaschistischen Deutschland, das sich in der freideutschen Bewegung zu konstituieren begonnen hatte. Thomas Mann dagegen plädierte für eine völlige Niederwerfung Deutschlands, wie sie die Alliiertenkonferenzen von Casablanca und – unter den großen Drei – in Teheran postuliert hatten bzw. postulierten.<sup>17</sup>

Was an dieser Kontroverse zwischen Brecht und Thomas Mann die Frage nach dem Anderen Deutschland kompliziert, ist der Umstand, daß der angebliche Gegner eines anderen Deutschland, nämlich Thomas Mann, seine Meinung im Wandel der internationalen Entwicklung geändert hatte. In der Tat teilte er die Vision eines sozialistischen neuen Deutschland, wie sie Brecht und dem Freien Deutschland vorschwebte, nicht. Diese Ablehnung bedeutete jedoch ebenso wenig, daß er einseitig als Gegner des Anderen Deutschland zu bezeichnen wäre. In seinem aus dem Jahr 1938 stammenden Aufsatz »Dieser Friede«, der die Situation der Münchner Konferenz festhielt, sprach er selbst »von den Hoffnungen eines anderen Deutschland«, deren Erfüllung aber nicht von den Deutschen selbst zu erwarten stand, sondern von einer Anstrengung unter den verantwortlichen Weltmächten, die in der Frage Österreichs und der Tschechoslowakei vor dem Nationalsozialismus versagten und erst im Laufe der Kriegsjahre zu einer gemeinsamen politischen Vorgehensweise fanden.<sup>18</sup> Der



Umschwung zwischen 1938 und 1943, zwischen der Annexion Österreichs durch Hitler und der Kapitulation von Stalingrad, war zugleich eine Zeit, in der neben Thomas Mann auch Franz Werfel und Leopold Schwarzschild die Frage des einen und des anderen Deutschland erörterten.<sup>19</sup>

Als früheste Manifestation des Anderen Deutschland im Exil gilt Ernst Tollers Auftritt anlässlich seiner Rede auf dem PEN-Kongress in Ragusa vom 28. Mai 1933. Damals artikulierte sich erstmals im Exil ein Anderes Deutschland, das sich – noch ohne das Schlagwort zu verwenden – der Weltöffentlichkeit als Alternative zum Nationalsozialismus präsentierte.<sup>20</sup> Was Toller kaum drei Wochen nach den Bücherverbrennungen in Deutschland unter Anspielung auf ein Anderes Deutschland ausführte, wiederholte er zwei Jahre später in der Einleitung seiner »Briefe aus dem Gefängnis« ausdrücklich zur Erinnerung an »ein anderes Deutschland – das schweigende, leidende«.<sup>21</sup>

Bis in die jüngste Nachkriegszeit hinein ist das Andere Deutschland als Bezeichnung für die Deutsche Demokratische Republik zu belegen.<sup>22</sup> Festzuhalten bleibt als *These IV*:

Die Begriffsgeschichte des Anderen Deutschland ist komplex. Gemeint sind nicht die politischen Gruppierungen wie das linkspazifistische Andere Deutschland der Weimarer Republik, die Exilbewegung Anderes Deutschland in Argentinien oder das Andere Deutschland des innerdeutschen Widerstands. Gemeint ist vielmehr die geistige, sinnbildliche Repräsentanz eines gemessen am nationalsozialistischen deutschen Staat anderen Deutschland.

#### *Amerika und Rußland als Bilder und Gegenbilder des Anderen Deutschland*

Soweit emigrierte deutsche Autoren als Repräsentanten des Anderen Deutschland wirkten, kann man davon ausgehen, daß ihre Werke an der Bildlichkeit anderer Länder ein Anderes Deutschland demonstrierten, und gerade Amerika und Rußland sind als Bilder und Gegenbilder des Anderen Deutschland in der Literatur des deutschen Exils gut zu belegen.<sup>23</sup>

In Ernst Glaesers Exilroman »Der letzte Zivilist« repräsentiert der deutschstämmige Amerikaner Johann Caspar Bäuerle die Errungenschaften einer neuen Welt, die er als Rückkehrer in seiner ehemaligen Heimat Deutschland – in seiner Vaterstadt Siebenwasser –, jedoch ohne Erfolg, ebenfalls durchzusetzen versucht. Hier steht Amerika als Sinnbild des Anderen Deutschland.<sup>24</sup> Als Gegenbild des Anderen Deutschland erscheint Amerika dafür in Brechts Hitlerstück »Arturo Ui«. Hier dient Amerika als Sinnbild des nationalsozialistischen Deutschland und seiner kapitalistischen Voraussetzungen.<sup>25</sup> Als Land und Sinnbild einer »neuen Zeit« – wie in Glaesers »Letztem Zivilisten« – ist Amerika bereits vor dem Jahr 1933 in Hanns Johsts Schauspiel »Thomas Paine« von 1927 belegt, als Sinnbild eines Anderen Deutschland, dessen Andersartigkeit sich an der Realität der Weimarer Republik bemißt.<sup>26</sup>

Rußland als Standort des Anderen Deutschland dokumentiert ebenfalls vor 1933 Johannes Robert Bechers Gedicht »Moskau Oktober 1927«, aus demselben Jahr wie Johsts »Thomas Paine« und mit einem direkten Vergleich zwischen der Sowjetunion und Deutschland.<sup>27</sup> Daß für Becher das Exil in Rußland zu einer Synthese mit Deutschland beitrug, dokumentiert – unbe-

schadet der Authentizität dieser Behauptung und anderer gegenteiliger Äußerungen – folgende Aufzeichnung:

Das Jahrzehnt meines Aufenthaltes in der Sowjetunion von 1935 bis 1945 wurde mir zur fruchtbarsten Periode meines Schaffens. Fern von Deutschland und doch zugleich so nahe ihm wie noch nie, habe ich hier in der Sowjetunion die große deutsche humanistische Tradition auf allen Gebieten erst wahrhaft entdeckt und sie zum Mittelpunkt meiner Dichtung werden lassen.<sup>28</sup>

Bechers Rußlandlyrik liegt in einem Sonderheft der Zeitschrift »Sinn und Form« gesammelt vor und belegt von 1917 bis 1951 eine durchgehende Thematik seines Gesamtwerks. Sie erreicht in einem Exilgedicht wie »Der Zauberwald« eine Identifikation mit der Landschaft, die ein auffallendes Merkmal seiner Exildichtung überhaupt ist und sich auch regionaler Namen in bildlicher Absicht bedient wie im Gedicht »Wir verbinden euch mit Sibirien und dem Ural«.<sup>29</sup>

Die Landschaft als poetisches Thema der Rußlanderfahrung und vor allem Sibiriens dokumentieren in den zwanziger bis dreißiger Jahren auch die Romane der »Deutschen Passion« von Edwin Erich Dwinger. In Sibirien rückt Rußland an die Stelle der deutschen Heimat und gewinnt dadurch eine Identität, deren Problematik der russische Kriegsgefangene und Ich-Erzähler in der »Deutschen Passion« selbst reflektiert. Die Frage, die der 1929 erschienene Roman »Die Armee hinter Stacheldraht. Das Sibirische Tagebuch« aufwirft, lautet für den überlebenden Helden:

Wozu soll ich noch heimkehren? Soll ich ihnen [den gefallenen Kameraden] nicht besser nachgehen? Hier, auf dem Hügel, auf dem es mir schon einer vorgemacht hat? Ist es nicht klüger, auf ein Leben zu verzichten, in dem möglich ist, was wir erlitten? Vielleicht dauert es noch zwei Jahre? Und wenn auch nicht – was soll ich zu Hause? Ist für mich nicht die ganze Welt durch diesen Krieg ein einziges Sibirien geworden? Ja, ist nicht für uns überall: Sibirien? Weil wir es nie vergessen werden...?<sup>30</sup>

Im Vergleich mit Johannes R. Becher ist der Unterschied zu Dwingers Rußlanderfahrung nicht zu bestreiten, sobald die Lebensgeschichte der beiden Autoren mitbetrachtet wird. Dwinger geriet 1915 selbst in russische Kriegsgefangenschaft und kämpfte später mit der weißen Armee gegen die Bolschewiken. Becher bereiste Rußland erstmals 1927 und lebte dort von 1935 an als Emigrant. Von ihrer politischen Gesinnung her vertraten sie unvereinbare Standpunkte. Wie nah sie sich jedoch literarisch standen, bezeugt Becher selbst in einem offenen Brief von 1941 »An E. E. Dwinger«. Von Dwingers Roman »Zwischen Weiß und Rot«, dem zweiten Band der »Deutschen Passion«, meinte Becher nämlich: »Was Sie als Ideologie in diesem Buch aussagten, ist unsinnig und nichtig, was Sie als Künstler in diesem Buch gestalteten, ist echt und wahr und bleibt es.«<sup>31</sup>

Zusammenfassend sind folgende Fälle – als *These V* – zu nennen:

Als Versinnbildlichung des Anderen Deutschland ist Amerika in Glaesers »Der letzte Zivilist«, Rußland in Johannes R. Bechers Lyrik belegt. Als Gegenbild des Anderen Deutschland findet sich bei Brecht Amerika im »Arturo Ui«. Daß das Andere Deutschland gemessen an der literarischen Bildlichkeit Amerikas und Rußlands keine normierende politisch-ideologische Systematik erschließt, zeigt ein Vergleich mit dem Bildgebrauch Amerikas durch Hanns Johst in »Thomas Paine« und Rußlands durch Edwin Erich Dwinger in der »Deutschen Passion«.



Der Vergleich zwischen Brecht und Becher auf der einen Seite sowie Dwinger, Johst und Glaeser auf der anderen zeigt eine Gemeinsamkeit des Bildgebrauchs, und zwar über die politischen Gegensätze, die die beiden Gruppen trennen, hinweg. Der Bildgebrauch steht zwar nicht außerhalb politischer Zwecke. Er ist in seiner Bedeutung aber nicht auf eine einzige politische Richtung festgelegt. So brisant daher die politische Lage für die Frage der juristischen und sozialen Integration der Emigranten war, so ergibt sich aus der Länderbildlichkeit allein kein Anhaltspunkt dafür. Ausschlaggebend ist immer nur der Zusammenhang zwischen dem Aufenthalt des emigrierten Autors in einem Niederlassungsland und dem der Geschichte dieses Landes entnommenen sinnbildlichen Kolorit einer Dichtung.

Unter dieser Voraussetzung ist am Amerikabild in Glaesers »Letztem Zivilisten« für die Integration im Exil nichts Spezifisches abzulesen. Der Roman entstand im Schweizer Exil.<sup>32</sup> Das Amerikabild war als Bekenntnis zu einem anderen Deutschland gemeint und dokumentierte damit eine Absage an das Exil, auch wenn der Roman sogar den Stoff einer Geschichte mit schweizerischem Kolorit bearbeitet hätte. Anders verhält es sich mit Brechts »Arturo Ui«, den er freilich schon in Finnland, vor seiner Übersiedlung nach den USA, aber doch unter dem Eindruck dieses Landes in Angriff nahm.<sup>33</sup> Gemessen an Amerika war »Arturo Ui« zwar kein Bekenntnis zum Anderen Deutschland, kann aber – soweit das Stück Amerika mit Hitlerdeutschland identifizierte – nicht als Beleg für eine geglückte Integration interpretiert werden. Anders im Vergleich zu Glaeser und seinem Roman verhält es sich auch bei Becher. Sein Bekenntnis zum Anderen Deutschland findet in der Sowjetunion eine sinnbildliche Erfüllung. Mit dieser Bestimmung seines Aufenthalts in Rußland verhindert Becher aber von sich aus seine Integration im russischen Exil.

Als Gegenbeispiel ist Thomas Mann hier wenigstens zu nennen, der durch seine Absage an das Andere Deutschland nach 1943 die beste Voraussetzung für eine annähernd glückliche Integration schuf. Dazu trug in seinem Exilwerk außerdem der Verzicht auf amerikanisches Kolorit bei, dessen Verwendung für ihn – nach »Königlicher Hoheit« – kein Neuland gewesen wäre.<sup>34</sup> Daß Thomas Mann im letzten Band der Josephs-Trilogie den Titelhelden mit Eigenschaften Franklin D. Roosevelts ausstattete, daß er Einzelheiten aus dem politischen Programm des amerikanischen Präsidenten am Wirken Josephs versinnbildlichte, steht außer Zweifel.<sup>35</sup> Es darf jedoch im Zusammenhang der bisherigen Argumentation nicht als Rückgriff auf amerikanisches Kolorit verstanden werden, sondern als Versinnbildlichung der amerikanischen Realität am Kolorit des biblischen Stoffes. Gerade darin aber manifestiert sich die behauptete Integration Thomas Manns in den USA, indem er sich nämlich in »Joseph, der Ernährer« an der sozialen Umwelt Amerikas und nicht am Anderen Deutschland orientierte.<sup>36</sup>

Daß die Frage nach geglückter oder mißlungener Integration sich am ehesten an der Rückkehrbereitschaft der Emigranten untersuchen läßt, sei hier ebenfalls nur nebenbei gesagt. Dieses Kriterium gilt natürlich für alle Emigranten, Politiker wie Künstler, gleich, und es mag Zufall sein, daß die hier behandelten Autoren des Exils, deren Integration mißglückte, zu den frühesten Rückkeh-

ren zählten. Glaeser kehrte bereits 1939 nach Deutschland zurück, Becher 1945 und Brecht 1947.<sup>37</sup> Die *Schlußthese* lautet:

Solange ein Autor im Exil das Land seines Aufenthalts als Versinnbildlichung des Anderen Deutschland begreift, ist die Integration gestört. Das Beispiel Bechers in Rußland belegt keine Integration mit dem Land. Die Integration ist jedoch ebenfalls gestört, wenn das Exilland als *Gegenbild* des Anderen Deutschland dient wie bei Brecht. Die Integration im Exilland bedingt grundsätzlich Desinteresse oder eine Absage gegenüber dem Anderen Deutschland und damit gleichzeitig an die Bildlichkeit, die mit dem Ländernamen des Exillandes verbunden ist. Thomas Mann hat keine Amerikadichtung im amerikanischen Exil geschrieben.

#### Anmerkungen

- 1 Daß die asylrechtliche Situation der Emigranten in der literaturwissenschaftlichen Exilforschung eine zentrale Thematik darstellt, dokumentiert vor allem Hans-Albert Walter: *Deutsche Exilliteratur 1933–1950*, Bd. 2: *Asylpraxis und Lebensbedingungen in Europa*, Darmstadt 1972, 7 ff.
- 2 Die sinnbildliche Bedeutung Machiavellis, besonders für das »elisabethanische Theater«, aber auch für das »Italienbild der deutschen Romantik«, belegt Werner Haftmann: *Machiavelli und die Artistik des Politischen*, in: ders.: *Skizzenbuch. Zur Kultur der Gegenwart. Reden und Aufsätze*, München 1960, 14–19, hier 16.
- 3 René König: *Niccolo Machiavelli. Zur Krisenanalyse einer Zeitenwende*, Erlenbach-Zürich 1941, 328 ff. Vgl. Haftmann, 18. – Den Zusammenhang seines Buchs mit der Exilsituation hat inzwischen René König in der soeben erschienenen Neuauflage selbst hervorgehoben; vgl. ders.: *Niccolo Machiavelli*, München 1979, 353 ff.
- 4 Haftmann, 18. Vgl. König (1941), 120 ff.
- 5 Vgl. Leonhard von Muralt: *Zum Problem »Freiheit und Notwendigkeit« bei Ranke*, in: ders.: *Der Historiker und die Geschichte. Ausgewählte Aufsätze und Vorträge*, Hg. Fritz Büsser u. a., Zürich 1960, 30–34.
- 6 Helfried W. Seliger: *Das Amerikabild Bertolt Brechts*, Bonn 1974, 7 ff., 50 ff.
- 7 Hans-Wolf Jäger: *Politische Metaphorik im Jakobinismus und im Vormärz*, Stuttgart 1971, 13 f.
- 8 Andre von Gronicka: *Thomas Mann and Russia*, *Germanic Review* 20, 1945, 105–37, hier 122 ff.
- 9 Vgl. Albert R. Schmitt: *Herder und Amerika*, Den Haag 1967, 22 ff. u. passim. Wendelin Schmidt-Dengler: *Die Ehre des alten Dampfschiffs. Zur Funktion der Technik im deutschen Amerikaroman des 19. Jahrhunderts*, *Jahrbuch der Grillparzer-Gesellschaft*, 3. F. 12, 1976, 277–90. Ferner auch Jäger, 17, 53, 55 f.
- 10 Gronicka, 120 ff. Vgl. Günther Wiegand: *Zum deutschen Rußlandinteresse im 19. Jahrhundert*. E. M. Arndt und Varnhagen von Ense, Stuttgart 1967. Terry H. Pickett u. Richard Porter: *Varnhagen and the Reception of Russian Literature in Germany*, *Germano-Slavica* 4, 1974, 69–78.
- 11 Vgl. Alexander Ritter: *Bemerkungen zur Exilsituation Charles Sealsfields* anlässlich wiedergefundener Brieftexte, *Literaturwissenschaftliches Jahrbuch*, N. F. 14, 1973, 395–420. Hans-Heinrich Reuter: *Grundpositionen der »historischen Autobiographie«*, in: Theodor Fontanes Werk in unserer Zeit. Symposium zur 30. Jahrfeier des Fontane-Archivs Potsdam, Potsdam 1966, 13–36, hier 27 ff. Vgl. Klaus Matthias: *Theodor Fontane – Skepsis und Güte*, *Jahrbuch des Freien Deutschen Hochstifts* 1973, 371–439, hier 402 Anm. 106. Walter Müller-Seidel: *Theodor Fontane. Soziale Romankunst in Deutschland*, Stuttgart 1975, 233.
- 12 Das zitierte Exemplar der Zeitung »Das Andere Deutschland« stammt aus den Beständen des Instituts für Zeitungsforschung (Dortmund).



- 13 »La Otra Alemania/Das Andere Deutschland« wird nach einem im Institut für Zeitungsforschung (Dortmund) befindlichen Mikrofilm zitiert, die nach dem Zweiten Weltkrieg erschienene Zeitung »Das Andere Deutschland« nach einem Dortmunder Originalexemplar. Vgl. Heinz D. Osterle: The other Germany. Resistance to the third Reich in German Literature, The German Quarterly 41, 1968, 1–22, hier 3. Lieselotte Maas: Deutsche Exilpresse in Lateinamerika, Frankfurt a. M. 1978, 31 ff. Kurt R. Grossmann: Ossietzky. Ein deutscher Patriot, München 1963, 180 ff. Hanno Drechsler: Die Sozialistische Arbeiterpartei Deutschlands (SAPD). Ein Beitrag zur Geschichte der deutschen Arbeiterbewegung am Ende der Weimarer Republik, Erlangen 1971, 366, 370.
- 14 Rudolf Pechel: Deutscher Widerstand, Erlenbach-Zürich 1947, 88 ff., 92, 95, 248 ff. Vgl. Hans Bernd Gisevius: Bis zum bitteren Ende, Bd. 2, Zürich 2. Aufl. 1946 [1947], 219 f. Anm.
- 15 Vgl. Dokumente des Anderen Deutschland, Hg. Friedrich Krause, 4 Bde., New York 1945–1946. Max Frisch: Stimmen eines Anderen Deutschland. Zu den Zeugnissen von Wiechert und Bergengruen, Neue Schweizer Rundschau, NF. 13, 1945–1946, 537–47.
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- 32 Koebner, 192.
- 33 Seliger, 203 f.
- 34 Vgl. Wolfgang Leppmann: Der Amerikaner im Werke Thomas Manns, The German Quarterly 38, 1965, 619–29, hier 620.
- 35 Vgl. Erich A. Frey: Thomas Mann, in: Spalek u. Strelka Hg., 473–526, hier 487.
- 36 Komplizierter ist die Einordnung des Amerikaners Ken Keaton in der Erzählung »Die Betrogene«, an dessen poetische Funktion mich in diesem Zusammenhang Anthony W. Riley erinnerte. »Die Betrogene« steht als Werk entstehungsgeschichtlich bereits im Zeichen der bevorstehenden Rückkehr Thomas Manns nach Europa und thematisiert die Nachkriegssituation nach 1945 ähnlich wie Döblins November-Trilogie oder Brechts Spätfassung seines Stücks »Trommeln in der Nacht« am Vorbild des Kriegsendes von 1918 und der damaligen Nachkriegszeit. Im Gegensatz zu Leppmanns Formulierung »büßt« sie »dadurch an Glaubwürdigkeit und zweifellos auch an Aktualität« gerade nicht ein (Leppmann, 624). Die Frage nach der Integration in den USA läßt sich daher an der erst 1953 nach Thomas Manns Rückkehr aus Amerika erschienenen Erzählung nicht mehr erörtern, sofern nicht der Rückgriff auf amerikanisches Kolorit umgekehrt als Zeichen einer Desintegration im Exil verstanden werden sollte. Vgl. Frey, 490 f.
- 37 Wilhelm Sternfeld u. Eva Tiedemann: Deutsche Exil-Literatur 1933–1945. Eine Bibliographie, Heidelberg 2. Aufl. 1970, 37, 74, 168. – Mit 1938 ist Glaesers Rückkehr irrtümlich ein Jahr zu früh datiert bei Koebner, 192, 213.



Frühwald / Schieder, Leben im Exil

Benita Luckmann

Exil oder Emigration

Aspekte der Amerikanisierung an der »New School for Social Research« in New York

I.

Von 1933 bis in die Mitte der sechziger Jahre lehrte und lebte eine Gruppe deutscher und österreichischer Sozialwissenschaftler an der *New Yorker University in Exile*. Der unmittelbare Anstoß zur Gründung dieser einzigartigen Exiluniversität war die Entrüstung eines liberalen amerikanischen Demokraten über die Anmaßung und Herausforderung Hitlers: Alvin Johnson, selbst dänischer Abstammung, kam aus dem populistischen Mittelwesten Amerikas, dem Staate Nebraska.<sup>1</sup> Landwirt von Beruf, dann Nationalökonom, war er längere Zeit Redakteur der liberal-progressiven Zeitschrift »The New Republic«, Professor an der *Columbia University*, Mitherausgeber der »Encyclopedia of the Social Sciences«, Gründungsmitglied und Direktor der *New School for Social Research*.

Durch die Arbeit an der »Encyclopedia« lernte Alvin Johnson Deutschland, deutsche Sozialwissenschaftler und deutsche Universitäten näher kennen, unter anderem auch die Herausgeber und Mitarbeiter des von Max Weber, Werner Sombart und Edgar Jaffé begründeten »Archiv für Sozialwissenschaft und Sozialpolitik«. Neben dem üblichen Kontakt, der unter Vertretern einzelner Disziplinen immer besteht – über internationale Kongresse, Seminare, Forschungsvorhaben, persönliche Freundschaften –, spielten deutsche Universitäten und deutsche Professoren eine spezifische Rolle im akademischen Leben Amerikas. Es gab immer wieder deutsche Professoren an amerikanischen Colleges und Universitäten – und dies nicht nur im German Department. Amerikanische Studenten besuchten auch immer wieder Vorlesungen oder verbrachten ein Studienjahr an deutschen Universitäten. Der *deutsche Professor* war in Amerika zu einem allgemein bekannten Typus geworden, oft mit Vorstellungen von besonderer Pedanterie, Weltfremdheit und einer gewissen Komik verbunden, aber auch mit den Attributen von Gelehrsamkeit, Idealismus und uneigennütziger Einfalt. Die deutsche Universität besaß – vor allem Ende des 19. Jahrhunderts und in der Periode vor dem Ersten Weltkrieg – ein hohes Ansehen in Amerika. In Deutschland studiert zu haben war damals (o tempora!) ehrenvoll und nützlich.

Als das nationalsozialistische Regime die deutsche Universität zerstörte, Bücher verbrennen ließ und Professoren vertrieb, waren amerikanische Wissenschaftler und Akademiker zutiefst entrüstet. Es gab Proteste, man nahm sich einzelner Wissenschaftler an, sammelte Geld, fand Anstellungen für sie – wenn möglich.<sup>2</sup> Alvin Johnson aber hatte eine Vision. Rettung von ausgewiesenen Wissenschaftlern aus Solidarität und humanitären Beweggründen – das selbstverständlich auch. Aber eine deutsche Universität in Amerika – das erschien ihm als große, historisch einmalige Gelegenheit.



Mit den Mitteln, die er unermüdlich mobilisierte: Geld, Beihilfe zur Ausreise oder sogar Flucht, Einreisevisen nach Amerika, Garantien amerikanischer Bürger, daß die Flüchtlinge keinem zur Last fallen würden, usw. – gelang ihm der große Wurf: Er brachte namhafte, aber auch noch junge, vielversprechende deutsche Wissenschaftler als Mitglieder einer sozialwissenschaftlichen Fakultät in Amerika zusammen. Der Auftrag dieser Fakultät war, die Idee der deutschen Universität zu repräsentieren und in freier Forschung und Lehre Wissen an amerikanische Studenten zu vermitteln.

Alvin Johnson war auch ein praktischer Wissenschaftspolitiker. Er war – im besten Sinne des Wortes – kulturpolitischer Entrepreneur. Und er war amerikanischer Patriot – dieses im Sinne des 18. Jahrhunderts. Was Hitler getan hatte, konnte man im Augenblick nicht ändern. Aber man konnte den Geschädigten helfen. Man konnte dies auch mit Nutzen für Amerika tun.

Amerika befand sich 1933 am Tiefpunkt der ökonomischen Krise. Die Banken waren geschlossen, die Fabriken standen still, jeder vierte arbeitsfähige Mann war arbeitslos, die Farmer weigerten sich, ihre Schulden zu zahlen, und rebellierten; es herrschte Hungersnot. Die Regierung Hoovers war mit ihrer Politik am Ende. Sie mußte der Regierung Franklin Delano Roosevelts Platz machen. Mit Roosevelts Politik eines *New Deal* begann eine neue Epoche der amerikanischen Sozialgeschichte: Reorganisierung des Finanzwesens, Einführung der Sozialversicherung, neue Gewerkschaftsgesetze, Steuerreform, Wirtschaftsplanung. Es kamen neue Männer nach Washington, um neue Lösungen zu suchen für die durch Industrialisierung und Technologisierung neu entstandenen sozialen Konflikte und Probleme.

Die Fakultät der »University in Exile« verfügte – aus ihrer europäischen Erfahrung heraus – über reiches theoretisches und praktisches Wissen, das zur Analyse und Lösung dieser Probleme beitragen konnte. Sie beherbergte Experten in Finanz-, Gewerkschafts-, Energie- und Sozialpolitik, von denen auch einige den Weg nach Washington in die *brain trusts* der Roosevelt Administration gingen. Sie beherbergte auch Erfahrungen auf dem Gebiet der Rechts- und Verfassungslehre. Und die meisten hatten mehr als eine Ahnung von all dem, was man in der Politik falsch machen kann.

Die »University in Exile« wurde am 24. April 1933, nur ein Vierteljahr nach Hitlers Machtergreifung, an der »New School for Social Research« gegründet. Die »New School« war eine neuartige Hochschule zur Weiterbildung von Erwachsenen.<sup>3</sup> Gegründet 1919 von einer Reihe liberaler Professoren und Intellektuellen wie Alvin Johnson, John Dewey, Thorstein Veblen, Charles Beard, James Harvey Robinson u. a., sollte sie eine Gegeninstitution zur traditionellen amerikanischen Universität werden – aber auch eine Ergänzung zu ihr. Die Absicht der Gründer war es, im Gegensatz zu etablierten Universitäten Vorlesungen, Diskussionsgruppen, Forschungsmöglichkeiten für bereits ausgebildete oder nicht voll ausgebildete, aber schon im Arbeitsleben stehende Erwachsene zu bieten. In den Worten von Alvin Johnson: »... an institution for the continued education of the educated.«<sup>4</sup> Es sollten besonders diejenigen Menschen angesprochen werden, die im öffentlichen Leben Stellungen einnahmen, in denen sie Entscheidungen über die Zukunft der amerikanischen Gesellschaft treffen mußten. Diese sollten durch Erweiterung ihres Bildungshorizonts eine klarere Übersicht über ökonomische, politische, soziale und

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kulturelle Probleme erlangen. Sie sollten für die Aufgaben bereit sein, die Amerika nach dem Ersten Weltkrieg in der Weltpolitik bevorstanden. Sie bekamen an der »New School« dafür keine Diplome. Sie mußten für die Immatrikulierung auch keine besonderen schulischen Vorleistungen nachweisen. Die Vorlesungsgelder waren minimal, die Vortragenden meist bekannte Gelehrte und Spezialisten; das Vorlesungsverzeichnis war umfangreich und vielseitig; Studenten konnten Kurse, die sie wünschten, beantragen.

Damit die Schule finanziell unabhängig blieb, ging Alvin Johnson jedes Jahr Geld sammeln, um das nächste Schuljahr zu bestreiten. Die Schule wurde zu einem großen Erfolg. Tausende und aber Tausende von New Yorkern haben irgendwann einmal irgend etwas an der »New School« gehört und gelernt, und wenn es auch nur ein Jazz-Konzert, eine Tanzstunde für »sitzende Berufe« oder eine Fahrt des Theaterseminars in eine Burlesque-Show war. Hinter all dem Flitter steckte jedoch viel ernste Arbeit.

Im Rahmen der »New School for Social Research« fanden sehr verschiedene Institutionen, Schulen und Arbeitsgruppen beständig oder zeitweilig Zuflucht. Erwin Piscator hatte dort einen *Dramatic Workshop*, Martha Graham ihre Schule für modernen Tanz. In den vierziger Jahren wurde das *Institute of World Affairs* nach dem Vorbild des Kieler *Instituts für Weltwirtschaft* gegründet. Orozco und Benton bemalten Wände von Seminarraum und Mensa; Zuckmayer plagte sich mit übersetzten Vorlesungen, Klemperer dirigierte und Thomas Mann trug vor. Die »New School« war auch der institutionelle Rahmen dafür, daß sich die »University in Exile« in die *Graduate Faculty of Political and Social Science of the New School for Social Research* verwandelte. Es soll hinzugefügt werden, daß nach dem Fall Frankreichs die *Ecole Libre des Hautes Etudes* auf einer ähnlichen Basis entstand.<sup>5</sup> Im Gegensatz zur »University in Exile« war diese eine französischsprachige Universität. Ihr Vorlesungsverzeichnis enthielt viele große und berühmte Namen, so die von Alexander Koyré, Claude Lévy-Strauss, Jacques Maritain, Georges Gurvitch und anderen mehr. Nach Kriegsende sind die meisten wieder nach Frankreich zurückgekehrt. Wenngleich sie in Amerika nur wenige Spuren hinterlassen haben, so hat auch ihnen Alvin Johnson und die »New School« ein akademisches Asyl in Zeiten großer Not geboten. Alvin Johnson hat die Rockefeller Foundation nach der französischen Niederlage von 1940 davon überzeugt, einhundert französischen, belgischen und nach Frankreich geflüchteten deutschen, österreichischen und polnischen Wissenschaftlern Überfahrt nach Amerika und ein zweijähriges Gehalt zu gewährleisten. Die »New School« bot als etablierte akademische Institution die legale Voraussetzung zur Gründung der *Ecole Libre des Hautes Etudes at the New School for Social Research*, und sie berief die Professoren. Eine Einladung und Anstellungsgarantie war allein schon deshalb notwendig, um ein amerikanisches *non quota*-Visum zu erhalten, das eine sofortige Einreise ermöglichte. Die »Ecole Libre« wurde anschließend von de Gaulle unterstützt und zur einzigen freien französischen Universität deklariert. Sowohl an der »Ecole Libre« wie an der »Graduate Faculty« fanden auch verschiedene italienische und spanische Gelehrte ein Asyl.



## II.

Die Mitglieder der »Graduate Faculty« kamen auf sehr verschiedenen Wegen nach Amerika. Die Gründungsmitglieder erreichten New York noch während des Sommers 1933. Andere kamen langsam nach: aus Österreich – nach dem Anschluß; über Frankreich – nach der französischen Kapitulation; nach einer ersten Etappe in England, Japan, der Türkei. Die Professoren der »Graduate Faculty« kamen in ein Land, in dem Emigranten zum Alltagsleben gehörten und in dem es eine offizielle Assimilationsideologie gab: die des *melting pot*. Diese setzte voraus, daß jeder Emigrant einmal zum Amerikaner werde, vielleicht zuerst einmal Amerikaner zweiter oder dritter Klasse. Es war nichts Außerordentliches, Emigrant in Amerika zu sein. Die vielen Unterscheidungen zwischen »Emigration«, »Flucht«, »ins Exil gehen«, »ins Exil getrieben werden«, »Asyl suchen« usw., Unterscheidungen, welche die deutschen Emigrantenkreise bewegten, waren aus amerikanischer Sicht nichtig. Im amerikanischen Alltag gab es immer Emigranten: gute und schlechte, erwünschte und unerwünschte, weiße und farbige, feine und schmutzige, deutsche und galizische Juden. Wer nicht gebürtiger Amerikaner war, war Emigrant, oder er war ein Gast. Seitdem hat sich einiges geändert, die Ideologie des *melting pot* ist durch die der *New Ethnicity* ersetzt worden. Für die Emigranten aus Hitlers Machtbereich war jedoch das geforderte Maß der Amerikanisierung das große Problem.

Im Gegensatz zu vielen anderen Emigranten jener Zeit kamen zwar alle Mitglieder der »Graduate Faculty« in die Geborgenheit einer wie immer anders und fremd anmutenden akademischen Lebenswelt.<sup>6</sup> Sie kamen als Professoren, Dozenten, Wissenschaftler. Sie folgten einem »Ruf an eine Universität«, auch wenn sie diese erst selbst konstituieren sollten. Immerhin war der Grundstein für diese Universität schon gelegt. Alvin Johnson war da: er erwartete seine Fakultät, »seine Deutschen«, wie er später zu sagen pflegte.<sup>7</sup> Und diese konnten, in der Gründergeneration der Fakultät jedenfalls, so gut wie ohne Unterbrechung wieder weiter lehren und weiter forschen.

Jeder einzelne von ihnen hatte jedoch mit einer Reihe von Schicksalsschlägen fertig zu werden, wie sie auch andere Emigranten zu bewältigen hatten. Sie litten unter den Folgen der brutalen nationalsozialistischen Verfolgung sowie unter dem Verlust der Heimat. Die Aufgabe der gewohnten Lebensweise, der Verlust des gewohnten Arbeitsplatzes traf sie ebenso wie die Zerstörung der etablierten oder begonnenen wissenschaftlichen Karriere. Hinzu kam die Sorge um die Zurückgebliebenen, um gefährdete Familienmitglieder, Freunde, Kollegen. Auf der anderen Seite war die Ankunft in der Fremde zu bewältigen. Man mußte sich in neue, völlig ungewohnte Verhältnisse einleben.

Wesentlich für das Einleben in Amerika, also für den sogenannten Integrierungsprozeß, war der Zwang, englisch zu sprechen und zu schreiben. Denn als Lehrer mußten die Fakultätsmitglieder sofort auf englisch unterrichten und diskutieren, für die neu erscheinende Fakultätspublikation »Social Research« mußten sie englisch schreiben. Der massive institutionelle Druck, personifiziert in Alvin Johnson, war für viele eine Belastung. Er führte zu hohen intellektuellen Leistungen, jedoch gab es auch manchen verfrühten Tod.

Über das Englisch der Professoren der »Graduate Faculty« gibt es viele

Geschichten und Anekdoten. Arnold Brecht hat sie in einem Satz zusammengefaßt: »At the New School we all speak the King's English . . . that of George I, George II, George III . . .«<sup>8</sup> (Die ersten Hannoveraner auf dem englischen Thron sprachen bekanntlich entweder überhaupt kein Englisch oder nur ein mangelhaftes.) Manche sprachen jedoch bald ein vorzügliches Englisch und zogen es später vor, englisch statt deutsch zu schreiben. All dies hat die Entstehung eines anglo-germanischen »New Schoolese« für den Eigengebrauch nicht ausgeschlossen.

An der »Graduate Faculty« kam es aber auch zu einer merkwürdigen Form umgekehrter »Assimilierung«. Manche amerikanische Studenten, die zu Schülern deutscher Philosophen und Soziologen wurden, dachten, sprachen und schrieben wie ihre Vorbilder. Sie lernten deutsch, um die früheren Schriften ihrer Meister zu lesen. Sie nahmen eine wissenschaftliche Tradition auf, welche die »Graduate Faculty« in die USA mitgebracht hatte. Sie nahmen sie auf und verwandelten sie im Rezeptionsprozeß, d. h., sie vertieften oder verflachten sie. An einigen blieb nichts von dieser Tradition mehr übrig außer einigen Oberflächenelementen einer intellektuellen Kultur. Aus anderen wurden Epigonen, wie sie jeder wissenschaftliche Ansatz kennt. Aber es zeichnete sich auch mehr ab: Die Traditionen, die in die »New School« eingeführt, dort gepflegt und weiterentwickelt wurden, wurden teils schon von den Mitgliedern der ersten Generation, teils von deren Schülern in die Sozialwissenschaften, vor allem die Soziologie, eingebracht. In der »New School« verbanden sich wie sonst kaum irgendwo die zeitgenössischen intellektuellen Strömungen Amerikas mit den geistes- und sozialwissenschaftlichen Traditionen Europas.

## III.

Es ist nicht einfach, Kriterien festzulegen, die es erlauben, die Erfolge einer Integration von Emigranten in Amerika oder einem anderen Land adäquat zu messen. Was mir möglich scheint, ist die Entwicklung von Kategorien der Reorientierung bzw. der Akkulturation, anhand derer Stufen und Grade der Integration beschrieben und verglichen werden können. Drei Kategorien sollen hier beispielsweise und skizzenhaft aufgeführt werden:

### 1. Emigration als vorübergehendes Exil

Der Entschluß, Deutschland oder Österreich zu verlassen und nach Amerika zu gehen, war für die Professoren der »New School« keine freie Entscheidung gewesen. Das Leben und Überleben in Deutschland war für sie von einem Tag zum anderen unmöglich gemacht worden. Sie mußten weggehen, sie konnten nicht anders. Konnten sie nicht anders? Andere, die letzten Endes viel stärker gefährdet waren und die hinterher getötet worden sind, glaubten nicht emigrieren zu müssen, auch wenn sie die Möglichkeit dazu hatten. Wer aber, solange es möglich war, aus dem »Dritten Reich« emigrierte, war davon überzeugt, keine andere Wahl zu haben. Für die Professoren der »Graduate Faculty« war dieses Bewußtsein durchweg maßgeblich. Deutschland zu verlassen war eine Sache, nach Amerika zu gehen eine andere. Viele gingen daher



zuerst nach England, nach Frankreich, in die Schweiz oder in die Türkei. Eine Anzahl deutscher Professoren blieb für immer in den ersten Asylländern, vor allem in England. Anfangs hatte man dabei durchaus noch Wahlmöglichkeiten, auch wenn diese von den Niederlassungsbestimmungen und den Arbeitsmöglichkeiten in den Asylländern stark eingeschränkt waren. Das Angebot der »New School« in Amerika war eine Alternative zu allen europäischen Exilmöglichkeiten. Aber die meisten Emigranten setzten voraus, daß auch der Aufenthalt in Amerika zeitlich begrenzt sein werde, daß es sich also nicht um eine Auswanderung für die Dauer, sondern um eine vorübergehende Exilsituation handelte, ein *Überwintern in Zeiten großer Not*. Die Mitglieder der »University in Exile« sahen sich zur Zeit der Emigration weder als Einwanderer, die mit der Ankunft in Amerika ihr gewähltes Ziel erreicht hatten, noch sahen sie sich als zukünftige Amerikaner. Ihre Integrationsversuche beschränkten sich daher auf das unmittelbar Notwendige: Englisch zu sprechen (ein eigenes wichtiges Kriterium der Integration), adäquate Arbeit zu leisten, sich im Alltag zurechtzufinden, die Familie in jedem Sinne des Wortes zu erhalten.

Diese Überbrückungszeit war notwendigerweise zwiespältig. Während der bedingte Akkulturationsprozeß im Gang war, wurden die *Selbstverständlichkeiten* der alten Heimat aufrechterhalten, so gut es ging. Vor allem wurde die Hoffnung auf eine baldige politische Änderung in Deutschland wachgehalten. In der Familie wurde deutsch gesprochen, es wurde deutsche Weihnachten gefeiert. Das Exil sollte nur so lange dauern, wie die Rückkehr in die Heimat unmöglich war.

## 2. Emigration als Auswanderung auf Dauer

Mit ihrer Ausbürgerung sind die Emigranten nach und nach staatenlos geworden; sie hatten keinen gültigen Paß mehr. Nach Deutschland konnten sie nicht mehr zurück. Das *Überwintern* war zu einer Eiszeit geworden. Als die USA in den Krieg eintraten, wurden die deutschen Emigranten im Lande zu *Fremden aus Feindesland (enemy aliens)*. Es entstanden zwingende Gründe, sich von Deutschland zu distanzieren, sich des deutschen Sprachgebrauchs in der Öffentlichkeit zu enthalten. Es wurde erwartet, daß sich auch die Emigranten mit amerikanischen Kriegszielen identifizierten. Dadurch entstanden neue Konflikte. Es ging um Loyalität gegenüber dem Gastland, das einem Asyl geboten hatte. Die nationale Identität mit der deutschen Heimat wurde zum Problem. Konnte man sich freuen, wenn Berlin bombardiert wurde? Waren *Hitlerdeutschland* und *das andere Deutschland* noch sauber zu trennen? Spätestens zu dem Zeitpunkt, an dem diese Fragen auftauchten, begannen viele ihre letzten Brücken nach Deutschland abubrechen. Aus den Emigranten im vorläufigen Exil wurden Einwanderer in Amerika.

## 3. Rückkehr als Alternative dauernder Emigration

Die meisten Mitglieder der »Graduate Faculty« sind nach 1945 in irgendeiner Form nach Deutschland oder Österreich zurückgekehrt. Nur einige wenige jüdische Professoren haben nie wieder einen Fuß in die alte Heimat gesetzt.

Manche von ihnen ließen sich nach ihrer Emeritierung in einem europäischen Land, aber nicht in Deutschland nieder. Nur einige wenige haben aber auch einen Ruf an eine deutsche Universität angenommen, um für immer zurückzukehren. Die große Mehrheit ist nur vorübergehend wieder zurückgekommen. Manche kamen unmittelbar nach Kriegsende als Mitarbeiter oder Berater der amerikanischen Militärregierung. Viele kamen zu gelegentlichen Besuchen, um Familienangehörige, Freunde oder einfach Deutschland wiederzusehen. Manche gewöhnten sich daran, regelmäßig (z. B. in den Sommerferien) einige Zeit in Deutschland zu sein. Und eine ganze Reihe der Mitglieder der »Graduate Faculty« waren einmal oder mehrmals als Gastprofessoren an deutschen Universitäten tätig. Insgesamt ergibt das eine breite Palette des Rückkehrverhaltens. Nicht ohne weiteres läßt sich daraus im Einzelfall auf den Grad der Integration in Amerika schließen. Es kann ebensowenig allein schon ein Zeichen geglückter Integration sein, wenn jemand nicht mehr nach Deutschland zurückkehrte, wie die Rückkehr nach Deutschland nicht in jedem Fall das Ergebnis einer gescheiterten Integration in Amerika gewesen sein muß. Ein Einzelfall mag das zum Schluß belegen: Arnold Brecht ist jedes Jahr nach Deutschland zurückgegangen: von 1933 bis 1939, und dann wieder sofort von 1945 bis 1976, als er in Deutschland starb. Er ist in beiden Welten, in Deutschland und in Amerika, bis zu seinem Tode in gleicher Weise zu Hause gewesen, er hat in beiden gearbeitet, ist in beiden erfolgreich gewesen, zu hohen Ehren gelangt, ist beiden treu geblieben, hat beide geliebt und hat nie die eine für die andere eintauschen wollen oder müssen. Arnold Brecht war ein aufrechter Mann. Emigration war sein Schicksal. Er hat es auf seine Weise – mit großer Würde – gemeistert. An das heute gängige Wort *Integration* wird er dabei kaum gedacht haben.

## Anmerkungen

- 1 Alvin Johnson: *Pioneers Progress. An Autobiography*, New York 1952. Von der »New School« veröffentlichte Festreden und Jubiläumsschriften für Alvin Johnson; Irving Dilliard: 1954/55 portrait: Alvin S. Johnson, *American Scholar* 24, 88–95; Alvin Johnson: *Ideas are high explosives. A selection of editorials from the New School Bulletin 1945–1951*, New York 1962. Ein großer Teil des Nachlasses von Alvin Johnson, vor allem Teile seiner umfangreichen Korrespondenz, befindet sich unter der Bezeichnung »Alvin S. Johnson Collection« in der Yale University, Sterling Memorial Library, Manuscripts and Archives, New Haven, Conn. In der sogenannten »Closed Section« der Raymond Fogelman Library der New School for Social Research, 65 Fifth Avenue, New York, gibt es Abschriften von Briefen Alvin Johnsons sowie auch einige Originale davon.
- 2 Vgl. Norman Bentwich: *The rescue and achievement of refugee scholars. The story of displaced scholars and scientists 1933–1952*, The Hague 1953; *The intellectual migration. Europe and America 1930–1960*, Hg. Donald Fleming u. Bernard Baylin, Cambridge, Mass. 1968, darin besonders der Beitrag von Szilard über das »Kaffeestaubtreffen« in Wien im April 1933. Vgl. ferner den Brief von Stephen Duggan vom 27. Mai 1933 an die Präsidenten von Colleges und Universitäten, in dem diese aufgefordert wurden, verfolgten Professoren zu helfen, abgedruckt in Stephen Duggan u. Betty Drury: *The rescue of science and learning. The story of the Emergency Committee in the Aid of Displaced Foreign Scholars*, New York 1948, 173 f. Ebenda, 182 f. auch das Protestschreiben der American Association of University Professors »Protest against tyranny in German Universities«.



- 3 Außer Vorlesungsverzeichnissen, Jubiläumsschriften, Organisationsplänen, Satzungen usw. informiert über die Gründung der »New School for Social Research« im Jahre 1919 vor allem der Bericht von Alvin Johnson in seiner Autobiographie »Pioneers progress«.
- 4 Alvin Johnson, *Pioneers progress*, 274.
- 5 Zur Geschichte der »Ecole Libre des Hautes Etudes« bereitet die französische Soziologin Malaquais u. a. auf der Basis des Quellenmaterials, das in der Sammlung »The Refugee Scholars« in den Rockefeller Foundation Archives vorhanden ist, eine Untersuchung vor.
- 6 Vgl. Benita Luckmann: *The small life-worlds of modern man*, *Social Research* 37, 1970, 580–96.
- 7 Mitteilung von Hans Staudinger in einem Interview mit der Verfasserin am 3. 7. 1978 in New York.
- 8 Arnold Brecht in seiner Vorlesung über »Comparative Government« an der Graduate Faculty im Oktober 1953, nach Vorlesungsnotizen der Verfasserin.





Einstein taking the oath of American citizenship in the Federal District Court in Trenton, New Jersey, in 1940 with Helen Dukas, his secretary (left), and his stepdaughter, Margot Einstein. (National Archives.)

H. S. Hujes ( Social Theory

# THE MUSES FLEE HITLER

Cultural Transfer  
and Adaptation  
1930-1945

Edited by

JARRELL C. JACKMAN

and

CARLA M. BORDEN

Smithsonian Institution Press

Washington, D.C.

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## Foreword

On the eve of World War I, Sir Edward Grey,\* a great hero of mine, wrote: "The lamps are going out all over Europe; we shall not see them lit again in our lifetime." Twenty years later, his image would be tragically apropos again, and I would reflect on it as a seventeen-year-old preparing a speech for school on the rise of the Nazi movement and the danger it posed to us in this country. It seems strange now to think back to those days, when I and my roommate, whose great-grandfather had been a refugee from Germany in 1848, were almost alone in our class in feeling deep concern about the impending crisis abroad.

In this volume, an inquiry into the extraordinary transfer and adaptation of artists and intellectuals from Hitler's Europe to various regions of the world, particularly the United States, the essayists and editors are asking where the "lamps" turned on again and under what conditions. What did this diaspora of savants mean to the receiving countries? How were the fruits of their intellects affected by being planted in new soil? How did they succeed or fail in establishing new niches for themselves in new geographical and human environments? How would the world later profit from the rescue and nurturing of such talent?

\*later Viscount Grey of Fallodon



21. The Feuchtwanger short story was published in Lion Feuchtwanger, *Stories from Near and Far* (New York, 1945). Werfel's *Star of the Unborn* was published in New York in 1946.

22. Thomas Mann, "Joseph and his Brethren," p. 10 (Manuscript of lecture delivered at the Library of Congress, Nov. 17, 1942), Manuscript Collection, Library of Congress, Washington, D.C.

23. Ibid.

24. A more precise number of émigrés who ended up in southern California has yet to be determined. The ten thousand figure is the number estimated by the émigré actor Walter Wicclair in his book *Von Kreuzberg bis Hollywood* (Berlin, 1975), p. 163.

25. Carl Zuckmayer, *A Part of Myself*, trans. Richard and Clara Winston (New York, 1970), p. 345.

26. Ibid., p. 352.

27. Erich Maria Remarque, *Shadows in Paradise* (New York, 1972), p. 205.

28. Quoted in Erika and Klaus Mann, *Escape to Life* (Boston, 1939), p. 265.

29. Marta Mierendorff, *Fifty Years in the Theater: A Publication Celebrating Walter Wicclair's 70th Birthday* (Los Angeles, 1971).

30. Frederick Kohner, *The Magician of Sunset Boulevard: The Improbable Life of Paul Kohner, Hollywood Agent* (Palos Verdes, Calif., 1977), p. 118.

31. "Arnold Schoenberg Institute at the University of Southern California" (Pamphlet issued on the occasion of the opening of the institute, Los Angeles, Feb. 20, 1977).

# Social Theory in a New Context

H. STUART HUGHES

Sometime in the year 1941 a distinguished American sociologist wrote, in behalf of an Austrian-born colleague who was himself to become equally distinguished:

In spite of the fact that he has lived in this country for seven years or more, he has a distinctly foreign appearance and speaks with a strong accent. This prejudices some people against him, and I think some are further prejudiced because they feel that there is occasional arrogance in his manner. Actually, P. is one of the most modest of men, but he does have a rather heavy Germanic way of presenting a topic which tends to make some people feel that there is not as much in the topic as the difficulty in following him would suggest. I think such critics would be occasionally right, but I can testify from experience that there is plenty of pure gold in them thar hills.

The letter is a delightful period piece. It suggests how exotic the émigré scholars still seemed nearly a decade after Hitler's advent and how cautiously those among the native-born who respected them felt they had to proceed in championing the newcomers—even to the point of closing with a stale old-West turn of phrase. It may serve to introduce the central problem in the confluence of American and German social theory: What made it possible for two such contrasting traditions to reach mutual understanding? What circum-



stances led to an interpenetration of assumptions and methods that at certain points amounted almost to symbiosis?

For the more active and imaginative of the émigrés, the difficulty of working with Americans could be summed up in the word *positivism*. Our countrymen struck them as naive fellows, pedestrian, commonsensical, down-to-earth, and hypnotized by "facts." While such a string of adjectives frequently had about it an air of caricature, it was unquestionable that most American social theorists subscribed to the central positivist tenets: they took for granted that the data they were seeking were "out there" and ready for immediate interpretation; it seldom occurred to them that their own mental activities figured in the proceedings. And this philosophical laziness they dignified with the eminently respectable term *empiricism*. Now the German- and Austrian-born were by no means uniformly anti-empiricist. Some of them—particularly those who had studied in Vienna—had come under the influence of a scrupulous form of neo-positivism in logic and epistemology. But one and all they insisted that a mere grubbing for facts would not do: they believed it incumbent on them to adopt a professorial tone toward their hosts—to teach the basics of Kant and Hegel, Marx and Weber, to reluctant listeners, to insist on a rigorous *Fragestellung*, or posing of the question, before the empirical work could begin. Hence the "arrogance" and "heavy Germanic way of presenting a topic" on which the writer of the letter felt obliged to comment. Hence also the annoyance—for the most part unexpressed—of Americans relegated to the rank of schoolboys.

Yet when the Second World War ended, four years after the writing of the letter in question, the émigrés not only had learned to speak our language (with a "strong accent" no longer cause for suspicion or reproach); they also had found common ground on which they and their hosts could approach the study of society. How had this intellectual miracle come about?

First for the preconditions. If we ask what were the circumstances that facilitated the exchange of ideas between émigrés and Americans, we can find at least five special conditions, heterogeneous to be sure, but in most cases mutually reinforcing.

112 Initially it was necessary for the newly arrived themselves to make an effort. They got nowhere if they simply squatted close to some

campus in the expectation that their international renown would automatically procure for them a university chair. A few eminent examples of this sort—fortunately of men with private means—were enough to deter the rest. If one wanted to insert oneself into American intellectual life, one was obliged to make a minimum of concessions—at the very least to simplify one's idiom and to become informed about what (however little) had been accomplished on this side of the Atlantic. One could not go on forever standing (or sitting) as a symbol of the superiority of Old World culture. In short, one needed to open one's mind.

If a certain adaptability was a prerequisite for finding an American audience, so too was a suitable locale. Geography exerted a crucial effect on the distribution and reception of talent. The older intellectual centers did not necessarily prove the most favorable; the Boston-Cambridge area is a case in point. Newer, warmer milieus seemed better able to provide pleasant and easy access between émigrés and native-born. The vast southern California beachhead on which the Germans and Austrians encamped is too well known to require elaboration here. Perhaps less familiar is the role played by the nation's capital. As, after Pearl Harbor, the war agencies sprouted, Washington became the place where those whom the universities had rebuffed could find a job: economic necessity and zeal for the struggle against fascism went hand in hand. And an expert knowledge of central Europe had overnight become a precious commodity. In the informal, frequently chaotic, and benignly tolerant atmosphere of the war agencies, the émigrés encountered native-born Americans who had themselves traveled and studied in their lands of origin. These latter were usually younger than the émigrés—and correspondingly willing to learn. They too had been uprooted—if less drastically—from their familiar environments. It was only natural, then, that open, spontaneous exchanges between these two varieties of scholar should have resulted.

All of which suggests a third precondition. If intellectual exchange went on more freely in a locale unfamiliar to both partners in the conversation, it similarly prospered where the institutional setting was new. The great northeastern universities found room for only a select few among the refugee scholars from central Europe. Still more significantly, the émigrés made only a small dent in such universities' academic procedures. The same was true in Washington. The personnel of the regular government departments changed surprisingly little during the war years: at State, the dominance of



Foreign Service types remained unchallenged; in the Pentagon, one could visit office after office without hearing a "strong accent." In these familiar bastions of government—as, more covertly, in the Ivy League institutions—doubts about the suitability (or possibly loyalty?) of the émigrés lingered longer than in the newer agencies. It was in the interstices of what had not yet come to be called the American "establishment" that the refugees from Germany and Austria found their niche; where bureaucracies or academic departments stood entrenched, they experienced a cool reception.

So much for geography and institutions. What of the "welcoming committee"? Just as the émigrés did best where institutional restraint was light, so the native-born who became their unenrolled "students" were seeking, not always fully consciously, to break the bonds of their previous training. To fields of study where young Americans were in a state of dissatisfaction or revolt, the scholars from central Europe came as heaven-sent messengers of a deeper wisdom. I can testify from personal experience to the staleness and flatness of graduate work in history in the late 1930s. I suspect that dozens of my contemporaries felt the same way about American sociology and political science. A fourth clue to the success of the émigrés may be discerned in the fact that they arrived just at the right time—just at the moment when a new generation of scholars was thirsting for what they had to offer. To us, their native-born juniors, the teaching they imparted was a heady brew, as learned as it was bold, that ranged freely over the whole field of social investigation. It mattered little whether the newcomers were professionally labeled sociologists, historians, or political scientists; the tradition they brought with them scorned such petty-minded demarcations.

A final precondition concerns the critical mass of the émigrés themselves. In order to bring their collective influence to bear, they needed to be concentrated in sufficient numbers. By the same token, there needed to be enough of them in each place or institution to provide mutual support, whether intellectual or emotional. But the optimum situation occurred when their mass was not overwhelming. In a setting where central Europeans outnumbered the native-born, life became deceptively easy for them: in enclaves of this sort, they might go for weeks without a serious conversation in English, visiting cosily back and forth much as they had done before their emigration. The balance between enough and too many was always delicate. It is a crucial consideration to keep in mind when we begin

to assess the achievements and failings of the more prominent locales in which the émigrés congregated.

Two institutions in particular may strike us as having been oversaturated with central Europeans—the New School for Social Research and the Institut für Sozialforschung. About the New School, it is difficult to generalize. Its midtown location in New York City admirably equipped it to attract a highly motivated part-time student body of adults. Its faculty, although constantly shifting and uneven in quality, included at one time or another a large number of the leading scholars in the emigration. But its influence remained diffuse: with its curriculum a miscellany of courses and its students for the most part only fleetingly in contact with their teachers, it was in no position to elaborate a common intellectual program. In this case, then, the preponderance of émigrés was of little significance; the achievements of the New School were those of individual scholars, working as well as they could on low pay and in makeshift facilities.

Quite different was the Institut für Sozialforschung, which resembled the New School only in that it had the words *social research* in its title and was located, temporarily at least, in New York. One prime distinction between the two was that while the New School was always threatening to go broke, the Institut usually had plenty of money. Originally based in Frankfurt—hence the name "Frankfurt School" that became associated with its labors—it had fled Germany early enough to save its endowment. And the money traveled with it again when it moved a second time—perhaps predictably—from the cold winds of Morningside Heights to the more inviting landscape of southern California.

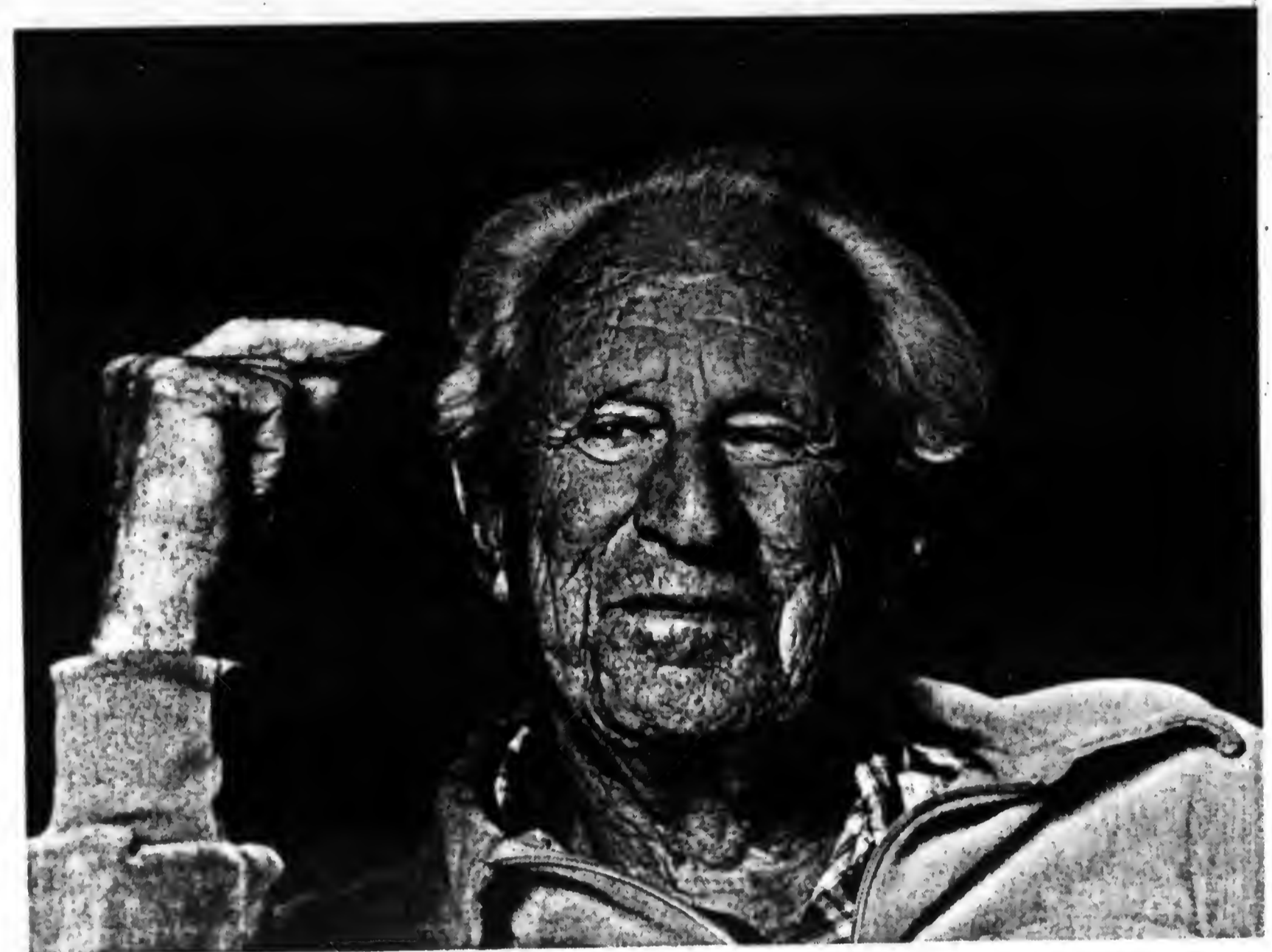
Whether in New York or on the Pacific Coast, the Institut was defiantly and uncompromisingly Teutonic. Its prime movers, Max Horkheimer and Theodor W. Adorno, defined their task in characteristically complex fashion as one of mounting an avant-garde assault on mass culture while preserving what was best in the tradition from which they had sprung. In neither role were they particularly concerned about their public. Indeed, their audience existed chiefly in their imaginations and did not materialize until the 1950s. Horkheimer and Adorno composed their most important works in German; their masterpiece, *Dialectic of Enlightenment*, although sub-



stantially completed in 1944, did not see the light until three years later and languished untranslated for a quarter century thereafter. During the Institut's New York phase, Herbert Marcuse had been associated with it, collaborating with Adorno and Horkheimer in developing its basic concepts. One reason why Marcuse's ideas burst with such explosive force on American readers in the 1960s was that these readers knew nothing that had come before; they never suspected that much of what struck them as totally novel in Marcuse's writings had been common intellectual property within the Institut a generation earlier. For—again unlike the New School—the Institut had a coherent program, which its individual members elaborated as personal whim might prompt.

The central feature of this program was an effort to accommodate the teachings of Sigmund Freud to those of Karl Marx. Such an aim, as Adorno and Horkheimer saw it, debarred them from theoretical exchanges with Americans; ever alert to the danger of shocking their hosts, the leading figures of the Institut went to absurd lengths to conceal their Marxist sympathies. A similar caution did not apply in the case of Freud. And it was in the realm of psychology alone that the Frankfurt School proved willing and able to reach out to American co-workers. The one significant Institut project that involved native-born collaborators was the investigation of "fascist potential" eventually published in 1950 under the title *The Authoritarian Personality*. The book turned out once again to be a curious period piece—or, rather, hybrid. The American and the German contributions never fused; they remained quaintly juxtaposed. On the quantitative, interview-based findings of the experimental psychologists he had recruited, Adorno superimposed an elaborate philosophical gloss that he could just as well have written without them.

In the field of psychology, the émigrés never outnumbered the native born. Here they acted as a leaven rather than an invading force. The subdiscipline of psychoanalysis is perhaps the "human" science most often cited as invigorated and raised to new heights by the arrival of the central Europeans; it also offered the classic example of young Americans eagerly awaiting the message from overseas. In the psychoanalytic institutes of our major cities, the émigrés quickly attained positions of commanding influence. It is astounding to learn of the apparent effortless with which a figure such as Heinz Hartmann, newly arrived from Europe in 1941, began to write lucid English and to overawe his colleagues by the power



Herbert Marcuse in Switzerland on his eightieth birthday, July 17, 1978. He first met H. Stuart Hughes at the Office of Strategic Services in Washington, D.C., during World War II, and they remained friends until Marcuse's death in 1979. (Photo by Isolde Ohlbaum.)

of intellect alone. The explanation, of course, is that the native-born were deferential to a fault: uncertain of the rigor of their own training, they were only too happy to let the Viennese and the Berliners tell them what to do. Thus, the institutional setting that may seem at first glance to have provided the most favorable mix of a majority of Americans stimulated but not overpowered by the émigrés proves on closer inspection to have been somewhat less idyllic. The difficulty here was that the newcomers did most of the talking.

Was true reciprocity ever possible? A fourth and last setting—necessarily less well known than those discussed up to now—suggests that intellectual exchange might proceed best when it came as a by-product rather than the ostensible purpose of an exercise. When Adorno and Horkheimer moved their Institut to California, their colleague Marcuse, following his friend the political scientist Franz Neumann, decided to go to Washington instead. Here Marcuse and Neumann eventually found their way into the Research and Analysis Branch of the newly founded Office of Strategic Services (OSS). The parting from their former associates crucially changed



their lives. No longer were they to live in an enclave of central European society, speculating in Olympian fashion on the origins and future of mass culture: they had now become civil servants, yoked to the task of winning the war. In the OSS they encountered a host of fellow émigrés, amply sufficient to form a "critical mass." But far more significantly, they learned to work closely and harmoniously with native-born scholars on projects whose urgency left little room for theoretical hair-splitting.

There was time, however, for conversation—fleeting, fragmentary, inserted once again in the interstices of the job. The subculture of the OSS's Research and Analysis Branch took the form of an ongoing if ever-interrupted seminar. The Americans might listen more than they spoke, but they were seldom deferential. They even gently teased the émigrés about central European mannerisms and complained about the opacity of Teutonic prose—something that I find difficult to imagine happening in a psychoanalytic institute. Thus on the one hand, the Research and Analysis Branch provided free of charge a second graduate education to young political scientists, historians, or sociologists who were to go on to become professors at major universities. On the other hand, the émigrés who worked with them enjoyed a rare opportunity to familiarize themselves with American manners and values under conditions that minimized occasions for wounded sensibilities or hurt pride. The interchange succeeded for the very reason that it was unintended: neither side needed to be self-conscious about a process that occurred so naturally that only long after the fact did its importance become manifest.

We might conclude that the history of émigré influence in social theory is impossible to write, since what was most rewarding in it was so informal that it went largely unchronicled. It may be worthwhile, however, to draw up a rough balance sheet. Initially, we should distinguish between the intellectual stratosphere and the more mundane plane of practice in the individual disciplines. On the level of grand theory, the philosophically inclined among the newcomers never got very far. The vast majority of their hosts remained unconvinced of the virtue of majestic thought-structures. Hegel tarried in the backwaters; the truly professional study of Marx began only in the late 1960s, and at the hands of young scholars almost totally free from émigré influence. In the pantheon of German social spec-

ulation, Max Weber alone became a naturalized American. And this happy result was in part due to Weber's work having had a firm foundation in empirical research. Moreover, it had never claimed to be an all-encompassing system; it could be—and was—appropriated piecemeal. What the native-born found in Weber was above all a new mental set: they learned to question what they meant by a "fact" and to subject to rigorous scrutiny the implicit value assumptions lurking behind an ostensibly factual inquiry. The Americans who had been persuaded to study Weber could never again be quite as simple-mindedly positivist as they had been before. That was the fundamental lesson of émigré social theory that took root in our country's scholarship.

On the level of individual labors in the several disciplines, we could always reel off a catalog of names. Such listings already exist in the standard works on the subject. In the present context, however, it is more helpful to mention a handful of figures whose influence lingered on long after the emigration experience in the narrower sense was over. In the field of history, Hajo Holborn and Felix Gilbert—both of whom had worked in Washington—continued to act as kind and discreet mentors to the native-born friends they had met in government service. Their characteristically European conviction that the writing of history was above all a process of thought—of imaginative reconstruction—little by little became second nature to those whom they counseled. In the field of sociology, Paul F. Lazarsfeld enjoyed a comparable position as someone whose advice was constantly sought and usually acted upon. Among émigré sociologists, Lazarsfeld was distinguished by his forthright empiricism; this gave him from the start a kind of acceptability with the native-born that eluded his more dogmatic colleagues. But Lazarsfeld wore his empiricism with a difference: he insisted that one should not proceed with an investigation until its methodological assumptions had been clearly staked out. The contemporary, sophisticated study of voting behavior sprang largely from his precept and example.

When one turns to the great success story of émigré influence—the theory and practice of psychoanalysis—the name of Heinz Hartmann once again inevitably comes to mind. And with it comes the realization that all is not well in psychoanalysis today. Its current difficulties are by no means entirely of its own making: a number can be ascribed either to financial stringency or to a disquieting current of anti-intellectualism in the psychiatric profession. But some part directly derives from the triumph of the central Europeans.



Scrupulously loyal to Freud's legacy, Hartmann and his co-workers refused to discard any of the intellectual baggage they had taken with them across the Atlantic. Still more, they lovingly elaborated what they already had. The result was an ever wider gap between the complexities of theory and the simpler, more verifiable insights of clinical practice. Their work also debarred American psychoanalysis from fully absorbing a body of work that might have helped to close that gap—the work of the British school of W. Ronald D. Fairbairn and D.W. Winnicott, whose allegiance to the basic Freudian discoveries was tempered by the hard-won knowledge they had wrung out of their own professional experience.

Must the verdict, then, be ambivalent? Must we substitute for the word *miracle* some cautious or guarded term to describe what émigré influence accomplished? I hesitate to go that far. As a living example of intellectual enrichment through the emigration, I have a vested interest in holding onto what I learned three decades ago. I suggest, rather, that this experience—like all good things—finally reached its end and that the termination occurred in the 1970s. As the émigrés died off or retired, and as other scholars who had sat at their feet became the older generation of scholars, the link that had held the German and American traditions together began to wear thin. Even at its best it had never been as strong as it appeared; only in the sort of privileged instances to which I have alluded had assumptions and methods been truly shared. Thus, as a younger generation of Americans who had no direct knowledge of the emigration came of age, its lessons began to be forgotten. Witness the current recrudescence of positivism in social science. Witness the renewed tendency to slice up the study of society into clearly demarcated disciplines and subdisciplines.

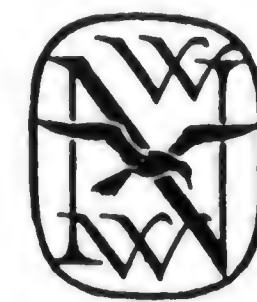
But one achievement no amount of intellectual erosion can destroy: from the emigration experience American social theory emerged deprovincialized. And that it has remained.

## *Transplanting the Arts*



THE (CLOCK  
OF HISTORY)

By ALVIN JOHNSON



W · W · NORTON & COMPANY · INC · *New York*

1946



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The New School had the honor and privilege of bringing to this country a large number of the distinguished scholars who were driven into exile by the advance of totalitarianism. Among them were distinguished artists, musicologists, philosophers, social scientists, geographers, physical scientists, mathematicians. They came from Germany, Poland, Russia, Czechoslovakia, Switzerland, France, Spain, Italy, Belgium, Holland, Scandinavia.

What does it mean to assemble in America scholars of diverse nationality, diverse temperaments, diverse training and experience? It means a new stimulus to our intellectual life. Modern scholarship has always been international. There is no field of thought in which the scholars of one nation have not drawn heavily upon the studies of scholars of other nations. A country may make itself entirely self-sufficing economically, if it is prepared to pay the cost, which is heavy. A country cannot make itself self-sufficing intellectually unless it is prepared to sink back to a low plane of scholarship. Future intellectual historians will record a notable advance in American science and philosophy and art, resulting from the migration of European scholars and artists to America.

But is there not a danger that these foreign scholars will occupy places that would otherwise be filled by American scholars? In predepression times there was a current saying: "Business makes business." It is still a true saying. If we had given a monopoly of the automobile to a single concern there would have been very few automobiles congesting our streets. Particularly in the fields of the arts and scholarship, "business makes business." The creation of a strong archeology department in one university forces other universities to brace up to responsibility for this field. The success of one

artist arouses the public interest in art. What scholarship and the arts have to fear is stagnation, not competition. And the accession of foreign scholars and artists to our educational personnel necessarily operates to abate stagnation.



**Die Deutsche  
Akademische Emigration  
nach den Vereinigten Staaten  
1933-1941**

Von

Dr. Helge Pross

Mit einer Einführung von

Prof. Dr. Franz L. Neumann †



DUNCKER & HUMBLLOT / BERLIN 1955



Helge Poon

## Einführung

Im Winter 1952 bat mich die University of Pennsylvania, im Rahmen ihrer Benjamin-Franklin-Lectures den einleitenden Vortrag in einer Serie zu halten, die sich mit dem Problem „The Cultural Migration“, der kulturellen Emigration, befassen sollte. Mein Thema war der Einfluß der deutschen Emigration auf die Sozialwissenschaften, während Paul Tillich (Union Theological Seminary) über Theologie, Henri Peyre (Yale University) über Literaturgeschichte, Wolfgang Köhler (Swarthmore) über Psychologie, Erwin Panofsky (Institute for Advanced Studies in Princeton) über Kunstgeschichte referieren sollten. Diese Vorträge sind dann von der University of Pennsylvania Press veröffentlicht worden (Philadelphia 1953).

Ich übernahm den Auftrag der Universität in dem Glauben, daß es recht leicht sein würde, den Einfluß der deutschen akademischen Emigration auf die Entwicklung der amerikanischen Sozialwissenschaften konkret darzustellen. Aber ich fand bald das Gegenteil heraus. Mangel an Zeit verbot mir, die Forschungsarbeit zu treiben, die notwendig gewesen wäre, um das Problem nach allen Seiten zu behandeln.

Gerade als ich das Vortragsmanuskript für den Verleger fertiggestellt hatte, erschien die Verfasserin, eine junge Heidelberger Soziologin und Fellow des Commonwealth Fund, bei mir, um mich zu interviewen. Wegen des großen Interesses an dem Problem, welches mein eigener Vortrag zwar geweckt, aber nicht befriedigt hatte, erklärte ich mich gern bereit, die Patenschaft ihrer Arbeit zu übernehmen.

Das kleine Buch ist ein wichtiger Beitrag zum Verständnis der intellektuellen Emigration, gerade weil es mehr Fragen stellt, als es beantworten kann.

Es ist erstaunlich, wie wenig Vorarbeiten es auf diesem Gebiete gibt. Der Einfluß der vor und nach dem Fall von Konstantinopel nach dem Westen gekommenen Gelehrten ist nie systematisch untersucht worden, und im Grunde hat Edward Gibbon dazu das letzte Wort gesagt. Ebenso wenig ist es möglich, die Bedeutung der hugenottischen



Emigranten für die intellektuelle Entwicklung der Aufnahmeländer festzustellen, trotz der zahlreichen Veröffentlichungen der Hugenotischen Gesellschaften in den verschiedenen Ländern.

Das erste große Verdienst des kleinen Buches ist es, die Aufmerksamkeit auf diese Probleme gelenkt zu haben. Das wird erleichtert durch die sehr klaren und scharfen Unterscheidungen, die die Verfasserin in die Literatur einführt.

Die Verbindung von historisch-systematischer Analyse und Feldstudie halte ich für besonders geglückt und fruchtbar. Es ist, wie die Verfasserin überzeugend nachweist, unmöglich, den Einfluß der deutschen akademischen Emigration zu quantifizieren, dennoch aber ist es der Verfasserin gelungen, ein Bild von den Bedingungen für die erfolgreiche Rezeption der deutschen Emigration und von ihren Beiträgen zu geben, das in seiner Klarheit und Sensitivität wohl überzeugender ist als das von anderen erarbeitete Zahlenmaterial.

Meine Hoffnung ist, daß das kleine Buch zu weiteren Arbeiten auf dem Gebiet anregen wird.

Z. Zt. Berlin, den 30. Juli 1954.

Franz L. Neumann

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### Vorbemerkung

Die vorliegende Arbeit entstand dank eines Fellowships des Commonwealth Fund in New York, der mir einen zweijährigen Aufenthalt, von 1952 bis 1954, in den Vereinigten Staaten ermöglichte. Es ist mir ein Bedürfnis, dem Commonwealth Fund und insbesondere den Herren E. K. Wickman und Dr. L. V. Hammond noch einmal meinen Dank für das großzügige Fellowship und ihre freundliche Hilfe auszusprechen.

Besonderen Dank schulde ich Herrn Professor Franz L. Neumann für seinen wissenschaftlichen Rat und die unschätzbaren Anregungen, die ich von ihm erfahren habe.

Düsseldorf, den 3. August 1954.

H. P.

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## I. Deutsche Ausgangssituation 1933

### 1. Entlassung von Hochschullehrern

Das „Gesetz zur Wiederherstellung des Berufsbeamtentums“ vom 7. April 1933 erlaubte der Hitler-Regierung, alle Beamten zu entlassen, die aus politischen oder ethnischen Gründen den nationalsozialistischen Prinzipien nicht entsprachen<sup>1</sup>. Beamte, einschließlich derer an Körperschaften des öffentlichen Rechtes wie der Universitäten, wurden ihrer Ämter enthoben,

1. wenn sie Mitglieder der kommunistischen Partei oder kommunistischer Hilfsorganisationen waren;
2. wenn sie sich in Zukunft marxistisch, d. h. sozialdemokratisch oder kommunistisch betätigen würden;
3. wenn ihre bisherige politische Tätigkeit keine Gewähr dafür bot, daß sie jederzeit rückhaltlos für den nationalen Staat eintreten würden;
4. wenn sie nicht-ariischer Abstammung waren.

Die letzte Bestimmung galt nicht für die Frontkämpfer des ersten Weltkrieges, für Beamte, die schon vor dem 1. August 1914 im Staatsdienst standen oder für die Väter und Söhne von Kriegsgefallenen.

Zwei Jahre später, am 4. November 1935, verordnete die Regierung die Entlassung aller noch im Amt verbliebenen jüdischen Beamten und hob die ursprünglichen Ausnahmen auf. Diese waren auch vorher nur begrenzt wirksam gewesen. Denn man hatte die Klausel des Gesetzes vom 7. April 1933, nach der Beamte im Interesse einer „Vereinfachung der Verwaltung“ zwangsweise pensioniert werden konnten, hauptsächlich gegen die Juden angewandt, die in eine der Ausnahmekategorien gehörten. Entlassene hatten keinen Versorgungsanspruch, zwangsweise Pensionierte erhielten zwei Drittel oder die ganze Pension. Am 26. Januar 1937 folgte endlich das Deutsche Beamtengesetz, das Beamte als „Vollstrecker des Willens des von der NSDAP getragenen Staates“ definierte, den Treueid auf Hitler befahl und die Entlassung derjenigen verfügte, deren Ehepartner nicht deutschen oder „artverwandten“ Blutes waren.

Diese Gesetze erlaubten oder erzwangen die Entlassung politisch oder ethnisch unliebsamer Beamter. Wieviel Hochschullehrer betroffen wurden, läßt sich nicht mit absoluter Genauigkeit feststellen. Nach der

<sup>1</sup> Reichsgesetzblatt I, 175.



Staatsbürgern, zu ausgeglichenen, emotionell und intellektuell besonnenen, selbstbeherrschten Persönlichkeiten gebildet werden, die in der Lage sind, selbständig zu urteilen, und die später die führenden Stellen im Staat einnehmen können. Damit strebt man also, vor allem in Oxford und Cambridge, das Ideal der Bildung einer nationalen Elite an.

Diese Elite ist zu einem erheblichen Teil im Civil Service repräsentiert. Im Gegensatz zu allen anderen Ländern rekrutiert er sich aus den College-Studenten, die in ihrer Mehrzahl nicht beruflich-spezialistisch trainiert sind, sondern nach Allgemeinbildung, methodischer Klarheit, Entschlußfähigkeit, Gemeinschaftssinn und guten Manieren ausgewählt werden<sup>6</sup>. Dies Ideal ist ausgesprochen englisch und von dem der anderen Nationen unterschieden. Ausländische Naturwissenschaftler können, wegen der Internationalität ihrer Wissenschaften, in diesem System noch eher verwendet werden als Geistes- und Sozialwissenschaftler. Niemand vertraut die Auslese seines Volkes gerne fremden Lehrern an, und die Ausrichtung auf ein so spezifisch englisches Ideal erschwerte nicht nur die Aufnahme deutscher Gelehrter, sondern stellte auch die, die untergebracht werden konnten, vor große Anpassungsschwierigkeiten.

Ein weiterer Faktor, der die Anstellung einer größeren Zahl von deutschen Emigranten verhinderte, war der geringe Umfang der sog. Graduate Studies, also derjenigen, die zum Doktorgrad führen. Es gab 1928/9 im Vereinigten Königreich nur 2 100 Graduate-Studenten, davon 1 300 in den Naturwissenschaften. Wie wenig das Studium für Fortgeschrittene, für höhere Semester damals entwickelt war, zeigt die kaum bekannte Tatsache, daß Doktorexamen und -titel (Ph. D.) erst 1918 eingeführt wurden, und zwar hauptsächlich, um amerikanische Studenten anzuziehen<sup>7</sup>. Sir Ernest Barker erzählt in seiner Autobiographie<sup>8</sup>, wie schwierig es immer war, in Cambridge ein Seminar von Graduate-Studenten zusammenzubringen. Das gelang ihm nur ein einziges Mal, und dann bestand sein Seminar in der Mehrzahl aus Ausländern. Erst das Ende des zweiten Weltkrieges brachte auch hier die entscheidende Änderung<sup>9</sup>.

Das alles heißt nicht, daß Englands akademische Intelligenz nicht bereit gewesen wäre, den ausgestoßenen deutschen Kollegen zu helfen. Aber ihrem Entgegenkommen waren durch den Charakter des Universitätssystems Grenzen gesetzt, und je enger diese waren, desto höher sind die Hilfsleistungen zu werten, von denen wir hier nur die wichtigsten andeuten.

<sup>6</sup> H. R. G. Greaves, *The Civil Service in the Changing State*. (London 1947), S. 65.

<sup>7</sup> Barker, *op. cit.*, S. 92.

<sup>8</sup> *Age and Youth. Memoirs of Three Universities*. (London 1953), S. 166 f.

<sup>9</sup> Siehe Seite 35, Anmerkung 4.

Es wurde bereits erwähnt<sup>10</sup>, daß wenige Wochen nach Hitlers Machtergreifung führende Männer der Wissenschaft und des öffentlichen Lebens den Academic Assistance Council gründeten, um den Universitätslehrern und Forschern beizustehen, die auf Grund ihrer Religion, ihrer politischen Ansichten oder ihrer Rasse ihre Arbeit im eigenen Land nicht weiter fortsetzen konnten<sup>11</sup>. Diese interkonfessionelle und unpolitische Gesellschaft sammelte Geld, mit dem sie geflohenen deutschen Wissenschaftlern die Möglichkeit zur Arbeit an Universitäten und in Laboratorien gab. Es ging zunächst darum, ihnen den Übergang zu erleichtern, bis sie später permanente Stellen innerhalb oder außerhalb Englands fanden<sup>12</sup>. 1937 wurde der Academic Assistance Council umgewandelt in die Society for the Protection of Science and Learning, die ihre Hilfstätigkeit auf geflohene Wissenschaftler aus ganz Zentraleuropa ausdehnte. England und die englischen Universitäten dienten ihnen in erster Linie als Auffanghafen, als Durchgangsland, wo sie nach einer dauerhafteren Bleibe Ausschau halten konnten, ohne den Kontakt mit ihrer Arbeit völlig zu verlieren. In vielen Fällen erleichterte der Aufenthalt den Schritt nach Übersee, vor allem nach Amerika, und führte die Deutschen in die ihnen so ungewohnte angelsächsische Welt ein.

### 3. Die amerikanischen Universitäten

Amerika war aufnahmefähiger als irgendein anderes Land des westlichen Kulturkreises. Durch die große Zahl seiner akademischen Anstalten, seiner Studenten und Lehrer, durch die Elastizität und Vielfaltigkeit seines Hochschulsystems und die rapide Expansion des gesamten Erziehungswesens in den letzten fünfzig Jahren waren wichtige Voraussetzungen gegeben, die sowohl die äußere Unterbringung wie die innere Rezeption emigrierter deutscher Geistes- und Sozialwissenschaftler erleichterten. In diesem riesigen, über einen ganzen Kontinent gespannten Netz akademischer Institutionen gab es ungleich mehr Lücken, die von Emigranten gefüllt werden konnten, als in dem engeren, statischen, begrenzteren englischen Hochschulsystem.

#### a) Das Liberal Arts College

Aber der Reichtum an Variationen hat auch seine Kehrseite. Die außerordentlich großen Unterschiede in der Art der Anstalten, in den Erziehungsprinzipien und in der Qualität der Hochschulen, die zahl-

<sup>10</sup> Siehe Seite 15.

<sup>11</sup> Norman Bentwich, *op. cit.*, S. 14.

<sup>12</sup> Später entstanden weitere Hilfsorganisationen für deutsche Gelehrte und Angehörige anderer akademischer Berufe, so u. a. das Jewish Professional Committee. Die Federation of University Women in England nahm sich vor allem der weiblichen Emigranten an. Bentwich, *op. cit.*, S. 15.



reicher und schärfer sind als irgendwo in Europa, machen es schwer, dies System zu übersehen. Unsere Aufgabe hier ist es, einige der entscheidenden Eigentümlichkeiten des amerikanischen Hochschulsystems aufzuzeigen, weil nur so klar wird, welche Bedingungen die Aufnahme von Deutschen begünstigten, wo Deutsche am besten hereinpäßten, und welche Besonderheiten des Systems andererseits die Einordnung fremder Gelehrter ausschlossen oder hemmten.

Nach der Art der Anstalten und ihren Bildungsidealen kennt Amerika drei Kategorien von Hochschulen:

- Liberal Arts Colleges
- Berufshochschulen (Professional Schools)
- Universitäten<sup>13</sup>.

Davon ist das Liberal Arts College die wichtigste Basis des gesamten höheren Bildungswesens, auf der alle Universitäten und die meisten Berufshochschulen aufbauen. Eine charakteristisch amerikanische Schöpfung, gibt es in Deutschland nichts, was dem Liberal Arts Colleges verwandt oder vergleichbar wäre. Es will im wesentlichen der Allgemeinbildung der Studenten dienen, bevor sie sich einem Fachstudium widmen oder in reiner Erwerbsarbeit untertauchen. Doch das College ist mehr als nur eine Lehranstalt, es ist zugleich eine Lebensgemeinschaft und stellt so eine einzigartige Kombination aus humanistischer deutscher Bildungsidee und englischem Collegeideal dar. Die Identifizierung des Studenten mit dem College spielt in den USA eine bedeutende Rolle. Wer z. B. am Harvard College studiert hat, bleibt ganz gleichgültig in welchem Fach er arbeitet, für den Rest seines Lebens ein Harvard-Mann, der die Ereignisse am College weiter verfolgt, auch wenn er es längst verlassen hat; der oft an seinem Wohnort dem Club ehemaliger Harvardstudenten, der sog. Alumni, angehört und in vielen Fällen durch eigene Stiftungen zur Finanzierung seines Colleges beiträgt. Dies lebt hauptsächlich von solchen Dotationen, Erbschaften und anderen Geschenken seiner Alumni. Die Studenten der anderen privaten Colleges empfinden ähnlich. Sie bezeichnen sich nur selten als Schüler eines bestimmten Lehrers und ihre Loyalität gilt dem College, nicht dem einzelnen Professor. Ihr Zugehörigkeitsgefühl zur Institution wird dadurch noch verstärkt, daß sie weniger wandern als ihre deutschen Kommilitonen und fast immer vier Jahre an einem College verbringen.

Von diesen vier Jahren werden die beiden ersten vornehmlich auf generelle Einführungen in Geschichte, Literatur, Philosophie, poli-

<sup>13</sup> Außerdem gibt es die sog. zweijährigen Junior Colleges, die aber aus unserer Betrachtung ausscheiden, weil sie nach deutschen Begriffen keine akademischen Anstalten sind. 1948/9 gab es 121 Universitäten, 453 selbständige Liberal Arts Colleges und 484 selbständige Berufshochschulen. Richard A. Ostheimer, *A Statistical Analysis of the Organization of Higher Education in the United States, 1948—1949*. (New York 1951), S. 89.

tische und wirtschaftliche Entwicklung und in die Naturwissenschaften verwendet. In den beiden folgenden Jahren beginnt dann eine gewisse Spezialisierung (z. B. Vorbereitung auf Jura- oder Medizinstudium), und das ganze Programm endet (nach bestandenen Abschlußexamen) mit dem Titel eines Bachelors of Art (B. A.). Weil das Schwergewicht des gesamten Lehrplans auf der Allgemeinbildung ruht<sup>14</sup>, ist die Lehrfähigkeit des Dozenten oft wichtiger als seine Gelehrsamkeit. Das machte es den deutschen Gelehrten, vor allem am Anfang und den Älteren, schwer, sich einzufügen, und man hat immer wieder beobachtet, daß sie sich für den Unterricht von Collegestudenten weniger eignen, als für fortgeschrittene, reifere Studenten<sup>15</sup>. Die Intensität der Beziehungen zwischen Lehrer und Schüler, die besonders an kleineren Colleges hohe Zahl der Vorlesungsstunden nahmen ihn so stark in Anspruch, daß er nur zu oft seine Forschungstätigkeit gar nicht oder in erheblich beschränktem Umfang fortsetzen konnte.

#### b) Die Graduate-Fakultäten

Aus diesem Grunde fühlten europäische Gelehrte sich im allgemeinen an den Universitäten eher zu Hause, deren Herzstück die sog. Graduate Schools (oder Graduate-Fakultäten) sind, an denen Forschungsarbeit in einer der europäischen ähnlichen Form betrieben wird<sup>16</sup>. Außer der Graduate-Fakultät gehören zur Universität meist ein Liberal Arts College und die Professional Schools, doch weisen die Graduate Schulen die stärkste Verwandtschaft mit englischen oder deutschen Universitäten auf. Sie sind der internationalste

<sup>14</sup> Es ist immer wieder betont worden, daß Allgemeinbildung das Ziel des Colleges ist. Als sich in den dreißiger Jahren abermals eine Welle des Protestes gegen Überspezialisierung und rein utilitarisches Berufstraining erhob, gingen viele Colleges und Universitäten daran, ihre Erziehungsprogramme erneut durchzudenken und zu reformieren. Diese Diskussion fand in zahlreichen Büchern ihren Niederschlag. Siehe z. B. Alexander Meiklejohn, *Education between two Worlds*. (New York 1952); Mark van Doren, *Liberal Education*. (New York 1943); *Liberal Education Re-Examined*, Report of a Committee consisting of Theodore M. Greene, C. G. Fries, H. M. Wriston and W. Dighton. (New York 1943).

<sup>15</sup> Duggan and Drury, op. cit., Kapitel X.

<sup>16</sup> Deutsche Universitäten haben starken Einfluß auf Entwicklung und Organisation der Graduate-Fakultäten ausgeübt. 1847 führte Harvard die ersten Graduate-Studien ein, andere Universitäten folgten, vor allem nach dem Ende des Bürgerkrieges (1865). Richard J. Storr, *The Beginnings of Graduate Education in America* (Chicago 1953). — Der deutsche Einfluß machte sich direkt und indirekt bemerkbar, direkt z. B. im Fall des ehemaligen Burschenschafters Franz Lieber. Lieber wanderte 1826 aus Deutschland aus, wurde 1857 Professor für politische Wissenschaft an der Columbia Universität in New York und hat sich dort entscheidend an der Gründung der Graduate-Fakultät beteiligt. Indirekt durch amerikanische Gelehrte, die in Deutschland studiert hatten und später zu Hause die Einführung von Fachstudien nach deutschem Muster befürworteten. Bernard Edward Brown, *American Conservatives: The Political Thought of Francis Lieber and John W. Burgess*. (New York 1951.)



Bestandteil der Universität, wie es sich aus der Natur der Probleme ergibt, die freier wissenschaftlicher Arbeit aufgegeben sind. Rein äußerlich schließen die Graduate-Studien (nach einem Jahr) mit dem Titel eines Master of Arts (M. A.) oder (nach mindestens zwei, normalerweise aber nach mehreren Jahren) mit dem des Philosophiae Doctor (Ph. D.) ab. Der M. A. sagt wenig über wissenschaftliche Qualifizierung aus, wogegen der Ph. D. heute für jeden, der in die akademische Laufbahn geht, die entscheidende Legitimation ist. Lenkung und Beratung dieser zukünftigen Doktoren verlangen vom Ordinarius ungleich mehr Zeit und Anteilnahme, als man es in Deutschland gewohnt ist, und sind dabei doch nur ein kleiner Teil der zahlreichen Examina, die er durchzuführen hat.

#### c) Die Berufshochschulen

Wichtige Wissenschaftsgebiete (wie Jura, Medizin, Betriebswirtschaft u. a.), die in Deutschland als Fakultäten zur Universität gehören, sind in Amerika in reinen Berufshochschulen, Professional Schools, organisiert, die entweder selbständig oder der Universität angegliedert sein können. Deutsche Gelehrte konnten hier (abgesehen von der Medizin und den Naturwissenschaften) nur sehr schwer Einlaß und Aufnahme finden, weil die Ausbildung rein pragmatisch auf ein Berufsexamen hinzielt und sich ausschließlich nach den Erfordernissen des Berufes richtet, die ja in allen Nationen verschieden sind<sup>17</sup>.

Alle die genannten Teile, Liberal Arts Colleges, Graduate-Fakultät und Professional Schools, aus denen das oft so umfangreiche Gebilde, die Universität, besteht, gehören kaum durch innere Notwendigkeit zusammen. Viele seiner Glieder könnten genau so gut selbständig und unabhängig voneinander existieren und werden hauptsächlich durch zwei Bande zusammengehalten, äußerlich durch die gemeinsame Verwaltung, innerlich durch ihr Zusammengehörigkeitsgefühl, dadurch, daß sie sich trotz ihrer verschiedenen Einzelziele mit dem größeren Universitätsganzen identifizieren.

#### d) Qualitätsunterschiede und Akkreditierung

Nicht nur die außerordentliche Verschiedenartigkeit der Anstalten, sondern die vielleicht noch größeren Qualitätsunterschiede machten es dem deutschen Gelehrten häufig so schwer, sich zurecht zu finden und selbst festzustellen, wohin er am besten passen würde, oder wo eine

<sup>17</sup> Zur Zeit gibt es akademische Berufsausbildung, innerhalb oder außerhalb der Universitäten, auf folgenden Gebieten: Jura, Medizin, Zahnmedizin, Maschinenbau, Forstwirtschaft, Bibliothekswesen, Pharmazie, Veterinärmedizin, Landwirtschaft, Lehrerbildung, Zeitungskunde, Musik, Wohlfahrtspflege, Theologie, Wirtschaftsprüferwesen, Architektur, Krankenpflege, Internationale Beziehungen. A. J. Brumbaugh, *American Colleges and Universities*. 5. Auflage 1948. Kapitel IV.

frei Stelle sich bot. Deshalb war die Vermittlung von Hilfsagenturen wichtig, von denen weiter unten noch die Rede sein wird. Weder die Bezeichnung „College“ noch der Name „Universität“ sagen an sich schon etwas über die Qualität einer Anstalt aus, die sowohl eine zweit- oder drittklassige wie eine akademisch hochstehende Institution sein kann. Dies Qualitätsproblem geht uns hier auch deshalb an, weil die Ernennung zum Professor an einer minderwertigen Anstalt an sich wenig über den Erfolg eines Emigranten aussagt.

Objektive Anhaltspunkte für die Bewertung der Qualität einer Hochschule sind durch die verschiedenen Akkreditierungssysteme gegeben. Während Ruf und Name einer Schule selbstverständlich eine große Rolle spielen, mußte man doch für die Masse der Anstalten bestimmte sachliche Kriterien entwickeln, nach denen ihre Qualität beurteilt werden kann. Für die Berufshochschulen arbeiten die Berufsvereinigungen, wie z. B. die American Medical Association, Richtlinien aus, deren Anforderungen eine Anstalt entsprechen muß, um von der Vereinigung akkreditiert, d. h. als fachlich vollwertig anerkannt zu werden. Die Ausbildung an diesen Hochschulen erfüllt die Mindestvoraussetzungen, die die offiziellen Vertreter eines Berufes für unerlässlich halten, um ein Absinken ihres fachlichen Niveaus und des Nachwuchses zu verhindern<sup>18</sup>.

Daneben übt der Staat (und zwar der Einzelstaat, nicht der Bund) durch sein Lizensierungssystem (Approbation) einen gewissen Druck auf die Schulen aus. Jeder höhere Beruf ist lizenzpflichtig, d. h. wer einen freien Beruf praktizieren will, muß eine staatliche Genehmigung dafür haben. Bei der Erteilung der Lizenzen arbeitet der Staat eng mit den Berufsvereinigungen zusammen und verläßt sich auf ihre Empfehlung und Akkreditierung. Er unterhält einen eigenen Prüfungsausschuß (Board of Examiners), vor dem der Kandidat ein zusätzliches Examen ablegt. Das System der Lizensierung wird zwar in den Staaten verschieden gehandhabt, garantiert jedoch ein gewisses einheitliches Qualitätsminimum der Berufe<sup>19</sup>.

Für Universitäten und Colleges gibt es keine öffentliche oder staatliche Mitwirkung bei der Akkreditierung. Sie ist reine Privatangelegenheit. Bei der Beurteilung der Universitäten kann man sich im wesentlichen auf die Vereinigung der Amerikanischen Universitäten (Association of American Universities) verlassen. Sie

<sup>18</sup> 1948/49 gab es 484 akkreditierte Berufshochschulen, darunter 170 Seminare für Lehrer und 193 Theologische Seminare. 200 davon waren öffentliche und 284 private Anstalten. R. H. Ostheimer, *op. cit.*, S. 46.

<sup>19</sup> Die Lizensierung war in den dreißiger Jahren besonders wichtig für emigrierte deutsche Ärzte, die häufig nochmal zur Universität gehen mußten, bevor sie für eine eigene Praxis zugelassen wurden. Donald P. Kent, *The Refugee Intellectual*. (New York 1953), S. 125 ff.



nimmt nur besonders qualifizierte Universitäten auf. Gegenwärtig gehören von den 121 Universitäten nur 34 der Vereinigung an.

Die Akkreditierung der selbständigen Colleges ist komplizierter. Dafür sind sechs regionale Vereinigungen zuständig, die aus Vertretern der höheren Schulen und der besseren Colleges in einem bestimmten Gebiet bestehen. Sie arbeiten Maßstäbe aus, nach denen sie ein College bewerten und akkreditieren. 1948/49 gab es (nach einem Bericht des U.S. Office of Education) 306 Vierjahres-Colleges, die nicht akkreditiert waren, also das von einer regionalen Vereinigung als notwendig erachtete Qualitätsniveau nicht erreichten<sup>20</sup>.

#### e) Fakultät und Universitätsverwaltung

Die Andersartigkeit seiner Stellung in der Universität und der gesamten Universitätsverwaltung war für den deutschen Professor, den Staatsbeamten mit Pensionsberechtigung, der an Fakultätsautonomie und kompetente Ministerialbeamte gewöhnt war, eine weitere Quelle von Schwierigkeiten. Handelt es sich um eine öffentliche, aus Staats- oder Gemeindegeldern finanzierte Universität, dann greifen die Politiker häufig in die Verwaltung ein, sei es, daß sie sich in die Gestaltung des Lehrplans, in die Zusammensetzung des Lehrkörpers oder in andere Aufgaben der Universität einmengen. Oft genug sind die Universitätspräsidenten von den Politikern abhängig, weil sie Jahr für Jahr vor dem Haushaltsausschuß des Staats- oder Gemeindeparlamentes erscheinen und um ihr Budget kämpfen müssen.

Bei den privaten Hochschulen muß man zwischen religiösen und säkularen unterscheiden. Da die amerikanische Verfassung die Trennung von Staat und Kirche vorschreibt, können öffentliche Anstalten nicht konfessionell sein. Den Religionsgemeinschaften steht es jedoch frei, eigene private Schulen und Hochschulen zu gründen, an denen das religiöse Element verschieden stark vertreten ist. Es dominiert selbstverständlich an den katholischen, spielt dagegen an den von Protestanten kontrollierten Colleges und Universitäten, wie etwa an den Quäkercolleges, häufig so gut wie gar keine Rolle<sup>21</sup>.

Die Probleme des Professors in seinem Verhältnis zur Verwaltung erwachsen an den privaten Hochschulen (ob religiös oder nicht) zu einem erheblichen Teil aus der ungleich größeren Macht der zwei entscheidenden Organe, des Board of Trustees und des Präsidenten. Die

<sup>20</sup> John D. Millett, *Financing Higher Education in the United States*. (New York 1952), S. 79.

<sup>21</sup> Von den 57 privaten Universitäten sind 33 säkular, 10 stehen unter protestantischer, 14 unter katholischer Kontrolle. Dem entsprechen bei den 416 privaten Liberal Arts Colleges 65 säkulare, 239 protestantische und 112 katholische. Unter den 284 privaten Berufshochschulen gibt es 80 protestantische, 98 katholische und 15 jüdische theologische Seminare. *Ostheimer*, op. cit., S. 47.

Treuhänder (Trustees) verwalten nicht nur die Vermögen<sup>22</sup>, sondern bestimmen auch die Richtlinien der Universitätspolitik. Sie ernennen (meist auf Lebenszeit) den Universitäts- oder Collegepräsidenten, der ihnen, und nicht der Fakultät, für die gesamte Administration verantwortlich ist. In vielen Fällen ist er weder ein Wissenschaftler, noch ein Verwaltungsfachmann, sondern ein Mann der Öffentlichkeit, der wegen seiner sonstigen Verdienste auf diesen Posten berufen wurde<sup>23</sup>. Normalerweise ist die Verwaltung amerikanischer Universitäten autoritärer, der Verwaltungsapparat umfangreicher als in Deutschland, wo ein Teil der administrativen Arbeit schon in den Ministerien geleistet wird. Der Einfluß der Fakultät beschränkt sich hauptsächlich auf Lehrplangestaltung und Berufungen, die vom Präsidenten und den Treuhändern bestätigt werden müssen<sup>24</sup>.

#### f) Die Ausweitung des Studiums

Bei allen diesen Schwierigkeiten, die Übersicht und Anpassung erschweren, darf man doch dies nicht übersehen: es ist gerade die Vielfältigkeit des Systems, und die ungeheure Expansion der Hochschulen, die — im Gegensatz zum Vereinigten Königreich — die Aufnahme deutscher Emigranten ermöglicht und erleichtert hat. Diese Expansion ergriff alle Gebiete, das College, die Berufshochschulen und die Universitäten einschließlich der Graduate-Fakultäten. Der Übergang von der akademischen Schulung einer kleinen Elite zur akademischen Massenausbildung setzte in den USA nach dem Ende des Bürgerkrieges ein. 1899/1900 gab es bei einer Gesamtbevölkerung von 75 994 000 nur 237 592 Studenten, insgesamt 4,01 Prozent der Jugendlichen von 18 bis 22 Jahren. Fünfzig Jahre später, 1949/50, war die Zahl der Bevölkerung auf 150 697 000, die der Studenten auf 2 659 024 oder 19,27

<sup>22</sup> Huber *Park Beck*, *Men Who Control Our Universities*. (New York 1947.)

<sup>23</sup> Ein Mitglied der Yale Corporation hat folgendes Idealbild von einem Präsidenten entworfen: „Er muß ein Führer sein, nicht zu weit nach rechts, nicht zu weit nach links und selbstverständlich nicht zu sehr in der Mitte stehen. Er muß ein hervorragender Redner und ein großer Schriftsteller sein. Er muß gute Beziehungen zur Öffentlichkeit unterhalten und ein erfahrener Geldsammler sein. Er muß eiserne Gesundheit und Kraft haben und ein junger Mann sein, aber auch ein reifer Mensch voller Weisheit. Er muß mit einer Musterfrau verheiratet sein, einer Kombination aus Königin Viktoria, Florence Nightingale und der am besten angezogenen Frau des Jahres. Er muß ein Weltmann sein und dennoch große geistige Qualitäten haben — ein großer Verwaltungsbeamter, der Autorität delegieren kann. Er muß ein Alumnus und ein großer Gelehrter sein — auch ein Sozialphilosoph, der die Lösung aller Weltprobleme an seinen fünf Fingern abzählen kann, von der Geburtenkontrolle bis zu Formosa.“ Aus *Millett*, op. cit., S. 208 f.

<sup>24</sup> Das Wort Fakultät bezeichnet im englischen Sprachgebrauch den Lehrkörper, zu dem an einigen Universitäten alle Unterrichtenden, an anderen nur die Professoren gehören.



Prozent der Jugendlichen gestiegen<sup>25</sup>. Die Zahl der Graduate-Studenten vermehrte sich im gleichen Ausmaß. Sie wuchs von 2382 im Jahre 1890 auf 237208 im Jahre 1950, also um etwa das Hundertfache<sup>26</sup>. Diese phantastische Ausdehnung hat zwei Ursachen, einmal die rapide Vermehrung der Zahl der höheren Schulen, und zum anderen die Akkumulierung verschiedener Funktionen innerhalb einer Universität. Die höheren Schulen gehen uns hier nichts an. Ihre Funktion ist Massenerziehung, was Abraham Flexner treffend charakterisierte: „Die höhere Schule sollte eigentlich ein Sieb sein, aber die amerikanische Demokratie liebt kein Sieb<sup>27</sup>.“ Der zweite Grund für die ungeheure Zunahme akademischer Anstalten, Studenten und Lehrkräfte liegt in den zusätzlichen Aufgaben, welche die Universitäten übernommen haben und die weder Forschung noch akademischen Unterricht darstellen. Sie geben Abendkurse für Erwachsene ohne akademisches Ziel, halten Sommerschulen für reguläre Studenten und nicht-studentische Hörer, bearbeiten Aufträge von Regierung, Industrie und Handel und bilden Fachleute auf Gebieten aus, deren wissenschaftlicher Charakter zumindest bezweifelt werden kann. Die Mehrzahl dieser für die Öffentlichkeit geleisteten Sonderdienste und manche Spezialausbildungen haben mit der humanistischen Idee der Universität nichts mehr zu tun<sup>28</sup>.

<sup>25</sup> Statistics of Higher Education. Federal Security Agency. Office of Education. Kapitel 4, Abschnitt 1.

<sup>26</sup> A. J. Brumbaugh, op. cit., S. 50.

<sup>27</sup> Abraham Flexner, *Universities, American, English, German*. (New York 1930), S. 47.

<sup>28</sup> Flexner, op. cit., S. 137, stellt fest, daß „weder Columbia, noch John Hopkins, noch Chicago oder Wisconsin wirklich Universitäten sind, denn sie haben kein einheitliches Ziel und keine homogene Verfassung“.

## IV. Die Aufnahme der Emigranten in den USA

### 1. Zahlen

Wieviel deutsche Emigranten heute als Professoren, Dozenten oder als außerhalb der Universität tätige Gelehrte in den USA wirken oder gewirkt haben, ist unbekannt. Insgesamt wanderten von 1933 bis zum Kriegseintritt Amerikas 104098 Deutsche (einschließlich der durch die deutsche Besetzung von 1938 vertriebenen Österreicher) ein, unter denen sich vermutlich nicht weniger als 98 Prozent Flüchtlinge vor dem Nationalsozialismus befanden<sup>1</sup>. 7622 oder 7,3 Prozent der Gesamtzahl gehörten akademischen Berufen an<sup>2</sup>, von denen sich wiederum 1090 bei der Landung als Professoren, Universitätslehrer verschiedener Ränge und als freie Wissenschaftler bezeichneten.

Diese Zahl deckt sich nicht mit der unbekannteren, größeren derer, die in Amerika ein Lehramt bekleidet haben. Während einige Hochschullehrer nach der Einwanderung in andere Berufe überwechselten, rückte eine zweite, umfangreichere Gruppe zu akademischen Positionen auf, ohne jemals zuvor an deutschen Universitäten gelehrt zu haben. Die akademische Karriere vieler ehemaliger Juristen, die keine Aussicht auf Richterstellen oder auf eigene Praxis hatten, von früheren Regierungsbeamten, von Journalisten und Schriftstellern oder auch von jungen Menschen, die ihr Studium gerade beendet oder unterbrochen hatten, begann erst in den USA.

### 2. Warum Amerika?

Viele Emigranten aus der hier betrachteten und aus anderen Gruppen kamen auf Umwegen und nach längeren Aufenthalten in westeuropäischen Staaten. Zwei Umstände waren dafür verantwortlich: 1. die amerikanischen Einwanderungsbestimmungen und 2. die subjektiven Überlegungen der Einwanderer selbst.

<sup>1</sup> Siehe Maurice R. Davie, *Refugees in America*. (New York 1947), S. 23.

<sup>2</sup> Kent, op. cit., S. 15, gibt folgende Verteilung auf die Berufe: 811 Juristen, 2352 Mediziner, 682 Journalisten, 645 Techniker, 465 Musiker, 296 bildende Künstler, 1281 aus verschiedenen Berufen. Verglichen mit früheren Einwanderungen war der Prozentsatz der Akademiker, der normalerweise nicht mehr als drei Prozent beträgt, hier ungewöhnlich hoch.



dazu steht das Bekenntnis eines hohen preußischen Beamten, der 1933 Deutschland verließ und heute eine einflußreiche Stellung an einem großen College einnimmt. Er nannte den Zwang zum Neubeginn aus dem Nichts eine „wunderbare Erfahrung“. Die Ansichten der Mehrzahl liegen vermutlich in der Mitte zwischen den beiden Extremen.

### 3. Die Haltung der amerikanischen Öffentlichkeit

Wie beurteilte die amerikanische Öffentlichkeit den Exodus der Gelehrten aus Deutschland? Die oben zitierte Erklärung der Vereinigung der amerikanischen Universitätsprofessoren ist nur ein Beispiel für die Anteilnahme der Kollegen. Auch Universitätsadministratoren drückten ihre Solidarität mit den Entlassenen aus, und im Juli 1933 riefen 142 Collegepräsidenten zur Unterstützung von jüdischen und katholischen Emigranten auf. Kurz darauf erließ ein neu begründetes Hilfskomitee mit dem damaligen Präsidenten der Universität Cornell, Livingstone Farrand, an der Spitze, einen ähnlichen Aufruf, der wegen der Armut der Universitäten vor allem an die Hilfe von nicht-akademischen Kreisen appellierte<sup>8</sup>. Die New York Times und andere Zeitungen berichteten regelmäßig über die Entlassungen in Deutschland, und die politischen Sympathien der breiteren Öffentlichkeit befanden sich fast ausnahmslos auf der Seite der Ausgestoßenen. Insbesondere international bekannte Männer wie z. B. die Physiker Einstein und Bethe, der Mathematiker Hermann Weil, der Historiker Ernst Kantorowicz, der Philosoph Ernst Cassirer, der Klassiker Werner Jäger, der Literaturhistoriker Karl Vietor und der Kunsthistoriker Erwin Panofsky, deren Ausweisung den Wahnsinn der nationalsozialistischen Politik am augenfälligsten demonstrierte, wurden mit uneingeschränkter Hilfsbereitschaft empfangen. Auch die weniger Berühmten, die sich in den ersten Jahren des Hitler-Regimes nach Amerika wandten, stießen im allgemeinen auf großes Interesse, das der Natur der Sache nach später nachließ, als die Zahl der Emigranten wuchs und der Reiz der Neuheit sich verlor.

Diese in der Presse und von Einzelnen ausgedrückte Sympathie der Öffentlichkeit schuf eine für Emigranten positive Stimmung und wirkte ebenso erleichternd, wie die ungezählten Beispiele individuellen, völlig unoffiziellen Hilfswillens. Aber sie konnten die aus der ökonomischen Situation erwachsenden Schwierigkeiten nicht beseitigen, sondern nur mildern. Selbstverständlich fehlte es auch nicht an grundsätzlicher Feindseligkeit gegen alles Ausländische schlechthin, an Mißtrauen, das

<sup>8</sup> New York Times, 5. Juli 1933.

<sup>9</sup> New York Times, 13. Juli 1933.

in den Flüchtlingen paradoxerweise die Vertreter einer faschistischen Fünften Kolonne sah, oder an Furcht vor der Konkurrenz. Derartige Kritik, die sowohl durch die Verschiedenheit der nationalen Gewohnheiten wie durch das Verhalten einzelner Emigranten selbst genährt wurde<sup>10</sup>, trat jedoch nur selten auf und begegnete Hochschullehrern weniger als irgendeiner anderen Berufsgruppe<sup>11</sup>. Diskrimination war fast immer eine Folge der ökonomischen Verhältnisse.

1933 stand die amerikanische Wirtschaft noch im Zeichen der Depression von 1929 und der daraus resultierenden Arbeitslosigkeit, die sich auch unter den akademischen Berufen stark bemerkbar machte<sup>12</sup>. Zahlreiche Colleges und Universitäten mußten einschneidende Sparmaßnahmen ergreifen. 246 öffentlich und privat kontrollierte Hochschulen mit einem Lehrkörper von insgesamt 27 000 Unterrichtenden hatten seit Juni 1930 über 2 000 Personen entlassen, davon mehr als die Hälfte Instruktooren und Assistenten<sup>13</sup>. Selbst da, wo Entlassungen und Gehaltskürzungen vermieden werden konnten, fehlte es häufig an Mitteln, um zusätzliche Lehrkräfte zu berufen oder neue Stellen zu schaffen. Unter diesen Umständen konnte es nicht ausbleiben, daß gerade junge Dozenten sich durch den Einstrom deutscher Konkurrenten bedroht fühlten und fürchteten, ihrer Aufstiegschancen beraubt zu werden<sup>14</sup>.

### 4. Hilfsorganisationen

Niemand hat mehr für die Unterbringung und Beratung emigrierter deutscher (später auch anderer zentral- und westeuropäischer) Wissenschaftler geleistet als die zahlreichen Hilfskomitees und -agenturen, von denen einige sofort 1933 in Aktion traten. Charakteristischerweise handelte es sich dabei ausschließlich um private Organisationen, an denen weder der Bund noch die Einzelstaaten sich direkt beteiligten. Die in unserem Zusammenhang wichtigsten Institutionen waren das Emergency Committee in Aid of Displaced Foreign Scholars, die Rockefeller Foundation, der Oberländer Trust und die New School for Social Research.

Das Emergency Committee wurde Anfang Mai 1933 von führenden Männern der Geisteswelt unter dem Vorsitz von Stephen Duggan begründet. Es entstand aus „der Überzeugung von der Universalität

<sup>10</sup> Gerhart Saenger, *Today's Refugees, Tomorrow's Citizens*. (New York und London 1941.)

<sup>11</sup> Kent, *op. cit.*, S. 115 ff.

<sup>12</sup> Walter M. Kotschnig, *Unemployment in the Learned Professions*, (London 1937).

<sup>13</sup> Davie, *op. cit.*, S. 302.

<sup>14</sup> Sophia Robison, *Refugees at Work* (New York 1942), hat nachgewiesen, daß diese von den verschiedensten Berufsgruppen geäußerte Sorge schon angesichts der im Vergleich zur Gesamtbevölkerung verschwindend kleinen Zahl von Emigranten unbegründet war.



der Wissenschaft, in dem Glauben, daß Wissenschaft und Bildung keine nationalen und ideologischen Grenzen kennen. Es wurde zu dem einen großen Zweck geschaffen: Wissen und Forschungstalente der Gelehrten zu retten, die durch den Nazifuror von den europäischen Universitäten vertrieben worden waren, und darüber hinaus, um Lehre und Bildung in den Vereinigten Staaten zu dienen<sup>15</sup>.“ Dies aus privaten, überwiegend jüdischen Fonds finanzierte Komitee war keine Wohlfahrtseinrichtung für alle Flüchtlinge, sondern fungierte als eine Art von Stellenvermittlung und Beratungsorganisation für emigrierte Wissenschaftler. Bis zu seiner Auflösung im Juni 1945 hat es 335 Europäer an insgesamt 145 Colleges und Universitäten und in anderen Forschungsstellen untergebracht. Davon waren 137 Geisteswissenschaftler (und zwar 43 Philologen und Literaturhistoriker, 27 Kunsthistoriker und Archäologen, 22 Philosophen, 18 Musikwissenschaftler); 110 kamen aus den Sozial- und Wirtschaftswissenschaften (einschließlich Jura), die anderen aus den Naturwissenschaften<sup>16</sup>.

Das Komitee ging im Wesentlichen nach drei Grundsätzen vor. Es nahm nur Anträge von Hochschulen und nicht von Individuen an. Das heißt, daß diejenigen Institutionen, die einen Emigranten anstellen wollten, sich an das Komitee wandten, das daraufhin einen Kandidaten für die Stelle nannte. Wurde er akzeptiert, so zahlte das Komitee für ein oder zwei Jahre die Hälfte seines Gehalts, wobei stillschweigend vorausgesetzt wurde, daß die Hochschule nach Ablauf dieser Frist und falls er sich bewährte, den Gast ganz und auf eigene Kosten in den Lehrkörper übernehmen würde. Das Komitee empfahl nur Professoren und Privatdozenten zwischen 30 und 58, um Konkurrenz mit jungen Amerikanern zu vermeiden, und es vermittelte ohne Unterschied Vertreter aller Religionen<sup>17</sup>.

Die Rockefeller Foundation hat bis 1945 mehrere Organisationen zur Stellenbeschaffung und Beratung emigrierter Intellektueller sowie 303 Einzelpersonlichkeiten mit insgesamt 1 410 778 Dollars finanziert. Im gleichen Zeitraum gab der Oberländer Trust in der Carl Schurz Memorial Foundation in Philadelphia über 300 000 Dollars für Stipendien und Forschungsbeihilfen an emigrierte Wissenschaftler aus<sup>18</sup>. Diese Ausgaben bedeuteten nicht nur materielle Hilfe. Dahinter steht eine ausgedehnte Beratungstätigkeit, die oft genug auch emotionell Erleichterung schuf.

Neben den genannten drei Organisationen existierten Hunderte anderer Agenturen, Komitees und Fonds, die sich Angehörigen ver-

<sup>15</sup> Duggan und Drury, op. cit., S. 60.

<sup>16</sup> ibid., S. 62, 66 f.

<sup>17</sup> Stephen Duggan, *A Professor at Large*. (New York 1943), S. 78 ff.

<sup>18</sup> Duggan and Drury, op. cit., S. 78, 87. Siehe auch die Jahresberichte des Oberländer Trust vom 1. Mai 1935 bis 30. April 1945.

schiedener Berufe und Konfessionen oder auch allen an sie herantretenden Flüchtlingen widmeten. Ohne ihre Arbeit auf Intellektuelle zu beschränken, schlossen sie diese doch ein, wo es nötig schien<sup>19</sup>. Die 1938 eingerichtete Flüchtlingsabteilung des American Friends Service Committee, der Gesellschaft der Quäker, hat hier besonders wirksame Arbeit geleistet.

Vor und im Krieg führte die Abteilung sog. Amerikanische Seminare durch, deren Absicht es war, emigrierte Akademiker durch mehrwöchiges Zusammenleben, durch Vorträge und Sprachtraining mit amerikanischen Kollegen bekannt zu machen und sie schrittweise in die neue Umwelt einzuführen<sup>20</sup>. Durch diese Seminare und durch ähnliche Unternehmungen der Quäker<sup>21</sup> konnten zahlreiche Emigranten, die nie zuvor an Universitäten gelesen hatten, sich auf den Lehrberuf umschulen. Ehemalige Rechtsanwälte, Journalisten, Künstler und andere sind auf diese Weise in der Zeit des Umlernens finanziert worden und später in Lehrstellen untergekommen. Nicht alle von ihnen, die heute meist an mittleren und kleinen Colleges im ganzen Land lesen und gelegentlich zu ordentlichen Professoren aufrückten, wurden Wissenschaftler in dem Sinn, daß sie eigene Forschung leisten. Ihre Funktion ist eine rein unterrichtende<sup>22</sup>.

Der Erfolg dieser Quäkeraktionen und alle der anderen Hilfsmaßnahmen kann nicht in Zahlen allein gemessen werden. Sie haben in vielen Fällen den beruflichen Neubeginn ermöglicht und die innere Anpassung gefördert.

Private Geldgeber und Foundations haben ferner die Mittel für eine ganze, nur aus Emigranten bestehende Fakultät an der New School for Social Research in New York zur Verfügung gestellt. Diese 1919 eröffnete private Abendschule für Berufstätige und andere nebenberufliche Hörer stand 1933 unter der Leitung von Alvin Johnson, der ein Pionier für die Sache der deutschen Emigranten in Amerika wurde. Unmittelbar nach dem Bekanntwerden der ersten Entlassungen gründete Johnson an der New School die „Universität im Exil“, an die er vertriebene Sozial- und Wirtschaftswissenschaftler berief. In seiner Autobiographie schildert Johnson, wie die Idee der Universität im Exil in ihm entstand. „Dies ist New York, sagte ich mir, und New York kann etwas so Kleines wie das Schicksal eines einzelnen Men-

<sup>19</sup> Vernant, op. cit., S. 520, teilt mit, daß sich 1939 545 derartige private Organisationen beim amerikanischen Außenministerium registrierten.

<sup>20</sup> Claudia Gardiner, *An Experiment in Co-operative Scholarship*. AFSC-Refugee Section. (Philadelphia 1940.) Josephine J. Williams, *The American Seminar's Second Season*. AFSC-Refugee Section. (Philadelphia 1941.)

<sup>21</sup> „The Haverford Co-operative College Work Shop“ in *The Meeting*. (Haverford 1940), Nr. 70.

<sup>22</sup> Ein anschaulicher Bericht über die Tätigkeit einer Emigrantin an einem kleinen College ist Erna Barschak, *My American Adventure*. (New York 1945).



schen, und mag er selbst noch so groß sein, nicht erkennen. Wenn ich jedoch eine ganze Fakultät zu finanzieren suchte, würde New York zumindest die Tatsache zur Kenntnis nehmen... Eine ‚Universität im Exil‘ — das klingt gut. Denn es war die Universität selbst, die aus Deutschland exiliert worden war<sup>23</sup>.“

Johnson richtete die Universität im Exil als Graduate-Fakultät (wie sie heute heißt) an der New School ein, wo in den Sozialwissenschaften alle akademischen Grade einschließlich des Ph. D. erworben werden können. Sein Ziel war, eine Gruppe von deutschen Professoren zu gewinnen, die nicht als Einzelne in einer sonst ganz amerikanischen Umwelt untertauchten und sich anpaßten, sondern ihr Europäertum, das Spezifische deutscher Gelehrsamkeit bewahrten. „Um in einer amerikanischen Institution richtig wirken zu können, müssen ausländische Professoren einen Prozeß der Assimilierung durchmachen. Assimilation von Individuen bedeutet jedoch in Amerika eine ebenso starke Amputation von Tugenden wie von Lastern. Eine koordinierte Fakultät deutscher Wissenschaftler würde sich zwar Amerika anpassen, aber als Gruppe, und dabei ihrer inneren Struktur nach die ursprüngliche Disziplin beibehalten<sup>24</sup>.“

Beim Kriegseintritt Amerikas lasen insgesamt 56 Professoren und Assistenten an der Graduate-Fakultät und in Abendkursen der New School. Stellt man sich vor, welche Wirkung 56 an einer einzigen deutschen Universität lehrende Amerikaner ausüben würden, so wird am ehesten klar, was diese Zahl bedeutet. Außerdem hat Johnson zahlreichen anderen deutschen Gelehrten bei der Unterbringung im akademischen Leben der Vereinigten Staaten entscheidend geholfen<sup>25</sup>. Nach dem deutschen Einmarsch in Belgien und Frankreich berief er Wissenschaftler aus beiden Ländern und gründete mit ihnen und für sie die seit 1947 selbständige *Ecole Libre des Hautes Etudes*, die während des Krieges als einzige freie französische Universität galt<sup>26</sup>.

Mit dem im Frühjahr 1933 wegen „staatsfeindlicher Tendenzen“ verbannten Institut für Sozialforschung an der Universität Frankfurt kam 1934 eine weitere geschlossene Gruppe deutscher Wissenschaftler unter Führung von Professor Dr. Max Horkheimer nach New York. Dieser geschlossene emigrierte Arbeitskreis, der an der Columbia Universität sein Hauptquartier hatte, verzichtete bewußt auf breitere Lehrtätigkeit und konzentrierte sich stattdessen auf Forschung in Philosophie, Psychologie, Volkswirtschaft, Soziologie und Rechtswissenschaft. Bis 1940 wurden die Ergebnisse

<sup>23</sup> Pioneer's Progress. An Autobiography. (New York 1952), S. 338.

<sup>24</sup> *ibid.*, S. 339.

<sup>25</sup> Alvin Johnson, „The Refugee Scholar in America“, *Survey Graphique* (April 1941), S. 227.

<sup>26</sup> Duggan und Drury, *op. cit.*, S. 82.

in deutscher Sprache in der vom Institut herausgegebenen Zeitschrift für Sozialforschung veröffentlicht<sup>27</sup>.

### 5. Typische Lebensgeschichten

Innerhalb dieser in Amerika gegebenen Bedingungen — die kritische Wirtschaftslage, politische Sympathien, das Vorhandensein von Hilfsagenturen, die Vielfältigkeit des Universitätswesens — die die Erfolgsaussichten und Einordnungsmöglichkeiten jedes emigrierten Gelehrten beeinflußt und mitbestimmt haben, verliefen die einzelnen Schicksale naturgemäß sehr verschieden. Aus dem in 40 Interviews mit ehemaligen Deutschen, die heute in den USA an Colleges und Universitäten lehren, gewonnenen Material, ergänzt durch das Studium der bisher erschienenen biographischen Literatur, greifen wir im Folgenden die Fälle von fünf Akademikern heraus, die in wesentlichen Zügen für eine größere Anzahl von Personen mit ähnlichen Schicksalen charakteristisch sind<sup>28</sup>. Die nach dem Gesichtspunkt ihrer typischen Qualität ausgewählten Lebensabrisse stehen hier stellvertretend für die zahlreichen anderer Emigranten.

A. der als Ordinarius für Philosophie an einer der größeren deutschen Universitäten eine einflußreiche und angesehene Stellung einnahm, wurde, 47 Jahre alt, im April 1933 wegen seiner aktiven antinazistischen Tätigkeit entlassen. Zunächst scheute er vor der Emigration zurück, hielt den Nationalsozialismus für vorübergehend und konnte sich nicht zum abrupten Bruch mit allem Gewesenen entschließen. Als jedoch die deutsche Atmosphäre ihm immer unerträglicher wurde, sich zudem kaum noch eine akzeptable Erwerbsmöglichkeit bot, nahm er im Herbst 1933 die Einladung einer großen Universität in New York an.

Nur wenigen amerikanischen Fachkollegen bekannt, mußte er als Professor praktisch ganz von vorn anfangen. Es dauerte Jahre, bis er sich wieder zum Ordinariat und zu einer einflußreichen Position in seiner Disziplin emporgearbeitet hatte. Heute liest er an der gleichen Universität, an der er begonnen hatte, und obwohl Stellungslosigkeit

<sup>27</sup> International Institute of Social Research. A Report on its History, Aims and Activities (1933—1938). (New York o. D.)

<sup>28</sup> Die in den Interviews gestellten Fragen betrafen im wesentlichen folgende Punkte: 1. Herkunft, Beruf, letzte Stellung 1933 in Deutschland. 2. Warum emigriert? Wohin? Mit wessen Hilfe oder Vermittlung? Wann nach Amerika? 3. Aufnahme in den USA: Allgemein, bei Kollegen, bei Deutschamerikanern. Haben Sie Auswirkung der Depression, Konkurrenzfurcht, sonstige Ablehnung erfahren? 4. Äußere Stationen des Berufsweges in den USA. 5. Reaktion von Studenten, Kollegen, Hochschulverwaltung. 6. Welches waren die Hauptprobleme der Umpflanzung? 7. Glauben Sie, daß Sie in Ihrer Disziplin und an Ihrer Hochschule einen besonderen Beitrag geleistet haben, und welchen als Lehrer, als Forscher? 8. Was haben Sie selbst fachlich dazu gelernt? 9. Gab es eine seelisch-geistige Rezeption der Hochschulemigranten in Amerika? 10. Sprechen Sie sich heute kulturell als Amerikaner, als Deutscher, als Deutschamerikaner an? 11. Sind Sie seit 1945 in Deutschland gewesen, und in welcher Funktion? 12. Stellung zu Deutschland heute.



Großstadt. Aus ethnischen Gründen entlassen, ging sie bereits im September 1933 nach den USA.

Diese Entscheidung bereitete verhältnismäßig wenig Schwierigkeiten. Frau D, die von 1920 bis 1923 für das American Friends Service Committee in Deutschland gearbeitet hatte, war auf Einladung der Quäker schon zweimal in den Vereinigten Staaten gewesen. Die amerikanischen Freunde besorgten ihr jetzt eine Stelle als Beraterin für zwei philanthropische Organisationen, in deren Auftrag sie Vorträge in verschiedenen Teilen der USA hielt, wodurch sie das Land näher kennen lernte, und Broschüren über ihre Erfahrungen mit deutscher Wohlfahrtspflege schrieb, wodurch sie selbst ihren amerikanischen Kollegen bekannt wurde. Gleichzeitig wirkte sie als Gutachterin für Wohlfahrtsgruppen im Staat New York und gelegentlich für das Bundesinnenministerium in Washington. Zwei Jahre unterrichtete sie über Sozialarbeit an einer guten Technischen Hochschule, von der sie schließlich an eines der angesehensten Mädchencolleges berufen wurde. Dort liest Frau D heute als planmäßige, außerordentliche Professorin (Associate Professor).

Durch ihre Verbindung zu den Quäkern, und ihre schon vor der Emigration erworbene Vertrautheit mit Amerika, waren die Ausgangsbedingungen für Frau D günstiger als für die Mehrzahl ihrer Schicksalsgenossen. Andererseits mußte sie von Anfang an eine ungeheure Arbeitslast bewältigen, um ihre beiden alten, nicht mehr arbeitsfähigen Eltern zu versorgen, die durch die unfreiwillige Auswanderung alles eigene Vermögen verloren hatten. Frau D sah sich gezwungen, jede nur erreichbare Sonderarbeit zu übernehmen. Während sie in Deutschland noch mit eigenen wissenschaftlichen Arbeiten begonnen und gerade einen Ruf an die Universität erhalten hatte, nahm die Notwendigkeit des vermehrten Geldverdienens jetzt fast alle freie Zeit in Anspruch. Der Umfang ihrer Forschungen war geringer, die Arbeit selbst gezwungenermaßen oberflächlicher, eiliger, als es unter normalen Bedingungen der Fall gewesen wäre. Der Verzicht auf eigene wissenschaftliche Produktion und die außerordentliche Belastung durch Zusatzarbeiten sind, nach Frau D's Ansicht, der wichtigste Preis, den sie für die Emigration zahlen mußte.

Diese Klage ist häufig und wird vor allem von Dozenten an kleinen Colleges geäußert, wo die Gehälter zu niedrig sind, um der Familie einen angemessenen Lebensstandard zu garantieren. Bei fast allen kommt die Notwendigkeit, für ihr Alter vorzusorgen, hinzu, denn die an kleineren oder mittleren Institutionen gezahlten Pensionen sind im Durchschnitt so unzulänglich, daß sie nicht einmal das Existenzminimum decken. Das ist einer von mehreren Gründen, warum in so vielen Fällen die Frauen der Emigranten, die, überwiegend aus dem deutschen Bürgertum stammend, früher nur ihren Haushalt gekannt und keine Berufsausbildung genossen hatten, mitarbeiten müssen — erst, um überhaupt existieren zu können, dann, um den Kindern eine adäquate Erziehung zu ermöglichen und schließlich, um im Alter nicht der öffentlichen Fürsorge zur Last zu fallen<sup>30</sup>.

<sup>30</sup> In diesem Zusammenhang sei die gesprächsweise geäußerte Mitteilung der leitenden Mitarbeiterin eines Hilfskomitees für deutsche und andere Emigranten in den dreißiger Jahren erwähnt. Ihrer Beobachtung nach ist

E ist Musikwissenschaftler und hatte 1933 gerade promoviert, als er sich der nazistischen Rassenpolitik durch Auswanderung entziehen mußte. Er ging nach Holland, wo er teils von Ersparnissen, teils von Gelegenheitsarbeiten lebte. Bevor sein Antrag auf das amerikanische Visum bewilligt war, marschierte die deutsche Armee in Holland ein. E ging nach Kuba, wo er zwanzig Monate wartete, bis die Vereinigten Staaten ihn einließen.

Zwei Jahre lang suchte er dort nach einer Stellung in seinem Beruf, bis ihn 1942 endlich ein sehr kleines, sehr schlechtes College im Süden anstellte. Er nahm an, obwohl er wußte, wie schwer es ist, von einer nicht akkreditierten Institution an eine bessere berufen zu werden. E unterrichtete dort fünf Jahre lang. Nebenher veröffentlichte er selbständige wissenschaftliche Studien. Hauptsächlich diese Publikationen brachten ihm 1947 ein Stipendium ein, das ihn nicht nur für ein Jahr von seinen Unterrichtsverpflichtungen befreite, sondern gleichzeitig als Empfehlung diente und ihm 1948 zur Anstellung an einem großen College in New York verhalf. Als erster permanent angestellter Musikwissenschaftler dieser Institution hat er dort eine stattliche Spezialbibliothek aufgebaut, den Lehrplan in seinem Fach erweitert und die ersten Seminare für Studenten, die sich spezialisieren wollen, eingeführt. Da es sich hier um ein College, also um eine Hochschule ohne Graduate-Schulen handelt, liest er nur für junge Studenten und kann dabei von seiner eigenen Spezialforschung keinen Gebrauch machen. Die wissenschaftliche Arbeit muß er, wie viele seiner Kollegen, in der knapp bemessenen Freizeit quasi nebenher besorgen. Er fühlt sich, wie er sagt, in Amerika zu Hause, liebt seine Lehrtätigkeit, obwohl er bedauert, daß er keine Graduate-Studenten hat.

E war nach dem Krieg im Auftrag seines Colleges in mehreren europäischen Ländern, nicht jedoch in Deutschland, das er nicht mehr sehen will. Sein Weg in den USA verlief, nach den großen Schwierigkeiten zu Anfang, stetig aufwärts, und bis heute hat er sowohl eine gute Position wie materielle Sicherheit erreicht.

## 6. Anpassung und Umstellung

Die Interviews mit emigrierten Hochschullehrern zeigen, daß die Einwanderung nach Amerika auch erneutes Lernen bedeutete, und zwar nicht nur durch die Notwendigkeit, sich einer neuen Kultur einzuordnen, sondern auch beruflich als Lehrer, Schriftsteller und Forscher.

Alle sahen sich zu einer gründlichen Revision ihrer bisherigen Lehrmethoden gezwungen. Der in Deutschland übliche Vorlesungsmonolog, die mehr oder minder autoritäre Atmosphäre des Hörsaals und das distanzierte Verhältnis zum Studenten konnten nicht übertragen werden. Die deutschen Professoren mußten sich umstellen. Die Mehrzahl paßte sich der größeren Umgangsfreiheit zwischen Lehrenden und Lernenden, dem Eingehen auf den Studenten, der Zwanglosigkeit im

gerade für ehemalige deutsche Professoren und Beamte, die an amerikanischen Colleges unterrichten, aber schon zu alt waren, um zusätzliche Mittel zu verdienen, die Restitution in Deutschland und die Nachzahlung der deutschen Pensionen praktisch oft die einzige Rettung.



Gegensatz zur fraglosen Anerkennung professoraler Autorität an, wenn auch mit unterschiedlichem Erfolg<sup>31</sup>. Einige scheiterten daran und schieden aus dem Lehramt aus. Andere sind, wie einer von ihnen es ausdrückte, „vom hohen Roß heruntergestiegen und bescheidener geworden“.

Ebenso mußte man sich als Schriftsteller umstellen. Hier waren die Schwierigkeiten noch größer. Die Mehrzahl der interviewten Professoren betonte, daß sowohl der Charakter der englischen Sprache als auch der Anspruch von Lesern und Hörern sie zwangen, ihre Ausdrucks- und Schreibweise zu ändern. Man mußte knapper, klarer, verständlicher formulieren, wenn man gehört werden wollte. Ein Kunsthistoriker nannte das den Verzicht „auf metaphysisches Schwafeln“. Wer sich zudem neben seinen akademischen Pflichten an ein Laienpublikum wandte — und das gehört ja mit zu den Aufgaben der amerikanischen Universität — kam erst recht nicht ohne diese (oft ungewohnte) Nüchternheit aus.

Bei der Frage, ob und wie die deutschen Emigranten als Forscher dazulernten und sich umstellen mußten, sind zunächst die großen Unterschiede in der Organisation der Forschungstätigkeit zu bedenken. Sie erfordert in den Vereinigten Staaten in der Regel eine zum Universitätsgehalt zusätzliche Finanzierung. Diese wird von den großen Stiftungen (Rockefeller Foundation, Carnegie Corporation) gegeben, die wiederum die beiden wichtigsten Forschungsräte: den Social Science Research Council für die Sozialwissenschaften und den American Council of Learned Societies für die humanistischen Disziplinen finanzieren. Die großen Stiftungen interessieren sich jedoch in der Hauptsache für organisierte Forschung. Der deutsche Emigrant mußte folglich erst den Zugang zu dieser, ihm unbekanntem und häufig nicht zusagenden kooperativen Methode der Sozialforschung finden. Das wurde oft schwer, vielleicht noch schwerer als die Umstellung als Lehrer und Autor. Doch die Stiftungen und Forschungsräte haben durchweg Verständnis für die großen Schwierigkeiten der deutschen Hochschullehrer gezeigt, und heute ist die Anpassung an den „organized research“ in den Sozialwissenschaften wohl restlos gelungen, während es in den Geisteswissenschaften, wo individuelle Forschung nach wie vor die Regel ist, kaum je Schwierigkeiten gegeben hat.

<sup>31</sup> Die New York Times vom 5. August 1934 berichtete in einem Artikel „A German View of Us“, daß interviewte emigrierte Professoren aus Deutschland bekannten, die persönlichen Beziehungen zwischen Dozenten und Studenten hätten sie besonders stark beeindruckt.

## V. Einflüsse deutscher Geistes- und Sozialwissenschaftler in den USA

### 1. Schwierigkeiten der Bestimmung

Es ist schwer, definitive Aussagen über den Einfluß des amerikanischen Aufnahmelandes auf Arbeit und Lebenshaltung der emigrierten deutschen Geistes- und Sozialwissenschaftler zu machen, aber noch viel schwieriger ist es, ihren Einfluß auf Lehre und Forschung in den Vereinigten Staaten zu bestimmen.

Dafür gibt es eine Reihe von Gründen. Einmal sind Einflüsse dieser Art selten offenkundig und nur dann — falls überhaupt — nachweisbar, wenn sie von überragenden Gelehrten stammen. 1933 war jedoch in Amerika wie in Deutschland das Zeitalter des universellen Gelehrten, der einer ganzen Disziplin neue Wege weist, vorüber. Die um große Forscher oder Lehrer zentrierten wissenschaftlichen Schulen waren im Aussterben begriffen. Auf beiden Kontinenten dominierte das Prinzip wissenschaftlicher Arbeitsteilung und Spezialisierung. Während in den Naturwissenschaften einige deutsche Emigranten auf ihren Gebieten führend und international bekannt waren, ragte in den Sozial- und Geisteswissenschaften keiner unbestritten über alle anderen hinaus.

Sodann bestanden zwischen der deutschen und der amerikanischen Forschung 1933 insofern keine grundsätzlichen Unterschiede als theoretische und empirische Forschungsmethoden in beiden Ländern bekannt waren. Der geistige Austausch war ja schon vor 1933 verhältnismäßig rege, und in beiden Nationen waren alle wissenschaftlichen Richtungen vertreten und die Unterschiede zwischen ihnen mehr gradueller Art. Die Behauptung, vor allem in Deutschland und Österreich kenne man nur theoretische Forschung, wogegen man sich in den USA rein auf empirische Arbeit beschränke, kann so nicht aufrechterhalten werden. Es kamen zahlreiche Empiristen und Positivisten aus Europa, deren Methoden und Fragestellung so beliebte Gleichungen wie Amerika = Empirismus, Deutschland = Theorie widerlegen. Diese drücken nur — wenn auch wichtige — Akzentverschiebungen, eine verschiedene Lagerung der methodologischen Schwerpunkte und kaum prinzipielle Unterschiede aus.



**Permanent**  
**Exiles** **ESSAYS**  
**ON THE**  
**INTELLECTUAL**  
**MIGRATION**  
**FROM GERMANY**  
**TO AMERICA**

**Martin Jay**

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## Introduction

“Collecting here texts published as prefaces or articles during the last decade, their author would gladly elaborate upon the life and times which have produced them, but cannot: he is too certain that the retrospective is never anything but a category of bad faith.”<sup>1</sup> So Roland Barthes once explained in denying himself a manipulative authorial “last word” in the reception of his works. Barthes’ warning is perhaps wisely heeded as a check on the temptation to rewrite the past for present purposes. But abstention is, alas, not without risks of its own. For if an author merely collects texts written over a long period of time and in very different circumstances, he courts another kind of bad faith: that engendered by the willful suppression of the original context of intellectual production and the subsequent fate of the texts in the world. Rather than effacing the productive origins and mediating receptions of separate texts to present what art historians like to call a “licked canvas,” making them apparent can be an act of good faith instead.

There is, in addition, a further advantage when a historian reflects on his now historical efforts to make sense of the past. For, as I have tried to argue elsewhere,<sup>2</sup> in so doing, a healthy alienation effect can be produced. By juxtaposing original texts with varying focuses and written in different voices, and then adding subsequent reflections on their significance, the historian can dispell the illusion of a harmoniously smooth narrative of the past *wie es eigentlich gewesen*. Readers are thus reminded of the inevitably subjective dimension in the writing of all history, as well as of the historicity of the writer himself. It is with this goal in mind, despite Barthes’ warning, that this introduction has been written.

The imperative to do so is all the more urgent insofar as my own relationship to the figures about whom I’ve written has often been personal as well as professional. Coming to know most of the emigrés discussed in this volume was an enormous advantage for my work, as



well as a genuine privilege, although at times I am sure it affected my capacity to judge their achievements with dispassionate distance. Encountering them near the ends of their lives and often benefiting from their trust and generosity doubtless had its effects, both good and ill, on my efforts to reconstruct their pasts. Several of the essays were in fact written as memorials to emigrés whose deaths I, like many who knew them even less intimately, genuinely mourned.<sup>3</sup> The elegiac quality that certain readers of my first book on the Frankfurt School noted was an undeniable consequence of this personal relationship.

I never, however, intended to bury their ideas as well, contrary to the assumption of those who think historians can only look backward with nostalgia. Indeed, one of the most exciting aspects of working on the migration has been the sense of helping to rescue and make available ideas whose potential has yet to be exhausted. The German sociologist Wolf Lepenies has recently written of the temporary "storage" of controversial ideas from one discipline in the discourse of another.<sup>4</sup> One of his examples was *The Dialectical Imagination*, which he generously cited as the work of an intellectual historian preserving ideas that mainstream sociologists and philosophers had ignored or marginalized until recently.<sup>5</sup> Several other intellectual historians of my generation—most notably Andrew Arato, Paul Breines, Susan Buck-Morss, David Gross, Russell Jacoby, Eugene Lunn, Mark Poster, Anson Rabinbach, and Richard Wolin—have played a similar role. And in most cases, we have begun increasingly to draw on and criticize the ideas themselves, rather than merely record them in disinterested fashion.

Before coming to the concrete contexts of the separate essays, I must say a word about the title of the collection itself. In 1969, I published a short essay in *Midstream* entitled "The Permanent Exile of Theodor W. Adorno,"<sup>6</sup> which reflected on his recently and prematurely ended life and career. The phrase "permanent exiles" seemed an accurate and evocative term to describe the Frankfurt School as a whole, and so I considered it as a possible title for the book I was writing on their history. Herbert Marcuse and Leo Lowenthal, two members of the School who remained in America, agreed that it rang true and encouraged me to use it. But much to my surprise, Max Horkheimer and Felix Weil, both then living in Europe and more at peace with the contemporary world than their erstwhile colleagues, were vehemently opposed. Horkheimer, who had graciously consented to write a preface to the book, even hinted at its withdrawal were I to insist on the title. As I had another attractive alternative at hand, which I had consciously derived from C. Wright Mills' *The Sociological Imagination* (and, as it was later pointed out to me much to my embarrassment, unconsciously to

a passage from Norman O. Brown's *Life Against Death*),<sup>7</sup> I decided to use it instead. But it has always been my conviction that the homecoming of certain Frankfurt School members to Germany did not really end the exile of Critical Theory. Nor were the other emigrés to whom I was also drawn—Kracauer, Arendt, Lichtheim, or Pachter—truly at home in their adopted country. So it now seems even more justifiable to call a book on the migration *Permanent Exiles*.

The opening essay concerns the figure who first piqued my interest in Critical Theory and its origins, Herbert Marcuse. It was delivered to the fifth annual Socialist Scholars Conference in September 1969 at Hofstra University. The meeting took place at the height of the New Left's influence in America, when Marcuse's impact was keenly felt here and abroad. Interest in his work was, in fact, so intense that the paper was published in three places, each, for reasons known only to their editors, under different titles.<sup>8</sup> In the last of these, a collection of essays from the Socialist Scholars conferences entitled with premature optimism *The Revival of American Socialism*, it was described with a slight touch of disdain as "an academic comment of a kind frequently presented to the Socialist Scholars Conference"<sup>9</sup> and contrasted with two other papers on Marcuse that linked him more directly to the practical tasks of "the movement." It was, in fact, aimed at disentangling the roots of Marcuse's ideas rather than advocating how best they might be applied under current circumstances. But it did not ignore entirely their practical implications, especially for a viable radical politics. The final, sketchy remarks on Habermas and Arendt as implicit critics of his metapolitical position were indications of this concern.

If "Metapolitics of Utopianism" was first delivered in the overheated setting of a gathering of socialist scholars straining to be socialist activists, the second paper reprinted below, "The Frankfurt School's Critique of Marxist Humanism," was called into being by a very different kind of event, the conference on Weimar Culture held at the New School for Social Research in October 1971. It was a glittering assembly of many distinguished survivors of the migration, as well as younger students of their history. Hovering over it all was the then fashionable "Specter of Weimar,"<sup>10</sup> as Theodor Draper called his contribution, which meant the analogy purporting to exist between its sad fate and that seemingly awaiting America in the coming years. On the program and in the audience were many emigrés like Henry Pachter, who were deeply troubled by the parallels they detected between the New Left and the irrational students who had prepared the way for Hitler by denigrating Weimar democracy.

My contribution to the conference took little note of the



analogy, which seemed to me at the time, as it does even more so now, highly questionable. Instead, I attempted to rescue the Frankfurt School from the then widespread assumption that it was another variant of Marxist Humanism. In particular, I was anxious to challenge the argument of the Swedish Althusserian Göran Therborn in one of the first historical accounts of the School that its Critical Theory was merely a "prescientific" vestige of the philosophical anthropology that Marx had left behind. In ways that would later be developed in my work on the question of totality, I began to explore the important but often misunderstood differences between Critical Theory and the Hegelian Marxism of Lukács and Korsch, to which it was often assimilated. The effort, although not without its detractors, seems to have had some impact, even in Sweden, where the article was translated in 1982 by the Marxist journal *Tekla* as an antidote to Therborn's still influential interpretation.<sup>11</sup>

The next essay on the Frankfurt School emerged out of a much less polemically charged context. It was solicited by Donald Fleming and Bernard Bailyn for the sixth volume of their *Perspectives in American History*, published by Harvard's Charles Warren Center. The second volume in the series had been devoted to the migration as a whole, and when it came out in book form in 1970, I had reviewed it for *Commentary*.<sup>12</sup> *The Intellectual Migration*, as the book was called, suggested to me a pattern of selective hospitality, depending on the emigrés' allegiance to the spirit of the *Neue Sachlichkeit*, which seemed to be borne out when I turned in greater detail to the initial American response to "The Frankfurt School in Exile."<sup>13</sup> The essentially depoliticizing implications of the *Neue Sachlichkeit* also fit well with another analysis by Joachim Radkau, which came to my attention when I reviewed his book shortly thereafter.<sup>14</sup> Radkau's general contention that the impact of the migration was ultimately conservative may have been somewhat overdrawn, but it complemented my observation about the greater success of those intellectuals beholden to the technocratic, anti-utopian values of the middle Weimar years. Insofar as a general pattern of reception is inherently problematic because of the variety of emigré experiences, such a claim can only be made tentatively, but it does suggest a hypothesis that might fruitfully be tested in other cases as well.

After *The Dialectical Imagination* was published in 1973, I began to extend my interests beyond the Frankfurt School with a new project on another refugee, Siegfried Kracauer. But as the American assimilation of Critical Theory was then gaining considerable momentum, I was drawn back into its orbit. In the fall of that year, I was invited by Paul Piccone, the editor of *Telos*, to speak at Washington University and by Jack Zipes, an editor of *New German Critique*, to do the same at the

University of Wisconsin, Milwaukee. My topic was "The Frankfurt School's Critique of Mannheim and the Sociology of Knowledge,"<sup>15</sup> chosen in part to accommodate another invitation by the Sociology of Knowledge contingent of the International Sociology Association meeting in Toronto.

Reaction to the article, when it was published in *Telos*, was vigorous and swift. But it did not come, as I had expected, from a defender of Mannheim. Instead, the political theorist James Schmidt took me to task in the next issue of *Telos* for having undermined Critical Theory as an inspiration for the American Left.<sup>16</sup> Disentangled from the overly vicious polemical rhetoric of that era, which seemed to find a special welcome in the pages of *Telos*, his critique focused on two essential flaws in my argument: the contention that the Frankfurt School's critical analysis of Mannheim's holism could be extended back to Lukács' version as well, and the claim that classical Critical Theory had failed to ground its critique with sufficient rigor. As *Telos* gave me ample time to reply in its next issue and Schmidt seems to have modified, if not entirely abandoned, his defensive attitude towards Critical Theory,<sup>17</sup> this is not the place to engage in yet another round of the debate. I would only say that further evidence of the Frankfurt School's hostility to Lukács' concept of totality can be found in my later piece in *Telos* on the subject, which aroused no less consternation on the part of its editors, and in *Marxism and Totality*.<sup>18</sup> As for the difficulty of establishing a firmer Archimedean point for Critical Theory after its abandonment of the Hegelian-Marxist belief that proletarian praxis could provide one, I would refer the reader to Seyla Benhabib's recent discussions of the issue,<sup>19</sup> which continue the general direction of my essay. In the 1980s it is even harder than it was in 1974 to quote, as did Schmidt, Horkheimer's uncharacteristically bold remark that Critical Theory "confronts history with that possibility which is always concretely visible within it,"<sup>20</sup> and then think that the problem is solved. The alternative, to be sure, is not a simple return to a traditional theoretical standpoint outside of history, as Schmidt and others claim I recommend,<sup>21</sup> but rather to find other ways of combining a variety of non-transcendent grounds for critique. It is because of Habermas' still evolving struggle to do precisely this that his work is so promising, especially against the backdrop of an increasingly postcritical philosophical climate that is nurtured more by hermeneutics and poststructuralism than the sociology of knowledge.

If the theoretical and practical issue of the Frankfurt School's search for a ground for its critique generated considerable debate, no less controversial has been its relation, both personal and intellectual,



to what in the Germany of its members' youth was called the "Jewish question." In the secondary literature on the School, opinion ranges from those who contend the influence of their predominantly Jewish backgrounds was absolutely fundamental throughout their work to those who claim its importance was nugatory.<sup>22</sup> The members of the School were no less divided, as they were on the question of religion in general.<sup>23</sup> In *The Dialectical Imagination*, I tried to establish a balance between the extremes, but it was clear that a great deal still needed to be said about both the putative influence of their ethnic backgrounds and their own work on anti-semitism and the role of the Jews in modern society. In a short essay that appeared in *Midstream* in 1974, I tried to address these questions by situating the School in a differentiated picture of the Weimar Left's attitudes towards the Jewish question.<sup>24</sup> "Anti-Semitism and the Weimar Left" also highlighted some of the controversy that still surrounds the question today. Then in 1979, at the invitation of Reinhard Rürup, who was preparing a special issue of *Geschichte und Gesellschaft* on "Anti-Semitism and the Jews," I returned to the problem once more.<sup>25</sup> An English version of "The Jews and the Frankfurt School: Critical Theory's Analysis of Anti-Semitism" appeared shortly thereafter in the first of three, extremely interesting issues of *New German Critique* on the problem,<sup>26</sup> which was stirred up again in Germany by the television series on the "Holocaust."

In his autobiographical interviews, published in 1982 as *Mitmachen wollte ich nie*, Leo Lowenthal spoke at length about his own thoughts on these issues. Despite his earlier reluctance to admit the impact of his and his colleagues' ethnic status on their thought, he now acknowledged that "the subterranean influence of Jewish tradition was codeterminate."<sup>27</sup> The chapter in which this remark appeared was translated in a special *Festschrift* issue of *Telos* dedicated to him on his eightieth birthday in 1980. It was my great honor to serve as its editor and write a brief introduction. The latter is reprinted below less because it can stand on its own as a serious analysis of his contribution to Critical Theory than as an inducement to turn to the *Festschrift* itself.<sup>28</sup>

The Suhrkamp Verlag's recent decision to collect Lowenthal's *oeuvre*,<sup>29</sup> along with similar collected editions of Adorno and Marcuse, testifies to the still potent fascination with the Frankfurt School in contemporary Germany. Unlike in other cases where an official *Gesamtausgabe* has signaled the reduction of once lively texts into dead classics, in these, it has not. A major stimulus to the still active impact of Critical Theory has been the extraordinarily rich and voluminous work of Habermas, who continues to build on the legacy of his mentors in new and creative ways. In 1981, he helped sponsor a conference at the

Max Planck Institute in Starnberg to examine the "social scientific potential of Critical Theory." Bringing together young German scholars with others from America, Italy, and France, the conference produced a volume entitled *Sozialforschung als Kritik*, edited by Wolfgang Bonss and Axel Honneth.<sup>30</sup> My own contribution, like several others, was devoted to the thorny issue of the interdisciplinary nature of the *Institut für Sozialforschung's* work. It was in large measure inspired by Helmut Dubiel and Alfons Söllner, whose two books on the inner workings of the *Institut* had uncovered a wealth of new detail absent from *The Dialectical Imagination*.<sup>31</sup> My emphasis, however, was on an alternative version of the *Institut's* interdisciplinary workings from that revealed by Dubiel and Söllner, one based more on Adorno's model of totality than Horkheimer's. In subsequent work on the issue, the argument seems to have had some impact.<sup>32</sup> An English version appeared in the new Australian journal *Thesis Eleven*, which is emerging as one of the leading forums for work on Western Marxism in the English-speaking world.<sup>33</sup>

The Starnberg conference was a closed affair with only a few invited guests in attendance. The next conference to which I was invited by Habermas, after his move back to Frankfurt, was very different. Organized as well by the current director of the *Institut*, Ludwig von Friedeburg, it was dedicated to Adorno on the occasion of what would have been his eightieth birthday in September 1983. Estimates of the crowd ranged as high as 1,200 and the event was discussed at length in a dozen German newspapers. It provided remarkable testimony to the staying power of Adorno's ideas, even after the attempt made by more militant leftists to discredit them in the years after his death in 1969. Habermas asked me to speak on his American experience, as well as on the reception of his ideas in the United States. In so doing, as I later discovered, he hoped to counter the widespread assumption that Adorno was simply anti-American, an image that fit all too well with certain trends in the contemporary German political scene. In his introduction to the talk, which was included in the volume of conference essays published in record time by Suhrkamp, he drove this point home by quoting Adorno's own remark from *Stichworte*: "Arrogance against America in Germany is unjust. It only draws on the most grousing instincts, while misusing the higher ones."<sup>34</sup> An English version of the paper was published the following year in *New German Critique* with several footnotes expanded to accommodate the additional American literature that came to my attention in the interim.<sup>35</sup>

"Adorno in America" acknowledged the importance of George Lichtheim, as one of the earliest transmitters of Adorno's ideas, and those of many central European Marxists, to the Anglo-Saxon world. Licht-



heim had, in fact, been very helpful when I began to do my research on the Frankfurt School in ways that I described in the memorial tribute I wrote for *Midstream* after his tragic suicide in 1973.<sup>36</sup> If it is true that authors normally write for an implied reader, *The Dialectical Imagination* was in large measure aimed at Lichtheim, whose work had set a standard I hoped to emulate. Part of the anger at his death discussed at the beginning of "The Loss of George Lichtheim" was, I should confess, derived from my feeling of being denied his response. But the larger reason was the general sense of abandonment by a figure who had meant so much to my generation in its struggle to assimilate the ideas and traditions he had mastered so well. When I participated in the conference dedicated to Lichtheim's memory organized by Shlomo Avineri at the Van Leer Jerusalem Foundation in June 1974, I discovered that I was not alone in this sentiment.<sup>37</sup>

If Lichtheim had chosen to end his life prematurely, the next emigré whose history I explored had done as much as possible to deny the inevitable closure of death. In "The Extraterritorial Life of Siegfried Kracauer," which appeared in the tenth anniversary issue of *Salmagundi* in 1975/76,<sup>38</sup> I employed Kracauer's desperate resistance of totalization as a leitmotif of his entire career. Together with my two later essays on Kracauer, it might be seen as a fragment of an open-ended, untotaled biography that honors Kracauer's own admonition against closure. "The Extraterritorial Life" might be understood, to use the cinematic metaphors he employed in his own ruminations on history, as an "establishing shot," while the two shorter essays are like close-ups. The discordance between them conforms to what Kracauer would have called the "heterogeneous" nature of the historical universe, which is no less disruptive of attempts to write totalized biographies than it is of general narratives.

The first of the two "close-ups" was occasioned by Leon Wieseltier's invitation to speak to the Oxford Jewish Society during the year I spent at St. Antony's College in 1974-75. In turning the talk into a publishable article for the *Leo Baeck Yearbook* the following year,<sup>39</sup> I was aided by the counsel of a number of expert readers, most notably Gershom Scholem, whose eight-page letter, written with the acerbity for which he was famous, saved me from many mistakes. The second essay, which was a response to Robert Boyers' request for a contribution to a *Salmagundi* issue on Adorno that never materialized, had Kracauer himself as its expert watchdog. Or at least so it seemed, as I drew on the materials he carefully left in his *Nachlass* for someone to use in precisely the way I used them. "Adorno and Kracauer—Notes on a Troubled Friendship"<sup>40</sup> was a particularly painful piece to write, because it

involved just such a sense of being an accomplice in a posthumous act of revenge. But the important intellectual issues aroused by the dispute seemed justification enough for allowing it to come to light, despite its petty personal dimension.

The private clash between two emigrés created, to be sure, scarcely a ripple in comparison to the controversies surrounding the career of the next figure I examined, controversies which, as I soon discovered, were still very much alive. I had first met Hannah Arendt at the New School Conference on Weimar Culture in 1971 when, for reasons that still elude me, she was assigned the task of commentator on my panel. I had long admired many aspects of her work, such as her link between speech and practice, which I invoked against Marcuse in the first essay in this collection. When in 1974 *Partisan Review* invited me to write a review essay of the first book published on her, Margaret Canovan's *The Political Thought of Hannah Arendt*,<sup>41</sup> I eagerly accepted. As I began to reread her work systematically, however, I discovered puzzling aspects that seemed difficult to explain and even more so to defend. To make sense of them, I hit on the unifying theme of political existentialism, a movement whose dangers had been a concern of the Frankfurt School from Marcuse's 1934 essay on "The Struggle Against Liberalism in the Totalitarian View of the State" through Habermas' more recent critiques of decisionism.<sup>42</sup> At the time I wrote "The Political Existentialism of Arendt," to give the article its original title,<sup>43</sup> I was unaware of the extent of her personal as well as intellectual debt to Heidegger, which was only revealed later in Elizabeth Young-Bruehl's wonderful biography.<sup>44</sup> But I was convinced nonetheless that only by tracing her roots to German *Existenzphilosophie*, which Canovan had completely ignored, could her idiosyncratic political philosophy be comprehended.

Before the essay could be published, Hannah Arendt suddenly died of a heart attack. Out of an understandable reluctance to print a critique so soon after this sad event and mindful of earlier charges of bias against her in *Partisan Review*,<sup>45</sup> William Phillips delayed its appearance for three years and commissioned a rebuttal to run simultaneously with it. Written by an old friend, Leon Botstein, who did not allow our personal ties to dull his polemical edge, it was the first of several responses by outraged defenders of Arendt in the next few years.<sup>46</sup> The most heat was generated by my cautious attempt to probe the ironic relationship between Arendt, the great critic of totalitarianism, and Arendt, the bed-fellow of the political existentialists whose work "was not entirely blameless in the rise of fascism."<sup>47</sup> Botstein turned this argument into the alleged assertion that I believed Arendt had "succumbed



somehow to fascism and was partly, by association, responsible for fascism."<sup>48</sup> James Knauer contended that I was claiming "Arendt's conception of politics had totalitarian implications" and Gerard P. Heather and Matthew Stolz castigated my "bizarre assertion [that] 'Hannah Arendt, nominally fleeing from fascism, first succumbed to its charms.'"<sup>49</sup>

Now, if I had to rewrite my essay, I would doubtless eliminate any ambiguity over the antecedent of the "it" in that last clause, but as any reader of good faith will see when turning to the sentence as a whole—which Heather and Stolz deceptively cut in half—"it" refers to political existentialism, not fascism. Although I had made this clear in my reply to Botstein,<sup>50</sup> the message had somehow not gotten through. As for the more serious issue of situating Arendt in the ambiguous context of political existentialism itself, one critic, Stan Draenos, has argued against it because "the overriding, governing motif of Arendt's thought is not political action at all, but rather her notion of 'the world.'"<sup>51</sup> "The world," according to his interpretation, is not comparable to Heidegger's use of the term, because it is severed from his fundamental concern for Being. But, as Mildred Bakan has recently and correctly emphasized,<sup>52</sup> Arendt's use was virtually the same as Heidegger's when he spoke of *Dasein* instead. Although it is certainly true that Arendt did not swallow Heidegger whole, as her interesting critique of his treatment of the Will in *The Life of the Mind* demonstrates,<sup>53</sup> it is clear that no appreciation of her work can ignore the extent of her debt. Indeed, it is only by acknowledging the power of his hold over her that we can begin to understand her apologia for his notorious political "error" in 1933, which a recent critic has denounced for having "evaded the moral problem that such involvement posed."<sup>54</sup>

One final point concerns the issue of Arendt's categorical separation of "the political" (a concept she shared with another political existentialist, Carl Schmitt)<sup>55</sup> from society, economics, and philosophy, which I found a troubling dimension of her work. Paradoxically, some of her defenders deny that the separation was really all that strict, whereas others hold on to it as a bulwark against the polluting effects of philosophical or social concerns.<sup>56</sup> This is not the place to marshal yet another round of citations from her work or that of other critics, except to say that it was perhaps because of her willingness to make bold if ultimately questionable distinctions that she still continues to fascinate as well as dismay many of her readers. One might even say, to play on the famous aphorism of another refugee towards whom she bore little good will,<sup>57</sup> in Arendt only the exaggerations are true.

The paths of emigrés often intersected, so it is no surprise to learn from Young-Bruehl's biography that in 1940 Arendt's second

husband, Heinrich Blücher, was interned in a barn in the French village of Villemalard with Henry Pachter. Although Pachter and the Arendt-Blüchers remained on good terms during their subsequent exile in America, they were not always in agreement—Pachter, for example, holding very different views on the connection between Heidegger's politics and his philosophy.<sup>58</sup> Pachter, in fact, was rarely in agreement with anyone, as I discovered in my own encounters with him. Nonetheless, or perhaps because of his pugnaciously independent streak, he was a figure of great importance for many younger scholars interested in the migration. It was therefore with no hesitation that I accepted Robert Boyers' request to reflect on Pachter's significance after his death in 1980 for *Salmagundi*, a journal he did so much to encourage during his lifetime.<sup>59</sup>

In that essay, I recalled Pachter's curmudgeonly attitude toward the pretensions of his fellow refugees. As a sobering check on the idealizing tendencies of students of the migration, perhaps my own included, his debunkings were unquestionably healthy. But I would still want to reaffirm my conviction that the emigrés' place in the intellectual history of the twentieth century is undoubtedly secure. There is, to be sure, the danger of which H. Stuart Hughes has recently warned:

as a younger generation of Americans who had no direct knowledge of the emigration came of age, its lessons began to be forgotten. Witness the current recrudescence of positivism in social science. Witness the renewed tendency to slice up the study of society into clearly demarcated disciplines and subdisciplines.<sup>60</sup>

But whatever the loss of direct influence produced by the passage of time, the migration continues to be the center of an ever-growing interest on the part of historians. The fiftieth anniversary of the Nazi seizure of power, in 1983, saw a flood of conferences and new books, as well as the founding of a full-fledged Society for Exile Studies, directed by John Spalek, complete with its own journal, *Exilforschung: Ein Internationales Jahrbuch*<sup>61</sup>

It is, however, vital to emphasize that historical interest need not betoken the loss of contemporary relevance. Not only are many of the ideas introduced by the refugees far from exhausted, so too the emigré experience itself is still worth pondering. For those of us lucky enough not to be living through truly "dark times," to cite Brecht's famous phrase, studying the histories of this extraordinary group of men and women provides a powerful reminder of the ways in which intellectuals can transcend the most pernicious attempts to silence them. As the surviving remnant of a people whose incalculable misfortune still defies adequate understanding, the emigrés—especially, I would argue, those who



remained in some sense permanent exiles—were the precious repository of a now moribund culture. As they progressively leave us, it becomes ever clearer that theirs is a legacy we can scarcely afford to squander in the years to come.

**Part I**  
**The Frankfurt School**



## Notes

### Introduction

1. Roland Barthes, *Critical Essays*, trans. Richard Howard (Evanston: 1972), p. xi.
2. "Alienation Effects," *Midstream* (October 1972), 18(8): 72. In order to preserve the original state of the essays, I have resisted the temptation to make more than cosmetic changes in the texts or update the notes.
3. Another example is the essay I wrote for the memorial conference on Marcuse at the University of California, San Diego in March 1980. Published as "Anamnestic Totalization: Reflections on Marcuse's Theory of Remembrance" in *Theory and Society* (January 1982), 11(1), it would have been included in this collection had it not already served as the basis for the chapter on Marcuse in *Marxism and Totality: The Adventures of a Concept from Lukács to Habermas* (Berkeley, 1984).
4. Wolf Lepenies, "Transformation and Storage of Scientific Traditions in Literature," in *Literature and History*, eds. Leonard Schulze and Walter Wetzels (New York, 1983), p. 37-63.
5. *Ibid.*, p. 62.
6. *Midstream* (December 1969), 15(10).
7. Norman O. Brown, *Life Against Death: The Psychoanalytical Meaning of History* (New York, 1959), p. 318. Shortly after this passage was brought to my attention, I had the opportunity to talk with Professor Brown. When I tried to apologize for not having acknowledged it, he generously replied that he had forgotten about the phrase himself. In any event, it is gratifying to have the chance now to bring its provenance to light.
8. "Marcuse's Utopia," *Radical America* (April 1970), 4(3); "Metapolitics of Utopianism," *Dissent* (July-August 1970), 17(4); "How Utopian is Marcuse?," *The Revival of American Socialism: Selected Papers of the Socialist Scholars Conference*, ed. George Fischer (New York, 1971).
9. *The Revival of American Socialism*, p. xii.
10. Theodore Draper, "The Specter of Weimar," *Social Research* (Summer 1972), 39(2) this volume contains other papers from the conference by Walter Laqueur, Henry Pachter, Wolfgang Sauer, Ivo Frenzel, Geoffrey Barraclough and Hans Morgenthau, as well as my own on "The Frankfurt School's Critique of Marxist Humanism."
11. *Tekla; Teori och klasskamp* (August 1982), 12/13. I am grateful to Lisbet Rausnig for having translated Anders Ramsay's introduction to the article, in which its function as a counterweight to Therborn is made clear. Therborn's "The Frankfurt School" first appeared in the *New Left Review* (September/October 1970), no. 63.



12. "Cultural Transplants," *Commentary* (March 1970), 49(3).
13. *Perspectives in American History* (Cambridge, Mass., 1972), vol. 6.
14. Review of Radkau, *Die deutsche Emigration in den USA: Ihr Einfluss auf die amerikanische Europapolitik 1933-1945* (Düsseldorf, 1971) in the *Journal of Modern History* (June 1973), 45(2).
15. *Telos* (Summer 1974), no. 20.
16. James Schmidt, "Critical Theory and the Sociology of Knowledge: A Response to Martin Jay," *Telos* (Fall 1974), 21:168-80.
17. "Crutches versus Stilts: A Reply to James Schmidt on the Frankfurt School," *Telos* (Fall 1974), no. 22; James Schmidt, "Reification and Recollection: Emancipatory Intentions and the Sociology of Knowledge," *Canadian Journal of Political and Social Theory* (Winter 1978), 2(1).
18. "The Concept of Totality in Lukács and Adorno," *Telos* (Summer 1977), no. 32. Paul Piccone and Andrew Arato reply in the same issue to this piece and to my "Further Considerations on Western Marxism," also in the same issue.
19. Scyla Benhabib, "Modernity and the Aporias of Critical Theory," *Telos* (Fall 1981), no. 49, and *Critique, Norm and Utopia: On the Normative Foundations of Critical Theory* (New York, 1985).
20. The remark is from Horkheimer's 1940 essay, "Authoritarian State" and is quoted by Schmidt on p. 179 of his essay.
21. See also the critique by Richard Kilminster, *Praxis and Method: A Sociological Dialogue with Lukács, Gramsci and the Early Frankfurt School* (London, 1979), p. 208.
22. For an example of the former position, see Zoltan Tar, *The Frankfurt School: The Critical Theories of Max Horkheimer and Theodor W. Adorno* (New York, 1977), which I reviewed in *Central European History* (March 1979), 12(1). For an example of the latter, see Douglas Kellner, "The Frankfurt School Revisited: A Critique of Martin Jay's 'The Dialectical Imagination,'" *New German Critique* (Winter 1975), vol. 4.
23. For useful discussions of their attitudes, see Rudolf J. Siebert, "Fromm's Theory of Religion," *Telos* (Winter 1977-78), no. 34; "Horkheimer's Sociology of Religion," *Telos* (Winter 1976-77), no. 30; and "Adorno's Theory of Religion," *Telos* (Winter 1983-84), no. 58.
24. "Anti-Semitism and the Weimar Left," *Midstream* (January 1974), 20(1). For a suggestive extension of its argument, see John Murray Cuddihy, *The Ordeal of Civility: Freud, Marx, Lévi-Strauss and the Jewish Struggle with Modernity* (New York, 1979), p.153 f.
25. "Frankfurter Schule and Judentum; Die Antisemitismusanalyse der Kritischen Theorie," *Geschichte und Gesellschaft* (1979), 5(4).
26. *New German Critique* (Winter 1980), vol. 19.
27. Leo Lowenthal, *Mitmachen wollte ich nie: Ein autobiographisches Gespräch mit Helmut Dubiel* (Frankfurt, 1980), p. 156.
28. It appeared in *Telos* (Fall 1980), no. 45, although one of the articles intended for it, Sandor Radnoti's "Mass Culture," was not ready until issue 48 (Summer 1981). Perhaps it is appropriate to mention here as well another *Festschrift* for a former *Institut für Sozialforschung* figure to which I was privileged to contribute: that for Kurt Martin (Mandelbaum) in *Development and Change* (October 1979), 10(4).
29. An American edition is now being published by Transaction Press.
30. Wolfgang Bonss and Axel Honneth, eds., *Sozialforschung als Kritik: Zum sozialwissenschaftlichen Potential der Kritischen Theorie* (Frankfurt, 1982).

31. Helmut Dubiel, *Wissenschaftsorganisation und politische Erfahrung: Studien zur Frühen Kritischen Theorie* (Frankfurt, 1978), translation forthcoming from M.I.T. Press; Alfons Söllner, *Geschichte und Herrschaft: Studien zur materialistischen Sozialwissenschaft 1929-1942* (Frankfurt, 1979).
32. See, for example, Wolfgang Bonss, *Die Einübung des Tatsachenblicks: Zur Struktur und Veränderung empirischer Sozialforschung* (Frankfurt, 1982), p. 192.
33. "Positive and Negative Totalities: Implicit Tensions in Critical Theory's Vision of Interdisciplinary Research," *Thesis Eleven* (1981), vol. 3.
34. Jürgen Habermas, "Einleitung zum Vortrag von Martin Jay," in *Adorno-Konferenz 1983*, eds. Ludwig von Friedeburg and Jürgen Habermas (Frankfurt, 1983), p. 353.
35. "Adorno in America," *New German Critique* (Winter 1984), vol. 31.
36. "The Loss of George Lichtheim," *Midstream* (October 1973), 19(8).
37. The essays from the conference were published as *Varieties of Marxism*, ed. Shlomo Avineri (The Hague, 1977); my own contribution was also published in *Telos* as "The Concept of Totality in Lukács and Adorno."
38. "The Extraterritorial Life of Siegfried Kracauer," *Salmagundi* (Fall 1975-Winter 1976), vol. 31-32.
39. "Politics of Translation—Siegfried Kracauer and Walter Benjamin on the Buber-Rosenzweig Bible," *Leo Baeck Yearbook* (London 1976), vol. 21.
40. "Adorno and Kracauer—Notes on a Troubled Friendship," *Salmagundi* (Winter 1978), vol. 40.
41. Margaret Canovan, *The Political Thought of Hannah Arendt* (New York, 1974).
42. Marcuse, "The Struggle Against Liberalism in the Totalitarian View of the State," *Negations: Essays in Critical Theory*, trans. Jeremy J. Shapiro (Boston, 1968), p. 31f; Habermas, *Theory and Practice*, trans. John Viertel (London, 1974), p. 266.
43. It was published as the opening part of "Hannah Arendt, Opposing Views," *Partisan Review* (1978), 45(3), without the footnotes, which are included in the version below.
44. Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven, 1982).
45. Young-Bruehl discusses this controversy on p. 359. It grew out of the journal's treatment of *Eichmann in Jerusalem* in 1963.
46. Botstein and I had another exchange in the *Partisan Review* letters column in (1979), 46(2). Other critiques included Gerard P. Heather and Matthew Stolz, "Hannah Arendt and the Problem of Critical Theory," *The Journal of Politics* (February 1979), 41(1), which elicited a rebuttal from John Forester, "Hannah Arendt and Critical Theory: A Critical Response," *The Journal of Politics* (February 1981), 43(1), and a counter-rebuttal by Stolz and Heather, "Reply to Professor Forester" in the same issue; James T. Knauer, "Motive and Goal in Hannah Arendt's Concept of Political Action," *The American Political Science Review* (September 1980), 74(3), which also included critiques of the Arendt interpretations of Habermas and Kirk Thompson; and Stan Draenos, "The Totalitarian Theme in Horkheimer and Arendt," *Salmagundi* (Spring 1982), vol. 56.
47. "Hannah Arendt: Opposing Views," p. 368.
48. *Ibid.*, p. 379.
49. Knauer, p. 724; Heather and Stolz, "Reply to Professor Forester," p. 204.
50. *Partisan Review* (1979) 46(2):312.
51. Draenos, p. 167.



52. Mildred Bakan, "Hannah Arendt's Concepts of Labor and Work," in *Hannah Arendt: The Recovery of the Public World*, ed. Melvyn A. Hill (New York, 1979), p. 63.

53. Hannah Arendt, *The Life of the Mind* (New York 1978), 2:172f.

54. Stephen J. Whitfield, *Into the Dark: Hannah Arendt and Totalitarianism* (Philadelphia, 1980), p. 194.

55. See Carl Schmitt, *The Concept of the Political*, trans. with intro. by George Schwab (New Brunswick, N.J., 1976). Although the concept was different in the two cases to some extent, it is significant that both Arendt and Schmitt spoke of "the political" rather than politics in a more mundane sense. In my essay, I noted that Schmitt was a virtually forgotten figure, which now seems no longer to be the case. For my reflections on his career and recent attempts to whitewash it, see my review of Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton, 1983), *Journal of Modern History* (September 1984), 56(3).

56. The former is held, for example, by Botstein and Knauer, whereas the latter is defended by Heather and Stolz.

57. Young-Bruehl reports (p. 80) the source of the animosity between Arendt and Adorno as the latter's snub of her first husband Günther Stern's work on music in the 1920s. There is a small measure of irony in the fact that in 1983, the winner of the city of Frankfurt's Adorno Prize was none other than Günther Anders, who had been known as Stern when he was married to Arendt. Adorno's original remark, "in psychoanalysis, nothing is true except the exaggerations," was made in *Minima Moralia: Reflections from Damaged Life*, trans. E.F.N. Jephcott (London, 1974), p. 49.

58. Pachter, "Heidegger and Hitler: The Incompatibility of Geist and Politics," in *Weimar Etudes* (New York, 1982). For Pachter's reminiscences of his friendship with Arendt and her second husband, see his "On Being in Exile" in the same collection, p. 326f.

59. "Remembering Henry Pachter," *Salmagundi* (Spring-Summer 1981), vol. 52-53; it was published after a much fuller memoir by Robert Boyers, who writes at length of Pachter's relation to *Salmagundi*.

60. H. Stuart Hughes, "Social Theory in a New Context," in *The Muses Flee Hitler: Cultural Transfer and Adaptation, 1930-45*, eds. Jarrell C. Jackman and Carla M. Borden (Washington, 1983), p. 120. See also Hughes's earlier study *The Sea Change: The Migration of Social Thought, 1930-1945* (New York, 1975).

61. The first volume was published in Munich in 1983 and was devoted to "Stalin und die Intellektuellen und andere Themen." The Society for Exile Studies also published a substantial newsletter in March 1984, edited by Ernst Loewy of Frankfurt. Among the most important recent books are Anthony Heilbut, *Exiled in Paradise: German Refugee Artists and Intellectuals in America from the 1930s to the Present* (New York, 1983) and Lewis A. Coser, *Refugee Scholars in America: Their Impact and Their Experiences* (New Haven, 1984).

### 1. The Metapolitics of Utopianism

1. Marcuse: *Cet Inconnu, La Nef* (January-March 1969), 36.

2. Herbert Marcuse, *An Essay on Liberation* (Boston, 1969), p. 22.

3. See, for example, Marcuse, "Contributions to a Phenomenology of Historical Materialism" (1928), published in English in *Telos* (Fall 1969), no. 4.

4. For a discussion of this problem see Alfred Schmidt, "Existential-Ontologie

und historischer Materialismus bei Herbert Marcuse," *Antworten auf Herbert Marcuse*, ed. Jürgen Habermas (Frankfurt, 1968).

5. *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society*, (Boston, 1964), pp. 153-54.

6. "The Struggle Against Liberalism in the Totalitarian View of the State," *Negations: Essays in Critical Theory*, (Boston, 1969), pp. 31-42.

7. *Being and Nothingness*, trans. Hazel Barnes (New York, 1966), p. 364.

8. *Negations*, pp. 135-36.

9. "On Hedonism," *Negations*, p. 198.

10. *Eros and Civilization* (Boston, 1955), p. 213.

11. Marcuse, *Five Lectures* (Boston, 1970), p. 41.

12. *Illuminations: Essays and Reflections*, trans. Harry Zohn (New York, 1968).

13. See Alfred Schmidt, *Der Begriff der Natur in der Lehre von Marx* (Frankfurt, 1962).

14. *Negations*, p. 238.

15. In *Eros and Civilization* (pp. 214-15), he writes: "The death instinct operates under the Nirvana principle: it tends toward that state of 'constant gratification' where no tension is felt. . . . If the instinct's basic objective is not the termination of life but of pain—the absence of tension—then paradoxically, in terms of the instinct, the conflict between life and death is the more reduced, the closer life approximates the state of gratification. . . . As suffering and want recede, the Nirvana principle may become reconciled with the reality principle. The unconscious attraction that draws the instincts back to an 'earlier state' would be effectively counteracted by the desirability of the attained state of life."

16. Hans Heinz Holz, *Utopie und Anarchismus: Zur Kritik der Kritischen Theorie Herbert Marcuses* (Cologne, 1968); George Lichtheim, "From Marx to Hegel: Reflections on Georg Lukács, T. W. Adorno, and Herbert Marcuse," *Triquarterly* (Spring 1968), no. 12.

17. Herbert Read, "Rational Society and Irrational Art," *The Critical Spirit: Essays in Honor of Herbert Marcuse* ed. Kurt Wolff and Barrington Moore, Jr. (Boston, 1967).

18. *Illuminations*, p. 244.

19. When Marcuse first stressed the ontological centrality of labor in one of his early Heideggerian essays, his attitude toward play was less favorable than in *Eros and Civilization*. In play, he argued, the sway of the objective world over the free subject is suspended. Thus, unlike labor, play produces no permanent objectifications. It has no essential duration, existing in the "inbetween" separating true *praxis*. Nor does it express man's essentially historical nature. "First and only in labor," he wrote, "does man become historically real and win his specific place in historical occurrence." ("Über die philosophischen Grundlagen des Wirtschaftswissenschaftlichen Arbeitsbegriffs," *Archiv für Sozialwissenschaft und Sozialpolitik* [June 1933], 69(3):279.) Using his own reasoning against him, it might therefore be argued that his recent praise of play as a superior alternative to labor indicates an ahistorical strain in his thinking. I think it is more important to note that Marcuse's discovery of *Homo Ludens* in his recent work occurred against the background of his life-long conviction of the ontological importance of labor. This allows him to see play as resolving contradictions, as he once argued labor did, rather than creating new ones, as is the case when play is understood as related to what Habermas calls "symbolically-mediated interaction."

20. *Reason and Revolution: Hegel and the Rise of Social Theory* (Boston, 1966), p. 78.



AR 5230

ERNST C. STIEFEL COLLECTION

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3/9 MAGDELENA SCHOCH 1942-1980



Magdalena  
Schoch

Magdalena Schoch

②



State University of New York at Albany

December 15, 1980

Dr. Magdalena Schoch  
2108 N. Illinois St.  
Arlington, VA. 22205

Dear Dr. Schoch,

let me introduce myself as Prof. John Spalek's research associate; our current project consists of locating and registering the archival materials of former German-speaking emigres who came to this country after 1933. Following up on the letter we sent you on December 7, 1980 I would like to inform you that I will be in your area during the last week of December 1980 and maybe the first week of January 1981.

Should you be willing to help us in completing our project, which as you can imagine is a great task, I certainly would like to give you a call once I am in your vicinity or even pay you a short visit. It would give me a chance to explain this project in greater detail and I would be able to answer your questions.

Hoping to hear from you I am

Sincerely,

*Ulrich R. Froehlich*  
Ulrich R. Froehlich, Ph.D.

To: Mr. Froehlich,  
Sorry, my sister Dr. Magdalena Schoch  
is 84 years old and doesn't know  
anymore what's going on in the world.  
To save you time and mailing, please  
cross her out on your list.

Sincerely

*Elisabeth C. Puyi - Schoch*



### A Bit About My Career

I had always intended to study medicine. But when I found out that this would take too many years before I could support myself, I switched over to law. The University had a pleasant custom of permitting new students to "taste" any lectures they might be interested in at the beginning of the semester. The first lecture on which I sat in was on Roman law, taught by an outstanding expert in the field. I'll never forget the expression on his face when he saw a girl sitting there. He was about to open the lecture with the traditional formal "meine Herren", but when he saw me he was speechless for a few minutes until he managed to say "meine Herren und meine Dame" with an ironic intonation. But I was so fascinated with the subject that I registered for his course and learned a lot, beside, naturally, attending other legal courses. After an extra semester in the University of Munich I acquired a doctorate in law from the Würzburg faculty in 1920. Soon thereafter I was hired as an assistant by Professor Albrecht Mendelssohn Bartholdy, who had been invited to help organize the newly founded University of Hamburg. A.M.B., as we always called him, was a grandson of the composer, and had wanted to become a musician himself. But when his father died, his uncle, a famous professor of law in Leipzig, insisted that he studied law because, he said, "If you become a musician, you will always be compared with your famous grandfather, and never judged on your own merits." A.M.B. made a brilliant career in the law. As a very young man he became a full professor in the law faculty of Würzburg. When he accepted the call to Hamburg, he asked me to become his assistant. This opened an entirely new world to me.



The widespread city along the banks of the Alster River, which formed a beautiful lake, the harbor with its coming and going of ships, the beautiful surroundings, the wide horizon, and the nice people: it did not take long before Hamburg became my second home. My work started with the organization of a library of foreign law and lecturing on conflict of laws and comparative law. When A.M.B. organized the Institute of Foreign Policy, which played an important role in the international relations of Hamburg, I worked there part-time, helped edit the magazine "Europäische Gespräche" and was editor of the "Amerika-Post". A fellowship gave me an opportunity to acquaint myself with the judicial system of England--a wonderful experience.

After a while I persuaded my Mother to come and live with me, after Liselotte had married. It was not an easy decision to leave Würzburg, but Mutter soon found new roots in the nice apartment I had found for us (there was still a housing shortage), and she made a comfortable home for me. Then after a few years, I had the good fortune of receiving a fellowship from the Rockefeller Foundation for a year of study and research in the United States--an opportunity I could not decline. During that time (1934-1935) Mother stayed with Liselotte and her family in <sup>Frankfurt</sup> Frankfurt. This is not the place to report on the interesting and fruitful year I spent travelling all over the United States and visiting a number of law schools. When I had to return to Germany I had great misgivings about the progress which Nazism had made in the meantime, and my fears were fully justified. The universities had completely surrendered to the Nazis, just like the entire population (Professor Mendelssohn had already moved to England with his family at the time I went to the United



States). I felt I could not stay in this atmosphere, and I had to disappoint my poor Mother's hope that we might start a joint household again. I cut off my connection with the Institut für auswärtige Politik and restricted myself to teaching "non-political" subjects. My office was in a small annex to the University, where I could avoid contact with the Nazi administration. But one day we received a notice from headquarters "permitting" every teacher and employee to apply for membership in the Party. The professor who was my superior at that time called me into his office in great agitation. He was not a Nazi but a remnant of the conservative party, and he was quite upset. "My God, what shall I do? What are you doing, Dr. Schoch?" "Me," I said, "I've thrown the notice in my waste basket." "But what about our future? I cannot live if I'm not permitted to teach!" "Well, Professor, that's your problem." So he signed on the dotted line. I, of course, did not, and strange to say, nothing happened to me.

Lennie has asked me to record the following, because it reveals the moral corruption which Hitler brought out in the so-called intellectuals. One Friday morning in 1936 I received a wire notifying me that Professor Mendelssohn had suddenly died in Oxford. I'm not going to dwell on my feelings at this blow. I called the head of the Faculty, told him the fact and that I could not attend the Faculty meeting next day because I was going to England for the funeral. He was practically speechless. "Do you think this is wise? I'll have to notify headquarters of the University." Which he did, and was told that this trip might have serious consequences for me. I told him I was not interested and asked him to cancel my lectures for the following week. I rushed to England by the night boat and caught a train in time to attend the funeral and spend a



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day with A.M.B.'s family. I found out that not one of his German colleagues nor his former university had sent even a token of sympathy. When I was back in my office in Hamburg, one or two of his former friends and colleagues would sneak to my office and ask me questions. I could not help showing them my contempt. Soon thereafter I resigned and left for the United States in 1937. My Mother and Trudel saw me off on the boat, and the courage which Mother showed almost broke my heart. This was the last time I saw her . . .

I had good friends receiving me in the U.S.A. who made it possible for me to start on a new career.

After the collapse of Germany I received a letter from Hamburg offering me a teaching position in the revived University. I replied I would never set foot into that institution . . .



mind - or thought I had - that this Germany was no place for me. I could not in conscience continue my academic work. I was going through the process of pulling up my roots, one by one, and of planning for a future which I could not yet visualize.

Suddenly an Amsel burst into song. I stood still and looked for him. There he was, in a treetop, his head lifted to the sky, pouring forth his music.

My heart contracted. How could I ever live without the song of the merle in the spring?

"But you do not have to leave", I told myself. "You need not exile yourself -- you can stay and keep all this."

All this? Yes. The birdsong and the linden trees in the heart of the city; the cherry blossoms along the dikes; the summer nights in the canoe on the moonlit Alster lake; the shimmering miles of heather blooming in late August; the evenings of searching talks with friends, and the family reunions. The familiar, the beloved, the soil in which I had grown and the air that had nourished me.

And what price all this?

The next minute I knew in my soul that there was no real choice.

On the following day I went to the American consul and applied for an immigrant's visa.

I have never heard the song of the merle since.

*P.S. Years after I had written this  
I did hear the merle again on  
a visit to Germany. It was  
as I remembered it.*



Curriculum Vitae

MANIA MAGDALENA SCHUCH

Home address: 2827 North Washington Boulevard, Falls Church, Va.  
Arlington 1587  
Office: Room 2743, Department of Justice, Republic Bldg  
ext. 586

Present position: Foreign Law Expert, Alien Property Section,  
Claims Division, Department of Justice.

Citizenship status: citizen of the United States since August, 1943  
(German born).

Legal training: Studied law at the Universities of Muerzburg and  
Munich (Germany). Four year course of studies, with emphasis on  
international law, conflict of laws, and comparative law (under  
Professor A. Mendelssohn Bartholdy). Submitted thesis on English  
War Legislation against Enemy Corporations, and received degree of  
doctor of laws (doctor juris) magna cum laude, 1926, University of  
Muerzburg.

Professional activities in Europe:

1920, appointed research assistant to professor A. Mendelssohn  
Bartholdy, Law Faculty of University of Hamburg, Germany. Assisted  
in teaching and research work in comparative law, in particular  
English law and private international law. Organized library of  
Institute of Comparative and International Law and supervised gra-  
duate studies.

1927 and 1928, attended the proceedings of the Hague Tribunal for  
the Interpretation of the Dawes Plan; subsequently published a Ger-  
man edition of the proceedings and awards, in four volumes (see list  
of main publications).

1928 and 1929, spent several months in England studying the organi-  
zation and procedure of the county courts. Mainly field studies in  
various county courts in London and outside London. Also familiarized  
myself with procedural methods in the High Court of Justice, Court  
of Appeal and House of Lords.

Beginning in 1926, lectured on English law in University of Hamburg  
(introduction to the common law, history, the development of equity,  
characteristic differences between civil law and common law) and  
taught seminars in comparative law, with emphasis on Anglo-American  
law (comparative analysis of recent cases).

1929, collaborated with Professor A. Mendelssohn Bartholdy in organ-  
izing the Hamburg Library of American Law, with the aid of Hamburg  
Society of Friends of the United States, and Sponsors in the United  
States.



As director of Hamburg Library of American Law and Associate director of the Institute of Comparative and International Law, was charged with giving information and rendering legal opinions to attorneys and law courts on questions of private international law involving the application of foreign (mostly American or English) law.

1932, became member of the Law Faculty of the University of Hamburg (first woman in Germany to attain faculty status in a law faculty), on the strength of a monograph on the delimitation of substance and procedure in private international law (see list of main publications) and a formal lecture with discussion before the Faculty (subject: "Recent Reforms in Civil Procedure in England"). Inaugural lecture on The Concept of Property in the American Constitution (14th Amendment).

Courses taught 1932 - 1934, 1935 - 1937: Jurisprudence; Introduction to English Law; The Constitution and Legal Institutions of the United States; Private International Law; Bankruptcy.

1937, resigned from the Faculty because of anti-Nazi convictions and prepared emigration.

Additional activities:

1935 - 1936, Research Associate at Hamburg Institute of International Affairs (under direction of Professor A. Mendelssohn Bartholdy) part time. Participation in and supervision of staff studies on questions of international law, such as the League of Nations mandates over former German colonies, problems of international disarmament, of international arbitration and adjudication, etc. Resigned in 1936, when Professor Mendelssohn Bartholdy was ousted from his post and replaced by a Nazi appointee.

Studies and professional activities in the United States:

1934 - 1935, Research Fellow of Rockefeller Foundation (Laura Spelman Rockefeller Memorial) for studies of conflict of laws in the United States, both from the point of view of methods of solving cases and of teaching. In fall, 1934, attended classes of Dean (now Judge) Herbert F. Goodrich, University of Pennsylvania Law School, and addressed the class on various subjects. January to June, 1935, attended classes (not for credit) at Yale Law School, under arrangement with Dean Clark, in particular: Lorenzen, Conflict of Laws; Borchard, Constitutional Law; Fleming, Procedure; Underhill Moore, Seminar on Jurisprudence. During summer term, 1935, attended Professor Page's course on conflict of laws at University of Wisconsin Law School. Interviews and discussions with law teachers in other law schools, notably Professor Rheinstein, University of Chicago; Professor Bingham, Stanford; Professor Beale, Harvard.



October 1927, immigrated into the United States and took out first papers for citizenship.

1928 - 1942, Research Associate at Harvard Law School. Assisted Professor (now Dean) Erwin H. Griswold and Professor Paul Freund in conducting courses and seminars on conflict of laws; planned and conducted graduate seminar discussions on selected topics of conflict of laws, with special emphasis on constitutional aspects of conflict of laws in the United States; advised graduate students on special studies in the field. Engaged in research and writing of my own. (See letter of Dean Griswold to Mr. Cleburne.) Collaborated with Professor Sidney P. Simpson in editing a volume of Readings in Jurisprudence (with Julius Stone), to be published next year. Prepared, under the auspices of the Association of American Law Schools, a selection of writings on the so-called "Jurisprudence of Interests"; translated them from the German and annotated them; to be published in the near future by Harvard University Press, in the modern Legal Philosophy series. In 1932, gave a public lecture on Conflict of Laws and International Conventions, as one of a series of Public Faculty lectures.

August 1942 - December 1943, on leave of absence from Harvard Law School for war work. Reconstruction Division (Law Section) of Office of Economic Warfare, later Foreign Economic Administration. Research and analysis regarding the legal implementation of economic controls in enemy countries and methods of economic administration; formulation of recommendations for Military Government (Civil Affairs Guides).

1943, promoted to section Chief in Property Control Division of FEA (Ex-Enemy and Neutral Property Section); September - November, 1943, Acting Division Chief. Duties: to initiate and supervise research and analysis of legal and economic problems relating to ex-enemy and neutral property in Germany, and German property in neutral countries; to formulate proposals for Military Government action under Potsdam Declaration, with a view to disarmament and reparations. Co-author, with Dr. Ernst Fraenkel, of an extensive legal study on "Extra-territorial effect of economic measures taken by the Occupying Powers in Germany: Problems of recognition and enforcement" (mimeographed).

December 1943 - March 1945: Practising Law Institute, New York. Chief of Department of Publications, and Acting Chief of Department of Instruction, under Colonel Sidney P. Simpson (Educational Adviser on Veterans' Programs). Organizing and supervising publication of materials for refresher courses for lawyer veterans, including series of pamphlets on General Practice and Trial Practice and volume on "Significant Developments in the Law in the War Years" (edited by Dean F.D.G. Ribble). Supervising organization of refresher courses for veterans in New York and elsewhere.



Main publications:

Die englische Kriegsgesetzgebung gegen feindliche Gesellschaften, insbesondere nach der Trading with the Enemy Act, 1918 (The English War Legislation against Enemy Corporations). Doctoral thesis. 10 Rheinische Zeitschrift 222 (1920).

Die Entscheidungen des Internationalen Schiedsgerichts zur Auslegung des Dawes-Plans (The Awards of the International Arbitral Tribunal I for the Interpretation of the Dawes Plan). 4 volumes, 1928 - 1930.

Uebersicht ueber das Recht der Vereinigten Staaten in seinen Besonderheiten (A Survey of the Law of the United States in its Characteristic Features). Handbuch der Amerikanistik, 1921, 132 et seq.

Klagbarkeit, Prozessanspruch und Beweis im Licht des internationalen Rechts (Delimitation of Substance and Procedure in Private International Law). 1924. 100 pp.

Reports and Comments on English Decisions in the field of conflict of laws, in 4 Giurisprudenza Comparata di Diritto Internazionale Privato 231 et seq.; 5 ibid. 137 et seq. (1928, 1929).

Articles and book reviews in German and Austrian legal periodicals.

Conflict of Laws and Private International Law (1935), Proceedings of the 33rd Annual Meeting of the American Society of International Law, 81.

Conflict of Laws in a Federal State: The Experience of Switzerland (1942) 55 Harv. L. Rev. 728.

Thayer, Schoch & Ireland, The Effect of a State of War upon Statutes of Limitation (1945) 17 Tulane L. Rev. 415.

Divorce Law and Practice under National Socialism in Germany (1945) 28 Iowa L. Rev. 223.

Determination of Paternity by Blood-Grouping Tests: The European Experience (1948) 16 So. Cal. L. Rev. 177.

Contributions to the Recent Case Department of the Harvard Law Review, 1933 - 1943.

Numerous book reviews in Harvard Law Review, Yale Law Journal, Columbia Law Review, Journal of the American Bar Association, Canadian Bar Review, Tulane Law Review.

Forthcoming:

The Jurisprudence of Interests. Selections from various German authors, translated and annotated. To be published in the Modern Legal Philosophy Series of the Association of American Law Schools (Harvard University Press).

With Sidney P. Simpson and Julius Stone, Readings in Jurisprudence.



## Curriculum Vitae

### Maria Magdalena Schoch

1. Address: (Miss) Maria Magdalena Schoch  
Harvard Law School, Cambridge, Mass.  
Tel.: KIRkland 7600, Ext. 221.  
  
Home: 117 Avon Hill Street, Cambridge, Mass.  
Tel.: KIRkland 9341.
2. Status etc.: German-born, German nationality;  
arrival in United States (immigration) October, 1937;  
first papers December 1937; application for  
final papers October, 1942.  
  
Unmarried; age 45.
3. Present occupation: Research assistant in comparative law  
and private international law, Harvard Law  
School (since September, 1938). Research and  
teaching.
4. Professional background and experience:  
Studied law and political science in the Univer-  
sities of Würzburg and Munich, Germany;  
Doctor of Laws (magna cum laude), University  
of Würzburg, 1920;  
research assistant to Professor A. Mendelssohn  
Bartholdy, University of Hamburg, at Institute  
of Comparative and Private International Law, 1920;  
Librarian of above Institute;  
lecturer (1928) and assistant professor (1929)  
in Law Faculty of Hamburg University, in com-  
parative and private international law;  
general assistant to Professor A. Mendelssohn  
Bartholdy as head of Hamburg Institute of Inter-  
national Affairs (1923 - 1928); research in inter-  
national affairs, collaboration in editing  
Europäische Gespräche (11 vols., 1923 - 1928);  
organized "Friends of the United States in Hamburg"  
(Gesellschaft der Freunde der Vereinigten Staaten);  
member of board of directors (1929);  
editor of bi-lingual magazine Amerika-Post (A Mes-  
senger of Good Will between the United States and  
Germany) (5 vols., 1929 - 1933);  
organized and directed Hamburg Library of American  
Law (1929 - 1937);  
rendered expert opinions to German courts and  
lawyers on questions of conflict of laws and foreign  
laws;  
travelled in England to study legal institutions  
(1928, 1929, 1930);  
research fellowship of Rockefeller Foundation for  
study and research in United States, 1934 - 1935.



5. Main publications:

Die englische Kriegsgesetzgebung gegen feindliche Gesellschaften, insbesondere die Zwangsliquidation nach der Trading with the Enemy (Amendment) Act, 1918.

(1920) 10 Rheinische Zeitschrift 323.

Völkerbündmandate und Kolonialpolitik (1922). 5 Handbuch der Politik 36.

Zum Abrüstungs - Fragebogen der Völkerbündskommission (1925) 4 Europäische Gespräche 121.

Die Entscheidungen des Internationalen Schiedsgerichts zur Auslegung des Dawes - Plans. (Translation and comments). 4 vols.

Elagbarkeit, Prozessanspruch und Beweis im Licht des internationalen Rechts. Zugleich ein Beitrag zur Lehre von der Qualifikation. 1924.

Ueberblick über das Recht der Vereinigten Staaten in seinen Besonderheiten (1931). 3 Handbücher der Auslandskunde: Handbuch der Amerikanikunde 1.2.

Aus dem Internationalen Recht. Reports and comments on foreign decisions concerning questions of private and public international law. Currently in 19 and 20 Hanseatische Rechts- und Gerichtszeitschrift (1926, 1937).

Reports and comments concerning English decisions in the field of private international law. 4 Giurisprudenz: Comparata di Diritto Internazionale Privato 231, 5 ibid. 137 (1928, 1939).

Conflict of Laws and Private International Law (1933), Proceedings of the 33rd Annual Meeting of the American Society of International Law 61.

Conflict of Laws in a Federal State: The Experience of Switzerland (1940) 55 Harv. L. Rev. 738.

Thayer, Schoch & Ireland, The Effect of a State of War upon Statutes of Limitation (1940) 17 Tulan. L. Rev. 413.

Divorce Law and Practice under National Socialism in Germany (1943) 28 Iowa L. Rev. 225.

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Forthcoming:

Simpson & Schoch, Social Control in the Totalitarian State. Source Materials on Law and Social Organization in Fascist Italy, Nazi Germany, and the USSR.

Divorce in Latin America: Some Conflict-of-Laws Aspects. Iowa L. Rev.

Book reviews: 51 Harv. L. Rev. 1310 (1938); 52 Harv. L. Rev. 1028 (1939); 53 Harv. L. Rev. 901 (1940); 14 Tulane L. Rev. 313 (1940); 55 Harv. L. Rev. 493 (1942); 20 Can. Bar Rev. 810 (1942); 55 Harv. L. Rev. (April, 1943).

Contributions to the Recent Case Department, Harv. L. Rev., 1939 to 1943.

Editing, translating, etc.:

Europäische Gespräche, 11 vols., 1923 - 1933.- Translations of documents concerning international affairs; bibliography of international affairs; general editorial work.

Urkunden zur Politik unserer Zeit. Vol. 3 of Handbuch der Politik, edited by A. Mendelssohn Bartholdy. (1933).- Translating, editing, annotating documents.

Amerika-Post. A Messenger of Good Will between the United States and Germany. 5 vols., 1933 - 1936.- responsible editor.

Der Lytton-Bericht. 1 Urkunden und Forschungen zum Internationalen Recht (1933).- Supervising translation.

Forthcoming:

The jurisprudence of Interests.- A volume in the Series of Modern Legal Philosophy, to be published by the Association of American Law Schools.- Translations from German legal authors; annotations.



1942

Dr. Magdalene Schoch,  
Harvard Law School.  
Curriculum Vitae.

I was born in Germany, went to school there, and studied law and political science in German Universities (for details, cf. application form). After having received the degree of doctor of laws (Dr. jur.) from the University of Würzburg, I became associated with the Law Faculty of the University of Hamburg in 1920, first as research assistant to the well-known international lawyer Professor Mendelssohn Bartholdy, and subsequently as lecturer and assistant professor (Privatdozent) in the fields of comparative law and private international law. I was also in charge of the Institute of Comparative Law, for which I built up a sizable library of foreign law books.

My activities were not purely academic. During the period that I was connected with the University of Hamburg, or to be more precise, until 1933, I devoted at least half of my time to the field of politics and international relations. These activities were closely associated with Professor Mendelssohn Bartholdy's work.

The Institute of Foreign Affairs (Institut für Auswärtige Politik) in Hamburg, of which Professor Mendelssohn Bartholdy was the founder and director, was not only a research institute, but had as one of its main functions the spreading of interest in and knowledge of foreign affairs and the furthering of international cooperation and of efforts for the establishment of an enduring peace. In my capacity



as general assistant to the head of the Institute, and later as the director of its Legal Department, I helped arrange numerous public lectures and round-table discussions held by the Institute, invited foreign speakers, and provided foreign visitors with material concerning the political situation in Germany. Professor Mendelssohn Bartholdy relied on me for much of the German and foreign material he used in his writings, lectures and speeches on foreign affairs. I also directed the work of two of the collaborators of the Royal Institute of International Affairs in London, who were sent to the Hamburg Institute for training and for research work.

For the periodical of the Institute, Europäische Gespräche (11 vols., 1923 - 1933) I wrote book reviews, translated articles and diplomatic documents from the English, French and Italian, and edited the bibliography on foreign affairs. I also translated into German, edited, and commented upon the Proceedings and Awards of the Hague Tribunal for the Interpretation of the Dawes Plan (Die Entscheidungen des Internationalen Schiedsgerichts zur Auslegung des Dawes-Planes, 4 vols., 1927 - 1929), and supervised the translation of the Report of the Lytton Commission concerning the Manchurian dispute (Der Lytton-Bericht. 1 Urkunden und Forschungen zum Internationalen Recht, 1933).

In 1928 and 1929 I collaborated in organizing the "Friends of the United States in Hamburg" (Gesellschaft der Freunde der Vereinigten Staaten in Hamburg) and became a member of its board of directors. Our purpose was to bring Americans



and Germans into closer contact (practically all the members of the sizable American colony in Hamburg joined), and to strengthen the cultural, economic and political ties between the two countries. As editor of the bi-lingual magazine "Amerika - Post (A Messenger of Good Will between the United States and Germany)" (5 vols., 1929 - 1933) I strove to supplement the work done by the Institute of Foreign Affairs on a broader and more popular basis and with special regard to American - German relations.

I withdrew from all these activities in 1933, when it became clear that under the National Socialist regime these endeavors and publications would sooner or later have to be turned into instruments of Nazi propaganda. Professor Mendelssohn Bartholdy was ousted first from his professorship, and then from the Institute. He was immediately invited to England to become a member of the Faculty of Oxford University. The Institute was taken over by the Nazis, and in 1937 it was moved to Berlin and made an annex to the notorious Ribbentrop Bureau. The Friends of the United States in Hamburg were forced to cease their activities and to discontinue the Amerika - Post.

However, I was able, for a time, to continue my teaching and research work at the University of Hamburg, especially in the Library of American Law, which had been established with the aid of American friends in 1929. In 1934 I had the good fortune to obtain a research fellowship from the Rockefeller Foundation. I spent one year in this country, from



the fall of 1934 to October, 1935, studying the teaching methods in various Law Schools, especially in the field of conflict of laws and international law, travelling, and getting acquainted with American institutions.

When I left Germany in the fall of 1934, there seemed to be still a reasonable chance, in the light of conditions as they then existed, that the Nazi regime would not last. I still do not feel that I was unduly optimistic in hoping at that time that the regime would break down under internal and external pressure, and that persons like myself, brought up in liberal and democratic beliefs, would have an opportunity to help rebuild a new and decent Germany. When I returned in November, 1935, however, my impression was entirely different. The National Socialist Party in the meantime had strongly entrenched itself in all positions of power, and had built up a strong machine of organized force which was brought to bear on all spheres in the life of the nation and the individual. When, in the spring of 1936, Hitler's reoccupation of the Rhineland and his tearing up of the Locarno Treaty did not meet with armed resistance, the hopelessness of the situation became evident to me. I was not willing to "co-ordinate" myself, as many of my colleagues had done or were trying to do. Nor was I heroic enough to risk my life by uttering useless protests against the suppression of all liberties. Although I made myself conspicuous by refusing to give the officially prescribed Hitler salute and by continuing my associations with Jewish friends, and



although, when it was officially "suggested" that all teachers in the University join the Party, I was the only one who refused, I was not for the time being molested. When Professor Mendelssohn Bartholdy died in Oxford, in the fall of 1936, I was warned by the President of the University that serious consequences would result if I went to the funeral. I went, and nothing happened. All that, and the fact that my teaching in the University was never interfered with, can only be explained by the well-known fact that Hamburg was one of the most "lukewarm" cities in Germany to the Nazis. Nevertheless, all in all, life in that terrorized country had become intolerable, and it was only a question of time when the Nazis would catch up with me. So I decided to resign from my position and to come to this country to become a free American citizen.

Despite the unpleasantness of living under the Nazi regime I do not now regret having remained in Germany until 1937. My staying gave me a first-hand insight into the workings of a totalitarian dictatorship. I learned about its propaganda technique and saw how effective it was in the long run, no matter how crude and childish it might appear to the intellectual. I observed the gradual corruption of the minds of the people, the disintegration of moral values, and the disillusionment which produced the present nihilistic state of mind in Germany - to my thinking one of the most important factors to be taken into consideration in any effective counter-propaganda by the United Nations. My



*beginning of this deposition*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

6500729

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CHARLES E. FONTAINE and  
I.O.S., LTD. (S.A.) d/b/a  
INVESTORS OVERSEAS SERVICES,

Plaintiffs

v.

CIVIL ACTION  
NO. 325-65

SECURITIES AND EXCHANGE COMMISSION,  
MANUEL F. COHEN, BYRON D. WOODSIDE,  
FRANCIS M. WHEAT, HUGH F. OWENS, and  
HAMER H. BUDGE, as Chairman and  
members respectively,

Defendants

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AFFIDAVIT OF SWISS LAW

CITY OF WASHINGTON )  
DISTRICT OF COLUMBIA ) ss.

Dr. M. Magdalena Schoch, residing at 2108 North Illinois Street,  
Arlington, Va., being duly sworn, deposes and says:

I.

I was until recently an attorney employed in the Civil Division (Office of Alien Property) of the U. S. Department of Justice, and I have served the Department as an expert on foreign law for a period of twenty years. I have retired from Government service and am now practicing as an independent consultant on foreign and international law. I have been a member of the Bar of the District of Columbia since 1947, and I am admitted to practice in the U. S. Court of Appeals for the District of Columbia and the Supreme Court of the United States.

After completion of a four year course in the German Universities of Wuerzburg and Munich, I obtained the degree of Doctor of Laws from the University of Wuerzburg in 1920.



I then became research assistant in the Law Faculty of the University of Hamburg, Germany, and later lecturer in the same Faculty. I organized an Institute of International and Comparative Law within the University of Hamburg. In 1932, having complied with the prescribed requirements, I was appointed a member of the Law Faculty of Hamburg, with the title of Privatdozent. I taught private international law and comparative law as well as various courses on German law. In the field of comparative law my work involved a study and analysis of the laws of the civil-law countries, including the law of Switzerland, and I familiarized myself with the Codes, the court decisions and the legal writings of Switzerland.

In 1938, after having come to the United States for permanent residence, I was given a position as research assistant at Harvard Law School. In this capacity I conducted research in German and other continental laws, and taught conflict of laws and comparative law in seminars for graduate students, under the direction of Professor (now Dean) Erwin M. Griswold. In one seminar course I discussed problems of Swiss private and public law in comparison with problems arising under the federal structure of the United States. Due to the fact that the Harvard Law School has an extensive library of foreign law, I was able to keep my knowledge of European law, and Swiss law specifically, up to date.

In 1943, I was appointed consultant on foreign law by the Office of Economic Warfare in Washington, D.C., which was later reorganized into the Foreign Economic Administration. There I was Section Chief in the Property Control Division, in charge of questions concerning property in Germany and in neutral countries including Switzerland; and in 1945 I became Acting Division Chief of the Property Control Division.

In 1946, I was appointed Foreign Law Expert in the Alien Property Section of the Claims Division of the Department of Justice, and later



in the Office of Alien Property, In this capacity I advised the Department of Justice on questions of Swiss law in numerous cases and furnished affidavits on Swiss law in litigation such as Eduard von der Hevdt v. Brownell, U. S. District Court for the District of Columbia (Civil Action No. 941-54), Societe Internationale pour Participations, etc. (Interhandel) v. Kennedy, U. S. District Court for the District of Columbia (Civil Action No. 4360-48), Werner von Clemm, et al. v. Kennedy, U. S. District Court for the Southern District of New York (Civil Action No. 60-2096).

I have previously testified as an expert on Swiss law in the United States District Court for the Southern District of New York in the case of United States of America v. The Watchmakers of Switzerland Information Center, Inc., et al. (Civil Action No. 96-170), and in the case of United States of America v. Ingemar Johansson, et al., United States District Court for the Southern District of Florida, Miami Division (Case No. 10,588-M-Civil).

I have also contributed articles and reports of decisions on Swiss law to American legal publications. The extensive collection of Swiss Code texts, court decisions and legal writings in the Foreign Law Section of the Library of Congress has enabled me to keep myself informed on current developments in the law of Switzerland.

I am fully familiar with the German and the French languages, which are official languages in Switzerland. I have read the laws, the cases and the literature which I discuss in this Affidavit in the original language, and I have prepared the translations which I quote herein.

## II.

I have been asked by the Securities and Exchange Commission to



furnish an opinion regarding the following questions of Swiss law:

1. Does Swiss law prohibit a broker-dealer who buys and sells securities in the United States and otherwise conducts a securities business both in the United States and other countries, and who has been registered with the Securities and Exchange Commission since 1960 as a broker-dealer and who became resident in Switzerland during 1964, from producing its books and records relating to transactions with or for United States citizens for inspection by the staff of the Commission in accordance with an express undertaking to do so filed by that broker-dealer and required by United States law as a condition precedent to its registration as a broker-dealer under the Securities Exchange Act?
2. Would Swiss law be violated if a broker-dealer in the circumstances related above produced its books and records relating to securities transactions with or for United States citizens pursuant to an order of a United States court or other governmental authority enforcing a demand for such books and records under the provisions of the Securities Exchange Act?

In addition to the facts stated in the above questions, I have been asked to assume the following facts:

I.O.S., Ltd. is a Panama corporation, which as a non-resident registered broker-dealer is required by Rule 17a-7 under the Securities Exchange Act to keep its books and records, or copies thereof, at a place designated within the United States, unless it signs an express undertaking to produce copies of all its books and records to the Commission upon demand. I.O.S. executed such an undertaking in 1960.

In 1964, I.O.S. established a branch office in Geneva, Switzerland, and was registered in the Geneva Commercial Register under the name "Ios, Ltd., Panama City, Geneva branch (Succursale) at Geneva."<sup>1/</sup> The entry states as the "purpose of the corporation": "management of investment funds and sale of participations"; and as the "particular object of

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<sup>1/</sup> Swiss Official Commercial Gazette (Handelsamtsblatt) No. 64 of March 16, 1964, p. 851.



the branch": "administration, control and supervision of the agencies of the corporation throughout the world; study of financial markets, preparation of the publicity program for these agencies." The members of the board of directors and the chief officers of I.O.S., with one exception, were listed as United States citizens.<sup>2/</sup>

The relevant books and records which the Commission has asked the I.O.S. to produce are located in Switzerland.

#### SUMMARY OF CONCLUSIONS

I have examined the opinion rendered to plaintiffs in this case by Maître Turrettini, which concludes that the production of the books and records here in question would render the officers and directors of I.O.S. liable under Article 273 of the Swiss Penal Code as well as under Article 47(b) of the Swiss Banking Act.

On the basis of my research and inquiry into Swiss law, specifically directed to the matters involved in this case, I believe that the conclusions of plaintiffs' expert, Mr. Turrettini, are not well-founded when applied to the facts and circumstances herein.

No case involving similar facts and circumstances has been decided by the Swiss courts. Neither has the Federal Attorney (Attorney General) of Switzerland made any ruling in any similar case.

Article 273 of the Swiss Penal Code is couched in very broad terms. The few decisions of the Supreme Court of Switzerland involving government agencies of other countries use sweeping language to deal with factual situations of a very limited type. It is doubtful whether these cases furnish any Swiss precedent for the novel problem posed here.

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<sup>2/</sup> Photostatic copy of the entry in the Commercial Register of Geneva.



On the basis of the material below, I conclude:

1. It is likely that Article 273 of the Swiss Penal Code would not be applied so as to preclude I.O.S. from producing its books and records relating to transactions with, or for, United States citizens for inspection by the Commission in accordance with I.O.S.'s express undertaking to do so, which was filed by I.O.S. as a condition of its registration.

2. It is likely that Swiss law would not be violated if I.O.S. under these circumstances produced its books and records relating to securities transactions with or for United States citizens pursuant to an order of a United States Court enforcing a demand for such books and records under the provisions of the Securities Exchange Act.

3. Whether I.O.S. is subject to Section 47(b) of the Swiss Banking Act is a question of fact depending purely upon whether I.O.S. has been certified as a bank or bank-like institution by the Swiss Federal Banking Commission. No such showing has been made.

4. There is no rule of Swiss law which would prevent I.O.S. from closing its branch office in Geneva and removing its operations, together with its books and records, to some other country whose laws would raise no doubts as to the permissibility of the production of its books and records under these circumstances.

#### DISCUSSION

1. Article 273 of the Penal Code

Article 273 provides as follows:

Economic Intelligence Service

Whoever elicits a manufacturing or business secret in order to make it available to any foreign official agency or to a foreign organization or private enterprise, or to any agents of the same,

Whoever makes available a manufacturing or business secret to any foreign official agency or to a foreign



(mad 1961)

MR. McCARTHY: The Government would now like to call Dr. Schoch to the stand if defendants have no further exhibits.

THE CLERK: You were sworn yesterday, were you not?

WITNESS M. MAGDALENA SCHOCH: I was, sir.

THE CLERK: Have a seat, please.

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M. MAGDALENA SCHOCH, witness for the United States, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

BY MR. McCARTHY:

Q Dr. Schoch, would you state your full name for the record, please?

A My name is M. Magdalena Schoch, S-C-H-O-C-H.

Q What is your present address?

A My address is 6817 Twenty-fifth Street North, Arlington, Virginia.

Q What is your present occupation?

A I am an attorney in the Department of Justice, Office of Alien Property.

Q Where were you born, please?

A I was born in Germany.

Q When, please?

A In 1897.

Q Would you tell us what universities you have attended and what degrees you have obtained?



A I was educated in Germany, and I attended the Universities of Wurzburg and Munich, studying a full four years course of law.

Q What degrees did you obtain, if any, there?

A I attained the degree of doctor of laws from the University of Wurzburg.

Q What did you do after you received your doctor of laws degree from this University?

A After I had received the doctor of laws degrees -- degree, I decided to do some graduate work in law. I received an appointment as research assistant to Professor Mendelssohn Bartholdy, the name is spelled like the name of the composer, in the University of Hamburg, in the law faculty. Professor Mendelssohn Bartholdy was an outstanding international and comparative lawyer.

Q Did you perform any other duties there in addition to being a research assistant?

A Yes, I helped organize an institute of comparative law, assembling a library of comparative law, and assisting in teaching seminars on comparative law.

Q Did you ever perform any other duties at the University of Hamburg?

A Yes; after awhile I was appointed instructor in the law faculty of the University of Hamburg, and I taught courses in conflict of laws, comparative law, and the German civil law.



In due course, I was appointed a member of the law faculty of the University of Hamburg, after having passed the required tests and examinations.

Q What did these tests or examinations consist of?

A It consisted in the submission of a monograph on a subject of comparative and international law <sup>and</sup> in a lecture given before the faculty, with ensuing discussion.

Q When were you appointed a member of the law faculty at the University of Hamburg?

A In 1932.

Q Am I correct in stating that you were the first member, or first woman to ever be a member of the faculty of law at the University of Hamburg?

A That's right.

Q In fact, weren't you the first woman to ever be a member of the faculty of law in a German university?

A That is right, yes.

Q You just stated that in addition to teaching, instructing in law, that you participated in the organization of an institute of comparative law; what were your duties with reference to this latter job?

A My duties were to assemble a reference library on the laws of the various European countries, which the students, mostly graduate students, could use in pursuing their studies of the laws of other countries; and I also had to conduct seminars for



graduate students on comparative law.

Q When did you first come to the United States, Dr. Schoch?

A I first came to the United States in 1934 under a fellowship of the Rockefeller Foundation, a research fellowship.

Q How long were you in the United States under this fellowship?

A I was in the United States for one year, during which I visited various law schools and studied certain aspects of conflict of law, and I also studied the methods of teaching law in American law schools, which are quite different from European methods of teaching.

Q How long were you on this fellowship?

A For one year; after that year I had to return to Germany, but then I decided that I was not willing to stay in Germany under the Hitler regime, and I came to the United States for permanent residence in the fall of 1937.

Q What did you do when you arrived in the United States?

A When I arrived in the United States, I renewed my contacts with American law schools and lawyers, I did some research work on study of my own; I looked for a job, which at that time was not very easy to find. But in 1938 I became associated with the Harvard Law School.

Q Did you become associated with any particular individual in the Harvard Law School?

A I was mainly associated with Professor Griswold, who was, among other things, teaching -- taught tax law and conflict of



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laws, and my position was that of a research assistant, in which capacity I assisted in teaching seminars for graduate students in conflict of law and comparative law.

Q What were your duties in that job?

A My duties were -- were to <sup>advise</sup> consult the agency on questions of foreign law which primarily had to do with the plans for the occupation of Germany, the reorganization of Germany, and which also involved questions of recognition of acts of an occupying power by other countries. I became section chief in the Property Control Division, and later on acting division chief.

Q Did there come a time when you left this employment?

A Yes, after the war I -- when the agency was liquidated, I became a consultant in the Department of Justice, in the what was then the Enemy Property Section in the Claims Division; my duties were those -- were to advise the Department of Justice on questions of foreign law which <sup>advise</sup> goes in connection with litigation and claims under the Trading With The Enemy Act.

Q Are you still with the Office of Alien Property today?

A Yes, I am; I am an attorney now. I was admitted to the bar of the District of Columbia in 1949, and later on to the bar of the Supreme Court of the United States.

Q Are you a member of the bars of any other countries?

A No, I am not.

Q What is your title today?



A My title until recently was Chief of the Foreign Law Unit in the Office of Alien Property. Due to a reorganization, my title now is that of an attorney in the Claims Division. My special assignment is to advise the Claims Division on questions of foreign law arising in connection with claims and litigation.

Q Now, let's go back to your tenure at the University of Hamburg; would you recite -- recall some of the particular problems you worked on, researched, while you were there?

A Well, in connection with the courses in German civil law which I taught, and of comparative law, I naturally referred very frequently to the law of Switzerland, among others; I studied the laws of France, the laws of Switzerland; Switzerland is a neighboring country of Germany, and their legal systems are very much alike. There is quite an exchange of teachers between Germany and Switzerland in the law faculties, and German students, as a rule, are taught some of the similarities and differences between German and Swiss law.

Q Is it true, Dr. Schoch, that the civil code of Switzerland is based on the German code, and vice versa?

A Well, I wouldn't exactly put it that way, but I would say that they have a great deal in common, because Switzerland, like most continental countries, adheres to the system of codification, that is, putting general principles of law into one large systematic code, like the civil code, the code of procedure, and so forth, and the Swiss civil code and the



German civil code have a common background of Roman law, Germanic law, and the tradition of the influence of the French civil code.

Q Now, could you tell us some of the problems you worked on when you were on the fellowship in the United States?

A During that fellowship I worked mostly on questions of American law in which I was interested at the time, that is, questions of conflict of laws.

Q All right. Now, when you went to Harvard Law School, did you work on legal problems there?

A Yes, I did. The -- fortunately, the Harvard Law School has a very extensive and complete library of foreign law, so that I could pursue research in the laws of various countries, among them the laws of Switzerland. As a matter of fact, in one semester I discussed with the graduate students the similarities of the conflict of laws between the Cantons in Switzerland and the conflict of laws between American States, and I also discussed with them cases, the decisions of the Swiss Supreme Court, in connection with conflict of taxation. I might explain that the Swiss Cantons, the equivalent to our States, have their own tax laws, besides the Federal taxation law, and there are many conflicts of double taxation, and the Swiss Supreme Court has rendered numerous decisions solving these problems of double taxation; in that connection I studied Swiss tax decisions and decisions of the Swiss Supreme



Court.

Q Now, when you came to work with the Government, did you work on legal problems?

A Yes, I did. I worked on foreign law problems, including numerous occasions in which I had to advise the Government on questions of Swiss law.

Q Would you give us some particular instances in which -- or problems on which you worked in Swiss law?

A Well, for instance, in connection with the I. G. Chemie case, which involved the General Aniline assets, I had to study problems of Swiss banking secrecy, Swiss corporation law, the Swiss laws on economic espionage, the powers of Swiss administrative authorities to sequester papers which the United States -- whose production the United States had requested; those were some of the problems I have studied in connection with that case. In another case, Rusche, R-U-S-C-H-E versus United States, I had <sup>to study</sup> studied the Swiss laws concerning permits for aliens to stay or to reside in Switzerland, Swiss tax laws, numerous Swiss documents in connection with -- with these problems and problems of the German - Swiss double taxation treaty.

Q Have you worked on any other cases involving Swiss law?

A I worked in numerous cases involving Swiss law, some of them ~~in that way,~~ in litigation, some of them that were settled, some cases in which my work appeared merely in advisory reports



to my superiors or the attorneys in charge of the case; they involved questions of corporation law, questions of the civil code, questions of family law, inheritance law, and so on.

Q Now, Doctor, have you ever published any articles?

A I have published articles and books in the English language, and in Germany I published articles and books in the German language.

Q Do you have a list of articles published in the English language?

A I think I gave you a list, Mr. McCarthy.

Q Dr. Schoch, I hand you Plaintiff's Exhibit 135, marked for identification, and I ask you to identify that document for the court, please?

A This is the list which I prepared for you, which of course does not contain minor publications, such as book reviews in various law journals, which I didn't bother to put on this list.

MR. McCARTHY: Your honor, the Government offers Plaintiff's Exhibit 135.

THE COURT: It will be admitted.

Q Dr. Schoch, I notice the first article listed on this list is, "Conflict of Laws and Private International Law. Proceedings of the Thirty-third Annual Meeting of the American Society of International Law, page eighty-one, et sequitur, 1939"; would you describe what that article deals with, please?

A This is a paper which dealt with the question of whether and to



what extent standards for the unification of conflict of laws or conflict of private laws could be derived from international law.

Q And the next article I notice on your list of publications is, "Conflict of Laws in a Federal State, colon: The Experience of Switzerland. 55 Harvard Law Review 738. 1942"; could you describe what that article dealt with?

A This article dealt with the problem which in my research I found very similar to the problem of conflict of State laws within the United States, that is, conflict of laws of the various Cantons in Switzerland, which were particularly important at the time when the Swiss law was not -- had not become Federal law to the extent it is today, so the courts had constantly to solve questions, what law to apply in a case where several Cantonal laws were involved. And I studied the early cases, beginning in 1848, under the then Swiss Constitution, and I then described the extent to which such conflicts disappeared when the law became unified; as for instance, when the -- Switzerland adopted a civil code and there were no longer any conflicts between the laws of contract of the Cantons, or the family laws of the Cantons, because that law was unified in a code uniform for all the Switzerland.

Q Dr. Schech, the third article listed on your list of publications is an article by Thayer, Schoch, and Ireland, entitled, "The Effect of War on Statutes of Limitation. 17



Tulane Law Review, page 416, in the year 1943"; would you describe what that article is about?

A That article dealt with the German law concerning the suspension of statutes of limitations due to war; it was part of a symposium on comparative law.

Q And the next article listed on your list of publications is, "Divorce Law and Practice Under National Socialism in Germany. Iowa Law Review, volume 28, page 225, 1943"; would you describe what that article is about?

A Well, I think the title of the article describes it; I discussed for the benefit of American leaders the changes which the Nazis had made in the divorce law in conformity with their ideology.

MR. LAUFER: Mr. McCarthy, I guess the next one pretty clearly indicates what it is, huh?

MR. McCARTHY: That is correct.

THE COURT: Let's skip on down.

MR. LAUFER: Skip that one.

Q I notice the sixth article on your list of publications is, "The Jurisprudence of Interests. Selected Writings of Max Rueselin, Philipp Heck, et al. Modern Legal Philosophy Series (Harvard University Press). 1948"; could you describe what the nature of that work is?

A This was a selection which I made and translated from the writings of a particular school of jurisprudence in Germany.



Those were all German authors. May I say that you omitted an article in which I did discuss Swiss decisions, and that is the preceding item on this list, "The Determination of Paternity by Blood Grouping Tests."

Q This dealt with Swiss law?

A This dealt with European law, German law, French law, Swiss law, and discussed decisions rendered by the courts of these countries, admitting or denying admissibility <sup>of</sup> to blood grouping tests in cases involving paternity; in connection with that article I had to study Swiss court decisions.

Q Now, the next article on the list of publications is an article by Simpson, Stone, and Schoch, entitled, "Cases and Readings on Law and Society, in particular designated Book Three, Totalitarianism and Democracy. Published 1949"; what is the nature of that article?

A These -- this is a three-volume book, and my collaboration referred mainly to Book Three, in which we collected reading materials, that is, laws, decrees, court decisions, and writings of authors in totalitarian states, namely, Germany, Italy, fascist Italy, and communist Russia.

Q The next article on your list of publications is, "Bowie and Friedrich, editors, Studies in Federalism. Appendices Three and Four. The Federal Judiciary in Germany and Switzerland. Published in 1957"; what is the nature of that work, Doctor?

A I was asked by Professor Bowie, who was one of the editors of



this study, to describe the problems of the Federal judiciary, the aspects of Federal judiciary in a Federal State, such as jurisdiction, the limitation of jurisdiction between the Federal courts and State courts, and problems there, and I dealt with these problems for Germany and for Switzerland. The volume was designed as a basis for studies for a court system for the European community.

Q Now, I notice the next article listed on your list of publications is entitled, "~~The~~ Foreigners in France and in French Courts Under the Civil Code." It contains Essays on French Law, published by the Washington Foreign Law Society, page sixty-five, et sequitur, in 1958"; would you describe what that article is about, Doctor?

A This was a paper, part of the symposium in which my assignment was to discuss the status of aliens in France, their rights in French courts, limitations imposed upon aliens in France under the French civil code, and so on.

Q I notice the last item on your list of publications is entitled, "Current reports on German and Swiss court decisions involving questions of international law, in American Journal of International Law"; would you describe what that listing on your list of articles is?

A This is a continuous assignment which I accepted at the request of the Journal, that is, to select and summarize decisions of German courts, Swiss courts, involving questions of international



law.

Q Doctor, have you ever testified in an American judicial proceeding as an expert on Swiss law?

A Yes, I have.

Q In what cases or case?

A I have testified as an expert on Swiss law in the antitrust case, United States versus Watchmakers of Switzerland, which is pending in the District Court for the Southern District of New York. I testified on Swiss law in May of this year.

Q Did you testify as an expert?

A I testified as an expert on various questions of Swiss law.

Q Now, would you describe what your connection or association with me and with this case is?

A I was asked by my superior, who is the Attorney General -- Assistant Attorney General in charge of the Civil Division, to assist you in examining questions of Swiss law involved in this case, and if necessary to testify for the Government on Swiss law. I am still connected with the Office of Alien Property.

THE COURT: You submit the witness as an expert?

MR. McCARTHY: I submit the witness as an expert.

THE COURT: Voir dire examination.

VOIR DIRE EXAMINATION:

BY MR. LAUFER:

Q Dr. Schoch, you say that you have never been a Swiss attorney;



is that correct?

A That is correct.

Q And did you ever study Swiss law at any Swiss university?

A No, I have no formal studies of Swiss law.

Q And most of your experience, then, I take it, then, as a student, and as a faculty in German universities; is that correct?

A And as a consultant in the Department of Justice.

Q Well, a consultant in connection with what, German law?

A In connection with Swiss law, among others.

Q Now, you said that you have testified as an expert on Swiss law in the antitrust case, United States against the Watchmakers?

A That is correct.

Q Have you testified as an expert on Swiss law in any other action?

A No.

Q Have you ever testified as an expert on Swiss law or -- I withdraw that. You said that you testified as a Swiss expert in this antitrust case on various points of the Swiss law?

A Yes.

Q Would you tell me what points of Swiss law were involved in this antitrust case?

A I will be glad to. The points on which I testified were interpretation of certain provisions of the statutes regulating



the Swiss watch industry.

Q Which statutes; were they Swiss statutes?

A Swiss statutes; yes, sir.

Q Is that statute found in the civil law?

A These statutes are found in the official publications of the Swiss law.

Q Who publishes those?

A They are Federal; they are Federal statutes.

Q In other words, that means that comes out of Berne?

A They come out of Berne; yes, sir. I testified particularly on the powers which the so called Swiss Watch Chamber, a private organization, had in prosecuting violations of the Swiss law regulating statutes. I testified on the provisions of the Swiss code of obligations concerning the relations of principal and agent. I testified on the provisions of the Swiss <sup>Penal</sup> civil code which provides that nobody can <sup>be</sup> <sup>ed</sup> punish for an act which is not clearly defined in the law. And I discussed the decisions of the Swiss courts interpreting this provision. I also testified on decisions of the Swiss courts concerning the legality or illegality of an economic boycott.

Q Any other Swiss laws that you testified on?

A Let me see.

Q As an expert?

A I think these are all the subjects on which I testified in that connection.



Q No other, no other than you have mentioned?

A I think I have mentioned them all.

Q Now, did you ever write any articles on tax conventions to avoid double taxation?

A No; no, I --

Q Did you ever testify in any capacity in any court in connection with the question of double taxation between contracting States?

A No, sir.

Q Have you ever worked for any department in the Swiss Government?

A No.

Q Now, this list that you prepared for Mr. McCarthy, Plaintiff's Exhibit 135, I think you said contains most of the main publications which you have worked on; is that right?

A Yes.

Q I think you said there might be a few others?

A Well, there are a number of book reviews which I did not list.

Q They are of a lesser character than the ones listed on Plaintiff's Exhibit 135; is that correct?

A Yes, they are book reviews of books on conflict of laws, comparative law.

Q Now, when you say, "Conflict of laws," do you mean the question of rights and liabilities that arise because of the place where a contract may be performed or where it may be made?

A That is correct.



Q And none of this conflict of laws had anything to do with a study of these double taxation conventions?

A No, none of my writings --

Q And none of your writings --

A -- refers to double taxation.

Q And none of your writings had anything to do with the various factors that go into determining the question as to whether or not a convention against double taxation would or would not apply in a given case; is that correct?

A No.

Q Did you write any law books other than these articles?

A No, this is the complete list.

Q Did you ever make a study of the question of residence?

A Oh, yes; I did.

Q Did you ever write an article on it?

A No.

Q Did you ever take a course in any school in connection with the differences between residence, permanent residence, and domicile?

A No.

Q Do you know whether there is a difference between domicile, permanent residence, and residence, with respect to double taxation convention?

A I -- there is a difference between these terms, yes.

Q Have you ever made a study of these differences?



- A Yes, I did, in connection with my studies of the Swiss civil code.
- Q That was in Hamburg, Germany?
- A Oh, that was in -- in connection with my research work for the Department of Justice.
- Q And that was in connection with what case, if any?
- A That was in connection with the Ruscha case, that was --
- Q How you spell it?
- A R-U-S-C-H-E. R-U-S-C-H-E; that was a case decided for the Government in the Court of Appeals for the District of Columbia in 1957; I made a study --
- Q What type of case was that?
- A Pardon?
- Q What type of case was that?
- A It was an alien property case, a suit for the return of property which the former owner claimed was illegally vested by the Department.
- Q I see; it had nothing to do with taxation?
- A It had -- well, it had to do with taxation to that extent that he submitted certain documents which he claimed showed that he was a resident of Switzerland.
- Q And the question there was whether or not he was a resident; is that right?
- A And in that connection, I -- I studied the question of residence and the question of the criteria which the Swiss



Law uses to determine residence.

Q And you understand what we are dealing with here is a treaty between the United States and Switzerland; is that correct?

A Oh, yes.

Q Are you familiar with that treaty?

A To some extent.

Q Well, to what extent are you familiar with it?

A I am familiar with it to the extent that I studied it to determine whether this treaty had any definition of residence and what terms the treaty used to describe the decisive factor, which in the English text is residence.

Q When was this that you studied it for the first time --

A I did that at the request of Mr. McCarthy --

Q -- Dr. Schoch?

A -- in the preparation for this case.

Q I am sorry; then it is a fair statement to say that the first time you actually looked at this treaty to study it was when Mr. McCarthy or someone else requested that you cooperate with Mr. McCarthy?

A That is correct.

MR. LAUFER: Your honor, I don't know the purpose of this witness's call; I certainly know she is a most qualified person; I think she has a vast --

THE COURT: Let me inquire; do you tender the witness as an expert on Swiss law generally, as it may generally



refer to this case?

MR. McCARTHY: As it may generally refer to this case --

THE COURT: Yes.

MR. McCARTHY: -- and also specifically for the purpose of defining residence in Swiss laws within the meaning of the treaty.

THE COURT: All right, now, go ahead.

MR. McCARTHY: And Swiss Federal -- as the term, "Residence," of course is defined in Swiss tax laws and various laws permitting aliens to enter into Switzerland. This does cut across several fields. The term, "Residence," in Swiss law --

MR. LAUFER: If your honor please, I think we have a firm document, two firm documents, from Berne, Switzerland, which says this man is a resident of Switzerland, and I think the only issue we have here is the question of residence under a double taxation treaty, not under the general laws of Switzerland, because if we read this treaty --

THE COURT: You are arguing your case, Mr. Laufer.

MR. LAUFER: No.

THE COURT: State your objections to the tendered witness.

MR. LAUFER: I certainly admit this is the most qualified witness I have ever heard testify, but I regretfully say I don't think she is qualified as a Swiss expert, especially in



view of the fact that she says she is not a Swiss lawyer and never studied in Switzerland, and this is the first time she had contact with this issue was when she was asked to read this treaty; and I regret that I must object to her qualifications as a Swiss expert.

THE COURT: All right, your objection will be overruled; Dr. Schoch will be permitted to testify as an expert on Swiss law. Prior to the time we get into the testimony, recess court for fifteen minutes.

(At which time, 10:33 a.m., a recess was had until 10:50 a.m., at which time the trial continued)

MR. McCARTHY: Your honor, before I proceed, I -- areas in which I intend to examine Dr. Schoch are contained in an extract of testimony of expert on the laws of Switzerland called by the plaintiff United States, which I have previously filed in this case.

MR. LAUFER: What is the date of that, Mr. McCarthy?

MR. McCARTHY: This was filed at the pretrial conference, I believe, was it June 30 or --

MR. LAUFER: Yes, it was June 30, 1961, and in one of our later conferences in Washington Mr. McCarthy said that he would call a Swiss expert only for the purpose of explaining these permis de sejours A, B, and C, and that was what was agreeable to -- we, too, had listed a Swiss expert, but because Mr. McCarthy had so restricted his -- the testimony of experts, we have not



AR 5230

ERNST C. STIEFEL COLLECTION

3/10

3/10 STATISTICS - JURISTS WHO TOOK EXAMS IN GERMANY



Statistik

107



Juristen, die in Deutschland Examen gemacht hatten:

(praktiziert wo?)

- Aaron, Albert (Giessen) (*lebenda*)
- Adler, Erwin (Frankfurt/M.)
- Adrian, Adolph A.
- Alexander, Paul Julius (Hamburg)
- Alexander, Walter (Dr. jur. Jena)
- Alsberg, Wilhelm J.
- Anspach, Ernst (Schlesien)
- Aram (Abraham), Siegfried
- Asch, Ernest
- Aschaffenburg, William A.
- Auerbach, Frank Ludwig (Heidelberg)
- Auerbach, Richard Joseph (Breslau)
- Baerensprung, Horst
- Baerwald, Friedrich (Frankfurt/M.)
- Bandmann, Eugen
- Behrendt, Peter H. (Berlin)
- Bekker, Konrad (Referendar Berlin, Dr. Jur. Basel)
- Bendix, Ludwig (Goettingen)
- Benfey, Eduard (Goettingen)
- Benjamin, Max P. (Berlin)
- Beradt, Martin (Freiburg, Anwalt in Berlin)
- Berent, Margarete (Preussen, erste Anwaeltin)
- Bernstein, Manfred
- Bernt, H. H. A.
- Biberfeld, Philipp von (Hamburg)
- Biel (Bielschowsky), Ulrich (Bonn)
- (-- Bing, R. A. (Muenchen) still in England in 1940)
- (-- Birnholz-Brinton, Guenther M. (Berlin) took first papers in 1938, went back to Geneva)
- Bloch, Fritz
- Bodenheimer, geb. Levy, Brigitte Marianne (Heidelberg)
- Bodenheimer, Edgar (Berlin)
- Boenheim (Berlin)
- Brann, geb. Frank, Hedwig (Frankfurt/M., erste Landgerichtsraetin)
- Braun, Kurt (Berlin)
- Brecht, Arnold (Berlin)
- Bretzfelder, Max
- Bruening, Heinrich (Bonn)
- Bruck, Eberhard Friedrich (Breslau)
- Cahn, Joseph (Heidelberg)
- Callmann, Rudolf (Freiburg, praktiziert in Koeln)
- Callomon, Heinrich (Breslau)
- Caro, Frederick William (Halle)
- Caro, Hans Erich (Berlin)
- Caspari, John (Greifswald)
- Cohn, William (Berlin)
- Cohn, Siegmund Albert (Berlin)
- Cohn Linde, Bruno (Berlin)
- Corsing, Fritz (Berlin)



-- Dallmann, Heinz (Berlin)  
 -- Derenberg, Walter (Hamburg)  
 -- Dickmann, Wilhelm (Marburg, praktiziert in Berlin)  
 -- Domke, Martin (Berlin)  
 -- Dorpalen, Andreas (Bonn)  
 -- Drucker, Peter (Frankfurt)  
 -- Dyck, Richard  
 -- Ehrmann, Henry Walter (Berlin)  
 -- Einstein, Oscar E. (Erlangen)  
 -- Eisner, Fritz (Freiburg)  
 -- Eisner, Hermann (Breslau)  
 -- Elbe, Joachim von (Berlin)  
 -- Elston, Friedrich Gustav  
 -- Emmerich, Hugo (Heidelberg)  
 -- Erlanger, Helmut  
 -- Esslinger, Wilhelm (Muenchen)  
 -- Eyermann, Kurt  
 -- Feibelmann, Hans A. (Muenchen)  
 -- Feigenbaum, Herbert  
 -- Fields (Feibelmann, Hans Alexander), Howard John (Muenchen)  
 -- Fischer, Julius  
 -- Flechtheim, Ossip (Koeln)  
 -- Flegenheimer, Eugen  
 -- Fleischmann, Max (Breslau)  
 -- Fraenkel, Ernst (Frankfurt)  
 -- Fraenkel, Franz (Frankfurt)  
 -- Franck, Peter Goswyn (Berlin, Dr. jur. Basel)  
 -- Frank, William (Berlin)  
 -- Friedlaender, Walter Andreas (Berlin)  
 -- Galewski, Walter  
 -- Gans, Ernest  
 -- Geiger, Rudolf  
 -- George, Manfred (originally Cohn, Manfred Georg)  
 -- Gerstel, Alfred (Göttingen)  
 -- Goldmann, Nahum (Heidelberg)  
 -- Goldschmidt, Eduard  
 -- Gottgetreu, Martin  
 -- Gottschalk, Anni  
 -- Grau, Richard O. (Berlin)  
 -- Grubel, Frederick (formerly Fritz) (Leipzig)  
 -- Gruenberg, Martin  
 -- Grueneberg, Curt (Erlangen)  
 -- Gruneberg, Joseph  
 -- Guenther, Wolfgang W.  
 -- Guggenheim, Siegfried  
 -- Gumbel, Heinz  
 -- Gunzenhauser, Alfred  
 -- Gutman, Theodore E. (Gutmann until 1939) (Jena)  
 -- Hachenburg, Max  
 -- Hamburger, Alfred  
 -- Hayum, Heinrich  
 -- Hayum, Simon



- Heimann, David
  - Heims, Edward H. (Eduard)
  - Held, Robert, O.
  - Hentig, Hans von
  - Herz, Franz
  - Herz, Hans H., changed his name to John H. Herz
  - Herzfeld, Arnold
  - Heyman(s), Erich (Mënster)
  - Hirsch II, Leopold
  - Hirschberg, Max
  - Hoeninge, Heinrich
  - Homberger, Konrad
  - Honig, Richard
  - Hosiosky, Abo (Berlin)
  - Husserl, Gerhart
  - Jacobi, Arthur
  - Jacobsohn, Kurt
  - Jacobson, Walter
  - Joseph, Franz M. (Heidelberg)
  - Katz, Julius
  - Kaula, Otto
  - Kellermann, Henry
  - Kempner, Robert
  - Kessler, Friedrich
  - Kiess, Paul Charles Albert (Jena)
  - Kirchheimer, Otto
  - Knorr, Klaus Eugene (Tèbingen)
  - Korsch, Karl
  - Kronstein, Heinrich
  - Lampe, Ernst
  - Landenberger, Leopold
  - Lapidus, Leo (Berlin)
  - Laserstein, Botho (speudo. Georg Lisau) (Halle)
  - Laufer, Joseph (Tèbingen)
  - Lekisch, Karl Peter (nicht zum Examen zugelassen)
  - Lepane, Walter W.
  - Levy, Ernst (Berlin)
  - Levy, Fred (Berlin)
  - Levy, Walter
  - Lewy, Leo (Leipzig)
  - Liebmann, Walter
  - Lion, Max
  - Lippmann, Walter
  - Loewenfeld, Philipp
  - Loewenstein, Karl (Mënchen)
  - Maass, Heinz J. (Berlin)
  - Maier, Lothar (Erlangen)
  - Mann, Siegfried
  - Marcuse, Hans Werner (Freiburg)
  - Marx, Werner (Bonn)
  - Mayer, Erich (Wèrzburg)
  - Mayer, P. A.
- Löwenstei, Hubertus, Driz zu  
- Löwenstei, Edith  
- Marbus, Alfred



-- Memelsdorff, Erwin, (Hamburg)  
 -- Memelsdorff, Ilse, (Hamburg)  
 -- Mendel, Herbert Isidor (Hamburg)  
 -- Merzbacher, Siegfried  
 -- Meyer, Emil  
 -- Meyer, Lyonel Julius (Leipzig)  
 -- Meyer, Werner  
 -- Michael, Hans (Leipzig)  
 -- Morgenthau, Hans (Frankfurt/Main)  
 -- Morstein Marx, Fritz (Hamburg)  
 -- Mosse, Walter M.  
 -- Moszkowski, Richard  
 -- Nadelmann, Kurt  
 -- Nathanson, Rudolf M. (Berlin)  
 -- Neisser, Hans Philip (Breslau)  
 -- Neumann, Franz Leopold  
 -- Neuner, Robert  
 -- Niemeyer, Gerhart (Kiel)  
 -- Nothmann, Rudolf  
 -- Nurnberg, Herbert. W. (Heidelberg)  
 -- Nussbaum, Arthur  
 -- Oettinger, Ernst  
 -- Oppenheimer, Fritz Ernst (Breslau)  
 -- Oppler, Alfred Christian  
 -- Peiser, Werner  
 -- Peters, Walter (formerly Gruenpeter)  
 -- Rabel, Ernst  
 -- Reinemann, Otto  
 -- Rheinstein, Max  
 -- Rheinstrom, Henry  
 -- Richheimer, Walter  
 -- Riesenfeld, Stefan  
 -- Roetter (Roedelheimer), Friedrich (Jena)  
 -- Rolef, Hans (Bonn, muatte Studium unterbrechen)  
 -- Rosenfeld, Kurt  
 -- Rosengart, Lutz  
 -- Rosenwald, Henry Martin (Erlangen)  
 -- Rothschild, Nora (Frankfurt/Main)  
 -- Saenger, August (Marburg)  
 -- Schepses, Erwin (Göttingen)  
 -- Schlesinger, Edgar H. (Leipzig)  
 -- Schlesinger, Rudolf  
 -- Schmal, Robert  
 -- Schmidt, Eugen (München)  
 -- Schoch, Magdalene  
 -- Schweizer, Alfred  
 -- Schwenk, Edmund Heinz (Henry) (Breslau)  
 -- Schwerin, Kurt  
 -- Sieradz, Edwin (Berlin)  
 -- Silberman, Curt  
 -- Singer, Rudolf  
 -- Steiner, Albert



- Steinfeld, Gerhard (Breslau)
- Stern, Robert R.
- Stiefel, Ernst
- Stoessel, Gustav
- Stoessel, Rudolf
- Stolper, Gustav
- Strauss, Max
- Sueskind, Hans
- Suesskind, Kurt
- Uhlmann, Rudolf
- Walter, Otto
- Wallach, Fritz (Bonn)
- Weichmann, Herbert
- Weigert, Hans
- Weigert, Julius B. (Heidelberg)
- Weigert, Oscar
- Weil, Bruno (Wuerzburg)
- Weiss, Erich
- Wilk, Kurt (Berlin)

Juristen, die in Oesterreich Examen gemacht hatten:

- Albert, John (Wien)
- Alexich, Georg Maria
- Ascher, Leopold (Wien)
- Auerbach, Joachim (Wien)
- Aufrecht, Hans (Wien)
- Balin, Arthur (Wien)
- Barth, Frank (Wien)
- Bauer, Robert (Wien)
- Bergel, Egon Ernst (Wien)
- Berger, Adolf (Lemberg)
- Berger, Peter Ludwig (Wien)
- Berl, Arthur (Wien)
- Beth (geb. von Weisl), Marianne (Wien, erste Anwaeltin in Oesterreich)
- (-- Bettelheim, Ernst (Wien) still in Vienna in 1940?)
- Bunzel, Joseph Hans (Vienna)
- Colish, H. J. (Wien)
- Croy, Louis (Koropatnicki, Ljubomir) (Wien)
- Deutsch, Johannes Leopold (Wien)
- Deutsch, Julius (Wien)
- Drechsler, Karl (Wien)                    - Deutsch, Karl
- Ebenstein, William (Wien)
- Ehrenzweig, Albert (Wien)
- Ehrenzweig, Albert Senior (Wien)
- Ehrlich, Otto Hild (Wien)
- Eisler, Armand (Wien)
- Eisler, Arnold (Wien)
- Ekstein, Gerhart (Wien)
- Elgart, Paul J. (Wien)
- Elias, Henry (Wien)



- Engelhard, Paul (Wien)
- Engelsberg, Rudolf (Wien)
- Ettinger, Karl E. (Wien)
- Fabry, Joseph (bis 1943 Epstein)
- Feger, Norbert (Wien)
- Feigl, Fred (Wien)
- Feingold, Harry (Wien)
- Fischer, Paul (Wien)
- Fishman, Leo (Wien)
- Fleischer, Georg Leopold (Wien)
- Foltin, Edgar (Innsbruck)
- Freundlich, Jacques (Jakob) (Wien)
- Fried, Hans Ernst (Wien)
- Friedlaender, Otto (Wien)
- Friedmann, Maximilian (Wien)
- Frostig, Benjamin (Wien)
- Fuchs, Martin (Wien)
- Fuerst, Herbert (Wien)
- Gans, Paul Hawkins Otto (Wien)
- Geiger, John (formerly Hans) (Wien)
- Geiringer, Otto (Wien)
- Goatcher, Robert Hahn (Wien)
- Goldner, Franz (Wien)
- Hahn, Robert
- Haim, Joseph (Wien)
- Hajek, Paul (Wien)
- Hannak, Philippine (Wien)
- Hauser, Franz (Wien)
- Hein, Frederic (Wien)
- Heitler, Oskar
- Hertz, Harry Franklin (formerly Harry Herz-Fraenkel) (Wien)
- Herzog, Friedrich (Graz)
- Herzog, George (Wien)
- Hoffmannsthal, Emil  
(originally Hofmannsthal, Emilio Edler von)
- Holzappel, Emanuel
- Homburger, Adolf (formerly spelled Hamburger) (Wien)
- Hoor, Ernst
- Hula, Erik (Erich)
- Hupka, Joseph
- Jacobson, Alfred
- Kann, Robert A. (Wien)
- Kavalier, Joseph. (formerly Kawaler) (Wien)
- Kelsen, Hans (Wien)
- Kisch, Guido
- Klimberger, Josef (Wien)
- Klinger, Julius Erich (Wien)
- Koessler, Maximilian (Wien)
- Krassa, Gerhard Friedrich (Wien)
- Krassa, Lucie (Wien)
- Kulka, Frederick
- Kurz, Emil (Wien)



-- Land, Ernest G. (Wien)  
-- Landau, Saul Rafael  
-- Lande, Adolf (Wien)  
-- Langer, Robert (Wien)  
-- Lederer, Emil (Wien)  
-- Leichter, Otto  
-- Lenhoff, Arthur (Wien)  
-- Liebesny, Herbert Joseph (Wien)  
-- Loebel, Rudolf (Wien)  
-- Loew, Ernst (Wien)  
-- Mayer, Charles (Wien)  
-- Mehler, Robert (Wien)  
-- Mire, Joseph (Wien)  
-- Moeller, Paul Eugen (Wien)  
-- Neumann, Alfred (Wien)  
-- Neumann, Francis von (Wien)  
-- Petschek, Georg (Prag)  
-- Plager, Egon (Wien)  
-- Pollak, Friedrich (Wien)  
-- Pollak, Ludwig (Wien)  
-- Reifmann, Karl (Wien)  
-- Reik, Otto E. (Wien)  
-- Reiss, Leo (Wien)  
-- Reisz, Ladislaus  
-- Rie, Robert (Wien)  
-- Rihs, Fritz (Wien)  
-- Rohrlich, Georg Friedrich (Wien)  
-- Rubin, Heinrich (Wien)  
-- Salomon, Emil (Wien)  
-- Saxl, Erich (Wien)  
-- Schall, Alexander (Wien)  
-- Schechter, Edmund (Wien)  
-- Schiffer, Ludwig (Wien)  
-- Schmetterling, Joachim (Wien)  
-- Schoenfeld, Ernest (Wien)  
-- Schreier, Robert (Wien)  
-- Schubert, Richard (Wien)  
-- Schulman-Lang, Gerda (Wien)  
-- Smetana, Richard (Wien)  
-- Sonnenschein, Siegmund (Wien)  
-- Spitzer, Ernst (Wien)  
-- Sternbach, Oskar (Wien)  
-- Strauss, Robert (Wien)  
-- Tauber, Siegfried (Wien)  
-- Uрман, Hermann  
-- Wallach, Maximilian (Wien)  
-- Wallach, Severin (Wien)  
-- Weinberger, Norbert (Wien)  
-- Weisz, Georg Anton (George Antony Weisz) (Wien)  
-- Wojnilower, Theodor (Wien)  
-- Wolf, George Victor (Wien)  
-- Zerner, Carl Egon (Wien)



Juristen, die in der Tschechei Examen gemacht hatten:

- Adler, John Hans (Student Prag)
- Deutschova, Lore Barbara (Prag)
- Eckstein, Charles (Prag)
- Eisenberg, Robert (Prag)
- Froehlich, Hans (Prag)
- Glesinger, Egon (Prag)
- Korn, Frank
- Fribram, Karl (Prag)
- Reiner, Anthony Stephen (Prag)
- Reiner, Paul (Prag)
- Stein, Ewald (Prag)
- Terebessy, John (Bratislava)
- Weissbarth, Arthur (Prag)

Geburtsjahr, nach Dekaden:

1860-1870:

- Landau, Saul Rafael

1871-1880:

- Alexander, Walter
- Alsberg, Wilhelm J.
- Bandmann, Eugen
- Bendix, Ludwig
- Benfey, Eduard
- Bloch, Fritz
- Bruck, Eberhard Friedrich
- Ehrenzweig, Albert, Senior
- Eisler, Armand
- Eisler, Arnold
- Fleischmann, Max
- Freundlich, Jacques (Jakob)
- Geiger, Rudolf
- Gerstel, Alfred
- Guggenheim, Siegfried
- Hoeningner, Heinrich
- Hupka, Joseph
- Loew, Ernst
- Nussbaum, Arthur
- Petschek, Georg
- Fribram, Karl
- Rabel, Ernst

1881-1890:

- Aaron, Albert
- Asch, Ernest



- Aschaffenburg, William A.
- Beradt, Martin
- Berent, Margarete
- Berger, Adolf
- Beth, Marianne
- Brecht, Arnold
- Bretzfelder, Max
- Caro, Frederick William
- Caspari, John
- Corsing, Fritz
- Deutsch, Julius
- Dyck, Richard
- Emmerich, Hugo
- Engelsberg, Rudolf
- Fishman, Leo
- Geiringer, Otto
- Hajek, Paul
- Heims, Edward H. (Eduard)
- Held, Robert, O.
- Hentig, Hans von
- Herzfeld, Arnold
- Hoffmannsthal, Emil (Hofmannsthal, Emilio Edler von)
- Honig, Richard
- Kelsen, Hans
- Kisch, Guido
- Koessler, Maximilian
- Korsch, Karl
- Landenberger, Leopold
- Langer, Robert
- Leichter, Otto
- Lenhoff, Arthur
- Levy, Ernst
- Lion, Max
- Pollak, Ludwig
- Reik, Otto E.
- Reiss, Leo
- Roetter (Roedelheimer), Friedrich
- Saenger, August
- Saxl, Erich
- Stein, Ewald
- Strauss, Robert
- Weigert, Julius B.
- Weigert, Oscar
- Weil, Bruno

1891-1900:

- Alexich, Georg Maria
- Ascher, Leopold
- Auerbach, Joachim
- Auerbach, Richard Joseph
- Baerensprung, Horst W.



-- Baerwald, Friedrich  
 -- Bergel, Egon Ernst  
 -- Berger, Peter Ludwig  
 -- Berl, Arthur  
 -- Bernstein, Manfred  
 -- Brann, Hedwig  
 -- Braun, Kurt  
 -- Cahn, Joseph  
 -- Callmann, Rudolf  
 -- Callomon, Heinrich  
 -- Caro, Hans Erich  
 -- Cohn, Sigmund Albert  
 -- Cohn Linde, Bruno  
 -- Domke, Martin  
 -- Ehrlich, Otto Hild  
 -- Eisner, Hermann  
 -- Elston, Friedrich Gustav  
 -- Ettinger, Karl E.  
 -- Feger, Norbert  
 -- Feigl, Fred  
 -- Fraenkel, Ernst  
 -- Fraenkel, Franz  
 -- Friedlaender, Walter Andreas  
 -- Friedmann, Maximilian  
 -- Fuerst, Herbert  
 -- Gans, Ernest  
 -- George, Manfred (originally Cohn, Manfred Georg)  
 -- Goldmann, Nahum  
 -- Grau, Richard O.  
 -- Grueneberg, Curt  
 -- Gruneberg, Joseph  
 -- Haim, Joseph  
 -- Hamburger, Alfred  
 -- Hein, Frederic  
 -- Holzappel, Emanuel  
 -- Husserl, Gerhart  
 -- Jacobson, Walter  
 -- Kiess, Paul Charles Albert  
 -- Kronstein, Heinrich  
 -- Kurz, Emil  
 -- Levy, Fred  
 -- Lippmann, Walter  
 -- Loebel, Rudolf  
 -- Loewenstein, Karl  
 -- Mayer, Erich  
 -- Mendel, Herbert Isidor  
 -- Meyer, Werner  
 -- Morstein Marx, Fritz  
 -- Nadelmann, Kurt  
 -- Neisser, Hans Philip  
 -- Neumann, Francis von  
 -- Neumann, Franz Leopold



- Nurnberg, Herbert. W.
- Oppenheimer, Fritz Ernst
- Oppler, Alfred Christian
- 60 -- Peiser, Werner
- Pollak, Friedrich
- Reiner, Paul
- Schepses, Erwin
- Schiffer, Ludwig
- Schmidt, Eugen
- Spitzer, Ernst
- Stern, Robert R.
- Weisz, Georg Anton
- 70 -- Wojnilower, Theodor

1901-1910:

- Adler, Erwin
- Alexander, Paul Julius
- Auerbach, Frank Ludwig
- Aufrecht, Hans
- Ballin, Arthur
- Barth, Frank
- Bauer, Robert
- Behrendt, Peter H.
- Biberfeld, Philipp von
- 1 -- Biel (formerly Bielschowsky), Ulrich
- Bing, R. A.
- Bodenheimer, Edgar
- Bunzel, Joseph Hans
- Cohen, William
- Colish, H. J.
- Dallmann, Heinz
- Derenberg, Walter
- Deutsch, Johannes Leopold
- Dickmann, Wilhelm
- Drechsler, Karl
- 2 -- Drucker, Peter Ferdinand
- Ebenstein, William
- Eckstein, Charles
- Ehrmann, Henry Walter
- Eisenberg, Robert
- Eisner, Fritz
- Elbe, Joachim von
- Elgart, Paul J.
- Elias, Henry
- 3 -- Engelhard, Paul
- Erlanger, Helmut
- Eyermann, Kurt
- Fabry, Joseph (bis 1943 Epstein)
- Feingold, Harry
- Fields, Howard John (formerly Feibelmann, Hans Alexander until 1944)



- Fischer (Fisher since 1944), Paul
- Flechtheim, Ossip
- Fleischer, Georg Leopold
- Frank, William
- Fried, Hans Ernest
- 4 -- Friedlaender, Otto
- Fröhlich, Hans
- Fuchs, Martin
- Gans, Paul Hawkins Otto
- Geiger, John (formerly Hans)
- Glesinger, Egon
- Goatcher, Robert Hahn
- Goldner, Franz
- Gottschalk, Anni
- 5 -- Grubel, Frederick (formerly Fritz)
- Grumbacher, Alfred
- Gutman, Theodore E. (Gutmann until 1939)
- Hauser, Franz
- Hertz, Harry Franklin (formerly Harry Herz-Fraenkel)
- Herz, Hans H., John H. Herz 1940
- Herzog, Friedrich
- Heyman(s), Erich
- Homburger, Adolf
- Hosiosky, Abo
- 6 -- Jacobi, Arthur
- Jacobsohn, Kurt
- Jacobson, Alfred
- Joseph, Franz M.
- Kann, Robert A.
- Kavaler, Joseph. (formerly Kawaler)
- Kellermann, Henry
- Kessler, Friedrich
- Klimberger, Josef
- Klinger, Julius Erich
- 7 -- Krassa, Gerhard Friedrich
- Lampe, Ernst
- Lande, Adolf
- Lapidus, Leo
- Laserstein, Botho (speudo. Georg Lisau)
- Laufer, Joseph
- Maass, Heinz J.
- Maier, Lothar
- Marcuse, Hans Werner
- Marx, Werner
- 8 -- Mayer, F. A.
- Mehler, Robert
- Meyer, Lyonel Julius
- Michael, Hans
- Mire, Joseph
- Moeller, Paul Eugen
- Morgenthau, Hans
- Nathanson, Rudolf M.



- Neumann, Alfred
- Niemeyer, Gerhart
- Peters, Walter (formerly Gruenpeter)
- 9 -- Plager, Egon
- Rie, Robert
- Riehs, Fritz
- Riesenfeld, Stefan Albrecht
- Rosenwald, Henry Martin
- Rothschild, Nora
- Schall, Alexander
- Schlesinger, Edgar H.
- Schmetterling, Joachim
- Schreier, Robert
- 10 -- Schubert, Richard
- Schwenk, Edmund Heinz
- Sieradz, Edwin
- Smetana, Richard
- Sonnenschein, Siegmund
- Steinfeld, Gerhard.
- Sternbach, Oskar
- Stiefel, Ernst C.
- Sueskind, Hans
- 11 -- Tauber, Siegfried
- Terebessy, John
- Wallach, Fritz
- Wallach, Severin
- Walter, Otto L.
- Weinberger, Norbert
- Weiss, Erich
- Wilk, Kurt
- Wolf, George Victor

1911 und jünger:

- Anspach, Ernst (1913)
- Adler, John Hans (1912)
- Albert, John (1912)
- Bekker, Konrad (1911)
- Birnholz-Brinton, Guenther M. (1911)
- Bloch, Henry Simon (1915)
- Bodenheimer, nee Levy, Brigitte Marianne (1912)
- Croy, Louis (formerly Ljubomir Koropatnicki) (1914)
- Deutschova, Lore Barbara (1913)
- 12 -- Dorpalen, Andreas (1911)
- Franck, Peter Goswyn (1913)
- Frostig, Benjamin (1913)
- Hoor, Ernst (1911)
- Knorr, Klaus Eugene (1911)
- Land, Ernest G.
- Lekisch, Karl Peter
- Liebesny, Herbert Joseph
- Mayer, Charles



- Reifmann, Karl
- Reiner, Anthony Stephen
- 2-- Rohrich, Georg Friedrich
- Rolef, Hans
- Salomon, Emil
- Schoenfeld, Ernest
- Schulman-Lang, Gerda (1915)
- Urman, Hermann (1911)
- Wallach, Maximilian (1914)
- Zerner, Carl Egon (1913)

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Beruf im Ursprungsland:

Referendar oder Assessor:

- Alexander, Paul Julius
- Anspach, Ernst
- Bekker, Konrad
- Biel (formerly Bielschowsky), Ulrich
- Bing, R. A.
- Bodenheimer, Edgar
- Bunzel, Joseph Hans
- Croy, Louis (formerly Ljubomir Koropatnicki)
- Eyermann, Kurt
- Fabry, Joseph (bis 1943 Epstein)
- Fields, Howard John (formerly Feibelman, Hans Alexander until 1944) (bis 1933)
- Franck, Peter Goswyn
- Frostig, Benjamin(?)
- Gottschalk, Anni
- Grubel, Frederick (formerly Fritz)(?)
- Guenther, Wolfgang W.
- Gumbel, Heinz
- Gutman, Theodore E. (Gutmann until 1939)(?)
- Herz, Hans H., John H. Herz 1940
- Jacobsohn, Kurt
- Jacobson, Alfred
- Knorr, Klaus Eugene
- Lampe, Ernst (Student)
- Land, Ernest G.
- Laufer, Joseph
- Lekisch, Karl Peter (Student)
- Lewy, Leo
- Maier, Lothar
- Marcuse, Hans Werner
- Marx, Werner
- Mayer, Charles
- Memelsdorff, Ilse
- Michael, Hans
- Nathanson, Rudolf M.
- Niemeyer, Gerhart
- Reifmann, Karl



- Rihs, Fritz
- Riesenfeld, Stefan Albrecht
- Rohrlich, Georg Friedrich
- Rolef, Hans (student)
- Rothschild, Nora
- Salomon, Emil
- Schulman-Lang, Gerda (student, dr. jur. 1938)

Anwalt:

- Aaron, Albert
- Asch, Ernest
- Adrian, Adolph A.
- Auerbach, Joachim
- Auerbach, Richard Joseph
- Baerensprung, Horst W. (bis 1930)
- Ballin, Arthur
- Bandmann, Eugen
- Barth, Frank
- Bauer, Robert
- Bendix, Ludwig
- Benjamin, Max P.
- Beradt, Martin
- Berent, Margarete
- Bergel, Egon Ernst
- Berl, Arthur
- Bernt, H. H. A.
- Beth, Marianne
- Biberfeld, Philipp von
- Bloch, Fritz
- Braun, Kurt
- Callmann, Rudolf
- Caro, Hans Erich
- Cohen, William
- Cohn Linde, Bruno
- Colish, H. J.
- Dallmann, Heinz (1933-1936)
- Derenberg, Walter
- Deutsch, Johannes Leopold
- Dickmann, Wilhelm
- Domke, Martin
- Drechsler, Karl
- Eckstein, Charles
- Einstein, Oscar E.
- Eisler, Armand
- Eisler, Arnold
- Eisner, Hermann (?)
- Ekstein, Gearhard
- Elgart, Paul J.
- Elias, Henry
- Elston, Friedrich Gustav
- Emmerich, Hugo



-- Engelhard, Paul  
 -- Ettinger, Karl E.  
 -- Feger, Norbert  
 -- Feigl, Fred  
 -- Feingold, Harry  
 -- Fischer (Fisher since 1944), Paul  
 -- Fishman, Leo  
 -- Flechtheim, Ossip  
 -- Fraenkel, Ernst  
 -- Fraenkel, Franz  
 -- Frank, William  
 -- Freundlich, Jacques (Jakob)  
 -- Fried, Hans Ernest  
 -- Friedlaender, Otto  
 -- Friedlaender, Walter Andreas(?)  
 -- Friedmann, Maximilian  
 -- Fuchs, Martin(?)  
 -- Fuerst, Herbert  
 -- Galewski, Walter  
 -- Gans, Ernest  
 -- Gans, Paul Hawkins Otto  
 -- Geiger, John (formerly Hans)  
 -- Geiger, Rudolf  
 -- Geiringer, Otto  
 -- George, Manfred (originally Cohn, Manfred Georg)(?)  
 -- Glesinger, Egon(?)  
 -- Goatcher, Robert Hahn  
 -- Goldmann, Nahum(?)  
 -- Goldner, Franz  
 -- Gottgetreu, Martin  
 -- Grau, Richard O.  
 -- Grueneberg, Curt  
 -- Grumbacher, Alfred  
 -- Guggenheim, Siegfried  
 -- Hahn, Robert  
 -- Haim, Joseph  
 -- Hajek, Paul  
 -- Hamburger, Alfred  
 -- Hauser, Franz  
 -- Hein, Frederic  
 -- Heitler, Oskar  
 -- Held, Robert, O.  
 -- Hertz, Harry Franklin (formerly Harry Herz-Fraenkel)  
 -- Heyman(s), Erich  
 -- Hirschberg, Max  
 -- Hoffmannsthal, Emil (Hofmannsthal, Emilio Edler von)  
 -- Holzappel, Emanuel  
 -- Homberger, Konrad  
 -- Homburger, Adolf  
 -- Jacobi, Arthur  
 -- Jacobson, Walter  
 -- Kann, Robert A.



- Kavalier, Joseph. (formerly Kawaler)
- Klimberger, Josef
- Klinger, Julius Erich
- Koessler, Maximilian
- Korn, Frank
- Kronstein, Heinrich
- Kulka, Frederick
- Kurz, Emil
- Lande, Adolf
- Landenberger, Leopold
- Laserstein, Botho (speudo. Georg Lisau)
- Lepane, Walter W.
- Levy, Fred
- Lion, Max
- Lippmann, Walter
- Loebl, Rudolf
- Loew, Ernst
- Loewenstein, Karl
- Mayer, Erich
- Mayer, P. A.
- Mehler, Robert
- Mendel, Herbert Isidor
- Meyer, Lyonel Julius
- Meyer, Werner
- Moeller, Paul Eugen
- Morgenthau, Hans (bis 1930)
- Mosse, Walter M.
- Moszkowski, Richard
- Neumann, Francis von
- Neumann, Franz Leopold
- Nurnberg, Herbert. W.
- Nussbaum, Arthur
- Oppenheimer, Fritz Ernst
- Peters, Walter (formerly Gruenpeter)
- Pollak, Friedrich
- Pollak, Ludwig
- Reik, Otto E.
- Reiner, Anthony Stephen
- Reiner, Paul
- Reiss, Leo
- Reisz, Ladislaus
- Rie, Robert
- Roetter (Roedelheimer), Friedrich
- Rosenfeld, Kurt
- Rosenwald, Henry Martin
- Rubin, Heinrich
- Saenger, August
- Saxl, Erich
- Schall, Alexander
- Schechter, Edmund
- Schiffer, Ludwig
- Schlesinger, Edgar H.



-- Schmetterling, Joachim  
-- Schmidt, Eugen  
-- Schoenfeld, Ernest  
-- Schreier, Robert  
-- Schubert, Richard  
-- Schwenk, Edmund Heinz  
-- Smetana, Richard  
-- Sonnenschein, Siegmund  
-- Spitzer, Ernst  
-- Stein, Ewald  
-- Steinfeld, Gerhard.  
-- Stern, Robert R.  
-- Sternbach, Oskar  
-- Stiefel, Ernst C.  
-- Strauss, Robert  
-- Sueskind, Hans  
-- Tauber, Siegfried  
-- Terebessy, John  
-- Urman, Hermann  
-- Wallach, Fritz  
-- Wallach, Maximilian  
-- Wallach, Severin  
-- Walter, Otto L.  
-- Weigert, Julius B.  
-- Weil, Bruno  
-- Weinberger, Norbert  
-- Weiss, Erich  
-- Weisz, Georg Anton  
-- Weissbarth, Arthur  
-- Wojnilower, Theodor  
-- Wolf, George Victor

Richter:

-- Behrendt, Peter H.  
-- Benfey, Eduard  
-- Bernstein, Manfred  
-- Brann, Hedwig  
-- Bretzfelder, Max  
-- Cahn, Joseph  
-- Caro, Frederick William  
-- Cohn, Sigmund Albert  
-- Dallmann, Heinz (bis 1933)  
-- Ehrenzweig, Albert, Senior  
-- Eisner, Fritz  
-- Gerstel, Alfred  
-- Herzog, Friedrich  
-- Hosiosky, Abo  
-- Kiess, Paul Charles Albert  
-- Langer, Robert  
-- Maass, Heinz J.  
-- Morgenthau, Hans



- Nadelmann, Kurt
- Oppler, Alfred Christian
- Schepses, Erwin

Staatsanwalt:

- Gruneberg, Joseph

Beamter:

- Alexander, Walter
- Alexich, Georg Maria
- Auerbach, Frank Ludwig
- Baerensprung, Horst W.
- Baerwald, Friedrich
- Brecht, Arnold
- Callomon, Heinrich
- Caspari, John
- Corsing, Fritz
- Derenberg, Walter
- Engelsberg, Rudolf
- Hula, Erik (1934-1938)
- Joseph, Franz M. (1931-1933)
- Memelsdorff, Erwin
- Mire, Joseph
- Morstein Marx, Fritz
- Neumann, Alfred
- Peiser, Werner
- Plager, Egon
- Weigert, Oscar

Professor (akademische Position):

- Ascher, Leopold (his own prep. law school in Vienna)
- Aufrecht, Hans
- Brecht, Arnold
- Bruck, Eberhard Friedrich
- Ehrenzweig, Albert, Senior
- Erlanger, Helmut (Assistent)
- Fleischer, Georg Leopold
- Fleischmann, Max
- Foltin, Edgar
- Fried, Hans Ernest (lecturer)
- Hentig, Hans von(?)
- Hoeningner, Heinrich
- Honig, Richard
- Hosiosky, Abo (Assistent)
- Hula, Erik (1931-1933, Assistent)
- Hupka, Joseph
- Joseph, Franz M. (1926-1931, Assistent)
- Kavalier, Joseph. (formerly Kawaler)
- Kelsen, Hans



- Kisch, Guido
- Korsch, Karl
- Lapidus, Leo
- Lenhoff, Arthur
- Levy, Ernst
- Liebesny, Herbert Joseph
- Lion, Max
- Mire, Joseph
- (Neisser, Hans Philip) *ecom.*
- Neuner, Robert
- Nussbaum, Arthur
- Petschek, Georg
- Pribram, Karl
- Rabel, Ernst
- Saenger, August
- Saxl, Erich
- Schwenk, Edmund Heinz
- Sieradz, Edwin
- Weigert, Oscar
- Wilk, Kurt

Andere Berufe:

- Adler, Erwin, Rechtsabteilung Allianz und Stuttgarter Verein  
Versicherungsgesellschaft
- Berger, Adolf, legal counsel Polish delegation in Vienna
- Berger, Peter Ludwig (Funktionär der Christlichen  
Gewerkschaft)
- Bunzel, Joseph Hans (insurance comp.)
- Deutsch, Julius (Politiker, SDAP)
- Deutschova, Lore Barbara (export business)
- Drucker, Peter Ferdinand (Redakteur)
- Ehrlich, Otto Hild (1919-1925 assist. mgr. Allgemeine  
Depositbank, Vienna; 1926-1934 head dept. of econ.  
Volkshochschule "Volksheim" Vienna, lect. for trade unions  
and labor groups, Arbeiterhochschule, Vienna; 1934-1938 pub.  
rel. counsel and owner of advertising agcy)
- Eisenberg, Robert (Bankwesen)
- Fields, John Howard (manager Frankfurt office of Jèdischer  
Centralverein, 1933-1939)
- Hannak, Philippine (librarian)
- Heims, Edward H. (Eduard) (1926-1936 director of international  
Mortgage and Investment Co., Berlin and Baltimore)
- Kiess, Paul Charles Albert (1920-1933 Abgeordneter des  
Thèringischen Parlaments)
- Krassa, Gerhard Friedrich (business manager)
- Leichter, Otto (journalist)
- Zerner, Carl Egon

Wann ausgewandert und wann in die USA eingewandert:

1933:



- Bodenheimer, Edgar D
- Brecht, Arnold D
- Eisner, Fritz D
- Loewenstein, Karl D
- Morstein Marx, Fritz D
- Neisser, Hans Philip D

1934:

- Biel (formerly Bielschowsky), Ulrich D
- Baerwald, Friedrich (1933 Saargebiet) D
- Derenberg, Walter D
- Elbe, Joachim von D
- Erlanger, Helmut (1933 Schweiz, Frankreich) D
- Husserl, Gerhart D
- Memelsdorff, Ilse (via France) D
- Memelsdorff, Erwin (via France) D
- Nussbaum, Arthur D
- Pribram, Karl T
- Rothschild, Nora D

1935:

- Alexander, Paul Julius (1933 France) D
- Hertz, Harry Franklin (formerly Harry Herz-Fraenkel) D
- Joseph, Franz M. D
- Kisch, Guido D
- Kronstein, Heinrich D
- Levy, Ernst D
- Riesenfeld, Stefan Albrecht D

1936:

- Adler, Erwin D
- Bekker, Konrad (1933 to Italy) D
- Callmann, Rudolf D
- Dorpalen, Andreas D
- Ebenstein, William (1934 England) D
- Friedlaender, Walter Andreas D
- Gutman, Theodore E. (Gutmann until 1939) (1933 Spain) D
- Hentig, Hans von D
- Jacobsohn, Kurt D
- Jacobson, Walter D
- Korsch, Karl (via Denmark, England) D
- Lekisch, Karl Peter (1933 France, 1934 England) D
- Neumann, Franz Leopold (1933 England) D
- Walter, Otto L. D

1937:

- Aaron, Albert D



- Adrian, Adolph A. D
- Behrendt, Peter H. (1933 to Austria) D
- Bloch, Henry Simon (1934 to France) ?
- Drucker, Peter Ferdinand (1933 to England) D
- Frank, William D
- Knorr, Klaus Eugene D
- Lampe, Ernst D
- Laufer, Joseph (1933 Palestine) D
- Lion, Max (1935 Holland) D
- Morgenthau, Hans (1933 Switzerland, 1935 Spain) D
- Niemeyer, Gerhart (1933 France, Netherlands, Spain) D

1938:

- Adler, John Hans T
- Aschaffenburg, William A. D
- Auerbach, Frank Ludwig D
- Auerbach, Joachim O
- Bandmann, Eugen (1933 to Prague) D
- Biberfeld, Philipp von D
- Birnholz-Brinton, Guenther M. (went back to Geneva) D
- Bretzfelder, Max (1936 Switzerland) D
- Callomon, Heinrich D
- 1 -- Cohn, Sigmund Albert (1933 to Italy) D
- Cohn Linde, Bruno (1935 Denmark) D
- Dallmann, Heinz (1936 Brazil) D
- Dickmann, Wilhelm D
- Eisner, Hermann (? , via Holland) D
- Elias, Henry O
- Engelhard, Paul O
- Engelsberg, Rudolf O
- Fischer (Fisher since 1944), Paul O
- Fleischer, Georg Leopold (oder 1939) O
- Fraenkel, Ernst D
- 2 -- Franck, Peter Goswyn D
- Fried, Hans Ernest O
- Fröhlich, Hans T
- Galewski, Walter D
- George, Manfred (originally Cohn, Manfred Georg) (1933 CSR, via Hungary, Yugoslavia, Italy, Switzerland, and France to US) D
- Goatcher, Robert Hahn O
- Grau, Richard O. D
- Guggenheim, Siegfried D
- Haim, Joseph O
- 30 -- Held, Robert, O. D
- Herz, Hans H., John H. Herz 1940 (1935 Switzerland) D
- Hoeningner, Heinrich D
- Homburger, Adolf O
- Honig, Richard (1933 Turkey) D
- Hosiosky, Abo D
- Kann, Robert A. (or early 1939) O



- Kavalier, Joseph. (formerly Kawaler) 0
- Lenhoff, Arthur (via Switzerland) 0
- Liebesny, Herbert Joseph 0
- 4 -- Loebl, Rudolf 0
- Maass, Heinz J. D
- Maier, Lothar (1933 France) D
- Marcuse, Hans Werner D
- Marx, Werner D
- Neumann, Alfred 0
- Petschek, Georg 0
- Plager, Egon 0
- Rie, Robert (via Italy and France) 0
- 5 -- Rohrlisch, Georg Friedrich 0
- Steinfeld, Gerhard. D
- Tauber, Siegfried 0
- Terebessy, John T
- Weigert, Hans D
- Weigert, Oscar (1935 Turkey) D

1939:

- Alexander, Walter (Frankreich, einige (?) Jahre später in die USA) D
- Aufricht, Hans 0
- Baerensprung, Horst W. (1934 to China) D
- Benfey, Eduard (May 1939 to England, Dec. to US) D
- Beth, Marianne 0
- Bloch, Fritz D
- Bruck, Eberhard Friedrich D
- Bunzel, Joseph Hans (1938 France) 0
- Cahn, Joseph D
- Cohen, William (first to France) D
- Deutsch, Johannes Leopold 0
- Deuschova, Lore Barbara (April 1939 England) T
- Drechsler, Karl (via Belgium and England) 0
- Ehrenzweig, A. Albert (1938 Holland) 0
- Ehrlich, Otto Hild 0
- Eisler, Armand 0
- Elgart, Paul J. 0
- Ettinger, Karl E. 0
- Eyermann, Kurt D
- 2 -- Feigl, Fred (1938 England) 0
- Feingold, Harry 0
- Flechtheim, Ossip (1935 to Switzerland) D
- Friedmann, Maximilian 0
- Frostig, Benjamin 0
- Geiger, John (formerly Hans) 0
- Glesinger, Egon T
- Hauser, Franz (via Switzerland, England) 0
- Hein, Frederic 0
- Heyman(s), Erich (1938 Holland) D
- 3 -- Kiess, Paul Charles Albert (via CSR, Switzerland, Holland, D



- France)
- Korn, Frank T
  - Kurz, Emil (1938 Switzerland) O
  - Langer, Robert O
  - Mayer, Charles (1938 England) O
  - Mayer, Erich D
  - Mendel, Herbert Isidor D
  - Meyer, Lyonel Julius (1933 England) D
  - Neumann, Francis von O
  - Neuner, Robert D
  - 4-- Oppler, Alfred Christian D
  - Peiser, Werner (1933 Italy) D
  - Rabel, Ernst D
  - Reiner, Anthony Stephen T
  - Reiss, Leo (1938 England) O
  - Roetter (Roedelheimer), Friedrich (1935 England) D
  - Rolef, Hans (1938 Holland, England) D
  - Rosenwald, Henry Martin (1934 Italy) D
  - Saxl, Erich (1938 Holland) O
  - Schall, Alexander O
  - 5-- Schepses, Erwin (1936/37 Italy, 1938/39 Germany) D
  - Schlesinger, Edgar H. D
  - Schreier, Robert O
  - Schubert, Richard O
  - Sieradz, Edwin (?) D
  - Spitzer, Ernst O
  - Sternbach, Oskar (1938 Holland, France, England, West Indies) O
  - Strauss, Robert O
  - Weigert, Julius B. (1933 to France and Italy) D
  - Weisz, Georg Anton O
  - 6-- Wolf, George Victor (via England) O
  - Zerner, Carl Egon (?) O

1940:

- Asch, Ernest D
- Albert, John O
- Alexich, Georg Maria O
- Auerbach, Richard Joseph D
- Ballin, Arthur O
- Bauer, Robert (1938 to Prague, 1939 Paris) O
- Beradt, Martin (1939 to England) D
- Berger, Peter Ludwig (1938 Brazil) O
- Braun, Kurt D
- 7-- Caro, Hans Erich D
- Ehrenzweig, Albert, Senior (1939 Netherlands) O
- Ehrmann, Henry Walter (1934 CSR) D
- Eisler, Arnold (1938 Czechoslovakia, Switzerland, France, Cuba) O
- Emmerich, Hugo (1933 to Holland) D
- Fabry, Joseph (bis 1943 Epstein) (1938 Belgium, 1939 England) O
- Feger, Norbert (1939 Scotland) O



- Fields, John Howard (1939 England) D
- Freundlich, Jacques (Jakob) O
- Friedlaender, Otto (1938 France, then England) O
- Fuchs, Martin O
- 2 -- Geiger, Rudolf (1939 to England) D
- Gerstel, Alfred D
- Goldmann, Nahum D
- Goldner, Franz (1938 France) O
- Grubel, Frederick (formerly Fritz) (1939 England) D
- Gruneberg, Joseph D
- Gumbel, Heinz (via England) D
- Herzog, Friedrich (1939 Sweden) O
- Holzappel, Emanuel (1939 England) O
- 3 -- Hoor, Ernst O
- Jacobi, Arthur (1939 Cuba) D
- Jacobson, Alfred O
- 2 -- Kelsen, Hans O
- Lande, Adolf (via England) O
- Landenberger, Leopold (1938 England) D
- Laserstein, Botho (speudo. Georg Lisau) (1933 C.S.R., 1934 France) D
- Leichter, Otto (via France) O
- Mehler, Robert (via France) O
- Oppenheimer, Fritz Ernst (via England) D
- 4 -- Peters, Walter (formerly Gruenpeter) (via Yugoslavia, Poland, Holland, Switzerland) D
- Pollak, Ludwig (1939 England) O
- Sonnenschein, Siegmund (1938 France) O
- Stiefel, Ernst C. (1933 France) D
- Sueskind, Hans (1939 Switzerland) D
- Urman, Hermann O
- Wallach, Maximilian O
- Weil, Bruno (via Argentine, interned in France) D
- Weinberger, Norbert O

1941:

- Alsberg, Wilhelm J. D
- Berent, Margarete (1939 to Chile) D
- Berl, Arthur (1939 France) O
- Bernstein, Manfred (via Spain) D
- Caspari, John (1933 Saargebiet, Paris, Prag, Paris) D
- Colish, H. J. (1938 China) O
- Deutsch, Julius (1934 CSR, 1940 France, England, Cuba) O
- Domke, Martin (Febr. 1933 France) D
- Eisenberg, Robert (1939 Italy, France) T
- 1 -- Elston, Friedrich Gustav D
- Fraenkel, Franz D
- Herzfeld, Arnold (1933 France) D
- Land, Ernest G. (1938 France) O
- Landau, Saul Rafael O
- Levy, Fred D



- Lewy, Leo (1939 England) D
- Lippmann, Walter D
- Nadelmann, Kurt (via France) D
- Rubin, Heinrich (1938 Canada) O
- Saenger, August (1936 Lithuania) D
- Schechter, Edmund (1938 France, imprisonment, 1940 Morocco) O

1942:

- Berger, Adolf (via France and Italy) O
- Dyck, Richard (1933 France) D
- Hoffmannsthal, Emil (Hofmannsthal, Emilio Edler von) (1937 England) O

(1947:)

- Bendix, Ludwig (1937 Palestine)

Juristen, die in der Foreign Economic Administration FEA gearbeitet haben:

- |                                |                  |
|--------------------------------|------------------|
| -- Bloch, Henry Simon (Baden)  | - Frankel, Ernst |
| -- Nadelmann, Kurt (Berlin)    | - Paul L. Weiden |
| -- Oppler, Alfred Christian    |                  |
| -- Schoch, Magdalene (Hamburg) |                  |
| -- Stiefel, Ernst (Mannheim)   |                  |

Juristen, die in Nürnberg beschäftigt waren:

- |  |                          |
|--|--------------------------|
| -- Albert, John (translator)           |                          |
| -- Derenberg, Walter (special counsel) |                          |
| -- Flechtheim, Ossip (prosecutor)      |                          |
| -- Fried, Hans Ernst (judges)          |                          |
| -- Kellermann, Henry                   | - Schoenfeldt, Hebert S. |
| -- Kempner, Robert M.W. (prosecution)  | - Rothschild, Walter     |
| -- Peiser, Werner                      | - Newman, Randolph Henry |
| -- Robinson, Jakob                     |                          |

Juristen, die in Office of Military Government OMGUS beschäftigt waren:

- |   |                           |
|---|---------------------------|
| -- Anspach, Ernst (Schlesien)           |                           |
| -- Biel (Bielschowsky), Ulrich (Berlin) |                           |
| -- Brecht, Arnold                       |                           |
| -- Elbe, Joachim von (Berlin)           |                           |
| -- Husserl, Gerhart (Halle)             |                           |
| -- Lekisch, Karl Peter (Essen)          | - Riesenfeld, St. (HICOG) |
| -- Loewenstein, Karl (Muenchen)         | - Schopler, Ernest        |
| -- Oppenheimer, Fritz Ernst (Berlin)    | - Schechter, Edmund       |
| -- Schwenk, Edmund Heinz (Henry)        |                           |
| -- Weigert, Hans                        |                           |



Juristen, die für den OSS gearbeitet haben:

- Alexander, Paul Julius
- Bekker, Konrad
- Caspari, John
- Dickmann, Wilhelm
- Eisenberg, Robert
- Emmerich, Hugo
- Foltin, Edgar
- Guenther, Wolfgang W. (was considered)
- Herz, Hans H. (later John H. Herz)
- Kellermann, Henry
- Kempner, Robert (?)
- Liebesney, Herbert Joseph
- Neumann, Franz Leopold
- Roetter (Roedelheimer), Friedrich
- Stiefel, Ernst
- Weinmann, Eric Walter
- Weigert, Oscar

- Baerengang, Hart
- Levy, Walter
- Simon, Joseph
- Sebba, Gregor
- Rothschild, Walter
- Rohlf, Georg Friedrich
- Meyer, Hans J.
- Loh, Ernst

Juristen, die beim Office for War Information OWI beschäftigt waren:

- Albert, John
- Bauer, Robert
- Deutsch, Julius
- Fabry, Joseph (bis 1943 Epstein)
- Fuchs, Martin
- Kellermann, Henry(?)
- Land, Ernest G.
- Lande, Adolf
- Leichter, Otto
- Peiser, Werner

- Knight, Max (bis 1941 Kählndel)
- Werner, Berthold
- Zennik, Clementine
- Werner, Alfred
- Schlechter, Edmund

Juristen, die mit anderen Agenturen beschäftigt waren:

- Adler, John Hans (1944-1945 economic adviser for Federal Reserve Board; 1945 work for strategic bombing survey at War Department;)
- Auerbach, Frank Ludwig (US DEpt. of Interior)
- Bodenheimer, Edgar (US Dept. of Labor, Alien Property Custodian)
- Braun, Kurt (1944-1945 consultant section industrial personnel US war dept; 1945 economic consultant for statistical bureau of US Labor Dept.)
- Callomon, Heinrich (Treasury Dept.)
- Derenberg, Walter (Office of Price Administration 1943-1946)
- Ehrmann, Henry Walter (1943-1947 consultant for US government on educational matters)
- Friedmann, Wolfgang Gaston (mit SHAEF für die Britische Armee)
- Franck, Peter Goswyn (Office of Price Administration)
- Fuchs, Martin (1945-1947 head of Austrian section)



- International Broadcasting Division at State Department)
- Hentig, Hans von (Research Assistant to Attorney General in Washington/DC)
  - Herz, Franz (US Army)
  - Husserl, Gerhart (1948-1952 Foreign Service officer, State Department, of class two and assigned as legal officer, Office of General Council, Berlin and Frankfurt, HICOG)
  - Joseph, Franz M. (adviser on international problems of taxation, currency regulations and blocking foreign funds to U.S. Treasury Department, 1940; adviser in postwar planning to State Department, 1944; counsel to United Nations Conference in San Francisco, 1945; General Counsel to American Council on NATO, 1948)
  - Knorr, Klaus Eugene (1941-1945 res. assoc. Food Res. Inst. Stanford Univ. (Karl Brand))
  - Kronstein, Heinrich (Dept. of Justice)
  - Land, Ernest G. (Voice of America, 1945-1947)
  - Lande, Adolf (1945-1947 head of library research section of USIS (US Information Service))
  - Laufer, Joseph (1943-1944 attorney U.S. Department of Labor, Solicitor's Office; 1945-1951 U.S. Department of Justice)
  - Morstein Marx, Fritz (1942- admin. coun. and 1945- staff assist. Off. of the Dir. Bureau of the Budget, Exec. Off. of the Pres.)
  - Neisser, Hans Philip (OPA)
  - Oppenheimer, Fritz Ernst (BEW)
  - Pribram, Karl (1936-1942 econ. expert Soc. Security Board; 1942-1951 chief economist, U.S. Tariff Commission)
  - Riesenfeld, Stefan Albrecht (BEW 1942)
  - *Lowenstein, Edith (Alice Property)* - *Newman, Randolph Henry (US-Headquarters, 1950-53)*

Juristen, die in der US Army waren:

- Biel (formerly Bielschowsky), Ulrich
  - Bloch, Henry Simon, CATS for Army and Navy 1943-1945
  - Deutsch, Johannes Leopold, 1945 on loan as tech. adv. to US Strategic Air Force, London, with rank of col.
  - Dorpalen, Andreas, 1943-1944 vis. assist. prof. US Army spec. training program, Kenyon Coll., Gambier, Ohio
  - Elbe, Joachim von
  - Gutman, Theodore E. (Gutmann until 1939), 1943-1945 Army intelligence in Europe
  - Herz, Franz (US-Army 1943-1945)
  - Lekisch, Karl Peter
  - Meyer, Rudolf Seligmann
  - Oppenheimer, Fritz Ernst
  - Riesenfeld, Stefan Albrecht
  - Salomon, Emil
- Steiner, Kurt*  
*- Schreiner, Albert*  
*- Roman, Kurt*  
*- Lustig, Theodore Heinz*

Juristen, die in den USA wieder studierten, auch andere Fächer:

- Adler, John Hans (Columbia, International Studies?; 1946 Ph.D.)



## SECOND INTENTIONAL EXPOSURE

### Juristen, die für den OSS gearbeitet haben:

- Alexander, Paul Julius
- Bekker, Konrad
- Caspari, John
- Dickmann, Wilhelm
- Eisenberg, Robert
- Emmerich, Hugo
- Foltin, Edgar
- Guenther, Wolfgang W. (was considered)
- Herz, Hans H. (later John H. Herz)
- Kellermann, Henry
- Kempner, Robert (?)
- Liebesney, Herbert Joseph
- Neumann, Franz Leopold
- Roetter (Roedelheimer), Friedrich
- Stiefel, Ernst
- Weinmann, Eric Walter
- Weigert, Oscar

- Baerengang, Hart
- Levy, Walter
- Simon, Joseph
- Sebban, Gregor
- Rothschild, Walter
- Rohlich, Georg Friedrich
- Meyer, Hans J.
- Lohr, Ernst

### Juristen, die beim Office for War Information OWI beschäftigt waren:

- Albert, John
- Bauer, Robert
- Deutsch, Julius
- Fabry, Joseph (bis 1943 Epstein)
- Fuchs, Martin
- Kellermann, Henry(?)
- Land, Ernest G.
- Lande, Adolf
- Leichter, Otto
- Peiser, Werner

- Knight, Max (bis 1941 Kählnd)
- Werner, Berthold
- Zennich, Clementine
- Werner, Alfred
- Schechter, Edmund

### Juristen, die mit anderen Agenturen beschäftigt waren:

- Adler, John Hans (1944-1945 economic adviser for Federal Reserve Board; 1945 work for strategic bombing survey at War Department;)
- Auerbach, Frank Ludwig (US DEpt. of Interior)
- Bodenheimer, Edgar (US Dept. of Labor, Alien Property Custodian)
- Braun, Kurt (1944-1945 consultant section industrial personnel US war dept; 1945 economic consultant for statistical bureau of US Labor Dept.)
- Callomon, Heinrich (Treasury Dept.)
- Derenberg, Walter (Office of Price Administration 1943-1946)
- Ehrmann, Henry Walter (1943-1947 consultant for US government on educational matters)
- Friedmann, Wolfgang Gaston (mit SHAEF für die Britische Armee)
- Franck, Peter Goswyn (Office of Price Administration)
- Fuchs, Martin (1945-1947 head of Austrian section)



- Silving-Ryan, Helen (US-Administrator, 1948-53)
- Waldstein, Henry F. (HICOG)
- Wallach, Kate (OPA, Nat. Lab. Rel., 1942-1946)
- Zingel, Hans (War Dept., 1940-1943)
- Horosky, Alva (Dept. of Justice)

- Wallach, Maximilian
- Weckslay, Joseph



- International Broadcasting Division at State Department)
- Hentig, Hans von (Research Assistant to Attorney General in Washington/DC)
  - Herz, Franz (US Army)
  - Husserl, Gerhart (1948-1952 Foreign Service officer, State Department, of class two and assigned as legal officer, Office of General Council, Berlin and Frankfurt, HICOG)
  - Joseph, Franz M. (adviser on international problems of taxation, currency regulations and blocking foreign funds to U.S. Treasury Department, 1940; adviser in postwar planning to State Department, 1944; counsel to United Nations Conference in San Francisco, 1945; General Counsel to American Council on NATO, 1948)
  - Knorr, Klaus Eugene (1941-1945 res. assoc. Food Res. Inst. Stanford Univ. (Karl Brand))
  - Kronstein, Heinrich (Dept. of Justice)
  - Land, Ernest G. (Voice of America, 1945-1947)
  - Lande, Adolf (1945-1947 head of library research section of USIS (US Information Service))
  - Laufer, Joseph (1943-1944 attorney U.S. Department of Labor, Solicitor's Office; 1945-1951 U.S. Department of Justice)
  - Morstein Marx, Fritz (1942- admin. coun. and 1945- staff assist. Off. of the Dir. Bureau of the Budget, Exec. Off. of the Pres.)
  - Neisser, Hans Philip (OPA)
  - Oppenheimer, Fritz Ernst (BEW)
  - Pribram, Karl (1936-1942 econ. expert Soc. Security Board; 1942-1951 chief economist, U.S. Tariff Commission)
  - Riesenfeld, Stefan Albrecht (BEW 1942)
  - *Louwiski, Edith (Alien Property)*      - *Newman, Randolph Henry (US-Headquarter, 1950-53)*

Juristen, die in der US Army waren:

- Biel (formerly Bielschowsky), Ulrich
  - Bloch, Henry Simon, CATS for Army and Navy 1943-1945
  - Deutsch, Johannes Leopold, 1945 on loan as tech. adv. to US Strategic Air Force, London, with rank of col.
  - Dorpalen, Andreas, 1943-1944 vis. assist. prof. US Army spec. training program, Kenyon Coll., Gambier, Ohio
  - Elbe, Joachim von
  - Gutman, Theodore E. (Gutmann until 1939), 1943-1945 Army intelligence in Europe
  - Herz, Franz (US-Army 1943-1945)
  - Lekisch, Karl Peter
  - Meyer, Rudolf Seligmann
  - Oppenheimer, Fritz Ernst
  - Riesenfeld, Stefan Albrecht
  - Salomon, Emil
- Steiner, Kurt*  
*- Schreijer, Albert*  
*- Rosenow, Kurt*  
*- Lustig, Theodore Herz*

Juristen, die in den USA wieder studierten, auch andere Fächer:

- Adler, John Hans (Columbia, International Studies?; 1946 Ph.D.)



- Hairy, Ho (Columbia, C.L.B.)



- Yale University)
- Alexander, Paul Julius (1935-1940 Univ. of Michigan and Harvard; 1940 Ph.D. history, Harvard)
  - Anspach, Ernst (M.Sc., New School of Social Research, New York)
  - Auerbach, Frank Ludwig (M.Sc. Columbia Univ.)
  - Auerbach, Richard Joseph (economics, NYU, exam 1945)
  - Behrendt, Peter H. ( His specialty, after having taken courses in Chemistry in the US, is hard metal alloys [ wartime adviser?]; 1944 graduated from Western Reserve Law School)
  - Berl, Arthur (1947 B.L. University of Syracuse)
  - Bodenheimer, nee Levy, Brigitte Marianne (1933-1935 Columbia Law School, New York, and University of Washington Law School; 1936 L.L.B.)
  - Bodenheimer, Edgar (1935-1937 University of Washington, Seattle; L.L.B. 1937)
  - Bunzel, Joseph Hans (1940-41 Johns Hopkins Univ., 1941-1943 stud. sociology and history at self study coll. in N. Carol.)
  - Callmann, Rudolf (LL.B. Havard University, 1939; research fellow 1936-1939)
  - Croy, Louis (formerly Ljubomir Koropatnicki) (Univ. Wisconsin at Madison Law School, graduating 1942)
  - Deutsch, Johannes Leopold (1940-1941 Univ. Illinois Library School; 1941 BS in lib. sci.; 1941-1944 Univ. Illinois, 1944 MS)
  - Dickmann, Wilhelm (University of Pennsylvania Law School)
  - Ehrenzweig, A. Albert (U. of Chicago)
  - Elbe, Joachim von (Yale, LLB 1938)
  - Emmerich, Hugo (NYU, LLB 1943)
  - Erlanger, Helmut (1948 LLB, JD, San Francisco)
  - Fraenkel, Ernst (1941 DJ Univ, of Chicago)
  - Frank, William (1940-1942 Western Reserve University, social work, MA 1942)
  - Friedmann, Maximilian (Law School at Southern Methodist University, Dallas, Texas, 1939-1941)
  - Gans, Paul Hawkins Otto (College of William and Mary, Williamsburg, VA, 1940-1942)
  - Goldner, Franz (LLB 1943)
  - Grau, Richard O. (law student 1 year U. of Chicago, 2 years UC Berkeley)
  - Haim, Joseph (Columbia Law School, 1940)
  - Hauser, Franz (NYU Law School, 1940)
  - Held, Robert, O. (LLB 1945)
  - Herzog, Friedrich (Univ. of Iowa Law School, 1940/41)
  - Jacobson, Walter (NYU Law School, 1937-1940)
  - Joseph, Franz M. (JD Univ. of Chicago, 1938)
  - Kann, Robert A. (Columbia Library School, 1939-1940)
  - Kiess, Paul Charles Albert (U. of Penn. Law School, 1940/41)
  - Knorr, Klaus Eugene (1938-1941 student of international relations Univ. of Chicago; 1941 Ph.D.)
  - Krassa, Gerhard Friedrich (Columbia Univ. Law School, 1940/41)



- Lampe, Ernst
- Landenberger, Leopold
- Laufer, Joseph
- Maass, Heinz J.
- Memelsdorff, Ilse
- Moeller, Paul Eugen
- Plager, Egon
- Reiner, Anthony Stephen
- Riesenfeld, Stefan Albrecht
- Rohrlich, Georg Friedrich
- Rosenwald, Henry Martin
- Rothschild, Nora
- Saxl, Erich
- Schall, Alexander
- Schiffer, Ludwig
- Schwenk, Edmund Heinz
- Stern, Robert R. (NYU accounting since 1939)
- Wilk, Kurt (NYU Law School 1943)

Juristen, die an amerikanischen Universititen oder Colleges  
lehrten oder andere akademische Positionen innehatten:

- Adler, John Hans (1941-1942 research assistant and instructor at the Institute for International Studies, Yale University; 1942-1944 instructor Oberlin College)
- Alexander, Paul Julius (1945-1954 mem. fac. Hobart Coll., Geneva, N.Y.)
- Alexich, Georg Maria (Georgetown University, Washington/DC, International Comparative Administration Law and Diplomatic Science)
- Auerbach, Frank Ludwig (1944-1947 lecturer for social sciences Hunter College, N.Y.)
- Aufricht, Hans (research assistant in the Department of Government at NYU, working with Prof. Eagleton on "American Neutrality Legislation" and work on textbook on International Relations, 1940/41 Carnegie Fellow in International Law; 1941/42 Visiting lecturer on Government, NYU; 1941-1943 Research Assistant, Commission to Study the Organization of Peace)
- Baerensprung, Horst W. (1939 until end of war lecturer at Harvard University)
- Baerwald, Friedrich (1935-1970 econ. dept. Fordham Univ. NYC)
- Bekker, Konrad (1936-1938 Research Assistant Columbia University; 1938-1939 Research Fellow Brookings Institute, Washington, D.C.)
- Berger, Adolf (1942-1962 professor of Roman Law at Ecole Libre des Hautes Etudes in New York; since 1952 visiting professor for Roman Law at City College, New York)
- Berger, Peter Ludwig (1940-53 prof. of publ. and comp. intl. law, Catholic Univ. of America, Washington/DC)
- Beth, Marianne, nee von Weisl (1939-1942 professor at Reed



- College, Portland/Ore.)
- Bloch, Henry Simon (Research Assistant University of Chicago, 1938; lecturer Institute for Military Studies, 1941-1942, instructor economics, 1943)
  - Bodenheimer, Edgar (since 1946 law professor at University of Utah; then UC Davis)
  - Braun, Kurt (research associate at University of New Hampshire at Durham, 1940-1942; 1942-1951 Brookings Institute)
  - Brecht, Arnold (New School/NYC)
  - Bruck, Eberhard Friedrich (1939-1952 research associate Harvard Law School)
  - Bunzel, Joseph Hans (1946-47 assoc. prof. of sociol. and res, Fisk Univ. Nashville, Tenn.; 1947-1948 spec. lect. of German and polit. sci. Washington and Jefferson Coll., Washington)
  - Callmann, Rudolf (Harvard University, research fellow 1936-1939)
  - Caspari, John (Jan. 1947 - 1953 Assist. Prof. für Deutsch Howard Univ. Washington/DC)
  - Cohn, Sigmund Albert (1939-1964 Univ. of Georgia)
  - Dallmann, Heinz (research assistant at Indiana University Law School, 1941/42)
  - Derenberg, Walter (1935-1974 mem. fac. New York University Law School, 1935 lecturer, 1947 assist. prof., 1951 assoc. prof., 1954 prof., 1974 prof. emer., taught trademark and copyright law; several summer position at other schools)
  - Dorpalen, Andreas (1944-1958 mem. fac. dept. of history, St. Lawrence Univ., Canton, N.Y.; 1958 prof. hist. Ohio State Univ., Columbus)
  - Drucker, Peter Ferdinand (1942-1949 prof. of philosophy and polit., Bennington College, Vermont; 1950-1972 prof. mgt, NYU Grad. School of Bus. Adm.)
  - Ebenstein, William (1936-1938 Univ. Wisconsin: 1936-1937 univ. fel., 1937-1938 res. assoc. law; 1938 Ph.D. in polit. sci.; 1938-1946 mem. fac. Univ. Wisconsin, Madison)
  - Ehrenzweig, A. Albert (1948-1974 prof. of law Univ. of CA, Berkeley)
  - Ehrlich, Otto Hild (1941-1947 instr. in econ. Brooklyn College, N.Y.; 1946-1959 mem. fac. NYU, 1956 prof. of econ.)
  - Ehrmann, Henry Walter (1940-1943 research assistant at New School for Social Research, New York; 1947-1950 associate professor; 1950-1961 professor for political science University of Colorado)
  - Elbe, Joachim von (Research assistant Yale Univ.)
  - Elston, Friedrich Gustav (Deutsch- und Mathematiklehrer Seton Hall University South Orange)
  - Fabry, Joseph (bis 1943 Epstein)
  - Fischer (Fisher since 1944), Paul (1943-1946 assistant professor Clark University/Mass.; 1946-1950 Dartmouth College/N.H.)
  - Flechtheim, Ossip (1940 - 1943 instructor to Atlanta University; 1943 instructor in government at Bates College/Maine)



- Hosiery, also (Amish)  
bei Nürnberg in  
(Columbia)



- Fried, Hans Ernest (CUNY)
- Guenther, Wolfgang W. (1935-1937 instructor at Catholic University, Dept. of Politics)
- Hentig, Hans von
- Herz, Hans H., John H. Herz 1940 (1938 - 1939 Research worker at Institute for Advanced Study, Princeton. 1939 - spring 1940 instructor in History at Trinity College, Hartford/Conn.; 1941 - 1942 Emergency COmmittee grantee at Howard University)
- Hoeninge, Heinrich (Hunter College, NYC)
- Hoffmannsthal, Emil (Hofmannsthal, Emilio Edler von)
- Homberger, Konrad (Professor fuer deutsche Sprache am Polytechnischen Institut in N.Y.)
- Honig, Richard (1939 - 1941 Emergency Committee grantee at University of Georgia in Athens; 1941 - 1942 Du Bose Memorial Training School in Monteagle, Tennessee, taught church history and canon law since 1943 School of Theology at the University of the South, Sewanee, Tenn.)
- Hoor, Ernst (1941-1943 lecturer Yale Univ.)
- Hula, Erik (Professor of Political Science, Graduate Faculty, New School for Social Research, New York, since 1938)
- Husserl, Gerhart (1934-1940 visiting professor of law University of Virginia; 1940-1946 National University, Washington, D.C.)
- Joseph, Franz M. (lecturer Univ. of Chicago, 1938)
- Kelsen, Hans (briefly at Havard Law School; 1942 professor of political science at UC/Berkeley)
- Kessler, Friedrich (1938 assistant professor at Yale Law School; 1938 associate professor at the University of Chicago; 1942 full professor; 1947 Sterling professor at UC/Berkeley)
- Kisch, Guido (1937 guest professor; 1942-1946 Research-Associate at University of Notre Dame, Indiana; 1950 Research Professor at Hebrew Union College, New York)
- Knorr, Klaus Eugene (1942-1952 assoc. prof. intl. rels. and res. assoc., Inst. Intl. Studies, Woodrow Wilson School)
- Korsch, Karl (1943-1945 prof. of sociology in New Orleans)
- Krassa, Gerhard Friedrich (assistant Institute for International Studies, Yale Univ., 1941/42)
- Kronstein, Heinrich
- Laufer, Joseph
- Lenhoff, Arthur
- Levy, Ernst
- Liebesny, Herbert Joseph
- Loewenstein, Karl
- Morgenthau, Hans
- Morstein Marx, Fritz
- Nadelmann, Kurt
- Neisser, Hans Philip
- Neumann, Franz Leopold
- Neuner, Robert
- Niemeyer, Gerhart



- Waldstein, Henry (NY, 1947)
- Wallad, Kate (Wisconsin 1942)
- Riesenfeld, Stefa (Minnesota, 1958?)
- Fulda, Carl (NY, Texas)  
1942?
- Jacoby, Sidney (1940, NY)
- Park Reginald (1944, Illinois, DC)
- Funnid, Hugo (N.Y., 1946?)



- Nussbaum, Arthur
- Petschek, Georg
- Rabel, Ernst
- Riesenfeld, Stefan Albrecht
- Saxl, Erich
- Sieradz, Edwin
- Weigert, Hans
- Weigert, Oscar
- Wilk, Kurt

Juristen, die in den USA zur Anwaltschaft zugelassen wurden:

- Alberti, F. M. (NYC)
  - Berent, Margarete (1949 NY)
  - Bodenheimer, nee Levy, Brigitte Marianne (1940 Washington State, 1942-1946 attorney, later assistant to General Counsel, Federal Public Housing Authority, Washington, D.C.; for State Department at The Hague Conference in May 1948)
  - Callmann, Rudolf (NY State 1943)
  - Croy, Louis (formerly Ljubomir Koropatnicki) (Wisconsin ?)
  - Derenberg, Walter (New York State bar 1940; accepted to appear before US Supreme Court in 1943; D.C. bar and Court of Customs and Patent Appeals in 1944)
  - Ehrenzweig, A. Albert (N.Y. bar 1945)
  - Erlanger, Helmut (Kalifornien, 1953(?))
  - Friedmann, Maximilian (New Mexico, 1943)
  - Gans, Paul Hawkins Otto (Virginia, 1942)
  - Goldner, Franz (New York, 1946)
  - Herzog, Friedrich (Iowa, 1941)
  - Homburger, Adolf (NY State, 1941)
  - Joseph, Franz M. (1940, since 1943 NY)
  - Kessler, Friedrich (1944 Illinois)
  - Landenberger, Leopold (1945 New York)
  - Lenhoff, Arthur (1945 N.Y. State)
  - Loewenstein, Karl (1939 Massachusetts)
  - Moeller, Paul Eugen (1941 Illinois State)
  - Morgenthau, Hans (1943 Missouri)
  - Schall, Alexander (1942 NYC)
  - Stiefel, Ernst C. (1943(?) New York)
  - Zerner, Carl Egon (1942, New Mexico)
- *Silving-Ryan, Helen (1944, NY state)*
  - *Schweizer, Edmund Herz (NY, 1942)*
  - *Schoenfeldt, (NY, ?)*
  - *Rosenfeld, Kurt (NY, vor 1943)*
  - *Werner Rosenberg (NY, ?)*
  - *Prager, Alfred (1938, NYC)*
  - *Newman, Randolph Henry (1943, NY)*
  - *Loewenstein, Edith (1939, Illinois)*
  - *Lampfe, Joseph (1942?)*
  - *Karrell, Joseph (1945, NY)*

Andere Tätigkeiten als Juristen in den USA:

- Bodenheimer, Edgar, attorney US Department of Labor, 1940-1942; Principal Attorney, Office of Alien Property Custodian, 1942-1946
- Braun, Kurt, 1951 chief information division in the office of economic statistics of the wage stabilization committee; 1951-1960 section chief at State Dept.
- Domke, Martin, director of research American Arbitration



- Association, 1943-1945
- Held, Robert, D., Information Service of the National Refugee Service, Inc., NYC
  - Hentig, Hans von, Research Assistant to the Attorney General in Washington, D.C. (date?); Director of the Colorado Crime Survey
  - Kann, Robert A. (April to Sept. 1939 examiner in the Classification Department of the Penitentiary of New York City on Rikers Island)
  - Kellermann, Henry (1949 member US delegation at Foreign Minister conference in Paris; 1953-1956 adviser to Assistant Secretary for European Affairs, State Department)
  - Krassa, Gerhard Friedrich (secretary for a judge)
  - Memelsdorff, Erwin (unemployment insurance, NY State)
  - Sieradz, Edwin
  - Weigert, Oscar

Nichtjuristische Berufe ergriffen:

- Adler, John Hans, 1945-1947 chief of currency division, then deputy chief of financial division with US delegation at Allied Commission in Vienna; 1947-1950 economic adviser for Federal Reserve Bank, New York
- Albert, John, State Department
- Asch, Ernest, Investmentberater, Borsenmakler
- Auerbach, Frank Ludwig, Emigrationsberater 1938-1944 für HIAS und International Migration Service
- Auerbach, Joachim, partner Hirsch & Co., New York; financial correspondent for Aufbau
- Auerbach, Richard Joseph, CPA
- Bandmann, Eugen, legal adviser for immigrants, Aufbau
- Bauer, Robert, Voice of America, chief European Division
- Behrendt, Peter H., patent adviser for Tungsram in Washington/DC
- Bekker, Konrad, State Department
- Benfey, Eduard, ran guest house in Massachusetts
- Biberfeld, Philipp von, rabbi in NYC
- Bloch, Henry Simon, section chief UN 1947-1949
- Cahn, Joseph, insurance agent in 1940
- Callomon, Heinrich, Sept. 20, 1938, to July 1939 assistant statistical analyst for US Treasury Department in Washington DC
- Corsing, Fritz, 1949-1953 Beratungsstelle für Wertpapierbereinigung New York
- Deutsch, Johannes Leopold (Bibliothekar)
- Dorpalen, Andreas, 1939-1942 ed. assist. Columbia Encycl., New York
- Drechsler, Karl (1940 accountant; 1942 editor for law firm)
- Drucker, Peter Ferdinand (1937-1941 journalist for British newspaper and fin. adv.)
- Dyck, Richard (work at Mt. Sinai Hospital in New York, for New Yorker Staats-Zeitung und Herald; 1944-1959 journalist



- Weidmann, Herbert
- Rosenfeld, Kurt
- Fraenkel, Ernst
- Ehlmann, Walter
- Bacht, Arnold



for Aufbau)

- Eisenberg, Robert (1943 Finanzsachverständiger Board of Governors der Federal Reserve Bank Washington/DC; 1945-1949 Research Analyst, 1949 Foreign Affairs Analyst, 1949-1951 Wirtschafts- und Finanzexperte State Department; 1951 Attaché US Botschaft London)
- Eisner, Fritz (nach Januar 1934 für Bank in Wall Street)
- Elias, Henry
- Erlanger, Helmut (Buchhalter bis 1953)
- Ettinger, Karl E. (Angestellter, 1940)
- Frank, William (social worker)
- Gans, Ernest (Papier- und Kartonfabrikant, Michigan)
- George, Manfred (editor Aufbau)
- Glesinger, Egon (1941-1943 journalist for Fortune Magazine, New York)
- Goatcher, Robert Hahn (odd jobs, 1940)
- Goldmann, Nahum (representative of Jewish Agency in New York)
- Grubel, Frederick (formerly Fritz) (Finanz- und Verwaltungsfachmann, Leo Baeck Institute, New York)
- Heims, Edward H. (Eduard) (since 1937 farmer in California)
- Hellin, Friedrich Philip (subscription manager of New Europe)
- Hertz, Harry Franklin (formerly Harry Herz-Fraenkel) (partner in export company, 1940)
- Lekisch, Karl Peter
- Memelsdorff, Ilse (chemist)
- Peters, Walter (formerly Gruenpeter) (ab 1954 Anwalt)
- Rothschild, Nora (Social worker)
- Sieradz, Edwin, since 1940 insurance salesman in Denver (bis wann?)

Mitglied politischer Exilorganisationen:

- Baerensprung, Horst W., 1941 member of German-American Council for the Liberation of Germany from Nazism; since 1941 member and since 1942 treasurer of Association of Free Germans; since spring 1942 German-American Emergency Conference; April 1944 Council for a Democratic Germany
- Bandmann, Eugen, Association of Free Germans
- Baerwald, Friedrich, Council for a Democratic Germany; with Paul Hagen, Albert Schreiner, Jacob Walcher, publ. "The Reconstruction of the Trade Union Movement in Germany"
- Berger, Peter Ludwig, Free Austrian Movement; leading repr. and mem. bd. of Christian-Soc. Party of Aus., founded in US in 1944 by Hans Rott
- Deutsch, Julius (1941 Free World Association)
- Engelsberg, Rudolf (1942 Austrian National Committee)
- Freundlich, Jacques (Jakob) (1942 Austrian Labor Committee)
- Langer, Robert (1942 Austrian National Committee)
- Peiser, Werner
- Weil, Bruno

- Kamnitzer, Bernhard
- Katz, Rudolf
- Fuchs, Martin
- Kaschell, Joseph
- Hentig, Hans von

- Lewinski, Emil, ISK (Frankfurt), Roma - America Council
- Löwenthal, Hubert, Priz zu
- Meyer, Oscar
- Plochl, W. M. (Free Austrian National Council)
- Wagner, F. W.



Nach Deutschland oder Österreich zurückgegangen:

- Berl, Arthur
- Berger, Peter Ludwig
- Bernstein, Manfred
- Deutsch, Julius
- Ehrenzweig, Albert, Senior
- Eisner, Hermann
- Freundlich, Jacques (Jakob)
- Fuchs, Martin
- Hentig, Hans von
- Honig, Richard
- Husserl, Gerhart
- Laserstein, Botho (speudo. Georg Lisau)
- Leichter, Otto
- Marx, Werner
- Morstein Marx, Fritz
- Peiser, Werner
- *Hannat, Jacques*
- *Katz, Rudolf*
- *Kozlik, Adolf*
- *Kraft, Julius*
- *Lachs, Ernst*
- *Lewinski, Eric*
- *Löwenstein-Wethem-Trendelenburg, Halsten, Priesen*
- ~~*Mayer, Carl W.*~~
- *Meyer, Ernst Wilhelm*
- *Plöhl, Willibald Maria*
- *Wagner, Friedrich Wilhelm*
- *Weinmann, Herbert*
- *Winter, Karl Ernst*
- *Wolff, Hans Julius*

- *Fleithum, Ossip*
- *Fraendel, Ernst*



Juristen, die in Deutschland Examen gemacht hatten:

- Aaron, Albert (Giessen)
- Adler, Erwin (Frankfurt/M.)
- Adrian, Adolph A.
- Alsberg, Wilhelm J.
- Anspach, Ernst (Schlesien)
- Aram (Abraham), Siegfried
- Aschaffenburg, William A.
- Auerbach, Frank Ludwig (Heidelberg)
- Auerbach, Richard Joseph (Breslau)
- Baerensorung, Horst
- Bandmann, Eugen
- Benrendt, Peter H. (Berlin)
- Bekker, Konrad (Referendar Berlin, Dr. Jur. Basel)
- Bendix, Ludwig (Goettingen)
- Benfey, Eduard (Goettingen)
- Benjamin, Max P. (Berlin)
- Beradt, Martin (Freiburg, Anwalt in Berlin)
- Berent, Margarete (Preussen, erste Anwaeltin)
- Biberfeld, Philipp von (Hamburg)
- Biel (Bielschowsky), Ulrich (Bonn)
- Bing, R. A. (Muenchen)
- Birnholz-Brinton, Guentner M. (Berlin)
- Bloch, Fritz
- Bodenheimer, geb. Levy, Brigitte Marianne (Heidelberg)
- Bodenheimer, Edgar (Berlin)
- Boenheim (Berlin)
- Brann, geb. Frank, Hedwig (Frankfurt/M., erste Landgerichtsraetin)
- Braun, Kurt (Berlin)
- Brecht, Arnold (Berlin)
- Bruening, Heinrich (Bonn)
- Bruck, Eberhard Friedrich (Breslau)
- Cann, Joseph (Heidelberg)
- Callmann, Rudolf (Freiburg, praktiziert in Koeln)
- Callomon, Heinrich (Breslau)
- Caro, Frederick William (Halle)
- Caro, Hans Erich (Berlin)
- Cohn, William (Berlin)
- Cohn, Siegmund Albert (Berlin)
- Cohn Linde, Bruno (Berlin)
- Corsing, Fritz (Berlin)
- Dallmann, Heinz (Berlin)
- Derenberg, Walter (Hamburg)
- Dickmann, Wilhelm (Marburg, praktiziert in Berlin)
- Domke, Martin (Berlin)
- Drucker, Peter (Frankfurt)
- Dyck, Richard
- Ehrmann, Henry Walter (Berlin)
- Einstein, Oscar E. (Erlangen)
- Eisner, Fritz (Freiburg)
- Eisner, Hermann (Breslau)
- Elbe, Joachim von (Berlin)



-- Emmerich, Hugo (Heidelberg)  
-- Erlanger, Helmut  
-- Esslinger, Wilhelm (Muenchen)  
-- Eyermann, Kurt  
-- Feibelmann, Hans A. (Muenchen)  
-- Feigenbaum, Herbert  
-- Fields (Feibelmann, Hans Alexander), Howard John (Muenchen)  
-- Fischer, Julius  
-- Flechtneim, Ossip (Koeln)  
-- Flegenheimer, Eugen  
-- Fleischmann, Max (Breslau)  
-- Fraenkel, Ernst (Frankfurt)  
-- Fraenkel, Franz (Frankfurt)  
-- Franck, Peter Goswyn (Berlin, Dr. jur. Basei)  
-- Frank, William (Berlin)  
-- Friedlaender, Walter Andreas (Berlin)  
-- Galewski, Walter  
-- Gans, Ernest  
-- Geiger, Rudolf  
-- George, Manfred (originally Cohn, Manfred Georg)  
-- Gerstel, Alfred (Göttingen)  
-- Goldmann, Nahum (Heidelberg)  
-- Goldschmidt, Eduard  
-- Gottgetreu, Martin  
-- Gottschalk, Anni  
-- Grau, Richard O. (Berlin)  
-- Grubel, Frederick (formerly Fritz) (Leipzig)  
-- Gruenberg, Martin  
-- Grueneberg, Curt (Erlangen)  
-- Gruneberg, Joseph  
-- Guenther, Wolfgang W.  
-- Guggenheim, Siegfried  
-- Gumbel, Heinz  
-- Gunzenhauser, Alfred  
-- Gutman, Theodore E. (Gutmann until 1939) (Jena)  
-- Hachenburg, Max  
-- Hamburger, Alfred  
-- Hayum, Heinrich  
-- Hayum, Simon  
-- Heimann, David  
-- Heims, Edward H. (Eduard)  
-- Held, Robert, O.  
-- Hentig, Hans von  
-- Herz, Franz  
-- Herz, Hans H., changed his name to John H. Herz  
-- Herzfeld, Arnold  
-- Heyman(s), Erich (Münster)  
-- Hirsch II, Leopold  
-- Hirschberg, Max  
-- Hoeningner, Heinrich  
-- Homberger, Konrad  
-- Honig, Richard  
-- Hosiosky, Abo (Berlin)  
-- Husserl, Gerhart



-- Jacobi, Arthur  
-- Jacobsohn, Kurt  
-- Jacobson, Walter  
-- Joseph, Franz M. (Heidelberg)  
-- Katz, Julius  
-- Kaulia, Otto  
-- Kellermann, Henry  
-- Kempner, Robert  
-- Kessler, Friedrich  
-- Kiess, Paul Charles Albert (Jena)  
-- Kirchheimer, Otto  
-- Knorr, Klaus Eugene (Tübingen)  
-- Korsch, Karl  
-- Kronstein, Heinrich  
-- Lampe, Ernst  
-- Landenberger, Leopold  
-- Lapidus, Leo (Berlin)  
-- Laserstein, Botho (pseudo. Georg Lisau) (Halle)  
-- Laufer, Joseph (Tübingen)  
-- Lekisch, Karl Peter (nicht zum Examen zugelassen)  
-- Lepane, Walter W.  
-- Levy, Ernst (Berlin)  
-- Levy, Fred (Berlin)  
-- Levy, Walter  
-- Lewy, Leo (Leipzig)  
-- Liebmann, Walter  
-- Lion, Max  
-- Lippmann, Walter  
-- Loewenfeld, Philipp  
-- Loewenstein, Karl (München)  
-- Maass, Heinz J. (Berlin)  
-- Maier, Lothar (Erlangen)  
-- Mann, Siegfried  
-- Marcuse, Hans Werner (Freiburg)  
-- Marx, Werner (Bonn)  
-- Mayer, Erich (Würzburg)  
-- Mayer, P. A.  
-- Memelsdorff, Erwin, (Hamburg)  
-- Memelsdorff, Ilse, (Hamburg)  
-- Mendel, Herbert Isidor (Hamburg)  
-- Merzbacher, Siegfried  
-- Meyer, Emil  
-- Meyer, Lyonel Julius (Leipzig)  
-- Meyer, Werner  
-- Michael, Hans (Leipzig)  
-- Morgenthau, Hans (Frankfurt/Main)  
-- Morstein Marx, Fritz (Hamburg)  
-- Mosse, Walter M.  
-- Moszkowski, Richard  
-- Nadelmann, Kurt  
-- Nathanson, Rudolf M. (Berlin)  
-- Neisser, Hans Philip (Breslau)  
-- Neumann, Franz Leopold  
-- Neuner, Robert



-- Niemeyer, Gerhart (Kiel)  
-- Nothmann, Rudolf  
-- Nurnberg, Herbert. W. (Heidelberg)  
-- Nussbaum, Arthur  
-- Oettinger, Ernst  
-- Oppenheimer, Fritz Ernst (Breslau)  
-- Oppler, Alfred Christian  
-- Peiser, Werner  
-- Peters, Walter (formerly Gruenpeter)  
-- Rabel, Ernst  
-- Reinemann, Otto  
-- Rheinstein, Max  
-- Rheinstrom, Henry  
-- Richheimer, Walter  
-- Riesenfeld, Stefan  
-- Roetter (Roedelheimer), Friedrich (Jena)  
-- Rolef, Hans (Bonn, mu te Studium unterbrechen)  
-- Rosenfeld, Kurt  
-- Rosengart, Lutz  
-- Rosenwald, Henry Martin (Erlangen)  
-- Rothschild, Nora (Frankfurt/Main)  
-- Saenger, August (Marburg)  
-- Schepses, Erwin (Göttingen)  
-- Schlesinger, Edgar H. (Leipzig)  
-- Schlesinger, Rudolf  
-- Schmal, Robert  
-- Schmidt, Eugen (München)  
-- Schoch, Magdalene  
-- Schweizer, Alfred  
-- Schwenk, Edmund Heinz (Henry) (Breslau)  
-- Schwerin, Kurt  
-- Sieradz, Edwin (Berlin)  
-- Silberman, Curt  
-- Singer, Rudolf  
-- Steiner, Albert  
-- Steinfeld, Gerhard (Breslau)  
-- Stern, Robert R.  
-- Stiefel, Ernst  
-- Stoessel, Gustav  
-- Stoessel, Rudolf  
-- Stolper, Gustav  
-- Strauss, Max  
-- Sueskind, Hans  
-- Suesskind, Kurt  
-- Uhlmann, Rudolf  
-- Walter, Otto  
-- Wallach, Fritz (Bonn)  
-- Weichmann, Herbert  
-- Weigert, Hans  
-- Weigert, Julius B. (Heidelberg)  
-- Weigert, Oscar  
-- Weil, Bruno (Würzburg)  
-- Weiss, Erich  
-- Wilk, Kurt (Berlin)



Juristen, die in Oesterreich Examen gemacht hatten:

- Albert, John (Wien)
- Alexich, Georg Maria
- Ascher, Leopold (Wien)
- Auerbach, Joachim (Wien)
- Aufrecht, Hans (Wien)
- Balin, Arthur (Wien)
- Barth, Frank (Wien)
- Bauer, Robert (Wien)
- Bergel, Egon Ernst (Wien)
- Berger, Adolf (Lemberg)
- Berl, Arthur (Wien)
- Beth (geb. von Weisl), Marianne (Wien, erste Anwaeltin in Oesterreich)
- Bettelheim, Ernst (Wien)
- Colish, H. J. (Wien)
- Croy, Louis (Koropatnicki, Ljubomin) (Wien)
- Deutsch, John L. (Wien)
- Deutsch, Julius (Wien)
- Drechsler, Karl (Wien)
- Ehrenzweig, Albert (Wien)
- Ehrenzweig, Albert Senior (Wien)
- Eisler, Armand (Wien)
- Eisler, Arnold (Wien)
- Ekstein, Gerhart (Wien)
- Elgart, Paul J. (Wien)
- Elias, Henry (Wien)
- Engelhard, Paul (Wien)
- Ettinger, Karl E. (Wien)
- Feger, Norbert (Wien)
- Feigl, Fred (Wien)
- Feingold, Harry (Wien)
- Fischer, Paul (Wien)
- Fishman, Leo (Wien)
- Fleischer, Georg Leopold (Wien)
- Foltin, Edgar (Innsbruck)
- Freundlich, Jacques (Jakob) (Wien)
- Fried, Hans Ernst (Wien)
- Friedlaender, Otto (Wien)
- Friedmann, Maximilian (Wien)
- Frostig, Benjamin (Wien)
- Fuchs, Martin (Wien)
- Fuerst, Herbert (Wien)
- Gans, Paul Hawkins Otto (Wien)
- Geiger, John (formerly Hans) (Wien)
- Geiringer, Otto (Wien)
- Goatcher, Robert Hahn (Wien)
- Goldner, Franz (Wien)
- Hahn, Robert
- Haim, Joseph (Wien)
- Hajek, Paul (Wien)
- Hannak, Philippine (Wien)



-- Hauser, Franz (Wien)  
-- Hein, Frederic (Wien)  
-- Heitler, Oskar  
-- Hertz, Harry Franklin (formerly Harry Herz-Fraenkel) (Wien)  
-- Herzog, Friedrich (Graz)  
-- Herzog, George (Wien)  
-- Hoffmannsthal, Emil  
    (Originally Hofmannsthal, Emilio Edler von)  
-- Holzappel, Emanuel  
-- Homburger, Adolf (formerly spelled Hamburger) (Wien)  
-- Hoor, Ernst  
-- Hula, Erik (Erich)  
-- Hupka, Joseph  
-- Jacobson, Alfred  
-- Kann, Robert A. (Wien)  
-- Kavalier, Joseph. (formerly Kawaler) (Wien)  
-- Kelsen, Hans (Wien)  
-- Kisch, Guido  
-- Klimberger, Josef (Wien)  
-- Klinger, Julius Erich (Wien)  
-- Koessler, Maximilian (Wien)  
-- Krassa, Gerhard Friedrich (Wien)  
-- Krassa, Lucie (Wien)  
-- Kulka, Frederick  
-- Kurz, Emil (Wien)  
-- Land, Ernest G. (Wien)  
-- Landau, Saul Rafael  
-- Lande, Adolf (Wien)  
-- Langer, Robert (Wien)  
-- Lederer, Emil (Wien)  
-- Leichter, Otto  
-- Lenhoff, Arthur (Wien)  
-- Liebesny, Herbert Joseph (Wien)  
-- Loebl, Rudolf (Wien)  
-- Loew, Ernst (Wien)  
-- Mayer, Charles (Wien)  
-- Mehler, Robert (Wien)  
-- Mire, Joseph (Wien)  
-- Moeller, Paul Eugen (Wien)  
-- Neumann, Alfred (Wien)  
-- Neumann, Francis von (Wien)  
-- Petschek, Georg (Prag)  
-- Plager, Egon (Wien)  
-- Pollak, Friedrich (Wien)  
-- Pollak, Ludwig (Wien)  
-- Reifmann, Karl (Wien)  
-- Reik, Otto E. (Wien)  
-- Reiss, Leo (Wien)  
-- Reisz, Ladislaus  
-- Rie, Robert (Wien)  
-- Rihs, Fritz (Wien)  
-- Rohrlich, Georg Friedrich (Wien)  
-- Rubin, Heinrich (Wien)  
-- Salomon, Emil (Wien)



- Saxl, Erich (Wien)
- Schall, Alexander (Wien)
- Schechter, Edmund (Wien)
- Schiffer, Ludwig (Wien)
- Schmetterling, Joachim (Wien)
- Schoenfeld, Ernest (Wien)
- Schreier, Robert (Wien)
- Schubert, Richard (Wien)
- Schulman-Lang, Gerda (Wien)
- Smetana, Richard (Wien)
- Sonnenschein, Siegmund (Wien)
- Spitzer, Ernst (Wien)
- Sternbach, Oskar (Wien)
- Strauss, Robert (Wien)
- Tauber, Siegfried (Wien)
- Urman, Hermann
- Wallach, Maximilian (Wien)
- Wallach, Severin (Wien)
- Weinberger, Norbert (Wien)
- Weisz, Georg Anton (George Antony Weisz) (Wien)
- Wognilower, Theodor (Wien)
- Wolf, George Victor (Wien)
- Zerner, Carl Egon (Wien)

Juristen, die in der Tschechei Examen gemacht hatten:

- Adler, John Hans (Student Prag)
- Deutschova, Lore Barbara (Prag)
- Eckstein, Charles (Prag)
- Froehlich, Hans (Prag)
- Glesinger, Egon (Prag)
- Korn, Frank
- Pribram, Karl (Prag)
- Reiner, Anthony Stephen (Prag)
- Reiner, Paul (Prag)
- Stein, Ewald (Prag)
- Terebessy, John (Bratislava)
- Weissbarth, Arthur (Prag)

Juristen, die in der Foreign Economic Administration FEA gearbeitet haben:

- Bloch, Henry Simon (Baden)
- Nadelmann, Kurt (Berlin)
- Schoch, Magdalene (Hamburg)
- Stiefel, Ernst (Mannheim)

Juristen, die in Nuernberg beschaeftigt waren:

- Derenberg, Walter (special counsel)
- Flechtheim, Ossip (prosecutor)
- Fried, Hans Ernst (judges)
- Kempner, Robert M.W. (prosecution)
- Robinson, Jakob



Juristen, die in Office of Military Government OMGUS beschaefligt waren:

- Anspach, Ernst (Schlesien)
- Biel (Bielschowsky), Ulrich (Berlin)
- Elbe, Joachim von (Berlin)
- Husserl, Gerhart (Halle)
- Lekisch, Karl Peter (Essen)
- Loewenstein, Karl (Muenchen)
- Oopenheimer, Fritz Ernst (Berlin)
- Schwenk, Edmund Heinz (Henry)

Juristen, die fuer den OSS gearbeitet haben:

- Bekker, Konrad
- Dickmann, Wilhelm
- Emmerich, Hugo
- Foltin, Edgar
- Guenther, Wolfgang W. (was considered)
- Herz, Hans H. (later John H. Herz)
- Kellermann, Henry
- Kempner, Robert (?)
- Liebesney, Herbert Joseph
- Neumann, Franz Leopold
- Roetter (Roedelheimer), Friedrich
- Stiefel, Ernst
- Weinmann, Eric Walter
- Weigert, Oscar

Juristen, die beim Office for War Information OWI beschnaefligt waren:

- Albert, John
- Bauer, Robert
- Deutsch, Julius
- Fuchs, Martin
- Land, Ernest G.
- Lande, Adolf
- Leichter, Otto
- Peiser, Werner

Juristen, die mit anderen Agenturen beschnaefligt waren:

- Auerbach, Frank Ludwig (US DEpt. of Interior)
- Bodenheimer, Edgar (US Dept. of Labor, Alien Property Custodian)
- Callomon, Heinrich (Treasury Dept.)
- Friedmann, Wolfgang Gaston (mit SHAEF fuer die Britische Armee)
- Hentig, Hans von (Research Assistant to Attorney General in Washington/DC)
- Herz, Franz (US Army)
- Joseph, Franz M. (US Treasury Dept., State Dept.)
- Pribram, Karl (econ. expert Social Security Board; US Tariff)



Commission)

Juristen, die in den USA wieder studierten, auch andere Fächer:

- Adler, John Hans (Columbia, International Studies?)
- Auerbach, Frank Ludwig (M.Sc. Columbia Univ.)
- Behrendt, Peter H. ( His specialty, after having taken courses in Chemistry in the US, is hard metal alloys [ wartime adviser?]; 1944 graduated from Western Reserve Law School)
- Berl, Arthur (1947 B.L. University of Syracuse)

Juristen, die an amerikanischen Universitäten oder Colleges lehrten oder andere akademische Positionen innehatten:

- Alexich, Georg Maria (Georgetown University, Washington/DC, International Comparative Administration Law and Diplomatic Science)
- Auerbach, Frank Ludwig (1944-1947 lecturer for social sciences Hunter College, N.Y.)
- Aufrecht, Hans (research assistant in the Department of Government at NYU, working with Prof. Eagleton on "American Neutrality Legislation" and work on textbook on International Relations, 1940/41 Carnegie Fellow in International Law; 1941/42 Visiting lecturer on Government, NYU; 1941- Research Assistant, Commission to Study the Organization of Peace)
- Baerensprung, Horst W. (1939 until end of war lecturer at Harvard University)
- Bekker, Konrad (1936-1938 Research Assistant Columbia University; 1938-1939 Research Fellow Brookings Institute, Washington, D.C.)
- Berger, Adolf (1942-1962 professor of Roman Law at Ecole Libre des Hautes Etudes in New York; since 1952 visiting professor for Roman Law at City College, New York)
- Beth, Marianne, nee von Weisl (1939-1942 professor at Reed College, Portland/Ore.)
- Bloch, Henry Simon (Research Assistant University of Chicago, 1938; lecturer Institute for Military Studies, 1941-1942, instructor economics, 1943)

Juristen, die in den USA zur Anwaltschaft zugelassen wurden:

- Berent, Margarete (NY)



Zur Liste der in die USA ausgewanderten Juristen nach 1933:

In Deutschland Examen gemacht: Wer hat in Deutschland Jura studiert (Name, Vorname); an welcher Universität den Dr. jur. gemacht; wo das Referendariat gemacht, falls Dr. jur. und Staatsprüfung an verschiedenen Orten stattfanden. Es wurden, bis auf einzelne Ausnahmen, nur Leute berücksichtigt, die mindestens das erste Staatsexamen abgelegt hatten, also zum Referendariat zugelassen wurden. Einige haben das Referendariat nur kurze Zeit innegehabt.

Der reguläre Ausbildungsgang des deutschen Juristen hat drei Ausbildungsstufen: Studium von normalerweise 8 Semestern, abschliessende erste Staatsprüfung, d.h. Zulassung zum Referendariat; zweijähriges Referendariat mit verschiedenen Stationen der Ausbildung, also in der Justizverwaltung, Staatsanwaltschaft, bei einem Richter, in einer Anwaltschaft, abschliessend die zweite Staatsprüfung, d.h. Zulassung zum Assessor; anschliessend mehrjährige (auch 2 Jahre?) Tätigkeit als bereits selbstständig arbeitender Assessor; (gibt es dann eine weitere Prüfung?) schliesslich Zulassung zur Anwaltskammer und Tätigkeit als Anwalt an einem bestimmten Gerichtsort, oder Eintritt in eine der verschiedenen Laufbahnen des Staatsdienstes, sei es als Staatsanwalt, Richter oder Beamter im höheren Dienst. Häufig wird anschliessend an die zweite Staatsprüfung zuerst eine Tätigkeit im Staatsdienst angenommen, um dann schliesslich Anwalt zu werden.

In Österreich Examen gemacht: Die Ausbildung in Österreich war anders als in Deutschland. Nach dem Studium gab es eine 7 jährige Ausbildungszeit mit Stationen bei verschiedenen Anwälten oder Staatsstellen, dann eine Prüfung und eine weitere Ausbildungsstufe vergleichbar der Assessorenzeit in Deutschland.

In der Tschechoslowakei Examen gemacht: Welche Ausbildung fand in der Tschechei statt?

Geburtsjahr, nach Dekaden:

1860-1870: waren 1933 bereits zwischen 63 und 73 Jahre alt, 1939 zwischen 69 und 79 Jahre alt, 1945 zwischen 75 und 85 Jahre alt. Nur 1 Person.

1871-1880: waren 1933 zwischen 53 und 62 Jahre alt, 1939 zwischen 59 und 68 Jahre alt, 1945 zwischen 65 und 74 Jahre alt. 22 Personen.

1881-1890: waren 1933 zwischen 43 und 52 Jahre alt, 1939 zwischen 49 und 58 Jahre alt, 1945 zwischen 55 und 64 Jahre alt. 46 Personen.

1891-1900: waren 1933 zwischen 33 und 42 Jahre alt, 1939 zwischen



39 und 48 Jahre alt, 1945 zwischen 45 und 54 Jahre alt. 70 Personen.

1901-1910: waren 1933 zwischen 23 und 32 Jahre alt, 1939 zwischen 29 und 38 Jahre alt, 1945 zwischen 35 und 44 Jahre alt. 118 Personen.

1911 und jünger: waren 1933 22 Jahre oder jünger, 1939 28 Jahre oder jünger, 1945 34 Jahre oder jünger. 28 Personen.

Beruf im Ursprungsland: Mehrere Berufsgruppen können unterschieden werden, wobei Wechsel zwischen einzelnen Berufen vorkamen, also Richter- oder Staatsanwaltslaufbahn nach Ablegung aller Staatsprüfungen, um dann später in die Anwaltspraxis zu gehen.

Referendar oder Assessor: Juristen, die das Studium beendet hatten und mindestens die erste Staatsprüfung abgelegt hatten. Dies wurde später bei Wiedergutmachungsfragen bedeutsam, d.h. der erste Schritt der Juristenkarriere war eingeschlagen.

Anwalt:

Richter:

Staatsanwalt:

Beamter:

Professor (akademische Position): Hierunter fallen zuerst Universitätsprofessoren mit Dauerstellung oder Assistenten mit Aussicht auf spätere Professur. Daneben gab es jedoch eine Reihe von Anwälten, die als Privatdozenten an einer Universität lehrten, d.h. sie waren habilitiert, oder an speziellen Berufsschulen, etwa Handelsakademien lehrten oder gar eigene Vorbereitungsschulen hatten.

Andere Berufe:

Wann ausgewandert und wann in die USA eingewandert:

Von 238 Personen konnten die Daten der Auswanderung festgestellt werden, d.h. von etwa einem Viertel der insgesamt erfassten Juristenemigranten.

1933: 6 Personen, alle aus Deutschland.

1934: 11 Personen, 10 aus Deutschland, 1 aus der Tschechei.

1935: 7 Personen, 5 aus Deutschland, 2 aus Österreich



1936: 14 Personen, 13 aus Deutschland, 1 aus Österreich  
1937: 12 Personen, 11 aus Deutschland, 1 unbekannt  
1938: 55 Personen, 31 aus Deutschland, 21 aus Österreich, 3 aus  
der Tschechei  
1939: 61 Personen, 25 aus Deutschland, 32 aus Österreich, 4 aus  
der Tschechei  
1940: 48 Personen, 22 aus Deutschland, 26 aus Österreich  
1941: 21 Personen, 13 aus Deutschland, 7 aus Österreich, 1 aus  
der Tschechei  
1942: 3 Personen, 1 aus Deutschland, 2 aus Österreich

(1947:)

Juristen, die in der Foreign Economic Administration FEA  
gearbeitet haben:

5 Personen, alle aus Deutschland

Juristen, die in Nürnberg beschäftigt waren:

8 Personen

Juristen, die in Office of Military Government OMGUS beschäftigt  
waren:

Juristen, die für den OSS gearbeitet haben:

Juristen, die beim Office for War Information OWI beschäftigt  
waren:

Juristen, die mit anderen Agenturen beschäftigt waren:

Juristen, die in der US Army waren:

Juristen, die in den USA wieder studierten, auch andere Fächer:



Juristen, die an amerikanischen Universitäten oder Colleges  
lehrten oder andere akademische Positionen innehatten:

Juristen, die in den USA zur Anwaltschaft zugelassen wurden:

Andere Tätigkeiten als Juristen in den USA:

Nichtjuristische Berufe ergriffen:

Mitglied politischer Exilorganisationen:

Nach Deutschland oder Österreich zurückgegangen:



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Eine von uns:

## Ellen Ash Peters — Karriere in der Jurisprudenz



„Congratulations, Madam Chief Justice“, sagte der Gouverneur des Staates Connecticut, nachdem er Ellen Ash Peters als Chief Justice des höchsten Gerichtes den Amtseid abgenommen hatte — die erste Frau, die in diesem Staat den hohen Posten erhielt. Das war am 21. November 1984, einen Tag vor Thanksgiving. Daten scheinen im Leben von Ellen Ash Peters die Dramatik der Ereignisse betonen zu wollen: fast genau sieben Jahre vorher hatte Gouverneur Ella Grasso ihre Ernennung als Associate Justice dieses Gerichtes beantragt. Und ihre Verteidigung als Mitglied des Anwaltsstandes fand einen Tag vor der Geburt ihres ältesten Sohnes statt.

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In ihrer Rede bei der Amtseinführung sagte Ellen Ash Peters: „... Während meiner Jahre an diesem Gericht hatte ich das grosse Glück, meinen Mann kennenzulernen und zu heiraten, Professor Phillip Blumberg von der Law School der Universität von Connecticut. Wir teilen gemeinsam den Wissensdurst über die Einrichtungen des Gesetzes... und wir teilen die Liebe und die Unterstützung von sieben wunderbaren Kindern und zwei Enkelkindern.“

In dem Glück, mit dem ich gesegnet wurde, muss ich dennoch an die dunklere Seite der menschlichen Bedingungen denken. Ich kann mich an Nazi-Deutschland nicht sehr gut erinnern, weil ich ein kleines Mädchen war, als es uns gelang, Europa zu verlassen; ich weiss aber, wie sehr andere unter dem Regime zu leiden hatten. Ihr Andenken ist wichtig, denn es erinnert uns daran, dass der Preis von Freiheit ewige Wachsamkeit ist, und dass Unmenschlichkeit gegen irgendeinen uns alle bedroht. Das ist ein Grund, warum ich der Idee so ganz ergeben bin, dass das Gesetz ein Werkzeug der Gerechtigkeit ist und immer sein muss...“

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AUFBAU FRIDAY, January 11, 1985



from Renate Alsberg Hunter  
his daughter

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### MAX ALSBERG, a German trial lawyer.

A lecture honoring the 100th birthday of Max Alsberg, delivered at the first Session of German Criminal Trial Lawyers in Bonn on October 16, 1977, by Professor Werner Sarstedt of Berlin.

Max Alsberg was born in Bonn a hundred years ago. His deep, yet un sentimental, compassion for anyone in trouble with the law, as well as his brilliant mind, his incredible memory and endless energy, made him at the relatively young age of forty the leading trial lawyer of Germany. It was as though he had a premonition that time was running out. Besides the painstaking and conscientious way in which he worked on his clients' cases, he created between 1911 and 1933 a vast legal literature of such vision and practical use that it must have been the envy of many a teacher of jurisprudence. Let me elaborate the point.

Even today whenever somebody in Germany is confronted by a question involving criminal procedure, legislation or the interpretation of existing law, he will, as often as not, find the solution to his problem in an article or book written by Alsberg.

The first writing of his which I encountered dates back to 1911 and deals with a case involving the distribution of pornographic material. The matter is presented in typical Alsberg fashion. First there is the factual description of the case. Then follows his critique. Even this early work clearly shows his talent for explaining the most complicated problems in simple words, a gift which was to delight legal minds for generations to come. Fate has provided that future generations of lawyers would, time and again, study this early masterpiece which so clearly shows Alsberg's keen sense of irony and ease of expression, because so far there have been eight attempts to change the statute in question (i.e. paragraph 184 of the German Criminal Code), and there is no guarantee that additional changes will not be required in the future. Without question, Alsberg had a sixth



sense when it came to matters requiring reform.

This sense is particularly evident in his first memorable work *Miscarriage of Justice and Retrial* (1913). We all know that the right to retry or to appeal a case is one of the weakest points in our criminal law, and that the Bar has for the longest time been clamoring for a change. Here too Alsberg was a pioneer. His starting point was the "Perjury Trial of Essen", a case with political implications involving a social democrat miner and a police officer given to violence. In 1895 some workers had been sentenced to several years at hard labor for perjury. An appeal for retrial was filed in 1896 and rejected in 1897. The sentences were served. Several years later new facts came to light which showed that the sole witness for the prosecution was totally unreliable. Nonetheless, an application for a new trial in 1909 was again rejected as inadmissible. Following a further complaint, witnesses were heard, and in 1910 the Supreme Court ordered a new trial. At that trial in 1911 the court acquitted all of the accused.

The book deals with this case as well as with seventeen others, in two of which Alsberg himself had participated. In each case he would have the defense counsel give a detailed description of the case, citing verbatim the reasons for the decision as well as the available legal remedies. To all this Alsberg added a detailed analysis of each case, and a strong demand for judicial reform of the applicable law. You know what happened to that demand. To date nothing worth mentioning. Yet, you will all agree with me that we cannot leave it at that, but have to continue to work for the goal that Alsberg set so long ago.

During World War I Alsberg wrote a small book which was as unpretentious as it was important. It dealt with the criminal law against war profiteering. Within four years it saw four editions. While the point it makes is moot now, it serves as another example of Alsberg's ability not to become biased in favor of one party or the other. It shows the same great objectivity which distinguishes also his later and most important work *The Presentation of Evidence in a Criminal Trial* which was published in 1930. It is that



objectivity which has made his writings so vibrant and has made them so effective in guiding legislation, in influencing judgments, and in giving all legal minds food for thought.

This book also points up another characteristic which distinguishes Alsberg's scientific works from those of other jurists. The first impulse usually came from an actual case, often from his own practice, or at times from a published judgment. Decisions by the Supreme Court often provoked his comment. There are few lawyers - then or now - who have written as many commentaries as he did. Take at random any volume of the *Law Journal* (Juristische Wochenschrift) between 1921 and 1932 and you will be hard put to find a single issue which carries less than twelve commentaries by Alsberg. At times you will find as many as twenty five. And what great commentaries they are! Alsberg kept a closer watch on the Supreme Court than any other critic. At one time he reminded the Court that it had failed to follow the decision of a prior tribunal; at another he called attention to the fact that it had relied on a prior cited decision which had actually raised quite a different point of law. In one case he accused the Court of obscuring the issue and being obtuse; in another he reproached it of avoiding the very question which was crucial to the decision. He never said this in a hurtful or arrogant way, and yet the meaning was clear and could not be misunderstood. Inevitably, his knowledgeable and persuasive criticism produced the desired effect.

In order to point up these errors or discrepancies between the various judgments, Alsberg had apparently devised a filing system or card indexing which was quite unknown in his time. Today the NJW will deliver to your doorstep in compact form all the reference material on any particular point of law you may require. Alsberg first had to invent such a reference system. He set out to collect all decisions the German Supreme Court had rendered in criminal trials, and eventually published them in three volumes. In a way they were the forerunner of today's loose leaf collections. Although I cannot prove it, I strongly suspect that it was Alsberg's publications and annotations which prompted the Supreme Court to start its own collection of decisions and annotations. The time span in which it



happened certainly speaks for the validity of such an assumption. In turn these publications, started in 1924, eventually led to today's "LINDEMAYER-MOERING". After all, it must have been quite embarrassing for these judges of the highest tribunal to find a trial lawyer who was more familiar with the decisions they had rendered than they were themselves.

The high point of this type of work in which Alsberg discussed principles of jurisprudence on the basis of his own legal experience came with the publication of the aforementioned book *The Presentation of Evidence in a Criminal Trial*. To appreciate the importance of this book one must look at the state of the law before its publication in 1930. It is of crucial importance to the defense to produce the right type of evidence from which the jury can fully evaluate the facts. True, Alsberg has stressed the importance of the final summing up by the defense attorney, and his right to interrogate witnesses, but the fact remains, if he is prevented from calling the witnesses he wants to examine, he can lay no basis for the facts he wants to prove and even the most brilliant address to the jury cannot save his case. Producing the right evidence is the most important thing in convincing those who judge the facts to believe a truth they might otherwise be reluctant to accept. There are many cases in which these findings can be of crucial significance, because in criminal trials the dispute is usually about facts and rarely about law.

This vital importance of producing pertinent evidence received little or no recognition by the trial law in effect in 1930. Conditions under which evidence could be admitted or rejected were not laid down by statute. It was left up to the participants in a trial to cull them from the great number of sophisticated Supreme Court decisions reported in 64 volumes, or to find them in the "Weekly Law Journal", or the "Leipziger Journal", or the "Goltdammer Archives" or wherever else one might be able to dig them up. One just has to look at the commentaries and text books of that time to realize what an impossible job this involved. There was no consistency in the judgments rendered, and rulings on details differed from case to case.



Alsberg, therefore, was faced with an enormous task. He called it his life's work, as though his main occupation was not that of an extremely busy trial lawyer. He admitted that anything he had ever written on trial procedure from the moment he started practicing law had been more or less in preparation for this book. It had taken years to complete the framework. Just by looking at the amount of cited decisions, both published and unpublished, one can appreciate the enormity of the task he accomplished. Also noticeable is the unusual form of these citations. He not only gives the source of each decision, but he adds the date and the tribunal which rendered it. The former enables the reader to see in the judgment not merely an accumulation of legal principles but also the evolution of a cultural phenomenon. Furthermore, naming the specific court, was a discreet hint at the discrepancy between conclusions reached in different jurisdictions and may have been intended as a tactful invitation to all for greater uniformity of the decisions they rendered.

The vital strength and impact of this book cannot be overstated. Even today it is indispensable and is of as much interest as when it was first written, despite the fact that since then the legislature has made up for lost time and has issued the necessary regulations. That happened in 1932. But it did not make Alsberg's ideas obsolete. On the contrary, they were simply adopted by the law makers. Jurists felt then and still feel privileged to have such a thorough and yet so easily understandable exposition of extremely complex material, and they have no intention of letting go of it. I can think of no other instance in which the work of a single author has had such overwhelming impact on jurisprudence, legislators and lawyers all at once.

Proof that the work does not in any way favor the defense point of view but gives an unbiased account of the problems involved is shown by the fact that a quarter of a century later, Attorney General Nüse published a new edition of the book. Nüse gained his experience first as a member of the State Bar Council and then at the Attorney General's Office. Quite a different background from Alsberg's. Besides, theory and practice of law had not stood still between 1930 and 1956. Yet, Nüse updated the book merely by incorporating writings



and new decisions which had appeared since it was first published. He saw no need for any change in the structure or contents of the original version and certainly none as far as the position of the defense vis-a-vis the court was concerned. There can be no greater proof of Alsberg's objectivity and sense of fair play than that.

Not always were his efforts at law reform so promptly rewarded. I refer to a question still of interest today, namely: to what extent findings of fact are open to review. He discussed this in an article written in 1928 entitled *The State of Trial Law*. It concerned an otherwise unimportant case in which he felt that the evidence had been quite wrongly evaluated. It appeared prior to the hearing of the appeal and Alsberg was hopeful that the Supreme Court would set matters right -- a hope which was not to be fulfilled. He used the case to ask for fundamental reforms. First, he suggested that judges be much more carefully selected, better supervised and more frequently changed. Second, he asked that judges be directed to state what evidence had led them to a specific judgment, and, following the example of the Austrian law, he demanded that the Court of Appeals be entitled to reopen a case in which the findings of fact seemed to differ sharply from the submitted evidence.

As you know, these demands are still being discussed; today more passionately than ever; but the legislature has not yet responded. There is no telling if and when it will do so. My own point of view is immaterial. Yet it seems undeniable that the general trend points in the direction of Alsberg's proposal. Even without a change in legal requirements the reasoning underlying judgments has become a lot more detailed than it used to be. Sometimes there is even too much of a good thing. Even without intervention by the legislature, the courts of appeal have found various ways to step in, either because they consider the conclusions illogical or contrary to judicial experience. But as far as a change on the administrative side is concerned, the outlook remains bleak. If possible, compared to Alsberg's days the supervision of judges seems to have diminished, sometimes to an alarming degree.

However, in one particular point of practical importance



Alsberg's efforts to widen the field of judicial revision have been fully successful. This concerns the lack of clarity, in other words, the reproach by the court of appeals that the lower court has failed to bring to light all the facts which could have been favorable to the defense. As late as 1929, Schneidewin sharply opposed the justification of such a complaint. If lack of clarity was the issue, surely such criticism should be directed only against the defendant. If the court reached no firm conviction of the defendant's guilt or innocence it should not immediately reject a finding of guilt, but should first consider means to dispel such doubts. "But why", he asked, "should there still be any incentive for the court to clear up matters further, if it is already fully convinced of the defendant's guilt?" Alsberg attacked this apparently logical argument with the full force of his conviction. Today nobody questions anymore the admissibility of an appeal based on the assertion that available information was not brought to light at the original trial. That few appeals nowadays are based on these grounds is probably due to the fact that judges, aware of just such later appeals, strive for greater clarification of facts at the original trial. Alsberg's efforts certainly helped a great deal in bringing about these results.

Let us now turn to his achievements as a trial lawyer. I should point out right away that we do not have as solid a basis for judging them as we have with his publications, and although he himself reported some of his trials, usually for the purpose of demanding a reform of the current law, these reports cover but a small part of his extensive practice. Then, of course, there are the press reports. The older ones among you may remember that until the abolition of the old jury trials in 1924, these reports used to be much more detailed than they are today. In important trials the papers would print almost in



their entirety the questions and answers during the examination of witnesses. Often they would give a verbatim report of the summations. Possibly Alsberg contributed unwittingly to change that, because his summations were usually very long. His biographer, Curt Riess, refers to one which lasted for six hours as "relatively brief by Alsberg's standards". In the Caro - Petschek trial the summing-up lasted six days. As his publications show, he was unusually thorough and left nothing to chance. He was allowed to take so long, because he was an inspired speaker to whom one listened willingly. The rule that one can talk about anything but never for more than 45 minutes simply did not exist for him. He prepared himself with extraordinary care. But even if he wrote down what he intended to say, and if he polished and repolished the wording, he was seldom satisfied. Let me give you his thoughts in his own words.

"Whoever ventures forth on the sea of oratory finds that the writing he has done at his desk is like a ship built with care to carry him across the ocean. But it is one thing to build a ship and quite a different one to sail it. Horace is wrong and probably speaks *pro domo poeta* (siding with the poet) when he says 'poeta nascitur, orator fit' (a poet is born, an orator made). It is also necessary to be born a speaker; and if we stay with the picture of the ship builder and the captain, it especially applies to the latter. The true orator is born and reborn again as soon as he rises for his speech. He will talk fast one moment and more slowly the next if only to avoid becoming a slave to his own notes. Even the words he has previously written down will escape the tedium of recitation and sound fresh and spontaneous. What emanates from the passionate orator is his own personality; a personality which has been shaped and grown, and as the words burst forth, the closer they are to his heart, the more persuasive they will be. The great speaker must be born with a gift for oratory. If, when he starts his speech, nothing comes forth but what he has learned, he will not possess the necessary power of persuasion which, unfortunately, so many speakers lack. Although the words he utters may be logical and well reasoned, they will never seduce his audience and make them captives to his own thoughts and feelings...."



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“Congratulations, Madam Chief Justice”, sagte der Gouverneur des Staates Connecticut, nachdem er Ellen Ash Peters als Chief Justice des höchsten Gerichtes den Amtseid abgenommen hatte — die erste Frau, die in diesem Staat den hohen Posten erhielt. Das war am 21. November 1984, einen Tag vor Thanksgiving. Daten scheinen im Leben von Ellen Ash Peters die Dramatik der Ereignisse betonen zu wollen: fast genau sieben Jahre vorher hatte Gouverneur Ella Grasso ihre Ernennung als Associate Justice dieses Gerichtes beantragt. Und ihre Verteidigung als Mitglied des Anwaltsstandes fand einen Tag vor der Geburt ihres ältesten Sohnes statt.

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Hilde Marx



It is difficult to cut off the citation and to ask you once more to listen to my own words. You know that Alsberg often reflected upon his profession, which happens to be yours too, and upon the conditions under which it should be practiced. You might ask what a man like him, a man whom Schiller would have called a philosopher, thought of his profession. His biographer would have us believe that Alsberg only defended a person if he was convinced of his innocence. But this seems an oversimplification and would greatly limit the role of the defense attorney in criminal proceedings. It would also be totally contrary to the ideas he propounds in his *Philosophy of Advocacy*. In it he considers the criminal trial as a conflict between society and the individual. Since the accused is not only an individual but also a member of that society, he represents, in Alsberg's view, the central character of a truly tragic drama. This, obviously, cannot only refer to innocent persons who have accidentally been accused of a crime. Neither can he mean incidents in which the actual law is in conflict with the idea of justice; nor cases - although they do happen - where morality is offended for reasons of morality, like the ever returning Michael Kohlhaas who "from a sense of justice does the right thing and thereby offends the law". He demands that the defense attorney show compassion, not "false or weak pity ...not even if it is accompanied by the fear that a similar misfortune might befall him too; but strong, ethically motivated compassion." The defense attorney must never forget, according to Alsberg, that the law not only gives him power, but that it mandates he exercise that power with all his might to ward off the seemingly inevitable. What sort of power would it be if it were aimed only against the miscarriage of justice? Everybody is opposed to that.

Alsberg did not say so explicitly, but it is evident from his writings that to him the defense attorney rather than the accused represents the truly tragic figure in this drama, because there is a conflict between his duty to the law and his duty to save the accused. That this is Alsberg's point of view, even if not explicitly stated, is evident from the great trouble he takes in solving this conflict of interest. He points to the law which, particularly if a serious



crime is involved, demands that an attorney represent the accused. One could quibble that this is merely to assure that the accused is defended against injustice but not against the law. But whatever the argument might be, it is impossible to imagine that a brilliant man like Alsberg saw his duty to the law limited only to the defense of the innocent.

There can be no doubt that the defense of the guilty was a problem constantly on his mind. Once he said bitterly, as though to remind himself of his duty, "one cannot only accept cases which are like defending Cato against the accusation of accepting a bribe". On another occasion he said: "Do you believe an attorney could put up with all this if he did not believe that he had a higher calling, yes, a sacred duty, to fight on the side of the man whose existence is threatened, and to defend him? It is my job to fill one of the pans of the scales of justice. It is for the judge to balance them."

We constantly encounter efforts by Alsberg to solve this conflict of interests or even to declare it non-existent. Obviously he found it easier to defend a person of whose innocence he was convinced, even if he was not strictly innocent within the letter of the law, but certainly innocent if measured by a higher court of justice. It is rare that an accused confesses his guilt to his attorney and then demands that he convince the court of his innocence. He does so seldom because it is far easier to lie to just one person than to do so in court when confronted by a battery of witnesses. Besides, even a simple uneducated person usually feels that his lawyer will do a better job of defending him if he believes in his innocence. Most attorneys agree with that. What was special about Alsberg was that he felt so passionately about it and that his keen intellect forced him to analyse his own sentiments so minutely. Yet, this is precisely what made Alsberg such an outstanding defense lawyer and as such, occasionally, a tragic hero.

A number of years ago I was privileged to listen to an argument between two well-known and highly respected criminal lawyers, who discussed the problem of defending an accused who happened to be



guilty. One of them is still alive and amongst us today. One attorney claimed that he could only defend a person if the latter told him the whole truth. He said that he would urge his client to confess his guilt first to him alone and then to repeat his confession in court. The other attorney argued vehemently against such a point of view and maintained that it was not his job to make the accused confess his guilt. And, furthermore, as far as he himself was concerned, he was not all that keen to know the whole truth. On the other hand, he would tell his client that he should not be surprised if the court disbelieved his story, but that the lawyer's own belief or disbelief was of little importance.

Alsberg's feelings on this point were a mixture of these two apparently contradictory opinions. His intellect and his experience told him that his defense would be stronger and more convincing if he could believe in his client's innocence. Thus, at times, he would force himself to believe in that innocence. At all cost he wanted to play the role of the defender of the wrongly accused. ( You may ask how do I, who have never met him, make such an assertion. I shall answer that question later.) It is obvious that with such an intelligent and at the same time passionate man conflicts were not always avoidable. He knew that all too well. He suffered deeply - and these were terrible moments in his life - when the client whom he had so fervently defended chose to rob him in the end of his illusions.

You may think that it served him right for having played the part of the actor rather than that of the counsel for the defense. But we may better understand that point if we agree on what constitutes a great actor. Alsberg loved the theatre passionately. He was a friend of outstanding actors such as Albert Bassermann, Emil Jannings, and Mathias Wiemann, and he had great respect for their profession. He himself wrote successful plays. Alsberg compared the defense counsel to the actor. Listen to his own words:

"Even a person who is legally guilty has the right - a right which the law neither wants to nor can deny - to have his deed judged not only as a wrongdoing but also as an event which fate has ordained.



To become closely identified with the person who has been singled out by a cruel fate and who is now persecuted by those seeking revenge creates in his defender an empathy which makes him understand the real tragedy of all that is happening. He himself becomes an actor in this drama. Surely one must assume that Demosthenes watching the Attic players, and Cicero admiring Roscius, or William Pitt listening to Garrick learned more from them than merely how they rolled their "R"s. When the defense attorney pleads his case he becomes to a certain degree an actor. Not a comedian who, as Hugo von Hoffmansthal points out in *The Fool and Death* 'unmoved by the hollow sound of his voice is incapable of moving others'. No, not a comedian, but a tragic actor who informs the Greek Chorus of the fateful events that have occurred. He himself is captivated by these events and overwhelmed by their tragedy. Seized by compassion, chained by bonds of studied as well as felt convictions, he is the true actor! Contrary to Corcos who had a low and quite wrong opinion of what constitutes acting, I believe that an actor who intuitively feels the part he is playing is vastly superior to one who takes the intellectual approach. To figure out how a line should be spoken can never be as effective as to say it, because that is the way you feel it. The costume does not make the compelling actor, nor does the robe make the captivating forensic orator. What makes both of them irresistible is an overwhelming compassion, a capacity to understand and identify with even the strangest behavior."

Again it is difficult for me to interrupt the citation. If you should have gained the impression that Alsberg considered the art of rhetoric in general and that of pleading in court in particular the same today as it was thousands of years ago in the days of antiquity, then that impression is quite wrong. He knew only too well and repeatedly said that it was most important for the speaker to stay in close touch with his audience. He also stressed that there was a distinct difference between Socrates who addressed a tribunal of 501 members and had only part of a day to do so, and the modern defense counsel, confronted by a court consisting of three jurists and two lay members, whose address to them can be as long as he wants to make it. It was at the peak of his activity, in 1924, that the old jury system,



consisting of twelve lay jurors was changed to one in which the bench was composed of three jurists and six laymen. At the beginning, he was strongly opposed to the change, but in the end he seems to have adjusted to it much quicker than a lot of others. Over half a century has passed since then, and his advice concerning the defense counsel's speeches should therefore be considered in the light of the changing times. Even he might no longer insist that only a compassionate man can invoke pathos. He might also plead with more restraint today, following less the French and more the English mode. In the past fifty years we Germans have experienced some frightening examples of emotional speakers and have become almost allergic to them.

The art of forensic oratory in Germany might have been advanced considerably if we had followed Alsberg's suggestion and had adopted the English trial procedure. Yet, undoubtedly, he too recognized that conditions for such a change were not yet ripe in Germany.

Alsberg's biographer, Curt Riess, complains that he lacked political understanding and in several cases represented the wrong side of an issue. In April 1919 he helped the former Kaiser win a civil suit against a film company which he claimed had defamed his character. In 1920 he defended Helfferich accused of having libelled Erzberger. Helfferich got away with a fine of 300 Marks, which was as good as an acquittal and constituted a moral condemnation of Erzberger. In those days Alsberg also defended a certain Captain von Kessel against an accusation of perjury in a case involving political mass murder of a group of communist soldiers. In 1925 he defended three young noblemen accused of having accepted large bribes. In 1927 he again represented the Kaiser against Piscator. In 1927 he successfully defended Hugo Stinnes, Jr. in a big trial for fraud. That same year he also won the acquittal of members of an association called "Immertreu" (a workmen's social club) involved in a stabbing incident. Then came the great case of Ullstein, a rather unsavory family affair. Curt Riess believes that to let the infighting between members of this prominent Jewish family become public knowledge should have been avoided at all costs, especially in those days (1931). He claims that the winner was neither Alsberg nor Ullstein, but Hitler.



Alsberg also unsuccessfully defended Carl von Ossietzky (a leftist writer) accused of high treason; and he was partly successful in his defense of Ludwig Katzenellenbogen accused of fraudulent conversion. Then came Alsberg's last great case, again one involving a conflict within a Jewish family. According to his biographer the case should either have been avoided altogether, or at least Alsberg should have steered clear of it. Riess comments: "Alsberg paid no more attention to politics during the last years than he had done throughout his life. He never understood the political implications of the Erzberger-Helfferich case. He did not defend Ossietzky because he shared his political ideas but because he was convinced the man was suffering an injustice." I believe this criticism is misplaced. Most people in those days were unaware of the danger Hitler represented. Besides, a true lawyer should no more be swayed by such considerations than a doctor should question whether his patient is a rightwinger who has been beaten up by a leftist or vice-versa. One must assume that a jurist of Alsberg's caliber would have defended the former Emperor with equal success, even if he had not grown up a monarchist. There would be no point in discussing such obvious facts, if in the last years, to the detriment of justice as well as to the detriment of many an accused, the opinion that a defendant is best served by an attorney who shares his political convictions, had not gained such wide acceptance. Surely the attorney who agrees with his client on every point is not necessarily his best defender; and Alsberg, in particular, was a man who liked to keep his distance.



It was not only through absorbing lectures like *The Trial of Socrates* or the *Philosophy of Advocacy* or *Views of the Judge in Criminal Trials* that Alsberg sought to attract public attention to legal problems. He also wrote plays which I should like to discuss for a moment. In 1930 he wrote *Veruntersuchung* (pre-trial examination) which Curt Riess calls a thriller of the type Herman Sudermann could have written a lot better. But then, this biographer's book, full of backstage gossip and devoid of real understanding of the law, makes quite a few libellous statements. For me *Veruntersuchung* which was shown in Hannover in 1930 represented the first encounter with Alsberg's genius. Everybody with any standing in the legal community of Hannover attended the performance. I remember well the deep impression the story of this reasonably good, yet narrowminded, overeager and therefore bungling judge made not only on me, a fifth-semester law student, but on the seasoned attorneys and judges as well. Certainly judicial confusion as a literary theme is neither new nor unique. Yet, this story of the investigative judge who, during the pre-trial examination in a murder case suspects his own son of being the murderer, can hardly be called a mere thriller. The surprising denouement which, incidentally, in Alsberg's play is not produced by the defense lawyer, creates such a metamorphosis in the judge, that it cannot fail to captivate and deeply move the spectator.

Alsberg's second play *Conflict* tells quite a different story. The heroine, Frau Christine, has a musically talented son of her first marriage. Her second husband is a drunkard who has not only invested his own money in some shady business, but who also wants to use his stepson's inheritance to reorganize that business. Also, much against the boy's wishes, he wants him to enter the business as an apprentice. In order to overcome the mother's opposition to this scheme, he seeks to have the court appoint his partner as her legal adviser. By some ruse he has already managed to obtain her signature agreeing to this appointment. When she becomes aware of her husband's machinations she goes to see her lawyer hoping that he can prevent the appointment of this self-serving adviser. However, this proves not an easy thing to do, since the husband - mostly drunk - refuses to return the document. The son reproaches her for having signed it in the first place, and urges her to get it back. She promises to do so and enters the bedroom



hoping that in his drunken state her husband has fallen asleep and that she can get the document out of the night table drawer without waking him. She knows that in the drawer there is also a gun. Two shots ring out. The wife emerges from the bedroom. The husband has been shot dead. As you can imagine, she is arrested on suspicion of murder. The attorney visits her in jail after she has given a statement telling a rather confused story about wrestling for the gun, trying to get it out of her husband's hand, and finally having shots go off unintentionally. The prison interview is one of the high points of the play. The attorney is gentle and understanding. He asks her several times to describe the events in greater detail. He assures her that she may have confidence in him, and that in order to defend her he has to know everything that happened. In the course of the conversation she noticeably attempts several times to make a confession. He interrupts her and it becomes obvious that he does not want to hear such a confession. She finally understands and coolly and clearly gives him an explanation that will exonerate her. He pleads her case and, as a result, she is acquitted. On her return to the flat her son acts distrustful and cold, and tells her to her face that she has shot his stepfather. In spite of the presence of her lawyer and that of another older attorney, and disregarding their attempt to silence her, she feels so cornered that she finally admits what she has done. Her husband's partner who also does not believe in her innocence faces economic ruin if as his widow and heiress she takes his capital out of the business. He threatens her with a disinheritance suit. Her lawyer refuses to represent her at that trial. When she presses him, he makes excuses claiming he is not too conversant with that particular branch of the law and suggests that she would be much better served by some other attorney whom he will gladly recommend. She argues convincingly that if he does not defend her people will conclude that he must have some knowledge of her guilt, possibly that he has heard a subsequent confession. Finally she appeals to his humanity which, after all, might find justification for her action. After a long inner struggle he relents. He arranges a settlement whereby the dead man's money remains in the firm, but her son's money will not be added to it. Also, understandably, the son will be free to pursue whatever career he chooses. The son leaves his mother. The spectator is uncertain whether, at some future date, he



will return. The attorney, deeply shaken at first, soon immerses himself in work.

There can be little doubt that this lawyer is a self-portrait of Alsberg. Too many details fit what is known about him from other sources. The secretary in the play, Fräulein Zerb, is Alsberg's secretary, Jenny Braun. The opinions and principles expressed in the play by attorney Bohlen are identical with the ones found in Alsberg's writings and lectures. The self-portrait is not always flattering. Bohlen is not a perfect person, just a human being with frailties which strongly resemble Alsberg's own small weaknesses: Such as his lack of punctuality, his tendency to overwork his assistants the same way he overworked himself, and a trait which I previously offered to prove to you, his inclination to make himself believe in his client's innocence even if all evidence points to the contrary. Who could fault him for that weakness, if such it is, when he himself, well aware of it could expose it to an audience of lawyers and non-lawyers alike. For Alsberg must have known in his mind as well as in his heart that everybody would identify him with this attorney Bohlen and would recognize the self-portrait he had painted. Who could deny such a man the right to expose his inner pain to all the world?

The cry of distress went unheeded. *Conflict* played in Bremen in February 1933 and from March 7 until March 31, 1933 in Berlin. It was the beginning of the terrible and shameful time of which we do not like to be reminded but which we nonetheless must remember. It was the time when some of the best Germans - and Alsberg was one of them - were denied the right to consider themselves true Germans. It was the time when some of the best amongst us were deprived of their profession, their property, their good name, their homeland, even of their life. It was the time when we behaved in such a way that even today no well-meaning person abroad will confront us with our German nationality. Those among us who travel much know this only too well. "I suppose you are British or Danish or Swiss?" is what tactful foreigners will say. The fact that you suspect someone you meet of being a German is simply something you would not want to say to his face.



People he had considered his friends abandoned him in a cruel and shameful manner. Alsberg had to leave. In Berlin his life was no longer safe. Neither could he stay in Baden-Baden where he first took refuge. He went to Switzerland. In Zürich he met many other victims of the persecution in Germany. Not all of them were as disheartened as he was. Many had plans to go to Vienna, to Paris, to London or to New York. Alsberg had none. He was a German. His roots were in German law, in the German language, in German culture. He was invited to the Sorbonne. He refused it. His French was not good enough, he claimed. A British colleague suggested he join him in his London office. Alsberg did not even reply. One or another of his former partners who had remained faithful visited him. They believed that to be surrounded by other emigrants did not create a helpful atmosphere. In the end he went to a sanatorium in Samaden. He could no longer find any meaning to his life. On September 11, 1933 he put an end to it. He is buried in the cemetery at St. Moritz.

The German newspapers kept their silence about the man who only a few years earlier had been appointed an honorary professor at the University of Berlin, the foremost university in Germany. The only exception was the *Grunewald Echo*, a local paper of the type still in existence in Berlin today. It ran a long and meaningful obituary. There was also appropriate mention in the foreign press.

The fact that at the start of your first Conference you are remembering your outstanding colleague does you great honor.

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# Nominee for Chief Judge

## Ellen Ash Peters

By RICHARD L. MADDEN

Special to The New York Times

HARTFORD, Nov. 13 — Ellen Ash Peters, nominated today by Gov. William A. O'Neill as Chief Justice of the Connecticut Supreme Court, was asked if being the first woman to head the state's highest court would put added pressure on her.

### Woman in the News

"That's bound to be a factor that I have to think about," Justice Peters said, "but I believe the Governor chose me because he believed I was the best person for the job."

Justice Peters is accustomed to being the "first woman." In 1964 she was the first woman to be named a tenured professor of law at Yale Law School. In 1978, Gov. Ella T. Grasso bypassed other judges in the state court system and named her as the first woman on the six-member State Supreme Court.

When Governor O'Neill called her over the weekend and offered the post as Chief Justice, Justice Peters said, she replied simply, "Yes, thank you."

### 'A New Dimension'

Following confirmation by the General Assembly, which is expected, Justice Peters will succeed John A. Speziale of Torrington who is stepping down next Wednesday, his 62d birthday, to re-enter private law practice after 23 years on the state bench, including three as Chief Justice.

In announcing his selection, Mr. O'Neill said, "Judge Peters, as the first woman to serve as Connecticut's Chief Justice, will add a new dimension to the history of our Supreme Court, a history which dates back to 1711 and the first Chief Justice, Gurdon Saltonstall, and extends into modern times through Judge Speziale."

In naming Justice Peters, the Governor was following a tradition of elevating the senior Associate Justice to Chief Justice, although there had been rumors that Mr. O'Neill might pick an older justice with more experience.

Asked today if she would like to serve as Chief Justice until reaching the mandatory retirement age of 70, Justice Peters, who is 54 years old, remarked with a smile: "At the moment I devoutly hope so. The last physical was all right."

### Widespread Praise

Justice Peters will be one of the few women who are chief justices of their states. Rose Bird is the Chief Justice of California, and women have been chief justices of Arizona, Michigan and North Carolina.

Justice Peters's nomination drew widespread praise in the legal community. The president of the State Bar Association, Raymond W. Beckwith, called the appointment "an historic moment in Connecticut."

Justice Speziale said, "Her crisp, clear, concise, but also erudite opinions have already made an indelible mark on this court."

Harry H. Wellington, dean of the

Yale Law School, said, "She really has the possibility of being a truly great jurist and making the Connecticut Supreme Court one of the most important state courts in the country."

In an interview in 1978, when she was first appointed to the Supreme Court, Justice Peters said, "In retrospect, my life looks well planned, but really things just happened."

Ellen Ash was born in Berlin on March 21, 1930. Her father, who was Jewish, and her mother decided to flee Germany in 1938, staying in the Netherlands before moving to New York City in 1939. Her father, who like her grandfather was a lawyer, became an investment banker in New York. She attended Hunter College High School, Swarthmore College and the Yale Law School, where she was graduated cum laude in 1954.

After serving as a clerk to a Federal Circuit Court judge for a year and then teaching law for a year at the University of California at Berkeley, she returned to the Yale Law School in 1956 as an assistant professor. She became a full professor in 1964 and was the prestigious Southmayd Professor of Law from 1975 to 1978.

### No Trial Experience

"I think a fair number of my colleagues expected me to teach for a few years and then disappear and have babies," she said in the 1978 interview. "I'm not sure when I knew that was nonsense."

Her first marriage, to Robert Peters, a psychiatrist, ended in divorce, although she still retains the Peters name. They have three children. She and her second husband, Phillip I. Blumberg, former dean of the University of Connecticut Law School, live in West Hartford.

Her appointment to the Supreme Court in 1978 brought skepticism from some lawyers because she did not have trial experience. "I think she has put that concern to rest," Dean Wellington of Yale said today.

Justice Peters, who once described herself as "always a middle-of-the-roader," said today that she believed the law "is an instrument for justice" but declined to characterize her philosophy as liberal.

Dean Wellington said, "She's a person not captured by ideologies at all." He said she respected the stability of the law but was sensitive to the need for the law to deal with changing times.

Justice Peters accidentally knocked over a microphone as she met reporters today at a Supreme Court conference room but seemed to take it all with good humor. "There has to be a better way," she said as she restored order to the cluster of microphones in front of her.

As Chief Justice will she be asking the State Legislature for money and judges for the state courts? "I can't



The New York Times/Steve Miller

"Her crisp, clear, concise, but also erudite opinions have already made an indelible mark on this court."

imagine we won't," she said.

She said she had no objections to the practice of allowing television and still cameras in the Supreme Court, but suggested the proceedings were a "great bore" for the viewers.

Justice Peters, who is known for close questioning of lawyers who appear before her, also was asked if administrative duties would take away her opportunity to join in the give-and-take of hearing appeals.

"I can't imagine I'll be much more quiet," she said. "It's not my style."

## Koch Tells Spaniards New York Isn't So Bad

MADRID, Nov. 13 (UPI) — Mayor Koch defended New York City's reputation to Spanish reporters today, denying that the city is the world capital of crime. But he conceded that compared with Madrid, New York was "filthy."

Mr. Koch, on the third day of a four-day visit for New York in Madrid Week, said news organizations had overplayed New York City's murders and rapes. He cited statistics showing higher crime rates in Miami, Detroit and Boston.

"Every time we have a crime we hear about it," Mr. Koch said. "The New York Times we never hear about crimes in Madrid. You can't even have no crime here."



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since the Illinois Supreme Court decided the landmark case of *Gray v. American Radiator & Standard Sanitary Corp.*,<sup>37</sup> national manufacturers, for instance, have been exposed to products liability suits outside their home states.<sup>38</sup> However, as *Burger King Corp. v. Rudzewicz*<sup>39</sup> shows, even nickel-and-dime franchisees may have to defend suits far away at a powerful franchisor's headquarters.

In addition to jurisdictional principles, recognition rules may prompt forum shopping. When the United States Supreme Court decided that sister-state divorces are entitled to full faith and credit so long as one of the parties was domiciled in the forum state,<sup>40</sup> and that the adjudication of domicile is *res judicata* if both parties are before the divorce court,<sup>41</sup> it opened the doors to those seeking to evade overly restrictive home-state divorce laws. Haven jurisdictions such as Nevada were happy to accommodate the desires of those who wish to divorce. Conversely, the Court's failure to accord binding effect to child custody determinations<sup>42</sup> prompted spousal kidnapping for the purpose of relitigating home-state decrees.<sup>43</sup> It took valiant efforts<sup>44</sup> to pass legislation on the state and federal levels that curtails the outrageous practice of resorting to child abduction as a forum-shopping tool.<sup>45</sup>

Choice-of-law doctrines present yet another incentive to the forum shopper. The traditional jurisdiction selection rules were designed, in Savigny's words, to assure that the applicable law is not determined by the "unilateral discretion of one party."<sup>46</sup> In

37. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

38. Concerning jurisdiction in products liability cases, see generally R. LEFLAR, L. MCDUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* § 37, at 111-18 (4th ed. 1986) [hereinafter R. LEFLAR]. The extent to which the confused and confusing opinions in *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987), will narrow the jurisdictional opportunities of products liability plaintiffs remains to be seen.

39. 471 U.S. 462 (1985).

40. *Williams v. North Carolina*, 317 U.S. 287 (1942).

41. *Coe v. Coe*, 334 U.S. 378 (1948); *Davis v. Davis*, 305 U.S. 32 (1938).

42. See *May v. Anderson*, 345 U.S. 528 (1953); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

43. See Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 *COLO. L. REV.* 495 (1975).

44. Most of the credit is due to the late Brigitte Bodenheimer. See Bruch, *Brigitte M. Bodenheimer, September 27, 1912-January 7, 1981*, 14 *FAMILY L.Q.* vii-viii (1981); Katz, *Brigitte Bodenheimer—Protector of the Children*, 16 *U.C. DAVIS L. REV.* vii (1982).

45. See R. LEFLAR, *supra* note 38, §§ 243-244, at 673-85.

46. 8 F. VON SAVIGNY, *SYSTEM DES HEUTIGEN ROMISCHEN RECHTS* 129 (1849) (trans. by author)

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Assn., Springfield (Mass.) Art League, Newport (R.I.) Art Assn., Boston Art Club, Copley Soc. of Boston, Allied Artists of America, N.E. Branch Soc. Sanity in Art (pres. since 1939). Author: Portrait Painting, 1933. Home: Boston. \*

**BROWNE, WALTER LYMAN**, newspaper editor; b. Minneapolis, Minn., July 31, 1885; s. Glen Walter and Nina (Sturtevant) B.; prep. edn., high sch. and business coll.; student U. of Ore., 1904-08; m. Ethel M. Dowling, of Butte, Mont., July 17, 1917; children—Glen Walter, Adelaide, Robert Dowling. Began newspaper work with The Billings (Mont.) Gazette, 1908; reporter and assistant city editor, Butte Miner, 1909-16; reporter Butte Daily Post, 1916-17; mng. editor Billings (Mont.) Gazette, 1917-20, and since 1921; sec. The Gazette Printing Co. Trustee and publicity dir. Nat. Custer Memorial Assn. Republican. Elk, K.C. Club: Billings Commercial. \*

**BROWNELL, ROY EDMUND**, lawyer; b. Metamora, Mich., Sept. 18, 1883; s. Edmund and Lexy (Copeman) B.; LL.B., U. of Mich., 1907; m. Chandler Begole, Nov. 15, 1922; 1 son, Edmund Begole. Admitted to Mich. bar, 1907, and since practiced in Flint; sr. partner Brownell & Gault; pros. atty. Genesee County, 1916-20; commr. State Bar of Mich. (the integrated bar organized by act of legislature 1935), term 1936-40. Dir. and sec. Charles Stewart Mott Foundation; mem. bd. dirs. Continental Dept. Stores, Inc., U.S. Sugar Co., Northern Ill. Water Co., Ill. Water Service Co., St. Louis County Water Co., Wayne-Oakland Bank, Long Island Water Co., Michigan Chem. Co. Pres. Mich. State Bar Assn., 1934-35, Flint C. of C., 1922. Republican. Home: Flint, Mich. \*

**BROWNELL, WILLIAM ARTHUR**, college dean; b. Smethport, Pa., May 19, 1895; s. Fred William and Hattie Adelaide (Foote) B.; A.B., Allegheny Coll., Meadville, Pa., 1917, LL.D., 1942; A.M., U. Chgo., 1923, Ph.D., 1926; postgrad. U. Ill., 1923-25; m. Kathryn Kahn, Dec. 21, 1924; children—Florence Dyer (dec.), Kathryn, Carol Anne. High sch. tchr. 1917, 1919-22; ins. salesman, 1918-19, instr. ednl. psychology, U. Ill., 1923-25; teaching fellow U. of Chicago, 1925-26; asst. prof. rural education, Cornell U., 1926-27; asst. prof. ednl. psychology, U. of Mich., 1927-28; prof. ednl. psychology, George Peabody Coll., Nashville, 1928-30; prof. ednl. psychology, Duke, 1930-49, Northwestern U., 1949-50; dean school edn. U. Cal. at Berkeley 1950-62; summer teacher U. Chgo., U. Tex.; vis. prof. Edn., U. of Puerto Rico, 1941. Served at Camp Jackson, S.C., Camp Taylor, Louisville, Ky., Camp Stanley, Tex.; 2d Lt. 45th F.A., U.S. Army, 1918. Consultant Civilian Pre-Induction Training Br., Army Service Forces, 1943. Mem. A.A.A.S. (vice pres.; chmn., sect. Q, 1947), Nat. Council Tchrs. Math. (mem. Post-War Planning Commn.), Am. Ednl. Research Assn. (pres. 1939), pres. Div. of Psychol. Edn., 1947, Am. Psychol. Assn., Nat. Soc. Study Edn. (dir. 1942-48 and since 1950), National Council Coll. Teachers Edn., Nat. Council Com. Arithmetic, A.A.U.P. (council, 1941-43), Phi Beta Kappa, Kappa Delta Pi, Kappa Phi Kappa, Delta Sigma Rho, Phi Delta Theta, Phi Delta Kappa. Democrat. Episcopalian. Author: Development of Children's Number Concepts in the Primary Grades, 1928; (monograph—with L. B. Stretch) Effect of Unfamiliar Settings on Problem Solving, 1931; Learning as Reorganization (monograph with others), 1939; Arithmetic in Grades I and II (monograph), 1941; Learning the Multiplication Combinations (monograph), 1943; Meaningful vs. Mechanical Learning (monograph) 1948. Daily Life Arithmetics—Grades 1-8 (with G. T. Buswell and Lenore John); Living Arithmetic (text); Review Arithmetics (for Armed Forces Institute); co-author math. and other year books. Home: Berkeley, Calif. Died May 24, 1977.

**BROWNING, GORDON**, ex-gov. Tenn.; b. Carroll Co., Tenn., Nov. 22, 1889; s. Jas. H. Browning and Melissa A. (Brooks) B.; B.Sc., and Pg.B., Valparaiso U., 1913; LL.B., Cumberland U., 1915, LL.D. (hon.), 1936; m. Ida Leach, Nov. 11, 1920. Admitted to Tenn. bar, 1915, and began practice at Huntingdon; Chancellor 8th Tenn. Chancery Div., 1942-49; mem. 68th to 73d Congresses (1923-35), 8th Tenn. Dist.; gov. of Tenn., 1937-39, 1949-53. Enlisted in Tenn. Nat. Guard, June 1917; commd. 2d Lt. U.S. Army, July 25, 1917 and assigned to 114th Field Arty., 30th Div.; 1st Lt., Nov. 23, 1917; capt., May 10, 1918; served with A.E.F. 10 mos.; participated in battles at St. Mihiel, Argonne, Woevre; honorably discharged Apr. 1919; served with U.S. Army, 1943-Feb. 17, 1947; overseas 3 yrs. in European theatre, dep. head, G-5, Belgium-Luxembourg Mission; dir. Mil. Govt. Bremen Enclave; lt. col. Decorated Legion of Merit (U.S.), Order Brit. Empire (Eng.), Order Orange-Nassau (Netherlands), Order Adolph-Nassau (Luxembourg), Order Leopold and Order of Crown (Belgium); memorabilia and documents of Gov. and Mrs. Browning housed in Gordon Browning Room, McKenzie (Tenn.) Meml. Library. Methodist. Mem. Tenn. Bar Assn., Am. Legion, VFW. Club: Masons (32d deg.). Home: Huntingdon, Tenn. Died May 23, 1976; buried Oak Hill Cemetery, Huntingdon.

**BROWNLEE, WILLIAM ALLEN**, banker; b. Bonham, Tex., Sept. 23, 1885; s. William Whitfield and Fay (Allen) B.; student pub. schs. Bonham; m. Frances Hunt, Dec. 10, 1919; children—Mary Frances, James Whitfield, Joanne, Robert Edward; married second Bernice Chapman, 1949. Executive vice pres. Nat. Bank of Tulsa (Okla.), 1933-57, president, 1957-60, vice chairman board, 1960—. Director Tulsa Philharmonic Soc., Tulsa Y.M.C.A.; dir. Tulsa Community Chest. Mem. Res. City Bankers Assn. Clubs: Tulsa, Southern Hills Country. Home: Tulsa. \*

**BRUCE, BRYSON**, naval officer; b. Garden Grove, Ia., Mar. 20, 1886; s. Bryson and Mary Ann (Liddle) B.; B.S., U.S. Naval Acad., 1907; M.A., Columbia U., 1914; m. Louise Frances Downs, Feb. 18, 1911; children—Louise Frances (wife of Comdr. Morton Sunderland, U.S.N.), Betty Dunlevy (wife of Lt. Comdr. Neil E. Harkleroad, U.S.N.). Comm. ensign, U.S. Navy, Sept. 1906; promoted through grades to rear adm., 1941. ret. 1946. Awarded Mexican, China and World War campaign medals. Mem. Am. Soc. Naval Engrs., U.S. Naval Acad. Alumni Assn., Newcomen Society, Episcopalian. Club: Army and Navy Country (Washington) Racquet, Engineers Club (Phila.). Home: Arnold, Md. \*

**BRUCE, DAVID K. E.**, diplomat, b. Balt., Feb. 12, 1898; s. William Cabell and Louise Este (Fisher) B.; student Princeton, U. Va., U. Md.; m. Ailsa Mellon; 1 dau., Audrey (dec.); m. Evangeline Bell; children—Alexandra (dec.), David, Nicholas. Admitted to Md. bar, 1921, practiced in Balt., 1921-25; vice consul U.S. Fgn. Service, Rome, 1926-28; engaged in bus. and farming, 1928-40; chief rep. in Gt. Britain for A.R.C., 1940; with OSS, 1941-45, dir., ETO, 1943-45; asst. sec. of commerce, 1947-48; chief ECA Mission to France, 1948-49; U.S. ambassador to France, 1949-52; under sec. of state, 1952-53; apptd. spl. U.S. observer at interim com. of European Def. Community, 1953; spl. Am. rep. to European High Authority for Coal and Steel, 1953-54; ambassador to Fed. Republic Germany, 1957-59, to Great Britain, 1961-69; U.S. rep. to Vietnam Peace Talks, Paris, 1970-71; chief U.S. Liaison Office, Peoples Republic of China, Peking, 1972-74; ambassador to NATO, Brussels, 1974-75. Mem. Md. Ho. of Dels., 1924-26, Va. Ho. Dels., 1939-42. Served with U.S. Army, 1917-20, AUS, 1942-45. Awarded mil. decorations by U.S., Gt. Britain, France, Poland, Norway, Denmark, Czechoslovakia. Democrat. Episcopalian. Author: Revolution to Reconstruction, 1938. Home: Washington, D.C. Died Dec. 5, 1977.

**BRUCE, JAMES**, ret. bus. exec.; b. Balt., Dec. 23, 1892; s. William Cabell and Louise Este (Fisher) B.; Litt.B., Princeton, 1914; LL.B., U. Md., 1916; m. Ellen McHenry Keyser, May 24, 1919; children—Ellen Bruce Terry, Louise Este. Mem. 1st Plattsburg Camp, 1915; Pvt. to maj., U.S. F.A., 2d Div. Staff 1st Army, 1917-18; mil. aide to Pres. Wilson, also asst. mil. attaché Italy, also rep. Versailles Peace Treaty, Montenegro and Albania, 1919; v.p. Chase Nat. Bank, 1926-31; pres. Balt. Trust Co., 1931-33; fin. adv. to bd. dirs. Home Owners Loan Corp., Washington, 1933-34; v.p. Nat. Dairy Products Co., 1935-47; ambassador to Argentina, 1947-49; 1st dir. Mut. Def. Assistance Program, 1949-50; dir. Am. Airlines, Inc., Am. Hawaiian S.S. Co., AVCO Mfg. Co., Chem. Bank & Trust Co., Fruehauf Trailer Co., Kraftco, Technicolor, Inc., Comml. Credit Co., Fed. Home Loan Bank of N.Y., Gen. Am. Investors, Md. Casualty Co., Revlon, Inc., Republic Steel Co. Vice chmn. United Hosps. Fund, 1946. Decorated Order of Merit (Italy); Medal Militaire (France). Mem. Am. Legion, VFW. Democrat. Episcopalian. Mason (Shriner, 32 deg.), Moose. Clubs: Maryland (Balt.); Brook, Links, Links Golf, Racquet and Tennis. Author: Those Perplexing Argentines. Home: New York, N.Y. Died July 17, 1980; buried Baltimore, Md.

**BRUCE, JOHN MARKEY**, physician; b. New Orleans, Apr. 13, 1917; s. Charles Tiffany and Margaret Lillian (Markey) B.; M.D., La. State U., 1951; M.P.H., Tulane U., 1955; m. Irma D. Weisdorfer, Feb. 19, 1941; children—Elizabeth Bruce Voelker, David, Margaret Bruce Camin, Gregory, Melody. Intern Hotel Dieu Hosp., New Orleans, 1951-52; asst. dir. Jefferson Parish health unit Dept. Health, Gretna, La., 1953; regional health officer local health units Western La., 1956-57; sect. chief, div. preventive medicine La. Dept. Health, New Orleans, 1957-66, dir. div. local health services, 1966-67; med. dir. East La. State Hosp., Jackson, 1967-74; dir. State Div. Health, New Orleans, 1974-77; ret., 1977. Served with USAAF, World War II. Diplomate Am. Bd. Preventive Medicine, Fellow Am. Coll. Preventive Medicine; mem. Delta Omega. Home: Metairie, La. Died Oct. 21, 1978.

**BRUCE, WILLIAM CONRAD**, ret. publishing co. exec.; b. Milw., Jan. 17, 1882; s. William George and Monica (Moehring) B.; A.B., Marquette U., 1901, M.A., 1905, LL.D., 1956; LL.D., Mt. Mary Coll., 1954. Editorial asst. Am. Sch. Bd. Jour., 1902-10, asst. editor, 1910-52, editor, 1952-67; v.p. mng. editor Bruce Pub. Co., Milw., 1914-52, pres., 1952-60, chmn. bd., 1961-68; chmn. Am. State Bank, Milw., 1959-61. Sec. bd. gov. Mt. Mary Coll., Milw., 1941-63; mem. lay bd.

advisers Misericordia Hosp., Milw., 1952-60. Mem. Nat. Council Schoolhouse Constr. (hon. mem., sec., 1922-37). Home: Wauwatosa WI. \*

**BRUCHHAUSEN, WALTER**, judge; b. Bklyn., May 29, 1892; s. Hugo and Anne (Dietrich) B.; LL.B., N.Y. U., 1912; m. Lois Thayer, June 12, 1943; 1 dau., Alice. Admitted to N.Y. bar, 1919, since practiced in N.Y.C.; mem. firm Duncan & Bruchhausen, 1919-42, Cadwalader, Wickersham & Taft, from 1942; U.S. dist. judge, 1953-76; chief judge U.S. Dist. Ct. for Eastern Dist. of N.Y., 1959-62, then sr. judge. Mem. N.Y. State Jud. Council, 1950-53. Served with mil. at Mexican Border, also World War I. Mem. Bklyn. Bar Assn. (past pres.), Brooklyn Heights Assn. (past pres.), Mason (33 deg.). Home: Brooklyn, N.Y. Died Oct. 11, 1976; interred Greenwood Cemetery, Brooklyn.

**BRUCKER, HERBERT**, writer, editor; b. Passaic, N.J., Oct. 4, 1898; s. Carl and Adele (Balthasar) B.; A.B., Williams Coll., 1921, LL.D., 1964; B. Litt., Columbia, 1924, L.H.D., 1963; Pulitzer traveling scholar, 1924; L.H.D., Colby Coll., 1960; D. Litt., U. Hartford, 1965; m. Sydney Seabury Cook, Feb. 6, 1926 (dec. Apr. 1950); children—Christopher, Sydney (Mrs. James Sowles), Thomas; m. 2d, Mrs. Elizabeth Spock Dominick, Aug. 10, 1951; 2 stepsons, William F., Anthony Dominick. Reporter, Springfield (Mass.) Union, 1923, World, N.Y.C., 1925-26; mem. editorial staff World's Work, 1926-27, Rev. of Revs., 1927-32; asst. to dean Columbia Sch. Journalism, 1932-44, asst. prof. journalism, 1933-35, asso. prof., 1935-42, prof., 1942-44; chief media div., asso. chief Bur. Overseas Pubs., OWI, 1942-43; asso. editor Hartford Courant, 1944-47, editor, 1947-66; dir. prof. journalism fellowships Stanford, 1966-69; syndicated newspaper columnist, 1968-77. Served with USN, 1918. Recipient John Peter Zenger award U. Ariz., 1959. Mem. Am. Soc. Newspaper Editors (pres. 1963-64), Am. Council Edn. for Journalism (pres. 1959-63), Chi Psi, Sigma Delta Chi, Episcopalian. Author: The Changing American Newspaper, 1937; Freedom of Information, 1949; Journalist: Eyewitness to History, 1962; Communication Is Power: Unchanging Values in a Changing Journalism, 1973. Address: Avon, Conn. Died Apr. 5, 1977.

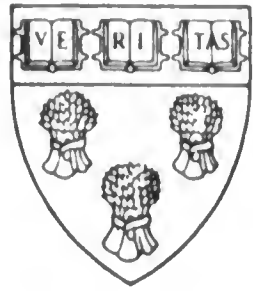
**BRUENING, HEINRICH**, univ. prof.; b. Muenster, Germany, Nov. 26, 1885; s. Friedrich Wilhelm and Bernhardine (Beringhoff) B.; ed. U. of Munich, U. of Strassburg, U. of Bonn (Ph.D.), London Sch. of Economics; LL.D., Brown U., 1937; hon. A.M., Oxford U., 1938. Came to U.S., 1935. Prussian Ministry of Welfare, 1919-21; polit. and econ. advisor to Christian Trade Unions, 1921-30; member German Reichstag, 1924-33; chancellor German Reich, 1930-32; lecturer Oxford Univ., 1937-38; lecturer, Harvard, since 1937, Littauer prof. of pub. administrn. since 1939. Served in German Army during World War. Decorated Iron Cross, 2d and 1st class. Roman Catholic. \*

**BRUGMAN, FRANCIS ALBERT (BRUG'MAN)**, oculist and aurist; b. Iowa City, Ia., Jan. 20, 1885; s. John Albert and Mary Theresa (Barry) B.; M.D., State U. of Ia., 1909; m. Mable V. Shalla, Sept. 15, 1909; 1 dau., Mary Jean. Physician and surgeon, Minot, N.D., 1909-10; resident surgeon Ill. Charitable Eye and Ear Infirmary, Chicago, 1911-12; oculist and aurist, Minot, N.D., 1913-23, Seattle, Wash., since 1924; partner Drs. Würdemann and Brugman. Served as Lt. Med. Corps, U.S. Army, 1918-19; capt. Med. Reserve, 1920-30. Mem. A.M.A., Wash. State Med. Soc., King County Med. Soc., Puget Sound Acad. Ophthalmology and Otolaryngology (sec. 1929-33, pres. 1934), Pacific Coast Oto-Ophthal. Soc., Am. Legion (post comdr. 1923), Democrat. Catholic. Clubs: College, Washington Athletic, Stillaguamish Country, Lake Washington Saddle, I Club (U. of Ia.). Contr. (with Dr. H. V. Würdemann) chapter on eye injuries in Modern Trends in Ophthalmology; also to med. jous. Home: Bellevue, Wash. \*

**BRUMBAUGH, DAVID EMMERT**, lumber co. exec.; b. Martinsburg, Pa., Oct. 8, 1894; s. Moses R. and Sarah Florence (Stuard) B.; ed. pub. schs., North Woodbury Twp., Pa., Summer normal school, Martinsburg, Pa., and Internat. Corr. Schs., Scranton, Pa.; D.C.S. (hon.), Franklin and Marshall Coll.; m. Carolyn L. Acker, Oct. 29, 1919; children—D. Robert, Sumner E., Carol and Carolyn (twins). Engaged in banking bus., Claysburg, Pa., 1914-77; partner Queen Lumber Co. from 1921; established D. Emmert Brumbaugh Ins. Agy., 1920; chmn. bd. Central Pa. Nat. Bank; dir. Penn State Mut. Ins. Co., Johnstown; mem. 78th Congress from 23d Pa. Dist., 79th Congress, 22d Pa. Dist.; sec. of banking Commonwealth of Pa., 1947-52; former state senator Pa., 30th Dist. Chmn. Blair County S.S.S. Bd. No. 1, Hollidaysburg, Pa., 1941-43; chmn. Blair County chpt. A.R.C. 1934-62, now mem. exec. com. Trustee Pa. Indsl Sch., Huntingdon, Pa., Cedar Crest Coll., Altoona Hosp. Served as Pvt. 33d Div., U.S. Army, World War I. Citation from Hood Coll., Frederick, Md. Mem. V.F.W., Am. Legion, 40 and 8, Pa. Soc. of N.Y. Mason (32 deg., Shriner, Jester). Republican. Clubs: Union

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Jan 11, 1983

Mr. Ernst C. Stiefel  
200 Park Avenue  
New York, N.Y. 10166

Dear Stiefel:

Thanks for your letter of Jan 7, 1983.

Yes, I would be glad to help. We were both at ICA at a given moment.

Brigitte Bodenhorn was draftsman of the Uniform Child Custody Jurisdiction Act. An article of hers: Proposal for the Uniform Act, 65 Calif. L. Rev. 978 (1977). The State Department appointed her for the work at the Hague Conference, but she had to resign because of illness (cancer). She was professor at Davis, if I am not mistaken. She was co-editor of either the California Law Review or the review of Davis, 1978, 1979 (?).

George Colby, now a law professor of comparative law in Georgia, had been on the OLG, I think. Relatively recently, he had an article in the International and Comparative Law Journal of Boston College.

With best regards,

Kurt H. Nadell

KURT H. NADELL



## 4 Posthume Ehrung Käthe und Otto Leichters

Der österreichische Generalkonsul in New York, Thomas Nowotny, überreichte posthum das Ehrenzeichen für Verdienste um die Befreiung Österreichs an Käthe und Otto Leichter. Die Urkunden, verliehen von Bundespräsident Kirchschräger, wurden von den beiden Söhnen der Verstorbenen und der zweiten Frau Otto Leichters entgegengenommen.

Käthe Leichter war eine der dominierenden Frauen in der Arbeiterbewegung der Ersten Republik. Sie war auch die Begründerin der Frauenabteilung in der Gewerkschaft. Frau Leichter hat als Lehrmeisterin einer ganzen Generation weiblicher Gewerkschaftsfunktionäre gewirkt. Von den ersten Tagen des aufkeimenden Nationalsozialismus bis zu ihrem Tod im Konzentrationslager Dachau hat Käthe Leichter an der Spitze einer aktiven Widerstandsbewegung gestanden. Otto Leichter, einem langjährigen hochrangigen Mitarbeiter der "Arbeiterzeitung", war es zu verdanken, dass die Welt

### Neuer Intendant im Sender Freies Berlin

Am 1. März 1983 trat der Journalist Lothar Loewe sein Amt als Intendant des Sender Freies Berlin an. Er war früher Fernseh-Korrespondent in Ostberlin bis zu seiner Ausweisung durch die DDR-Behörden, sowie Berichterstatter in den USA. Im letzteren Amt erwies er sich als guter Freund des "Aufbau".

H.E.

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vom autoritären System in Österreich erfahren konnte. Auch er hatte im Untergrund aktiv für die sozialistische Bewegung und für die Befreiung Österreichs gearbeitet. Otto Leichter starb im Jahr 1973 in New York; in den letzten sechs Jahren seines Lebens war er ein regelmässiger Kolumnist des "Aufbau".

### Horst-Egon Berkowitz verstorben

Die Stadt Hannover trauert um einen ihrer bedeutendsten und prominentesten jüdischen Bürger. Der Rechtsanwalt und Notar Dr. Horst-Egon Berkowitz, über den "Aufbau" mehrfach berichtet hatte, starb im Alter von 85 Jahren.

Als 17jähriger Kriegsfreiwilliger wurde Berkowitz im Ersten Weltkrieg schwer verletzt und blieb sein Leben lang davon gezeichnet. "Ich habe für Deutschland gekämpft, wurde unter den Nazis verfolgt, misshandelt und verhöhnt," erzählte einst der Jurist. Sein Schicksal zeigte die Tragik eines Lebens in den letzten 70 Jahren, wenn man als Jude in Deutschland geboren worden war und dort lebte.

In der Champagne-Schlacht verlor er sein rechtes Auge, sein Gesicht wurde für immer entstellt. Der Kaiser verlieh ihm das Eiserne Kreuz und das Goldene Verwundetenabzeichen. In der Weimarer Republik eröffnete Berkowitz in Hannover ein Anwaltsbüro und kämpfte mit grossem Einsatz und beispielhafter Menschlichkeit für die Bürger in Not.

Nach 1933 traf den jüdischen Anwalt der Hass der Nazis, da Berkowitz weiter unerschrocken für seine jüdischen Mitbürger eintrat. Im Jahre 1938 kam er ins Konzentrationslager Buchenwald. Er überlebte, weil sich einflussreiche Militärs für ihn einsetzten. Ferner sollten (nach einem Geheimereiss von Göring) bis zum "Endsieg" Juden mit hohen Kriegsauszeichnungen von der "Endlösung" ausgenommen werden. Nach dem Krieg gehörte Berkowitz zu denen, die innere Versöhnung predigten und vorlebten, die durch das eigene Beispiel selbst Nazi-Mitläufer zum Umdenken brachten.

Horst-Egon Berkowitz, Ehrenmitglied des Deutschen Anwaltvereins, wurde von der Stadt Hannover mit der Stadtplakette geehrt. Die Stadt Hannover teilte der Schwester des Verstorbenen in einem Kondolenzschreiben unter anderem mit: "Der Mensch Horst-Egon Berkowitz wird für uns und kommende Generationen ein Vorbild sein." W.R.

Als zurücktitjahu sprach. sieben J in Bonn. ging 1933 und steht se des Staates.

In Bonn v Bundeskanzler Abgeordnete würdige Erin Zweiten We stischen Gew

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## Mitteilungen

### Auszeichnung von Anwälten

Der Bundespräsident hat RA Dr. Gerhard Hammerstein, Freiburg i. Br., und RAuN Dr. Johannes Kumor, Oberhausen, das Verdienstkreuz Erster Klasse des Verdienstordens der Bundesrepublik Deutschland verliehen.

### Horst Berkowitz †

Am 13. 2. 83 verstarb in Hannover der Rechtsanwalt und Notar a. D. Dr. Horst Berkowitz kurz nach Vollendung seines 85. Lebensjahres.

Geboren in Königsberg i. Pr. wuchs er in Hannover auf, der Stadt, die ihm Heimat wurde. Sechszehnjährig meldete er sich 1914 als Kriegsfreiwilliger. Im November 1915 wurde er in Frankreich schwer verwundet, verlor ein Auge, Teile des Gehörs; auch trug er eine Gehbehinderung davon. Im Sommersemester 1916 nahm er an der Universität Göttingen das Jurastudium auf, promovierte, bestand im März 1919 das Referendarexamen und 1922 das Assessorexamen. Seit April 1922 war er Rechtsanwalt in Hannover, Juniorpartner in einer Dreiersozietät. Seine beiden Sozien trennten sich im Juni 1933 von ihm, weil er Jude war. In der „Reichskristallnacht“ wurde er verhaftet und nach Buchenwald eingeliefert. Als Inhaber des Goldenen Verwundetenabzeichens wurde er nach kurzer Zeit wieder nach Hannover entlassen, wo er zunächst als sog. Judenkonsulent tätig war. Im Dezember 1940 wurde er arbeitsverpflichtet und hatte sich täglich im Konzentrationslager Ahlem bei Hannover zu melden. Seine Mutter wurde 1941 nach Theresienstadt verschleppt und starb dort 1943 an Hungertyphus.

Nach der Besetzung Hannovers im April 1945 wurde Berkowitz dort wieder Rechtsanwalt und Notar, beteiligte sich am Wiederaufbau der Justiz seiner Heimatstadt und gehörte von 1945 bis 1973 dem Vorstand des Rechtsanwaltsvereins Hannover an.

Auf dem 40. Deutschen Anwaltstag 1979 in Hannover wurde ihm die Ehrenmitgliedschaft im Deutschen Anwaltverein verliehen.

Horst Berkowitz war ein sehr erfolgreicher Anwalt. Er mußte als Jude schwerste körperliche Quälereien und schlimmste seelische Demütigungen hinnehmen. Er ist einer der wenigen jüdischen Kollegen, die die NS-Herrschaft im Inland überlebt haben. Ulrich Beer hat den Lebensweg dieses außergewöhnlichen Anwalts in einer 1979 erschienenen Biographie nachgezeichnet. Was uns an diesem Mann so beeindruckt hat, ist nicht nur seine berufliche Tüchtigkeit. Viel mehr zu bewundern ist die Haltung, die er uns vorgelebt hat. Berkowitz war nach 1945 ohne Groll und ohne Haß; er konnte verzeihen und hat verziehen – selbst denen, die geglaubt hatten, sich von ihm als Träger des gelben Judensterns abwenden zu müssen.

Wir werden Horst Berkowitz nicht vergessen! Wir werden aber auch nicht vergessen, was man ihm – und vielen anderen – angetan hat, „im Namen des deutschen Volkes“.

Hans-Jürgen Rabe

### Neue Vorsitzende von Mitgliedsvereinen

#### Klevert Anwaltverein e. V.

RA Richard van de Loo,  
Nassauer Str. 9, 4190 Kleve

#### Wittener Anwaltverein

RAuN Joachim Korfmann,  
Bahnhofstr. 32 a, 5810 Witten (Ruhr)

### Neue DAV-Mitglieder

#### Aachener Anwaltverein e. V.

Alfred Frantzen, Im Hech 13, 5107 Simmerath  
Dietrich Gehrman, Markt 45, 5100 Aachen  
Helmut Groth, Robert-Koch-Str. 7-13, 5107 Simmerath  
Friedhelm Hammer, Oppenhoffallee 106, 5100 Aachen  
Konrad Hochhausen, Wilhelmstr. 16, 5170 Jülich  
Margret Lingens, Kurbrunnenstr. 48, 5100 Aachen  
Marcel van Maele, Theaterstr. 24-34, 5100 Aachen  
Rudolf Meyer-Volland, Konrad-Adenauer-Str. 244,  
5130 Geilenkirchen  
Willi Niessen, Konrad-Adenauer-Str. 244,  
5130 Geilenkirchen  
Hans Jürgen Norda, Wilhelmstr. 60, 5100 Aachen  
Norbert Keusen, Rathausstr. 3, 5138 Heinsberg  
Tibor Szabo, Herzogstr. 19, 5100 Aachen

#### Anwaltsverein Amberg e. V.

Gerwig Bahle, Gumping 4, 8411 Wald  
Adolf Gутtenberger, Regierungsstr. 6, 8450 Amberg  
Wolfgang Herdegen, Gumbelstr. 2, 8450 Amberg  
Hans Herrmann, Tassilostr. 24, 8401 Niedertraubling  
Rudolf Pleichl, An der Allee 7 e, 8458 Sulzbach-Rosenberg  
Josef Simbeck, Sonnenweg 2, 8472 Schwarzenfeld

#### Auricher Anwalt- und Notarverein

Christoph Hinkelmann, Leerer Landstr. 30, 2960 Aurich 1  
Wilhelm Steinbömer, Norder Str. 32, 2960 Aurich 1  
Johannes-Albert Wiens, Leerer Landstr. 3, 2960 Aurich 1

#### Vereinigung der beim LG Baden-Baden zugelassenen Rechtsanwälte e. V.

Peter Antoni, Schulstr. 4, 7580 Bühl  
Christoph Eiermann, Markgrafenstr. 7, 7570 Baden-Baden

#### Anwaltverein Bad Hersfeld e. V.

Raimund Schraad, An der Untergeis 10, 6430 Bad Hersfeld

#### Berliner Anwaltsverein e. V.

Christina Brandies, Ludwigkirchstr. 9, 1000 Berlin 15  
Anne Butenholz-Schoess, Uhlandstr. 2, 1000 Berlin 12  
Gisela Drewes, Wilhelmsruher Damm 127, 1000 Berlin 26  
Thekla Fizke, Marktstr. 3, 1000 Berlin 51  
Kajo Frings, Gneisenastr. 114, 1000 Berlin 61  
Jochen Glasberger, Fritschweg 4, 1000 Berlin 41  
Ute Grund, Pfalzburger Str. 74, 1000 Berlin 15  
Karin Heinrich, Normannenstr. 6, 1000 Berlin 38  
Jürgen Holze, Lipaer Str. 40, 1000 Berlin 45  
Klaus Inderfurth, Kaiserdamm 5, 1000 Berlin 19  
Thomas Leyke, Heerstr. 53, 1000 Berlin 19  
Helge Lode, Müllerstr. 153 a/154, 1000 Berlin 65  
Dr. Peter Meier, Fasanenstr. 39, 1000 Berlin 39  
Andreas Mostertz, Bismarckstr. 24, 1000 Berlin 12  
Thomas Riedel, Kurfürstendamm 157, 1000 Berlin 31  
Felicitas Selig, Kaiserdamm 5, 1000 Berlin 19  
Michael Severin, Kurfürstendamm 220, 1000 Berlin 15  
Gisela Schönrock, Bundesplatz 3, 1000 Berlin 31  
Manfred Schulz, Stuttgarter Platz 1 a, 1000 Berlin 12  
Alfons Schulze-Hagen, Kurfürstendamm 29,  
1000 Berlin 15  
Aribert Steubel, Wielandstr. 24, 1000 Berlin 15  
Reinhard Weber, Heidelberger Str. 37, 1000 Berlin 44  
Horst Wittschier, Joachimstaler Str. 14, 1000 Berlin 15

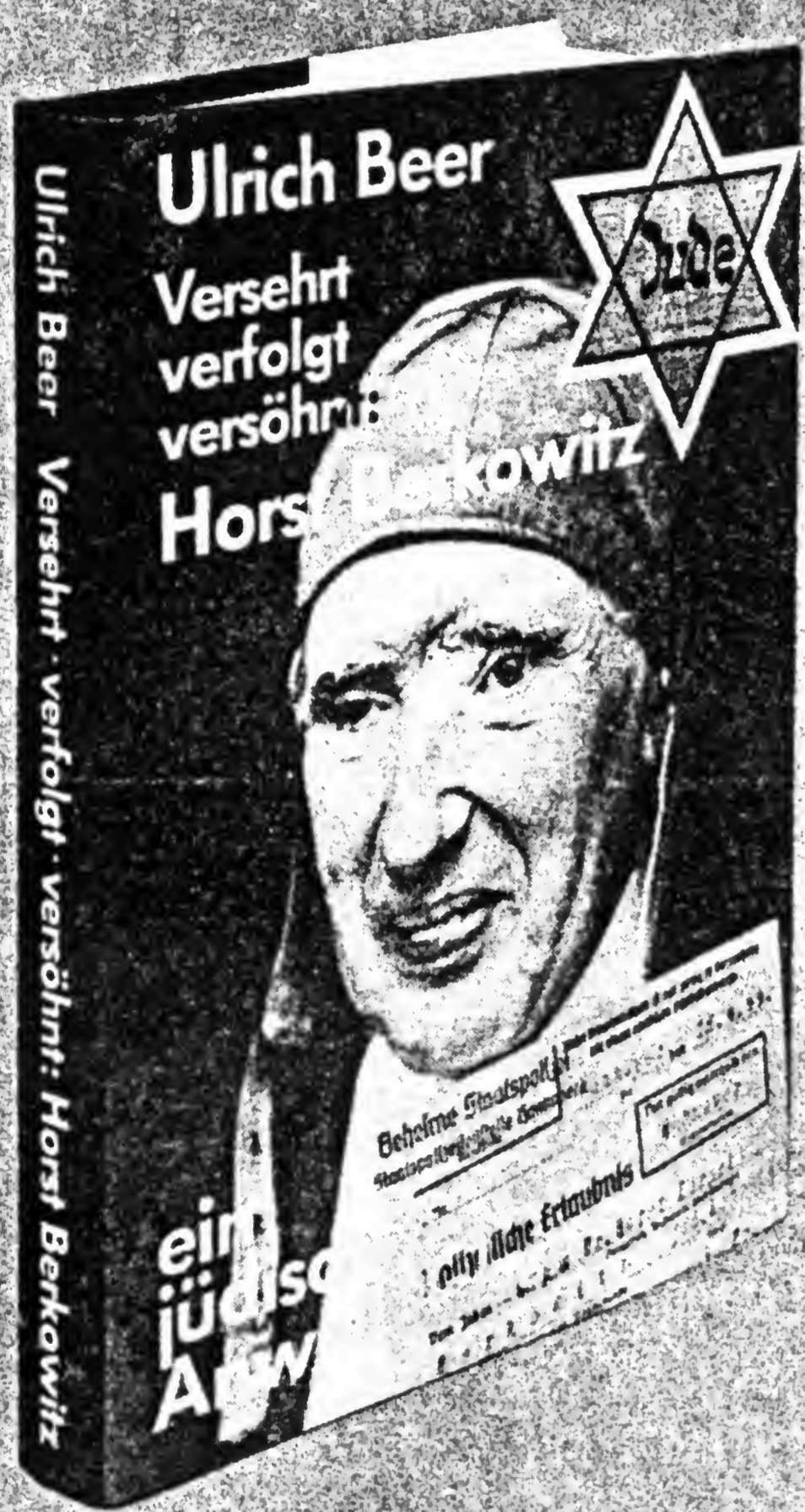
#### Bremischer Anwaltsverein

Rainer Ditsch, Sebaldsbrücker Heerstr. 34, 2800 Bremen  
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Gerold Homburg, Obernstr. 32, 2800 Bremen  
Harald Köhler, Marktstr. 3, 2800 Bremen  
Dr. Karsten Kühne, Am Sedanplatz 2, 2820 Bremen 70  
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## Geschenkbücher zum Weihnachtsfest



### Auszüge aus Besprechungen:

„Bei dem Versuch, ein ganz und gar ungewöhnliches Leben zu beschreiben, ist dem Autor Ulrich Beer (bekannt als Kommentator der ZDF-Serie ‚Ehen vor Gericht‘) ein in mehrfacher Hinsicht ebenso ungewöhnliches wie einfühlsames Buch geglückt.“

DIE WELT

Ulrich Beer

### Versehrt, verfolgt, versöhnt: Horst Berkowitz, ein jüdisches Anwaltsleben

Auflage 1979, 168 Seiten, DIN A 5, Ganzleinen, 24,- DM

In Königsberg als Sohn jüdischer Kaufleute geboren, kam er mit vier Jahren nach Hannover. Mit 16 Jahren meldete er sich freiwillig zum Ersten Weltkrieg und wurde schon nach wenigen Monaten schwer verletzt. Er verlor ein Auge, fast das ganze Gehör, eine halbe Hand und Teile des Gehirns. Sein Gesicht ist seitdem von Verletzungen entstellt und sein Körper heute noch voller Granatsplitter.

Er überlebte die Hölle des 1. Weltkrieges und zwei KZ-Aufenthalte und übt heute noch seinen Beruf als Anwalt aus. Seine Plädoyers sind eindrucksvoll; er selbst ob seines unbestechlichen Gerechtigkeitssinns ist geachtet. Der Deutsche Anwaltverein ehrte ihn auf dem Anwaltstag in Hannover durch die Verleihung der Ehrenmitgliedschaft.

Leben und Größe dieses Mannes sind aus seinem unerschöpflichen Vermögen zu verstehen, Verzichte, Opfer, Lebenseinschränkungen hinzunehmen und in dem, was ihm bleibt, das Positive herauszufinden, es sich bewußt und das Beste daraus zu machen.

Die Verfolgungsjahre haben nicht Verbitterung, sondern Humor, allenfalls auch Galgenhumor, in ihm zurückgelassen. Die Zahl der Anekdoten, die über ihn umlaufen, ist Legion, und ständig liefert er den Stoff für immer neue. Seine Späße, von denen in diesem Buch unzählige festgehalten sind, entstehen nie auf Kosten anderer, sondern allenfalls auf seine eigenen . . .

„Die Biographie von Horst Berkowitz ist aufregend . . .

Darüber hinaus bietet das Buch Überraschungen – historisch, medizinisch, vor allem moralisch – so wird es in den eisernen Bestand der Memoirenliteratur eingehen.“

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Chatham Towers Coop., 1977-78; mem. N.Y. U. Senate; mem. budget com. N.Y. U., 1971-74. Served with U.S. Army, 1942-45. Decorated Bronze Star. Mem. Am. Econ. Assn., Downtwon Economist Luncheon Group, Beta Gamma Sigma. Author, editor: (with R.A. Schwartz) Impending Changes in Securities Markets, 1979; contrib. articles to prof. publs. Home: 100 Bleeker St New York NY 10012 Office: NY U Washington Sq New York NY 10003

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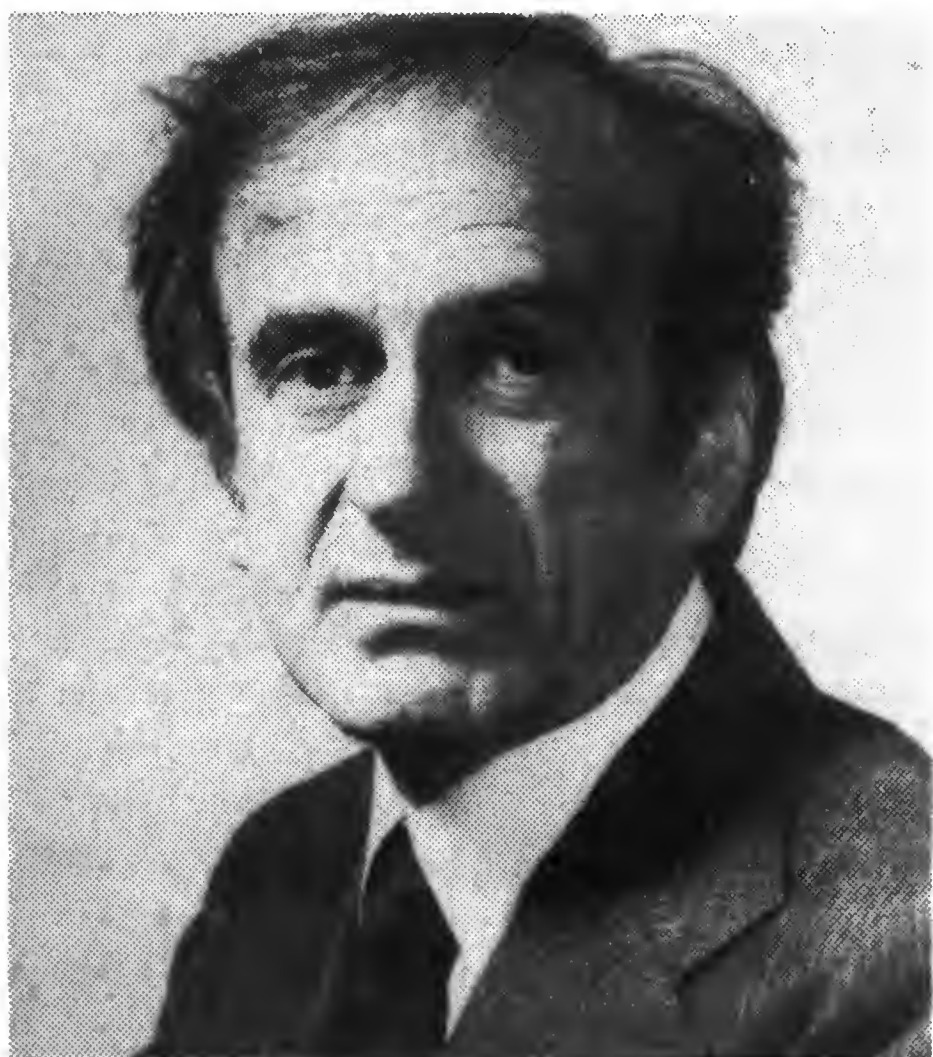
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“Ich verstehe den Holocaust und Gott nicht”:

## Jüdische Prioritäten im Wechsel der Zeiten



Von Elie Wiesel

Der jüdischen Tradition zufolge gilt Verleumdung als eine der schlimmsten Sünden, die begangen werden können, — fast einem Mord gleichzusetzen.

Der Talmud sagt, man könne, wenn man in Rom sei, jemanden, der Tausende Meilen entfernt lebt, mittels Verleumdung töten. Durch Verleumdung können Einzelpersonen wie ganze Gemeinschaften vernichtet werden. Ist der Antisemitismus denn etwas anderes als Verleumdung?

Theoretiker, Philosophen und Psychologen waren alle daran beteiligt, Theorien zu entwickeln, um die Idee, das Bild, die Psyche und die Ewigkeit des Juden zu verleumden und zu vernichten. Sie lebten in allen möglichen Ländern, wo sie nie auf Menschen trafen, die Juden hassten. Sie aber hassten Juden, die tot waren, Juden, die lebten, und Juden, die noch in Zukunft auf die Welt kommen werden. Warum? Wegen Verleumdung.

Seit mehr als 40 Jahren habe ich versucht,

nigten Staaten und wurde dann irgendwie nach Deutschland zurückgeschickt, mit den Flüchtlingen noch an Bord. Wie war dies möglich? Warum haben die amerikanischen Juden nicht 100.000 Menschen nach Washington geschickt, um einen Hungerstreik zu organisieren?

Heute könnte so etwas nicht geschehen. Heute würde die Anti-Defamation League die Bevölkerung mobilisieren und dafür sorgen, dass das Schiff die amerikanische Küste nicht verlassen müsste.

Die jüdische Gemeinschaft ist militanter geworden. In Frankreich waren die Juden bis vor etwa 30 Jahren schüchtern, verschämt, voller Angst. Sie hätten es nie gewagt, sich gegen die Regierung zu stellen. So war es auch in den Vereinigten Staaten; aber seither hat sich dies geändert. Jetzt wagen wir es. Wir melden uns zu Wort, wenn uns etwas nicht gefällt, das sich in Washington ereignet. Nicht nur eine Person oder eine Organisation, sondern die gesamte Gemeinschaft.

Aber die grundlegende Frage bleibt. Wie war der Holocaust möglich? Wir machen uns Gedanken, wenn wir Bücher lesen, die dieser Tragödie die Einzigartigkeit nehmen wollen. Ich bin empört — und wir alle müssen es sein — wenn wir lesen, dass es in Deutschland eine Bewegung gibt, die die Tragödie entjudaisieren will. Ich war überzeugt, dass Deutschland zumindest den Anstand hätte, in der vordersten Front derer zu stehen, die für die Erinnerung kämpfen. Aber nein. Da ist ein Kampf unter Historikern im Gange, und die vorherrschende Meinung ist die, dass der Holocaust nur eine von vielen Tragödien sei. Einer sagt, dass Stalin schlimmer war als Hitler, weil er ein System der Unterdrückung einführte, das schlimmer war als das Hitlers. Das lässt bei mir einen sehr bitteren Nachgeschmack zurück.

Warum? Weil sie den Mut und die Energie hatten, zu kämpfen. Vor Solschenitzyn, vor Sacharow, vor allen Dissidenten waren es junge Juden, die sich als erste der Geheimpolizei widersetzen. Sie bekannten sich zu ihrem Judentum nach aussen in Gesang und Rede, zu ihrer Zugehörigkeit zum Judentum und zur jüdischen Geschichte.

Ich sah sie und konnte nicht glauben, dass sie eines Tages frei sein würden. Es ist mir aber klar, dass Gorbatschow die Tür wieder schliessen wird, sobald die weithin sichtbaren Refuseniks alle gegangen sind. Was werden wir dann tun? Es gibt noch immer drei Millionen Juden in der Sowjetunion. Ich glaube, dies ist ein Schlachtfeld, auf dem die ADL wachsam bleiben, ihre Stärke und Klugheit unter Beweis stellen muss.

Früher sagten jüdische Eltern ihren Kindern: Denke daran, dass du ein Jude bist, wohin du auch gehen magst. Denke daran, dass du ein Jude bist, was immer sich ereignen mag. Du musst der Gemeinschaft angehören, musst deine Identität mit dem jüdischen Schicksal behaupten. Diese Haltung müssen wir beibehalten. Was immer wir tun, wir müssen immer daran denken, dass wir es als Juden tun müssen. Das bedeutet nicht, dass wir nur zu Fragen von jüdischer Bedeutung Stellung nehmen dürfen. In unseren Herzen muss genügend Platz bleiben, um auch an andere Menschen zu denken, die leiden.

Wenn ich an das jüdische Volk denke, habe ich nur Dankbarkeit. Ich habe Probleme mit der Welt, die oft gerechtfertigt sind. Zeitweise bin ich der Verzweiflung nahe. Ich glaube, die Zivilisation hat sich selbst verraten. Ich glaube, dass Kultur abgedankt hat. Aber wenn ich an das jüdische Volk denke, dann ist dies für mich ein Anlass zum Lächeln. Ich kann meinen Studenten nichts Jüdisches beibringen, ohne nicht dabei zu lächeln. Ich kann den Talmud nicht ohne

Die Kinder, die ich unterrichte, wollen lernen. Wenn sie über die Inquisition lesen, erfahren sie etwas von der Würde, die unsere Vorfahren bewahrten. Der Staat war gegen uns, die Welt war gegen uns. Und wir sagten nur: “Wir sind Juden”, und mit ein paar Worten leisteten wir den mächtigsten Nationen der Welt Widerstand. Das müssen wir unseren Kindern beibringen.

Ich glaube an die israelische Gemeinschaft. Ich kann mir Juden nur vorstellen, die von Juden umgeben sind. In Freuden wie im Schmerz ist ein Jude niemals allein. So wie ein Mensch andere Menschen benötigt, um human zu sein, so braucht ein Jude andere Juden, um jüdisch zu sein. Wir definierten uns nicht im Verhältnis zu dem Hass, der uns von Fremden entgegenschlug, sondern im Glauben, den wir bei unserem eigenen Volk spürten.

Ein Jude, der allein ist, ist in Gefahr. Seine Sicherheit liegt in der Gemeinschaft, die ihm zu überleben und Erfüllung zu erlangen hilft. Gemeinschaft ist das Schlüsselwort. Es zeigt uns an, welchen Wegen wir folgen sollen, es öffnet uns versteckte Tore, es verleiht alltäglichen Worten alte Stärke. Was wäre ein Jude ohne seine Gemeinschaft? Ein verkümmerter Ast, ein namenloser Wanderer, bedrängt durch Feindseligkeit.

Zusammen stellen die Juden eine historische Macht, ein kollektives Bewusstsein dar. Wenn wir allein sind, müssen wir mit unserer Schwäche fertig werden, zusammen ist einer die Bekräftigung des anderen. Allein müssen wir verschwinden. Ein Teil der Gemeinschaft zu sein, sie zu gestalten und zu stärken, ist die dringlichste und lebenswichtigste Verpflichtung, der sich der einzelne Jude gegenüber sieht. Die schwerste Sünde, die ein Jude begehen kann, ist die, sich von der Gemeinschaft zu lösen. Die schwerste Strafe, die uns zuteil werden kann, ist die, von ihr abgeschnitten, exkommuniziert zu werden. Ein Teil der Gemeinschaft zu sein, gibt uns ein Gefühl der Schönheit und der Geschichtlichkeit, die kein anderes Volk besitzt.

Die auszugsweise im ADL Bulletin (January 1988)



## Gleich zweimal Grund zu feiern

*Verleger Heinz M. Bleicher 65, sein Unternehmen 20 Jahre alt*

Einen doppelten Geburtstag galt es am 10. Februar im Hause Heinz M. Bleicher im Stuttgarter Vorort Gerlingen zu feiern: der Hausherr selbst hat seinen 65. Geburtstag begangen, und der von ihm gegründete Verlag, der seinen Namen trägt, kann nunmehr auf ein zwanzigjähriges Bestehen zurückblicken.

Als evangelischer Vorsitzender und Vorstandssprecher der Gesellschaft für Christlich-Jüdische Zusammenarbeit in Stuttgart und Kuratoriumsmitglied des Deutschen Koordinierungsrats ist Heinz M. Bleicher heute einer der bekanntesten Mittler zwischen christlicher Ökumene und Judentum, aber auch zwischen der Bundesrepublik und Israel; als Verleger setzt er sich nachhaltig für die kleine Gruppe deutschsprachiger Schriftsteller in Israel ein, deren Verband ihn 1981 zum Ehrenmitglied ernannt hat.

Bleicher ist Initiator und seit 1980 Vorsitzender des Förder- und Trägervereins Ehemalige Synagoge Freudental, deren Restaurierung 1985 abgeschlossen werden konnte. Aber auch die Versöhnung zwischen den Völkern Europas ist ein wichtiger Punkt im politischen und verlegerischen Konzept Bleichers, wie seine Arbeit im Volksbund Deutsche Kriegsgräberfürsorge und sein Zusammenwirken mit dem Deutsch-Französischen Institut und der Robert-Bosch-Stiftung ausweisen.

Sein Verlag, der mit der Veröffentlichung von Telefon- und Adressbüchern begann, verfügt heute über eines der führenden Programme in Deutschland auf dem Gebiet der Judaica. Zu seinen Autoren zählen Schalom Ben Chorin, Max Zweig und eine Reihe anderer deutschsprachiger Autoren in Israel, denen Bleicher sein Hauptaugenmerk zuwendet. Ausserdem bringt er die Veröffentlichungen des Instituts für Deutsche Geschichte an der Universität Tel Aviv heraus, die wissenschaftlichen Publikationen der Robert-Bosch-Stiftung sowie die Reihe "Mili-



(Herausgeber: Karl Geibel) mit Beiträgen von Autoren erschienen, deren Werk im Lauf der letzten 20 Jahre vom Bleicher Verlag betreut wurde: ausser den bereits Genannten findet man u.a. die Autoren Simon Wiesenthal, Leopold Marx, Ladislav Grossmann, Walter B. Goldstein, Lola Landau, Arie Efrat und Meir M. Faerber. Herausgeber Geibel, der auch Vorsitzender der Gewerkschaft der Journalisten Württembergs ist, hielt bei der Geburtstagsfeier die Laudatio für Bleicher, der bei dieser Gelegenheit die Gründung der Heinz-M.-Bleicher-Stiftung bekanntgab, durch die Personen gefördert werden sollen, die sich für die Überwindung von Antisemitismus und Antijudaismus engagieren.

Ebenfalls aus Anlass des Geburtstags hat das PEN-Zentrum deutschsprachiger Autoren im Ausland (die Nachfolgeorganisation des deutschen Exil-PEN in London) eine Anthologie mit Lyrikbeiträgen seiner Mitglieder dem Verleger Heinz Bleicher, in dessen Verlag der Band erschien, gewidmet. Herausgegeben wurde die Anthologie mit

## In memoriam

In Philadelphia verstarb 85jährig am 6. Februar der aus Gronau (Westfalen) stammende Kantor **Eric Mandell**, der die Abteilung für Synagogalmusik am Gratz College in Philadelphia gründete, sie um eine der grössten Sammlungen liturgischer Musik bereicherte und sich als Kantor, Komponist und Lehrer betätigte. Er war nach dem Studium in Münster Kantor und Musikleiter an der Synagoge in Bochum, als er im Gefolge des November-Pogroms 1938 von den Nazis in ein Konzentrationslager verbracht und erst freigelassen wurde, als seine Auswanderung feststand. Er wanderte nach England aus, lernte dort seine Frau Martha, geb. Wolff kennen, und beide kamen im Juni 1941 in New York an, mit zehn Dollar in der Tasche und ohne jemanden zu kennen. Aber noch im selben Jahr wurde Mandell als Kantor an den Har-Zion-Tempel in Philadelphia verpflichtet, wo er ein Vierteljahrhundert blieb. 1942 hatte er die Musikabteilung am Gratz College begründet, wo er bis 1956

unterrichtete, ebenso wie später an der Temple University. Die Eric Mandell Music Collection schenkte er dem Gratz College.

\*\*\*

In Los Angeles ist am 20. Februar der aus Wien stammende Architekt **Rudi Baumfeld** gestorben, ein enger Mitarbeiter seines Landsmanns Victor Gruen, mit dem er 1951 die Firma Victor Gruen Associates gründete, die zahlreiche interessante Bauprojekte an der Westküste durchführte. Baumfeld hat u.a. die South Coast Plaza und die Costa Mesa Centers, das Wohnhaus Wilshire Terrace und das Tishman 615 Building, alle in Los Angeles, erbaut und hat auch zahlreiche der Joseph-Magnin-Modehäuser an der Westküste entworfen. Vielleicht am bekanntesten wurde er durch den Bau der ersten zweistöckigen Mall in Minneapolis, die unter dem Namen Southdale bekannt wurde. Baumfeld, der bereits durch mehrere von ihm geschaffene Bauten in Europa hervorgetreten war, kam 1940 in die Vereinigten Staaten.

\*\*\*

## Frankfurt: Wochen der jüdischen Kultur

Die "Stimmen der Zweiten Generation" — der Kinder der Opfer und Täter der Judenverfolgung — stehen im Mittelpunkt der jüdischen Literatur- und Theaterwochen 1988 in Frankfurt. Mit Theaterstücken, Lesungen und einer Kunstaussstellung wollen die Stadt und die jüdische Gemeinde Frankfurt bis zum 16. März "Zeichen setzen gegen Verdrängung und Verleugnung der Geschichte", erklärte Kulturdezernent Hilmar Hoffmann. Eröffnet wurde die von Rachel Salamander konzipierte Veranstaltungsreihe mit dem Theaterstück *Der Prozess von Schamgorod* von Friedensnobelpreisträger Elie Wiesel. Für die Lesungen konnte unter anderem der Schriftsteller Ralph Giordano gewonnen werden.

## Donauessingen will 1989

Am 1. März verstarb im Alter von 72 Jahren in seiner Manhattaner Wohnung **Henry Simon Bloch**, geschäftsführender Partner der Investment-Bank E.M. Warburg Pincus & Company, der er seit den sechziger Jahren angehörte. Er war ausserdem emeritierter Honorarprofessor an der Columbia University, an deren Law-School und School of International Affairs er von 1953 bis 1986 lehrte. Bloch wurde in Kehl am Rhein geboren, promovierte an der Universität von Nancy und wanderte 1937 in die Vereinigten Staaten ein. Er unterrichtete zunächst Nationalökonomie an der University of Chicago, wurde 1945 ins Bundesfinanzministerium geholt und bereits 1946 stellvertretender Leiter der Finanzabteilung der Vereinten Nationen in New York. Ein Ehrendoktorat wurde ihm von der Université Libre in Brüssel verliehen.

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# Rudy Boschwitz: das ist mein Mann!

Es passiert nicht oft, dass der Schreiber dieser Zeilen, ein registrierter Demokrat, offen für die Wiederwahl eines republikanischen Senators eintritt (dessen Mandat im Herbst abläuft); das letztemal, dass er sich für einen republikanischen Senator aussprach, betraf Jacob Javits, anfangs der siebziger Jahre. Nun aber setzt er sich mit allen seinen bescheidenen Kräften für die Wiederwahl von Rudy Boschwitz ein, der im Jahr 1978 zum erstenmal — als Republikaner in dem bis dahin immer demokratisch ausgerichteten Staat Minnesota — in den Washingtoner Senat geschickt worden war.

## Wissen sie es schon?

**Aus Einsparungsgründen verringerte das Handelsministerium die Zahl der Presseaussendungen von 1200 (1981) auf etwa 850. Die einzige Möglichkeit, Amerikas Bürger von dieser bemerkenswerten Tat in Kenntnis zu setzen, war — richtig geraten — eine Presseaussendung.**

\* \* \*

**Mit gewisser Berechtigung beansprucht Reagans Regierungsmannschaft einen Teil des Jackson ausgesprochenen Lobes für die Befreiung des US-Soldaten Good-**

Nun ist es Zeit, sich für seine Wiederwahl zu entscheiden.

Er hat sich, nunmehr fast sechs Jahre lang, die Hochachtung seiner Senatskollegen, seiner Wähler und auch seiner politischen Gegner erobert. Der Schreiber dieser Zeilen hat ihn praktisch von Anfang an respektiert und geachtet, — aber dann kam, vor ziemlich genau einem Jahr, eine Episode, die mir Tränen der Rührung in die Augen brachte und mich rückhaltlos zu einem hundertprozentigen "Boschwitzianer" machte. Das war am 31. Januar letzten Jahres, als Boschwitz im Plenarsaal des Senats aufstand, um das Wort zu nehmen und vor einem vollen Saal, mit atemlosem Schweigen angehört, eine persönliche Erklärung abgab.

"Gestern vor genau fünfzig Jahren," sagte er, "hat Adolf Hitler in meinem Geburtsland Deutschland die Macht errungen und sehr schnell verkündet, dass er rücksichtslos von ihr Gebrauch machen wolle. Mein Vater war einer der wenigen Juden in Deutschland, die das Gefühl hatten, man müsse das Land, zu dem wir bis dahin gehört hatten, nun verlassen. Unsere Familie wanderte noch im gleichen Jahr aus, zuerst in die Tschechoslowakei, dann geisterten wir von Land zu Land

— bis das rettende amerikanische Visum eintraf. Den meisten unserer Verwandten, Freunde und jüdischen Nachbarn (und in Berlin-Charlottenburg hatten wir viele jüdische Nachbarn) war das Schicksal nicht so hold und wir wissen, welchen Leidensweg sie zurücklegen mussten, bis sie nach Auschwitz kamen..."

Solche Worte sind unter der Kuppel des Capitols selten ausgesprochen worden, und diese an sich simple, warme, menschliche Haltung des Senators verdient vollste Anerkennung. Ich kann noch einiges hinzufügen, was er damals im Plenarsaal nicht gesagt hat; kurz nach seinem Wahlsieg hatte ich ihn in seiner Residenz in einem Vorort von Minneapolis angerufen, und er erzählte mir, dass seine Familie sich seinerzeit auf der Westseite Manhattans niedergelassen hatte und seine Eltern in jenen Tagen treue "Aufbau"-Leser waren — Einzelheiten, die bestimmt nicht in die Senatssitzung gehört hätten.

Mir ist noch ein andere Bemerkung von Rudy Boschwitz bekannt, die er im Gespräch mit einem Journalistenkollegen fallen liess. Die relativ bescheidene Finanzhilfe der USA für Israel, meinte er, sei im Vergleich zu dem, was wir sonst für unsere Sicherheit ausgeben, und in Anbetracht des Nutzens, den die USA aus dieser Finanzhilfe ziehn, eine ausgesprochene "Mezzije", —

## Die Meinung der anderen

Alle ärgerlichen Beschuldigungen der US-Regierung gegen die sogenannte Kulturorganisation UNESCO treffen zu und sind berechtigt. Ohne die Vereinigten Staaten und ihre Millionenbeiträge würde UNESCO längst von der Erde verschwunden sein. Die Sowjetunion, die immer so laut und beharrlich den "amerikanischen Imperialismus" verdammt, ist mit ihren Mitgliedsbeiträgen im Rückstand und weigert sich, die Organisation mit ihren Pflichtzahlungen am Leben erhalten zu helfen. Aber bisher haben die Amerikaner als einzige offen gesagt, was ihnen bei UNESCO und der sie ständig stützenden Mehrheit missfiel; die anderen westlichen Länder, die genau so dachten, haben sich immer hinter den USA versteckt und brauchten nicht selber den Mund aufzumachen. Das dürfte vermutlich fortan anders werden.

*Frankfurter Allgemeine Zeitung*

was dem Reporter erst in ins Englische übersetzt werden musste.

Wie gesagt, es gibt viele Gründe, sich für diesen prächtigen Senator aus Minnesota einzusetzen; die hier aufgezählten Episoden sind nicht die geringsten darunter.

Hans Steinitz



## Minnesota's GOP Sen. Boschwitz Attacks Deficit but Backs Programs Voters Want

By JEFFREY H. BIRNBAUM

Staff Reporter of THE WALL STREET JOURNAL

MANKATO, Minn.—“You’re right on the money about your concern over deficits,” says a balding man in the audience at Mr. Rene’s Banquet Hall here. “But why isn’t the thing being fixed?”

Sen. Rudy Boschwitz draws a deep breath before answering. “Lack of political courage,” he replies. “In an election year, people are afraid to make the votes.”

The admission comes hard for the Minnesota Republican, who has just spent the long day trying to goad his constituents into supporting his plan to trim federal budget deficits. Sen. Boschwitz, a moderate member of the Budget Committee who is campaigning for a second term, has made federal spending the subject of his basic stump speech.

Sen. Boschwitz and a lot of other U.S. lawmakers are keenly interested in what the folks back home say about deficits. Judging from reactions here, voters are plenty mad. At nearly every stop, people want to know why Congress is still throwing the country deeper into debt.

But gripes about overspending share the spotlight with calls for additional aid. While professing their displeasure with deficits, many constituents also expect the senator to vote special assistance for them. Farmers, for example, make clear that they want him squarely behind any dairy subsidies. And while Sen. Boschwitz talks about restraining spending in general, he doesn’t call for any specific sacrifices. Indeed, he boasts to his constituents of backing spending programs that benefit them.

Such ambivalence on the part of voters and legislators is a major obstacle to deficit-reduction efforts in Congress, particularly in an election year.

Clad in his customary plaid shirts, Sen. Boschwitz hands out copies of his deficit-slimming plan, called “The Fair Play Budget,” and uses its detailed charts to explain how the government each year spends itself nearly \$200 billion into the hole. “The budget is perhaps the most important federal document,” he tells each group, “and the one in most disarray.”

His constituents call him “Rudy” with affection and still tease him openly about his folksy role in the television commercials for his home-improvement stores that made him well-known in Minnesota a decade ago. Then, for as long as his audiences will listen, this 53-year-old German-Jewish immigrant, who came to the U.S. at the age of three, discusses the troubled budget and dispenses favors when he can.

At a meeting of corn growers in Bloomington, the senator blames deficits for depressed grain exports. Minutes before, however, he received a standing ovation for endorsing such expensive subsidies as the payment-in-kind program for grains and a new law that pays farmers not to milk their cows. “Agriculture,” he concludes, “has a friend in their senator.”

At a nearby gathering of Realtors, Sen. Boschwitz is pressed to fight deficits, which, he is warned, are sure to increase

interest rates and ruin the housing market. But at the same meeting, he also is urged to revive an expired tax-exemption that provides federally subsidized home mortgages for low- and moderate-income families. “It’s important to Minnesota,” he says.

During an assembly at Waseca Senior High School in southern Minnesota, one student asks the senator why defense spending is so high. But the question is double-edged. Why, she also inquires, doesn’t Congress spend more on education?

Sen. Boschwitz’s budget proposal is designed to solve these conflicts among interests the easy way—by avoiding them. Under his “Fair Play” plan, the senator wouldn’t allow the budget to grow by more than 5% annually. With every program capped, the pain of austerity would be spread equally among the interest groups. Tax revenues, he reasons, will grow at nearly 10% annually, placing a budget within reach in four or five years.

“I have to deal with political realities,” he says. “All parts of the budget have to be affected or you’ll never get the votes.”

Some budget experts are dubious. “Unless you forge a consensus,” says an official at the Office of Management and Budget, “simply picking a number out of the air isn’t going to do it.” And Sen. Boschwitz himself concedes that his plan isn’t likely to be adopted this year. But it is “as good a solution,” he asserts, as any of the other plans being promoted by his congressional colleagues.

Lawmakers like to talk about the dangers of budget deficits, but don’t appear to be moving toward agreement on how to reduce them. President Reagan firmly opposes tax increases, insisting instead on reductions in domestic spending. House Speaker Thomas O’Neill, on the other hand, says his Democratic majority in the House won’t accept more cuts in social programs. So most lawmakers, unwilling to take unpopular stands in an election year, wait on the sidelines and complain about lack of leadership.

Even if the contentious factions were inclined to compromise, they might be bedeviled by the details of a plan. “Powerful constituencies, where parochial interests prevail over national interests, can block almost any measure in Congress,” says Republican Sen. Mark Andrews of North Dakota, who sits with Sen. Boschwitz on the Budget Committee. “The bottom line is that we are unable to spend less today in order to be solvent tomorrow.”

The Senate Budget Committee itself is deeply divided about how to deal with deficits. As much as half of the panel’s 12-member Republican majority firmly opposes raising taxes, a fact that hampers chances of a budget compromise. (Sen. Boschwitz isn’t so doctrinaire: He says he’s willing to consider tax boosts.) In interviews, committee members say that absent an uprising from their constituents, a major deficit-reduction package isn’t likely to pass Congress this year.

Here at the Mankato Area Chamber of Commerce meeting, several businessmen express discomfort with continuing deficits. But there isn’t much evidence of passion in their opinions. “If I didn’t use props,” the senator says of his budget pamphlet, “people would doze off.”

Though well-financed, Sen. Boschwitz is likely to face a tough race this fall. He’s hoping that his campaigning against budget deficits will boost his reelection chances, but he’s also counting on help from his support of a number of programs that add to those deficits.

“In my line of work,” he says, “we have to fight for our constituencies.”



Rudy Boschwitz

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# Who's Who in America®

✓ BOSCHWITZ, RUDY, U.S. senator; b. Berlin, 1930; student Johns Hopkins U., 1947-49; B.S. in Bus., N.Y. U., 1950, LL.B., 1953; m. Ellen; children—Gerry, Ken, Dan, Tom. Admitted to N.Y. State bar, 1954, Wis. bar, 1959; founder, owner, operator Plywood Minnesota, do-it-yourself bldg. materials chain, 1963—; mem. U.S. Senate from Minn., 1979—, Del., Minn. Republican Conv., 1968-78, Republican Nat. Conv., 1972-76; state chmn. Am. Cancer Soc., Minn. Mental Health Assn., Minn. Kidney Found., Lubavitch House, St. Paul. Served with Signal Corps, U.S. Army, 1954-55. Office: Senate Office Bldg Washington DC 20510

Senators and Staffs - CYB I-9

## Rudolph E. Boschwitz

R—Minnesota, Reelection Year: 1984  
Began Service: 1978

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### KEY STAFF AIDES

Name	Position	Legislative Responsibility
Gary Russell	Admin. Asst.	
Tom Mason	Press Secy.	
Dan Meyer	Legis. Director	Environment, State Affairs, Telecommunications
Bob Orr	Legis. Asst.	Budget, Finance, Appropriations
Dan Pearson	Legis. Asst.	Agriculture
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Senate Republican Committee on Committees • Senate Steel Caucus • Northeast-Midwest Senate Coalition, Steering Committee • Senate Export Caucus • Senate Drug Enforcement Caucus • Senate Tourism Caucus



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# Laudationes et Gratiae

Verleihung der Ehrendoktorwürde  
an Thomas Buergenthal  
und André Colomer  
zum 600jährigen Bestehen  
der Juristenfakultät  
der Universität Heidelberg

Herausgegeben  
von der Juristischen Fakultät  
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Heidelberg 1986



## Laudatio für Thomas Buergenthal

*Rudolf Bernhardt*

In knapp bemessener Zeit soll und darf ich etwas über Thomas Buergenthal, den neuen Ehrendoktor der Heidelberger Juristischen Fakultät, sagen. Die Fakultät ist aus guten Gründen sparsam bei der Verleihung der Ehrendoktorwürde. Sie verlangt in ihrer Promotionsordnung für eine Ehrenpromotion nicht nur eine bedeutende Persönlichkeit im allgemeinen, sondern vor allem eine herausragende wissenschaftliche Leistung. Da dem so ist, werde ich meiner Laudatio zuerst die wissenschaftlichen Verdienste umschreiben, um anschließend kurz dem Menschen Tribut zu zollen, der das Werk hervorgebracht hat. Aber natürlich gehören Werk und Mensch, wissenschaftliche Leistung und Persönlichkeit auf das engste zusammen. Das gilt in ganz besonderem Maß für Thomas Buergenthal, dessen wissenschaftlicher Arbeit über den internationalen Menschenrechtsschutz das eigene Erleben menschenverachtender staatlicher Machtausübung vorausging.

Professor Buergenthal ist Völkerrechtswissenschaftler. Seit vielen Jahren bemüht er sich mit großem Erfolg, das heutige Völkerrecht wissenschaftlich zu durchdringen. Vieles aus dem wissenschaftlichen Werk muß unerwähnt bleiben, etwa eine Arbeit zum Genfer Protokoll von 1925 über die Verwendung von Gift-



gas oder der im vorigen Jahr erschienene knapp-präzise Grundriß des Völkerrechts. Ich beschränke mich auf die Schwerpunkte des wissenschaftlichen Werkes.

Wenn man versucht, die Bereiche des Völkerrechts und der Völkerrechtswissenschaft hervorzuheben, die seit dem 2. Weltkrieg eine herausragende Bedeutung erlangt haben, so kommen – neben wenigen anderen Bereichen wie dem internationalen Wirtschaftsrecht, dem Seerecht, dem Weltraumrecht – vor allem zwei Gebiete ins Blickfeld: das Recht der internationalen Organisationen und der internationale Schutz der Menschenrechte. Dies sind die beiden Bereiche, denen sich Thomas Buergenthal mit besonderem Nachdruck und mit besonderem Erfolg zugewandt hat.

Die internationalen Organisationen sind ein zentraler Bestandteil der heutigen internationalen Ordnung, mit ihren Leistungen, mit ihren Schwächen und Fehlschlägen. Von den Vereinten Nationen zur UNESCO, von den regionalen Organisationen in anderen Erdteilen bis zu den europäischen Institutionen gibt es einige Hundert völkerrechtliche Zusammenschlüsse. Einer der universellen Organisationen, der Internationalen Zivilluftfahrtorganisation, hat Thomas Buergenthal Ende der 60er Jahre ein gewichtiges Buch gewidmet, es heißt: *Law-Making in the International Civil Aviation Organization*. Mit großem Verständnis für die allgemeinen Probleme der internationalen Organisationen geht Buergenthal der Struktur der Spezialorganisation nach und untersucht vor allem die in dieser Organisation in begrenztem Umfang anzutreffenden Rechtsetzungsbefugnisse. Das Werk hat zu Recht weite Beachtung gefunden.

In den 60er Jahren finden wir auch schon Aufsätze aus der Feder von Thomas Buergenthal über europäische Organisationen, so zur Anfechtungsklage nach dem Recht der Europäischen Gemeinschaft für Kohle und Stahl. Hinzugekommen sind im



*Rudolf Bernhardt, Frau Buergenthal, Thomas Buergenthal, Gerhard Rau*

Laufe der Jahre zahlreiche Abhandlungen über Organisationen und Institutionen, die sich mit dem Menschenrechtsschutz befassen. Hier vermischen sich die beiden Schwerpunkte von Buergenthals Arbeit: Das Recht der internationalen Organisationen und der völkerrechtliche Menschenrechtsschutz. Nur auf diesen kann ich jetzt noch eingehen.

Ein besserer Schutz der Menschenrechte wird in unserer Zeit auf drei Ebenen angestrebt: im nationalen Verfassungs- und Gesetzesrecht, im Rahmen regionaler Organisationen und drittens auf universeller Ebene. Auf all diesen Ebenen gibt es eine Vielzahl von Rechtsvorschriften. Sie befassen sich mit materiellen Grundrechts-Garantien und mit dem gerichtlichen Rechtsschutz, sie enthalten Regeln über internationale Institutionen



und Verfahren, die den Schutz der Menschenrechte sichern sollen. Und zu vielen Problemen gibt es inzwischen eine eindrucksvolle Zahl von Abhandlungen von Thomas Buergenthal.

In der Buffalo Law Review von 1964 finden wir eine gründliche Untersuchung über die innerstaatliche Stellung der Europäischen Menschenrechts-Konvention, die damals gut 10 Jahre in Kraft war.

Vielleicht wird sich mancher fragen, wieso eine solche Abhandlung über europäisches Recht in der Rechtszeitschrift einer amerikanischen Universität im Nordwesten des Staates New York erschien. Die Erklärung ist einfach und bemerkenswert zugleich: Ein junger, aus Europa stammender Professor war in Buffalo und schrieb dort über die europäische Menschenrechtskonvention. Der Wechselwirkung zwischen den Garantien der Europäischen Konvention und den innerstaatlichen Rechtsordnungen sind mehrere weitere Arbeiten gewidmet. Der amerikanische Rechtswissenschaftler und Rechtslehrer Buergenthal hat sich zu einem der besten Kenner des europäischen Systems entwickelt, wahrlich ein bemerkenswertes Beispiel transnationaler Forschung und transkontinentaler Rechtsvergleichung.

Knapp zwei Jahrzehnte nach der europäischen Konvention wurde 1969 eine amerikanische Menschenrechts-Konvention unterzeichnet, sie trat 1978 in Kraft. Mit demselben Nachdruck, mit dem Buergenthal die europäische Konvention durchdrungen und kommentiert hat, hat er sich auch der amerikanischen Konvention angenommen, nicht selten durch gründliche Vergleiche der Normen diesseits und jenseits des Atlantischen Ozeans. Der Bogen reicht von noch skeptischen Betrachtungen des amerikanischen Systems Anfang der 70er Jahre bis zu Darstellungen über die inzwischen erreichten Fortschritte in jüngster Zeit; dabei kann Thomas Buergenthal nun auf das Wirken

einer Institution eingehen, der er inzwischen selbst angehört. Doch dazu sogleich.

Zunächst ist noch zu erwähnen, daß auch universelle Menschenrechts-Texte von Thomas Buergenthal durchleuchtet und wissenschaftlich kommentiert werden. Das gilt etwa für die Konvention der Vereinten Nationen gegen die Rassendiskriminierung oder die Verpflichtungen der Staaten, die den universellen Pakt über bürgerliche und politische Rechte angenommen haben.

Insgesamt wüßte ich keinen Wissenschaftler zu nennen, der sich im Recht des internationalen Menschenrechtsschutzes sowohl weltweit als auch für Europa und Amerika besser auskennt als Thomas Buergenthal.

So viel zum wissenschaftlichen Werk. Dem Kommentator des Menschenrechts-Schutzes ist vor wenigen Jahren der Menschenrechts-Richter zur Seite getreten. Als 1979 der Inter-Amerikanische Menschenrechts-Gerichtshof ins Leben gerufen wurde, gehörte zu den ersten Richtern auch Thomas Buergenthal. Der amerikanische Staatsbürger konnte nicht von seinem Heimatstaat nominiert werden, da die USA der Konvention nicht beigetreten sind. Aber lateinamerikanische Staaten haben Thomas Buergenthal vorgeschlagen und gewählt, und voriges Jahr wiedergewählt. Und seine Richterkollegen haben ihn Ende des vergangenen Jahres zu ihrem Präsidenten gekürt. So ist der Wissenschaftler nun auch zum richterlichen Gestalter des Menschenrechtsschutzes geworden. In Europa wird die amerikanische Entwicklung mit großer Aufmerksamkeit verfolgt. An dieser Stelle darf ich vielleicht einfügen, daß der Präsident und die übrigen Mitglieder des Europäischen Gerichtshofs für Menschenrechte mich gebeten haben, ihre Glückwünsche zu dieser Ehrenpromotion zu übermitteln.

Der Mensch, der die skizzierte Arbeit geleistet hat und weiter leistet, war als Kind deutscher Eltern im Konzentrationslager, in



Sachsenhausen und Auschwitz, er entkam 1945 dem Inferno als 11jähriger. Er ging nach dem Krieg noch einige Zeit in Deutschland zur Schule, um dann in die Vereinigten Staaten zu emigrieren, als bleibender Freund Deutschlands und seiner deutschen und europäischen Kollegen. Schon 1962 wurde Thomas Buergenthal Professor für Völkerrecht in Buffalo. Es folgten bisher drei weitere Universitäten: Austin in Texas, das Washington College of Law der American University in der amerikanischen Hauptstadt und nun Atlanta in Georgia. Als Buergenthal im vergangenen Jahr nach fünfjähriger Amtszeit als Dekan Washington verließ, hat ihm die Rechtszeitschrift der Universität ein eindrucksvolles Heft gewidmet. Offensichtlich genießt der Hochschullehrer und Dekan denselben Respekt wie der Wissenschaftler und Richter.

In all den Jahren jenseits des Ozeans ist Thomas Buergenthal oft nach Deutschland und speziell nach Heidelberg gekommen. Wir haben ihn bei vielen wissenschaftlichen Kolloquien und Diskussionen getroffen, er gehört unter anderem zum Beraterkreis der in Heidelberg redigierten Enzyklopädie des Völkerrechts. Wenn heute die Juristische Fakultät der Ruprechts-Karls-Universität Thomas Buergenthal die Ehrendoktorwürde verleiht, ist das ein Zeichen der Verbundenheit, der Anerkennung und des Dankes.



die hierdurch angezeigte Problematik in der Praxis vor allem bei der Anfechtung behördlicher Erlaubnisse zutage tritt, erscheint es angebracht, die Ausführungen auf diese Gruppe von Verwaltungsakten zu beschränken. Die Anerkennung des Suspensiveffektes bei vollzugsunfähigen Verwaltungsakten war bereits nach den früher geltenden landesrechtlichen Verwaltungsgerichtsgesetzen Gegenstand einer lebhaften Auseinandersetzung. In diesem Meinungsstreit hat die Rechtsprechung wiederholt versucht, die durch die herkömmliche Definition des Suspensiveffektes ausgelösten Schwierigkeiten mit Hilfe einer extensiven Interpretation dieses Rechtsinstitutes auszuräumen, in dem sie die aufschiebende Wirkung als Hemmung der Rechtswirksamkeit des angefochtenen Verwaltungsaktes behandelte.<sup>8)</sup> Diese Rechtsauffassung, die den Suspensiveffekt als Wirksamkeitshemmung qualifiziert und damit den Eintritt der Rechtsunwirksamkeit des Verwaltungsaktes als Klagewirkung ansieht, hat jedoch schon vor Inkrafttreten der VwGO erheblichen Widerspruch gefunden.<sup>9)</sup> Nach Inkrafttreten der VwGO muß ihr eine Anerkennung gänzlich versagt werden, da sie mit der Systematik und der Grundkonzeption dieses Gesetzes nicht vereinbar ist.

Bei extensiver Interpretation des Suspensiveffektes im Sinne der vorerwähnten Rechtsauffassung führt die dem Widerspruch und der Anfechtungsklage eigene aufschiebende Wirkung im Falle der Anfechtung behördlicher Erlaubnisse zu deren Unwirksamkeit, die automatisch mit der Einlegung des Rechtsbehelfes eintritt und die stets bis zum rechtskräftigen Abschluß des Verwaltungsstreitverfahrens fort dauert. Diese Unwirksamkeit könnte im Verlaufe des Verwaltungsstreitverfahrens nicht behoben werden, da einerseits für die Anordnung der sofortigen Vollziehung infolge der Vollzugsunfähigkeit behördlicher Erlaubnisse kein Raum ist und andererseits die Möglichkeit einer einstweiligen Anordnung gem. § 123 VwGO ausscheidet, da nach der ausdrücklichen Bestimmung des § 123 Abs. 5 VwGO dieses Rechtsinstitut zur Beseitigung der aufschiebenden Wirkung eines Rechtsbehelfes nicht herangezogen werden kann. Eine solche Regelung, die den Suspensiveffekt zu einer der Disposition der Beteiligten und des Gerichts entzogenen Nebenwirkung des Verwaltungsstreitverfahrens erhebt und dadurch den Kläger mit besonderen Rechtsvorteilen im Verwaltungsprozeß ausstattet, ist dem System der VwGO, das auch den vorläufigen Rechtsschutz der ausschließlichen Entscheidungskompetenz des Gerichtes unterstellt, fremd. Hinzu kommt, daß die VwGO die Anordnung der sofortigen Vollzugs im Verwaltungsstreitverfahren als Korrelat zur aufschiebenden Wirkung der Rechtsbehelfe ausgestaltet hat.<sup>10)</sup> Daraus folgt, daß grundsätzlich jeder Verwaltungsakt für sofort vollziehbar erklärt werden kann, für den bei Einlegung eines Rechtsbehelfes die aufschiebende Wirkung eintritt.<sup>11)</sup> Auch dieser aus der Grundkonzeption der VwGO folgende Grundsatz verbietet die Deutung des Suspensiveffektes als eine der richterlichen Entscheidung entzogene Wirksamkeitshemmung, da man hierdurch weder der Bedeutung der beiden Rechtsinstitute noch ihrem durch eine gegenseitige Abhängigkeit und Wechselbezüglichkeit bestimmten Verhältnis zueinander gerecht würde.

Die Frage nach dem Inhalt und der Bedeutung des Suspensiveffektes kann daher nicht durch eine Verlagerung der

Problematik in den Bereich der Rechtswirksamkeit von Verwaltungsakten beantwortet werden. Das Problem des Suspensiveffektes einschl. der Anordnung der sofortigen Vollziehung ist bei behördlichen Erlaubnissen ebenso wie bei sonstigen vollzugsunfähigen Maßnahmen der Verwaltung ausschließlich ein Problem der Vollziehung von Verwaltungsakten, das nur durch eine die moderne Entwicklung und Ausgestaltung des Verwaltungsrechts und Verwaltungsprozeßrechts berücksichtigende Interpretation des Vollzugsbegriffes gelöst werden kann.<sup>12)</sup> Dabei muß davon ausgegangen werden, daß die VwGO bisher nach „Herkunft und Eigenart an der hoheitlichen Eingriffsverwaltung orientiert war“.<sup>13)</sup> Diese Orientierung des Verwaltungsprozeßrechtes an der Eingriffsverwaltung hat auch das Schrifttum und die Rechtsprechung der Verwaltungsgerichte zur Vollziehung von Verwaltungsakten und zum Vollzugsbegriff in den vergangenen Jahren und Jahrzehnten maßgebend beeinflusst. Nachdem jedoch, wie auch die Änderung der verwaltungsgerichtlichen Generalklausel mit aller Deutlichkeit erkennen läßt, in der jüngsten Entwicklung des Verwaltungsrechts und Verwaltungsprozeßrechtes die Eingriffsverwaltung mehr und mehr in den Hintergrund tritt und die Rechtsprechung den ursprünglichen Begriff der Verwaltungsvollstreckung bereits ausgehöhlt hat, indem sie die Einstellung der Gehaltszahlung zur vollziehbaren Wirkung der Entlassung aus dem Beamtenverhältnis erklärte,<sup>14)</sup> kann die Interpretation des Vollzugsbegriffes nicht mehr ausschließlich an dem klassischen Verwaltungszwang ausgerichtet werden. Die Vollziehung der Verwaltungsakte im Sinne des § 80 VwGO beschränkt sich nicht auf die überkommene behördliche und zwangsweise Vollstreckung der ein Gebot oder Verbot enthaltenden Verwaltungsakte, sondern umfaßt darüber hinaus jede Verwirklichung des Inhalts einer behördlichen Maßnahme, ohne Rücksicht darauf, ob diese Verwirklichung durch die Behörde selbst oder aber durch einen Adressaten des Verwaltungsaktes erfolgt oder erfolgen kann.<sup>15)</sup> Damit findet auch die äußerst umstrittene Vollzugsfähigkeit behördlicher Erlaubnisse, die in der Verwirklichung der durch den Erlaubnisbescheid eingeräumten Rechtsposition liegt, eine ebenso einfache wie überzeugende Erklärung, die jederzeit eine dem Gesetz entsprechende Behandlung der Erlaubnisse bei der Gewährung vorläufigen Rechtsschutzes gestattet.

Da dies in gleicher Weise auch für alle anderen „vollzugsunfähigen“ Verwaltungsakte gilt, kann zusammenfassend festgestellt werden, daß diese durch die moderne Entwicklung des Verwaltungsprozeßrechtes gerechtfertigte und durch die Loslösung von einem überkommenen Rechtsdenken gekennzeichnete Ausweitung des verwaltungsprozessualen Vollzugsbegriffes auf alle zur Realisierung eines Verwaltungsaktes geeigneten und erforderlichen Verwirklichungshandlungen dem System und der Grundkonzeption der VwGO in vollem Umfange entspricht, wodurch gleichzeitig die nach der früheren Rechtsauffassung unlösbar erscheinende Problematik des § 80 VwGO eine zufriedenstellende Klärung erfährt und der vielfach erhobene Vorwurf einer widerspruchsvollen und nicht genügend durchdachten Normierung des vorläufigen Rechtsschutzes entkräftet wird.

Regierungsrat DR. HANS JUNG, Neustadt/Weinstr.

8) LVG Hannover, VerwRspr. 2, 14; OVG Lüneburg, OVGE 7, 412ff.; VGH München, VerwRspr. 10, 1018ff.

9) OVG Münster, MDR 54, 502; VGH Kassel, DVBl. 51, 125; VGH Stuttgart, VerwRspr. 10, 1030ff.

10) EYERMANN-FRÖHLER, aaO § 80 Anm. 30d.

11) EYERMANN-FRÖHLER, aaO § 80 Anm. 32.

12) Vgl. QUARITSCH, VerwArch. 60, 226, der die Möglichkeit u. Notwendigkeit einer neuen Interpretation des Vollzugsbegriffes erstmals aufgezeigt hat.

13) KRÜGER, DVBl. 56, 381.

14) BVerwGE 1, 45ff. = NJW 54, 653; OVG Hamburg, NJW 54 488; OVG Münster, MDR 54, 502ff.

15) Ebenso QUARITSCH, aaO S. 227.

## Mitteilung

Professor Dr. EBERHARD F. BRUCK †

Am 13. Oktober 1960 verstarb auf der Insel Reichenau im Alter von über 80 Jahren der emeritierte Professor für römisches und bürgerliches Recht an der Universität Bonn, EBERHARD FRIEDRICH BRUCK. Die Wissenschaft vom Recht der Antike verliert in ihm einen Gelehrten hohen Ranges, dessen Lebens-

werk ihm trotz der Eigenart, die es von gleichzeitigen Strömungen der rechtshistorischen Fachwelt abhob, höchste Anerkennung brachte. Bei Beginn seiner wissenschaftlichen Laufbahn als Privatdozent an der Universität Breslau stand die Interpolationenforschung auf ihrer Höhe. Die Erforschung des klassischen römischen Rechts galt als das wesentlichste Ziel der



Forschung des römischen Rechts. BRUCK erblickte den entscheidenden Wert der Lehre vom antiken Recht in der Erkenntnis des Rechts als eines Bestandteils der allgemeinen Kultur, insbesondere in der durch sie eröffneten Möglichkeit, die Verbindungen zwischen Recht, Religion, Weltanschauung und Politik zu studieren. So wurde ihm Rechtsgeschichte zu einem Teil der allgemeinen Kulturgeschichte. Die Tatsache, daß alles menschliche Selbsterkennen von der Gewißheit des Todes seinen Ausgang nimmt – heute oft zu Unrecht als Entdeckung der Existenzphilosophen ausgegeben – führte ihn dazu, im Erbrecht den entscheidenden Ansatzpunkt für seine Forschung zu erblicken. Seinem großen Lehrer LUDWIG MITTEIS folgend, hat er schon in seiner Habilitationsschrift über „Die Schenkung auf den Todesfall“ (1909) die römische Rechtsgeschichte nur als einen Teil der Geschichte der antiken Rechte angesehen. Sein eigentliches Interesse galt der griechischen und früh-mittelalterlichen Rechtsgeschichte. Ersterer ist sein Hauptwerk „Totenteil und Seelgerät im griechischen Recht“ (1926) gewidmet – eine auf fast unerschöpflichem Material beruhende Untersuchung der griechischen Vorstellungen von Grabbeigaben und ihrer Fortentwicklung zu vergeistigteren Formen bis zu den den Namen des Stifters fortführenden frommen Stiftungen. Letztere hat er in seinem letzten Werk „Kirchenväter und soziales Erbrecht“ (1956)<sup>1)</sup> behandelt, in dem rechtswissenschaftliche, theologische, kulturhistorische und sozialwissenschaftliche Erkenntnisse sich zu einer Einheit verbinden, deren Erringung ihm selbst als das Charakteristische seiner Leistung erschien. Während diese Werke sich in erster Linie an den Forscher wenden, ist die Sammlung seiner zwischen 1939 und 1952 in englischer Sprache geschriebenen Aufsätze, die unter dem Titel „Über römisches Recht im Rahmen der Kulturgeschichte“ 1954 erschien, geeignet, auch dem Nichthistoriker einen überaus fesselnden Einblick in moderne historische Arbeitsmethoden zu geben. Das erste Kapitel dieser

von ERICH GENZMER feinsinnig gewürdigten<sup>2)</sup> Publikation bildete den geistigen Ansatzpunkt für eine von BRUCK geplante umfangreiche Arbeit, die unter dem Titel „Masse und Mythos“ die Gestaltung und Verfälschung des Weltbildes der Massenschildern sollte, die wie schon in der Antike so auch heute einen fast selbstverständlichen Bestandteil des Lebens in der Zivilisation bildet. Der Tod hat ihn an der Durchführung dieses Planes gehindert.

Seine akademische Laufbahn führte BRUCK über Genf, Breslau, Frankfurt/M. zuletzt an die Universität Bonn, wo seiner Wirksamkeit in Deutschland ein für ihn nicht unerwartetes Ende gesetzt wurde. Denn im Kreis vertrauter Freunde pflegte er schon seit 1930 den Zerfall der deutschen Kultur – einschließ-lich der „trahison des clerks“ – zu prophezeien. Auf seinem für ihn als „Nichtarier“, wie er wußte, verlorenen Posten gleichwohl bis zur Stunde der tödlichen Gefahr ausharrend, ist er erst 1939 im Alter von 62 Jahren nach USA ausgewandert, wo er an der Universität Harvard in Cambridge einen neuen Wirkungskreis gefunden hat. Dort war die Anziehungskraft seiner Vorlesungen trotz der völlig anderen Umwelt so stark, daß die akademischen Behörden den Lehrauftrag BRUCKS trotz Überschreitung der Altersgrenze von Jahr zu Jahr verlängerten.

BRUCK ist, sobald ihm dies praktisch möglich war, Jahr für Jahr, wenn auch nur als Gast, nach Bonn zurückgekehrt. Er war dankbar dafür, daß Universität und Fakultät ihm während der Verfolgungsperiode die Treue bewahrt hatten. Der Dekan der Bonner rechtswissenschaftlichen Fakultät sagte am Grabe BRUCKS, er sei selbst ein „fröhlicher Geber“ gewesen, ganz wie es die Lehre der Kirchenväter von der Schenkung verlangte. – Die eigentlichste Natur dieses bis in seine letzten Lebenstage schöpferisch tätigen Mannes, der alles andere als ein weltabgewandter Stubengelehrter war, war unerschöpfliche Fröhlichkeit des Lebens, Empfindens und Mitteilens.

Professor DR. ERNST J. COHN, London und Frankfurt/M.

1) Vgl. die Besprechung, NJW 57, 374.

2) JZ 55, 292.

### Buchbesprechungen

Lehrbuch des Arbeitsrechts, 1. Bd., 4. und 5. Lfg. Von Prof. DR. A. HUECK und Präs. Prof. DR. DR. H. C. NIPPERDEY. – Berlin-Frankfurt a. M., Verlag Franz Vahlen GmbH 1959. XXVIII, 2089 S. Ganzl. DM 154,50.

Die früheren Teile des großen Werkes sind in dieser Zeitschrift jeweils nach Erscheinen besprochen worden. Der 2. Bd. liegt seit längerem fertig vor. Die 4. Lieferung behandelt außer dem Leiharbeitsverhältnis vor allem die Kündigung und den Kündigungsschutz. Diesem Komplex sind 162 S. gewidmet. Bei der Darstellung wird stets der geschichtliche Zusammenhang hergestellt. Der Überblick über die Entwicklung des Kündigungsschutzes umfaßt beispielsweise rd. 7 S. Auf Einzelheiten einzugehen verbietet der Umfang des Gebotenen. Hervorgehoben sei lediglich, daß HUECK betont, daß es ein Verbot der bedingten Kündigung nicht gebe, da das Gesetz sie z. B. in § 643 BGB kenne.

Diese letzte Lfg. umfaßt verschiedene Abschnitte, und zwar den Schluß des „Rechts der Arbeitsverhältnisse“, den von DR. GOETZ HUECK bearbeiteten Abschnitt über die Arbeitsgerichtsbarkeit und den von DR. SCHREGLE bearbeiteten Teil „Das individuelle Arbeitsrecht des Ausländers“ (Anhang I). In einem kurzen Anhang II sind die wichtigsten gesetzlichen Änderungen seit Erscheinen der früheren Lfgn behandelt.

Was die hervorragende Qualität des Werkes anlangt, insbesondere die Ausgewogenheit des Urteils und die umfassende Verarbeitung von Literatur und Rspr., darf auf die früheren Besprechungen verwiesen werden. Besonders zu erwähnen ist folgendes: Die schwierige Darstellung des Gruppenarbeitsverhältnisses und verwandter Rechtsformen, insbesondere des mittelbaren Arbeitsverhältnisses ist besonders gut gelungen (§ 78). Zum Schwerbeschädigtenrecht ist zu sagen, daß bei der Zwangseinstellung wohl die Vereinbarkeit mit Art. 2 Abs. 1 GG zu prüfen wäre; SCHEUNER weist auf die Zweifelhaftheit der Vereinbarkeit mit Art. 12 GG hin (DVBl. 58, 845 [847]). Angebracht wäre auch eine Erörterung der Rechtsmittel gegen den ablehnenden Beschwerdebescheid bezüglich der Zwangseinstellung.

Daß auch in dieser sonst so ausgezeichneten Darstellung die Arbeit der Frau noch nicht organisch eingefügt ist, beweist der Umstand, daß in § 69 „Das Arbeitsverhältnis der Frau“ mit Hausarbeitstag und Mutterschutz dargestellt wird und im 2. Kapitel (§§ 82 ff.) „Der Schutz des männlichen erwachsenen Arbeitnehmers“, im 3. Kapitel (§§ 87 ff.) unter dem Titel „Der Schutz der besonderen Gruppen von Arbeitnehmern“ der

Frauenschutz (§ 87) und der Schutz der jugendlichen Arbeitnehmer (§ 88). Richtiger wäre es wohl gewesen, das grundsätzlich auf den Arbeitnehmer ohne Rücksicht auf das Geschlecht abgestellte Arbeitsrecht als für Mann und Frau geltend darzustellen und bei der Behandlung des Lohnes auf den Gleichberechtigungsgrundsatz, beim Arbeitsschutz die nur für gewisse Gruppen von Arbeitnehmern (jugendliche Arbeitnehmer, Schwerbeschädigte, weibliche Arbeitnehmer, schwangere oder stillende Arbeitnehmerinnen und weibliche Arbeitnehmer mit eigenem Hausstand usw.) geltenden Bestimmungen gesondert darzustellen und jeweils das Problem der Doppelzugehörigkeit zu diesen Gruppen (schwerbeschädigte schwangere Arbeitnehmer, jugendliche Wöchnerinnen) zu behandeln.

Aus dem Abschnitt über die Arbeitsgerichtsbarkeit ist die eingehende Behandlung der Feststellungsklagen und des Problems der Rückverweisung hervorzuheben. Bei der Darstellung der Zuständigkeitsnormen, insbesondere wenn ein unzuständiges Gericht angerufen worden ist, hätte wohl auf das Problem des gesetzlichen Richters (Art. 101 Abs. 1 S. 2 GG) eingegangen werden müssen; das gilt auch für das Problem der (Zurück-)Verweisung.

Der interessierte Leser wird es dankbar begrüßen, daß er sich in der Übersicht über das individuelle Arbeitsrecht des Auslands nicht nur über die gegenwärtige Situation in den USA, Holland und Frankreich, sondern auch über Thailand, (Belgisch-)Kongo und Vietnam orientieren kann und durch reiche Quellenangaben in die Lage versetzt wird, selbst weiter zu forschen.

Verwaltungsgerichtsrätin HILDEGARD KRÜGER, Düsseldorf

Dyckerhoff-Rinke: Das Recht des Immobilienmaklers. 3. neubearb. Aufl. von RA DR. ROBERT DYCKERHOFF unter Mitarbeit von DR. EGON SCHWARZ. – Berlin-Frankfurt a. M., Verlag Franz Vahlen GmbH 1960. IX, 136 S. Ganzl. DM 10.–

Die 2. Aufl. dieses bekannten Büchleins wurde in NJW 55, 495 gewürdigt. Die 3. Aufl. ist unter Beibehaltung der ursprünglichen Anlage und des Charakters durchgesehen, überarbeitet und ergänzt worden. Sie gibt damit einen Überblick über dieses wichtige und mit vielen Streitigkeiten belastete Rechtsgebiet. Insoweit kann auf die Besprechung der 2. Aufl. Bezug genommen werden. Die Beibehaltung der bisherigen bewährten Form hat allerdings auch ihre Nachteile, weil nun alte und neue Entscheidungen, Urteile von oberen und von Instanzgerichten aus-



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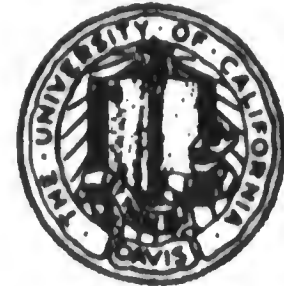
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## PREFACE\*

The 1987-1988 U.C. Davis Law Review Board of Editors dedicates this *Festschrift* to Edgar Bodenheimer on the occasion of his eightieth birthday. Although Professor Bodenheimer retired from full-time teaching in 1975, to many of us he is a familiar and venerable figure, renowned for his treatise on jurisprudence and his work with Justice Jackson at the Nuremberg Trials. For all of the students at King Hall, his co-authored book, *An Introduction to the Anglo-American Legal System*, serves as a first glimpse into our legal institution. There, in his prefatory comments, Professor Bodenheimer counsels us to reflect on the guiding principles and ideals that fortify the profession that we will serve. He suggests that the "perplexing multitude" of philosophies we will discover are not necessarily mutually exclusive. Rather, it is through their synthesis that we develop a personal philosophy to serve us throughout our legal careers.

Professor Bodenheimer's own legal philosophy evolved from the classical natural law tradition. However, in his seminal work, *Jurisprudence: The Philosophy and Method of Law*, Professor Bodenheimer developed his own theory of "integrative justice," which balances the sometimes competing values of societal order with the need for equal justice. His tolerance and integration of others' viewpoints strengthens our belief that law is evolutionary and that the development of a personal, guiding legal philosophy is both possible and practical.

It is appropriate that this volume contain the work of three genera-

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\* The Law Review is grateful to Professor Carol Bruch for her inspiration and to Professor Fritz Juenger for his patience and guidance.



tions of distinguished international scholars from the fields of jurisprudence, comparative law, and the conflict of laws. It is also appropriate that this issue contain contributions from scholars with whom Professor Bodenheimer might disagree, a further tribute to his belief that a dialogue of ideas best promotes a synthesis and evolution of legal principles. This *Festschrift* honors a scholar who has dedicated his life to the quest for "the highest knowledge and truest insight" into the function and purpose of law.

If this *Festschrift* is woven with a common thread, it is that each contribution is forward-looking. This also honors a legal scholar who believes in the future and who counsels future generations to become architects of their own professional ideals. It is for this counsel that the U.C. Davis Law Review joins with our distinguished contributors in honoring Professor Edgar Bodenheimer.

*Kathleen Rogers*  
*Editor-in-Chief*



## TRIBUTES

### The Remarkable Career of a Beloved Friend

*Edward L. Barrett, Jr.\**

I am delighted to have the opportunity to write a few words about Edgar Bodenheimer in this issue of the *U.C. Davis Law Review* celebrating his eightieth birthday. It is a major tribute to Edgar and his work that such a distinguished group of scholars has contributed essays to this volume. But I will not comment on them. My purpose is to say a little about the remarkable career of a beloved friend.

Edgar was born in Berlin in 1908 and by age 24 had received the degree of Juris Doctor (*magna cum laude*) from the University of Heidelberg. In 1933, at age 25, he emigrated to the United States. Four years later he had received an LL.B. degree from the University of Washington. In 1939 he became an American citizen, and the following year was admitted to the bar in Washington and entered government service as an Attorney in the U.S. Department of Labor in Washington, D.C. In 1942 Edgar transferred to the Office of Alien Property Custodian as Principal Attorney in the Division of Patent Administration. During the Nuremberg trials he served as a member of Justice Jackson's Office of Chief Counsel in Germany. He began teaching law at the University of Utah in 1946.

Beyond this interesting youth, however, Edgar's true strength as a scholar emerged early with the publication of a treatise which has distinguished his entire life. In 1940 just as Edgar was beginning law practice, McGraw-Hill published *Jurisprudence*. This remarkable work has been, and still is, a benchmark in the world market. It has been translated into Spanish and Portuguese. In 1962 Harvard Univer-

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\* Professor of Law Emeritus and Founding Dean of the University of California, Davis, King Hall School of Law.



sity Press published a revision of the book under the title, *Jurisprudence: The Philosophy and Method of Law*, and revised editions were published in 1974 and 1981.

In 1988, the year of Edgar's eightieth birthday, *Jurisprudence* is receiving even greater international attention. The Chinese government looked for a jurisprudence treatise for scholars and students in China. It selected Edgar's book, invited him to write a special preface for Chinese readers, and translated it. In December 1987 Edgar was told that the Chinese publisher had 30,000 prepublication orders!

A review of the book is not appropriate here. It is worth noting, however, that the core of the book develops Edgar's thesis that a legal system "must aim at the creation of order as well as the realization of justice."<sup>1</sup> His perception that the law must be concerned with justice and that natural law plays a part in that concern is qualified by his belief that justice "cannot be accomplished without an orderly system of judicial administration which will ensure the equal treatment of equal situations . . . . The required synthesis of the two values (order and justice) may be summed up in the statement that law aims at the creation of a *just societal order*."<sup>2</sup>

Let us return to Edgar's academic life. He was a faculty member at Utah for twenty years, teaching courses relating to his wide interests: introduction to law, legal history, constitutional law, equity, jurisprudence, and international law. But research and writing were his primary interests. He revised the *Jurisprudence* book and published many notable articles. In recognition of his scholarly interest he received three Fulbright grants to teach abroad, a research grant from the Rockefeller Foundation, and a research grant from the National Endowment for the Humanities.

I first met Edgar during his Utah years. In 1965, when I was busily recruiting a faculty for the first class in the new law school at Davis, I was delighted to hear that Edgar might be persuaded to leave Utah. He came, contributing his wisdom to faculty and students alike. His research and writing continued at a faster pace. He published *Treatise on Justice* in 1967, *Power, Law, and Society* in 1973, and *Philosophy of Responsibility* in 1980. He was invited to speak around the world and published more than thirty articles and book reviews while at Davis. He retired from active teaching in 1975.

Since his retirement, Edgar's teaching and scholarly activities have

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<sup>1</sup> E. BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 246 (rev. ed. 1974).

<sup>2</sup> *Id.* at 247 (emphasis in original).



increased. He has taught the Introduction to Law course at Davis many times, and as a result he co-authored a teaching book, *An Introduction to the Anglo-American Legal System* in 1980. A second edition will be published this year. In recent years he has also taught Introduction to Law and the Legal Process in the U.C. Davis Graduate School of Management.

More impressive is the continued international interest in Edgar and his jurisprudence since his retirement. From Budapest to Sydney to Salzberg to Caracas, Edgar's scholarship remains in high demand. His most recent writings continue to evoke thoughtful and provocative exchanges among legal philosophers.

I look with awe upon Edgar's professional life: spanning the decades and the world. I look upon Edgar as friend and colleague with constant pleasure. With all of his international recognition as a scholar, he has remained a modest human being enjoyed by all who come in contact with him. Yet his continued influence on students is reflected by their call to hear his famous lecture on the Nuremberg trials as seen from his perspective as a member of Justice Jackson's staff.

And finally, it pleases me to report that there are some signs that Edgar is beginning to relax. In a recent note to me he indicated that he would no longer teach and would spend the remaining years of his life chiefly on research and writing. Also, I am informed, he recently purchased a condominium in Hawaii!



## Edgar Bodenheimer and the Search for the Good

John J. Flynn\*

In his *Allegory of the Cave* Plato characterized the "world of sight" as the "prison house" or the "cave" and the "journey upwards to be the ascent of the soul into the intellectual world." Plato continued:

[M]y opinion is that in the world of knowledge the idea of good appears last of all, and is seen only with an effort; and when seen, is also inferred to be the universal author of all things beautiful and right, parent of light and of the lord of light in this visible world, and the immediate source of reason and truth in the intellectual; and that this is the power upon which he who would act rationally either in public or private life must have his eye fixed.<sup>1</sup>

Edgar Bodenheimer began his journey "upward" to the "idea of the good" in his native Germany where he graduated from the gymnasium in 1926. He has made this journey with great personal effort. He studied civil law and political science at the universities of Geneva, Munich, Heidelberg, and Berlin. Thereafter, he served an apprenticeship assisting judges and the public prosecutor in civil and criminal courts. He received his Juris Doctor from Heidelberg in 1932 where his thesis on the principle of equality in corporate law was published.

Edgar's steady progress into Germany's legal profession came to an abrupt and frightening end with the political ascent of the Nazis. In 1933 the Nazi government dismissed Edgar from state service because of his "non-Aryan" origin and after a brief stint as a history teacher in a private school, he immigrated to the United States. Witnessing first hand the rise of the Nazis, losing his position because of their racist policies, and losing his native land to avoid even greater penalties has had a searing and lasting effect on Edgar and his views of the role of law in a civilized society. Later on in life, in reaction to the narrow and rigid definition of law put forth by legal positivists, he observed:

The large majority of men have always experienced law as a positive value, as an institution which is necessary and beneficial for the living

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\* Hugh B. Brown Professor of Law, College of Law, The University of Utah.

<sup>1</sup> PLATO, THE REPUBLIC ch. XXV.



together of human beings in society. As the history of revolution, social struggle, and law evasion demonstrates, it has not been the preponderant opinion of mankind that the inviolability characteristic of true law must necessarily extend to sovereign commands experienced by large groups as outrageous and oppressive. It is revealing to point out in this connection that refugees from totalitarian countries always complain about the "lawlessness" reigning in these countries, although a larger part of this "lawlessness" is usually sanctioned by articulated commands of the government having all of the outer trappings of legal rules. What is experienced as lawlessness by these people is the fact that certain minimum conditions of life, liberty, and security were denied to them, and their worth as human beings was accorded no respect.<sup>2</sup>

Experiencing the denial of one's worth as a human being drove Edgar from his native land. And that experience has directed his teaching and scholarship toward the exploration of the sources of moral content in law and claims for the existence of a system of natural law.<sup>3</sup> From personal experience Edgar knew that every legal decision is unavoidably a moral decision and that any civilized society is required to recognize every individual as a human being, entitled to the respect of basic and inherent human rights.

Edgar arrived in New York City in 1933 where he worked in a law office for two years while taking night courses at N.Y.U. law school. In 1935 he met and married Brigitte M. Levy, the daughter of Professor Ernst Levy of the University of Heidelberg, a leading and famous scholar of Roman and civil Law. Edgar's marriage to Brigitte was of great good fortune as all who knew her will attest. She was a beautiful and memorable human being and the mother of their three outstanding children. She was a wise, gentle, and sensitive human being who became an outstanding professor and scholar of law in her own right, first at the University of Utah and then at the University of California at Davis. Her untimely death was a great loss for Edgar and their children and for all of us who knew her well. It was also a great loss for a generation of students who would not have the opportunity to know this friendly, concerned, and devoted teacher.

Edgar and Brigitte studied law at the University of Washington where Brigitte's father had continued his distinguished career. There Edgar received an LL.B. in 1937 and a B.A. degree in Law Librarianship in 1939. During this time Edgar began work on a basic textbook

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<sup>2</sup> Bodenheimer, *Reflections on the Rule of Law*, 8 UTAH L. REV. 1, 10 (1962).

<sup>3</sup> See Bodenheimer, *The Case Against Natural Law Reassessed*, 17 STAN. L. REV. 39 (1964) (noting that natural law philosophy was considered eradicated in pre-World War II Germany and that a legal scholar with sympathy for the natural law view was simply not considered a respectable member of the academic community).



in the field of Jurisprudence. It was to be a devotion and a record of his journey "upward" to the good. It is a work for which he has become justly famous both in this country and many other parts of the world, particularly in South America where his book was translated into Spanish and published in Mexico City in 1942. I expect that the next part of the world where Edgar's book will have a substantial impact will be China, for the latest edition has recently been translated into Chinese. Lawyers visiting China in the future may well find law students there carrying about "Bodenheimer on Jurisprudence" rather than Mao's little red book.

I first encountered *Jurisprudence* in the late 1950s while writing a paper on post-World War II jurisprudence and the rebirth of natural law philosophy. While I was a graduate student at the University of Michigan, the 1962 edition was published. I quickly purchased a copy so that I could cite "Bodenheimer on Jurisprudence" in my legal process class taught by Edgar's former colleagues at the University of Utah, Sandy Kadish and Spence Kimball — then on the University of Michigan faculty. Anyone familiar with *Jurisprudence* and its subsequent editions cannot help but be impressed by the depth of its scholarship, embracing all of the great writers of western philosophy from the classical to the modern. In a single volume, Edgar managed to explore masterfully the central issues of jurisprudence, adding an insightful explication of the nature of legal reasoning.

After his sojourn in Seattle, Edgar went on to Washington, D.C. to take a position in the Solicitor's Office of the Department of Labor. And in fulfillment of the old adage about the wheel coming full circle, Edgar transferred to the Office of Alien Property Custodian in 1942, there to track down well-hidden German property interests in this country. In 1945 he was assigned to Mr. Justice Jackson's Office of Chief Counsel for the Prosecution of Axis Criminality and assisted in the legal preparation of the Nuremberg war crimes trials — an historic application of natural law principles Edgar was to spend his academic career both advocating and defending. The mill of justice may grind slowly, but it grinds well.

Edgar had an abiding interest in continuing his scholarship and in teaching in a university. University of Utah's dean, William Leary, had a legendary talent for finding outstanding law professors and luring them to Utah. Dean Leary came to know of Edgar's interest and managed to lure him back to the West in 1946 for the princely sum of \$4,438 per annum. Subsequently, Dean Leary brought Ron Degnan, Dan Dykstra, Fred Emery, Sanford Kadish, Spence Kimball, Monrad Paulsen, and Bob Swenson to Utah.



From 1946 to 1966 Edgar and Brigitte remained at Utah: raising their children, hiking the mountains and canyons of the state, following the birth and growth of the Utah Symphony, and teaching a generation of law students. They became a unique part of the academic and cultural community; a bridge to the classical education of Europe, the intellectual life of the world, and the cultural life of fine music and great books.

I must confess that I did not know much about Utah, its University, or its College of Law when I was invited to join the faculty in 1963, except that it was west of Denver and that "Bodenheimer on Jurisprudence" taught there. I still remember my first meeting with Professor Bodenheimer. He invited me to take a walk across campus to the new law building under construction. A walk with Edgar meant he walked and his companion jogged. We talked of many things, and I had the impression that my senior colleague was a somewhat shy and gentle man deeply immersed in his teaching and research. In between pointing out buildings of interest, he mentioned that he was reading one book and then another. It was apparent that his reading was wide and diverse. Over those first few months, my impression of Edgar as a true scholar and intellectual broadened and deepened as I watched him work and read in his disciplined way. It was quite intimidating to be around so well disciplined and widely read a scholar. He would disappear into his office for hours on end, and did not appreciate casual interruptions. While always friendly and helpful to colleagues and students, one was careful about disturbing Edgar as he steadily pursued his intellectual quest. Then one day, I think I saw into Edgar's soul. It was the day President Kennedy was assassinated.

I recall hearing the news on my car radio as I was leaving the law building at Utah to head home for lunch. I went back into the building and stood in a state of disbelief in the hall talking with a member of the staff and trying to make sense of it all. I recall seeing Edgar quickly walking down the hall, his face drained of all color. I rushed over to him and we clasped hands without saying anything. For an instant, I fully appreciated what his life must have been like back in the early 1930s because I think I saw it all flash before his eyes once again in 1963. Edgar was deeply upset and unable to speak. I thought he had visions that a *coup d'etat* was underway and he might find himself stateless once again or, even worse, being treated as less than a human being once again. It was only for an instant, but I will never forget what was written on Edgar's face in that instant. I saw the lifetime of fear, anger, and torment over what had happened to him as young man and what had happened to his friends, family, and others who had not



been able to escape. I understood then why jurisprudence, and a belief in the necessity for a moral content to law if society is to be civilized, had become not only this man's life-long academic interest, but his central intellectual conviction and passion as well.

Thereafter, our friendship ripened into a deep and personal one. It is not often someone is allowed to see into another's soul. My wife Sheila and I came to know the Bodenheimer family as a close and loving one. By then their children were away at college and Edgar and Brigitte were enduring with quiet pride the necessity for buying two plane tickets to Boston for their daughter Rosemary — one for Rosemary and one for her cello — and the other dilemmas of parents who send their children away for the best education they can provide. Reports of the academic progress of their sons, Tom and Peter, were quietly shared among the faculty with a mutual sense of pride in their successes, since the Bodenheimer family was our family and we were a part of theirs. It was more than the product of a small and close faculty who enjoyed each other's company and shared each other's common commitment to providing the best legal education we could provide. It was and is a deep and genuine admiration and affection for a close and devoted family and for someone we all recognized as unique — a decent and gentle man who has devoted his life to the search for the good.

After Edgar and Brigitte left Utah to help establish the outstanding law school of the University of California at Davis, a void was left at our law school. We had lost two outstanding teachers and scholars and a bridge to the broader world of ideas and the pre-World War II culture of Europe. It was a void we knew we could not fill, except to take pride in their further contributions to legal education and legal scholarship. We continued to claim them as ours even though they now carried on their work further west from the place of their origins and the place where they had raised their family and perfected their careers as teachers and scholars. Every now and then we would hear of a new article or learn that Tom was practicing medicine in San Francisco or Peter was teaching at Santa Cruz. We learned of Brigitte's illness and death with great sadness and sympathy for Edgar and their children because we knew how central she was to their lives. Our sense of loss was deepened because of how much Brigitte had meant to us in Utah.

Later we learned that Edgar had met and married a gracious and lovely woman by the same name, a companion to carry on his journey in search for the good. Last year Edgar and his new bride Brigitte visited Utah where we had a wonderful reunion with Edgar and opportunity to meet Brigitte at the home of Jeff and Rita Fordham. It was apparent that the years had treated Edgar kindly and that once



again he had the remarkable good fortune to find a wise, gentle, and wonderful companion named Brigitte. They were off to hike about the wonders of southern Utah, a trip on which I am sure Edgar walked and Brigitte jogged.

This occasion honors this man and his life in scholarship and teaching. It is appropriate that we do so, for he is a leading scholar of jurisprudence and a memorable teacher for a generation of students. Those of us who have been fortunate to know him personally honor him and his family for what they have meant and mean to us on another basis as well. We do so on a personal level, for Edgar has meant far more to us than a colleague and outstanding scholar. He is a friend and an example to us. I suspect that he found the "good" early in his life. He discovered the importance of law to a civilized society and the importance of moral values to law when he had to leave his native country because it failed to accord to him his worth as a human being. He has spent his life teaching the rest of us the necessity that we accord each person their worth as a human being, both through our laws and through our personal relationships with each other. It is the central message of "Bodenheimer on Jurisprudence," a lesson those of us who know him and those who study his writings cannot forget. And we who know him personally know that he and his family have lived the life he has taught in their dealings with each other and all their friends, to accord to each their basic worth as human beings. It is only appropriate that we who have benefitted from the friendship and example of Edgar and his family take this occasion to proclaim publicly the love and affection we have for them and our admiration for living the moral lesson he has taught so well in his search for the good.



since the Illinois Supreme Court decided the landmark case of *Gray v. American Radiator & Standard Sanitary Corp.*,<sup>37</sup> national manufacturers, for instance, have been exposed to products liability suits outside their home states.<sup>38</sup> However, as *Burger King Corp. v. Rudzewicz*<sup>39</sup> shows, even nickel-and-dime franchisees may have to defend suits far away at a powerful franchisor's headquarters.

In addition to jurisdictional principles, recognition rules may prompt forum shopping. When the United States Supreme Court decided that sister-state divorces are entitled to full faith and credit so long as one of the parties was domiciled in the forum state,<sup>40</sup> and that the adjudication of domicile is *res judicata* if both parties are before the divorce court,<sup>41</sup> it opened the doors to those seeking to evade overly restrictive home-state divorce laws. Haven jurisdictions such as Nevada were happy to accommodate the desires of those who wish to divorce. Conversely, the Court's failure to accord binding effect to child custody determinations<sup>42</sup> prompted spousal kidnapping for the purpose of relitigating home-state decrees.<sup>43</sup> It took valiant efforts<sup>44</sup> to pass legislation on the state and federal levels that curtails the outrageous practice of resorting to child abduction as a forum-shopping tool.<sup>45</sup>

Choice-of-law doctrines present yet another incentive to the forum shopper. The traditional jurisdiction selection rules were designed, in Savigny's words, to assure that the applicable law is not determined by the "unilateral discretion of one party."<sup>46</sup> In

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37. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).  
 38. Concerning jurisdiction in products liability cases, see generally R. LEFLAR, L. McDOUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* § 37, at 111-18 (4th ed. 1986) [hereinafter R. LEFLAR]. The extent to which the confused and confusing opinions in *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987), will narrow the jurisdictional opportunities of products liability plaintiffs remains to be seen.  
 39. 471 U.S. 462 (1985).  
 40. *Williams v. North Carolina*, 317 U.S. 287 (1942).  
 41. *Coe v. Coe*, 334 U.S. 378 (1948); *Davis v. Davis*, 305 U.S. 32 (1938).  
 42. See *May v. Anderson*, 345 U.S. 528 (1953); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).  
 43. See Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 COLO. L. REV. 495 (1975).  
 44. Most of the credit is due to the late Brigitte Bodenheimer. See Bruch, *Brigitte M. Bodenheimer, September 27, 1912-January 7, 1981*, 14 FAMILY L.Q. vii-viii (1981); Katz, *Brigitte Bodenheimer—Protector of the Children*, 16 U.C. DAVIS L. REV. vii (1982).  
 45. See R. LEFLAR, *supra* note 38, §§ 243-244, at 673-85.  
 46. 8 F. VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 129 (1849) (trans. by author)



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EDGAR BODENHEIMER



## Edgar Bodenheimer 1908-1991

The life and career of a gentle and kind man ended in Davis on May 30, 1991, when Edgar Bodenheimer died following a brief illness. Born eighty-three years earlier in a Germany that proved neither gentle nor kind, Edgar devoted his professional life to understanding the place of law in the scheme of things. What was the role of law in people's individual lives and in the life of society? How was one to understand the many unrighteous things done in the name of the law, and how was one to gauge whether a proposed law, or a legal system, was fair and just? For Edgar, these were burning questions—a search for guidance in addressing the major issues of our times.

Beneath his quiet demeanor, his dignity and his serious view of life, lay Edgar's delightful sense of humor, displayed not infrequently by a casual remark and a twinkling eye. An eminent jurisprudential scholar, he had a tolerance for ideas and conclusions he did not share and a willingness to re-examine his own. But he also had the intellectual and moral courage, when others pursued more popular and less normative views of legal philosophy, to stand by the basic truths as he saw them. While he was one of the few brave souls of his day to embrace the idea of natural law, he defied classification as either conservative or traditional. His exquisitely modern mind was fascinated with scientific developments in fields as diverse as physics, biology and psychology, because these held clues for understanding our individual and collective behavior and goals.

Born in Berlin on March 4, 1908, the son of Siegmund and Rosi Bodenheimer, Edgar received his European education in law and political science at the universities of Geneva, Munich, Heidelberg and Berlin. But in 1933, the year in which he earned his J.U.D. from Heidelberg and published his thesis, National Socialism cost Edgar his legal apprenticeship and prompted his emigration to the United States.

While working for a New York law firm and taking night courses at N.Y.U., he spotted an acquaintance from Heidelberg in the Columbia University law library. Brigitte Levy, who had also emigrated, was studying law at Columbia. The couple married in 1935 and moved to Seattle, where Brigitte, who was later to become a distinguished member of the Utah and Davis law faculties in her



own right, received a law degree in 1936. Edgar completed his American law degree in 1937, followed two years later by a B.A. in law librarianship. He also wrote the first edition of his most famous work, originally published in 1940 as *Jurisprudence*.

Naturalized in 1939, Edgar became a member of the bar. As an attorney in Washington, D.C., he worked first for the U.S. Department of Labor, then served as Principal Attorney in the Division of Patent Administration of the Office of Alien Property Custodian. During the Nuremberg War Crimes Trials in 1945 he helped prepare the prosecution's brief as a member of Justice Jackson's Office of the Chief Counsel. The jurisprudential issues he confronted there later became the topic of lectures that fascinated several generations of law students.

In 1946 Edgar joined the law faculty of the University of Utah and exactly twenty years later he became a member of Davis' founding law faculty. In Davis, as in Salt Lake, the Bodenheimers became—in a Utah colleague's words—"a bridge to the classical education of Europe, the intellectual life of the world, and the cultural life of fine music and great books." They also hiked, skied, and walked, doubtlessly contributing to the fine physical health Edgar always enjoyed.

A devoted and memorable teacher, over the years Edgar taught many subjects: jurisprudence, international law, legal history, unfair trade practices, the conflict of laws, and equity. He also devised an introduction to law course, later co-authoring the published text. Much in demand, he visited at Heidelberg, Freiburg, Texas, Southern California and Princeton. Even after assuming emeritus status in 1975, he taught at the Law School and the Graduate School of Management at Davis.

His true love and the basis for his fame, however, was jurisprudence, a subject to which he dedicated four books and most of his numerous articles. His enduring work, *Jurisprudence*, later appeared in two extensively revised editions as *Jurisprudence: The Philosophy and Method of the Law*, and was also published in three foreign languages. Its most recent translation was in 1987, when the Chinese government chose it as a text for students and scholars in that country. His other jurisprudential books are *Treatise on Justice* (1967), *Power, Law and Society* (1973), and *Philosophy of Responsibility* (1980). Quite literally, Edgar never stopped writing, having published an important article on Hegel just weeks before his death.

An Honorary Member of Phi Kappa Phi and the Order of the Coif, Edgar served as a Vice-President of the American Society of Political and Legal Philosophy, as a Director of the American Society of Comparative Law, and as a member of the Board of Editors of



the American Journal of Comparative Law. He was a good citizen of our law school and the University, serving both in numerous capacities.

Edgar was blessed with two happy marriages. There were three children of his marriage to Brigitte M. (Levy) Bodenheimer: Peter, a physics professor at U.C. Santa Cruz, Thomas, a San Francisco physician, and Rosemarie, an English professor at Boston College. Brigitte M. Bodenheimer, whose life is warmly recalled in the 1985 *In Memoriam* volume, predeceased him in 1981. In 1982, Edgar married his second wife, the gracious Brigitte Hirschfeld Bodenheimer, also a native of Berlin. She survives him, as do his children and three grandchildren.

Unassuming despite his eminence, Edgar was equally beloved by his family, his students and his colleagues. "The living embodiment of the scholarly ideal," as a colleague called him, Edgar's life-long commitment, in word and deed, was to law in a civilized society. He will be missed.

CAROL BRUCH  
DANIEL DYKSTRA  
FRIEDRICH JUENGER  
JOHN OAKLEY



Herbert A. Strauss <sup>(ed.)</sup> : Jewish immigrants  
of the Nazi Period in the U.S.A.

- New York : K.G. Saur

1978

Vol. 1



Hopkins Univ. 1938-41, financed by \*Refugee Economic Corp. with grants of \$25,000 in 1938 and 1941. Cooperated with \*Henry Field on \*"M" [Migration] Project 1943-45.

*Papers.* D.A.B., suppl. 4, pp. 98-100.

*Dictionary of Scientific Biography*, vol. II, pp. 373-374.

Geoffrey J. Martin, *The Life and Thought of Isaiah Bowman*. Publication expected 1979.

*Records.* Johns Hopkins Univ. Library, Dept. of Special Collections: papers, 6 file drawers (unrestricted) and ca. 35 ft (restricted), include scattered correspondence on refugees and migration problems with Roosevelt and Charles J. Liebman, president of the Refugee Economic Corp. NUCMC MS 63-217.

Johns Hopkins Univ. Archives: records of the Walter Hines Page School include 14 items, 1938-39 and 1941, on the grants received from the Refugee Economic Corp. These items were originally part of the records of the Office of the President of Johns Hopkins Univ.

#### 394. BRANDEIS, LOUIS DEMBITZ, 1856-1941

Jurist and social reformer. Associate Justice of the U.S. Supreme Court 1916-39. Zionist leader, especially during World War I. By the 1930s, Brandeis had become the respected elder statesman of all Jewish groups in the U.S.A.

*Literature.* D.A.B., suppl. 3, pp. 93-100.

Alpheus Thomas Mason, *Brandeis: A Free Man's Life*. New York: Viking Press, 1946.

Ezekial Rabinowitz, *Justice Louis D. Brandeis: The Zionist Chapter of His Life*. New York: Philosophical Library, 1966.

*Papers.* Univ. of Louisville, Law Library: papers, 1870-1938, 140 ft (ca. 25,000 items). Those papers which relate to Brandeis' Jewish activities are on microfilm (31 reels) at Zionist Archives and Library, American Jewish Archives, Brandeis Univ. Library, and Central Zionist Archives, Israel. NUCMC MS 61-945 (Univ. of Louisville), 68-1137 (American Jewish Archives). Finding aid: unpublished index.

#### 395. BRESLAUER, WALTER, 1890-

German-Jewish lawyer and communal leader, emigrated to England in 1936. *Verwaltungsdirektor* (chief executive), Berlin Jewish Community 1931-36.

Cofounder and executive board member, Association of Jewish Refugees (AJR), Great Britain. Vice-president, \*Council of Jews from Germany. Leading expert on legal aspects of *Wiedergutmachungs*-laws for damages suffered by victims of Nazi persecution.

*Literature.* *International Biographical Dictionary*, vol. I.

*Papers.* Leo Baeck Institute Archives: collection of Breslauer's publications, 1938-73, includes articles concerning emigration and *Wiedergutmachung* in

*AJR Information* (London) and other periodicals. Finding aid: unpublished inventory (7 pp.).

#### 396. BRIN, FANNY (FLIGELMAN), 1884-1961

Civic leader in Minneapolis, active in social welfare, pacifist, and women's causes. National president, \*National Council of Jewish Women 1932-38.

Active participant in the Minneapolis Committee for Refugee Service (whose work was continued by the \*Jewish Family and Children's Service, Minneapolis).

*Literature.* Barbara Stuhler, "Fanny Brin, Woman of Peace." In *Women of Minnesota: Selected Biographical Essays*, Barbara Stuhler and Gretchen Kreuter, eds. St. Paul: Minnesota Historical Society, 1977, pp. 284-300.

*Papers.* Minnesota Historical Society, Div. of Archives and Manuscripts: papers, 1896-1958, 10 ft (ca. 12,500 items), include materials concerning Brin's efforts on behalf of the National Council of Jewish Women, aid to refugees from Germany, German (\*European) Jewish Children's Aid, and cooperation with other Jewish organizations concerned with immigration and resettlement. Also one box of "Refugee Letters," consisting of correspondence, 1933-51, with and about refugees; and correspondence, 1933-46, on the work of a committee appointed in 1933 by the president of the Univ. of Minnesota, Lotus D. Coffman, to aid displaced German scholars. NUCMC MS 63-232. Finding aid: unpublished inventory.

#### 397. BROWN, DAVID ABRAHAM, 1875-1958

Business executive and Jewish communal leader, Detroit and New York.

Active in various relief programs. Member of executive committee, \*American Jewish Joint Distribution Committee 1915-36.

*Literature.* *Who's Who in World Jewry*, 1955, p. 110.

*Papers.* American Jewish Archives: papers, 1891-1959, 1.3 ft (ca. 1200 items), include material on Committee for the Assistance of European Jewish Refugees in \*Shanghai, \*National Coordinating Committee, and \*Non-Sectarian Anti-Nazi League, 1934. NUCMC MS 68-11. Finding aid: unpublished inventory (12 pp.).

#### 398. BRUNSWICK, MARK, 1902-1971

Composer; professor of music and department chairman, The City College, New York.

Responsible for the placement of hundreds of European musicians and university teachers in the U.S.A. Chairman, National Committee for Refugee Musicians (former name: Placement Committee for German and Austrian Musicians), affiliated with the \*National Refugee Service. Author of "Refugee Musicians in America," *Saturday Review*, Jan. 26, 1946, pp. 9, 50-51.



**Literature.** Genizi, "American Non-Sectarian," pp. 202-204.

**Papers.** New York, City College Library, Dept. of Archives and Special Collections: photocopies of mimeographed materials, 1938-45, 50 pages, consist mostly of reports on the Committee's activities. The original materials are with Brunswick's widow, Mrs. Natasha Artin-Brunswick, Princeton, NJ.

#### 399. BUTLER, NICHOLAS MURRAY, 1862-1947

President, Columbia Univ. 1902-45. President, \*Carnegie Endowment for International Peace 1925-45. Cowinner of Nobel Peace Prize 1931.

Because of his positions, Butler received numerous inquiries relating to refugees. Corresponded with the political refugees Hubertus Prinz zu Loewenstein and Richard N. Coudenhove-Kalergi, and with \*Dorothy Thompson and \*Leslie C. Dunn. Chairman, American Committee for Relief in Czechoslovakia, ca. 1939 (the Committee raised funds for relief and forwarded the money to the Czechoslovakian Red Cross and other local organizations).

**Literature.** *D.A.B.*, suppl. 4, pp. 133-138.

Albert Marrin, *Nicholas Murray Butler*. Boston: Twayne, 1976.

**Papers.** Columbia Univ., Rare Book and Manuscript Library: papers, ca. 1900-1947, ca. 200 ft, include correspondence and other material dealing with refugees, immigration, and related topics. *NUCMC MS 61-2922*. Finding aid: unpublished index.

Many of the inquiries which Butler received asking for help for refugee scholars were forwarded to the Carnegie Endowment, in whose records they are found.

#### 400. CELLER, EMANUEL, 1888-

Lawyer; U.S. Representative from Brooklyn, NY 1923-72; chairman, \*House Judiciary Committee 1948-72.

Advocate of liberalized immigration legislation since 1923 and a leading critic of the restrictive immigration practices of the \*U.S. Dept. of State during the \*Roosevelt era. Proposed a liberalized immigration bill following the Austrian Anschluss of March 12, 1938; urged rescue efforts in Congress for Nazi victims in occupied Europe during World War II, and supported U.S. policies favoring the establishment of a Jewish state in Palestine since the 1940s.

**Literature.** Emanuel Celler, *You Never Leave Brooklyn: The Autobiography of Emanuel Celler*. New York: J. Day Co., 1952.

**Papers.** Library of Congress, Manuscript Div.: papers, 1924-72, ca. 183,000 items, include correspondence, notes, clippings, memoranda, speeches, printed matter, and materials concerning refugees, immigration, Jewish affairs, and Israel. *NUCMC MS 70-942*. Finding aid: unpublished inventory.

#### 401. CHAMBERLAIN, JOSEPH PERKINS, 1873-1951

Author and diplomat. Professor of public law, Columbia University 1923-51. Chairman, \*Survey Associates 1943-51. Special Assistant to Secretary of the Treasury on the problem of blocked funds of nationals of enemy countries 1941. Member, Advisory Committee on Voluntary Foreign Aid, \*U.S. Dept. of State 1949-51.

Chairman, \*National Coordinating Committee for Aid to Refugees and Emigrants Coming from Germany (NCC) 1934-39. Chairman of the board, \*National Refugee Service (NRS—successor to NCC) 1939-46. Honorary chairman of the board, \*United Service for New Americans (USNA—successor to NRS) 1946-51. Member of governing board, \*League of Nations High Commission for Refugees (Jewish and Other) Coming from Germany 1933-35. Member, \*U.S. President's Advisory Committee on Political Refugees (PACPR). Chairman, International Migration Service, American Branch (\*Travelers Aid-International Social Service of America). Founder 1943, chairman 1943-50, honorary chairman 1951, \*American Council of Voluntary Agencies for Foreign Service.

**Literature.** *D.A.B.*, suppl. 5, pp. 107-108.

**Papers.** YIVO Institute for Jewish Research: papers, 1933-51, ca. 1.7 ft, also on microfilm (4 reels), consist of the files of the PACPR, 1938-43, and other materials on Chamberlain's activities on behalf of refugees. Include correspondence with individuals and organizations working to aid refugees, and correspondence with and about individual refugees who sought Chamberlain's assistance in finding jobs or obtaining funds.

Some materials on Chamberlain's activities in aid to refugees, especially activities connected with the American Council of Voluntary Agencies for Foreign Service, are with that agency.

#### 402. COHEN, ISRAEL, 1879-1961

British writer; secretary, Zionist Organization, London. Toured Poland and Hungary after World War I to investigate the position of Jews, and reported on current pogroms and discrimination.

**Literature.** Israel Cohen, *A Jewish Pilgrimage: The Autobiography of Israel Cohen*. London: Vallentine, Mitchell, 1956.

*News of the YIVO* 83 (July 1962): 3\*, 6\*.

**Papers.** YIVO Institute for Jewish Research: papers, 1930s, 1.25 ft, consist of manuscripts, reports, clippings, and correspondence relating to European Jewish life, the Nazi persecution of Jews, the \*Évian Conference, and refugee problems.

#### 403. COHN, ALFRED EINSTEIN, 1879-1957

Physician and medical researcher, Rockefeller Institute for Medical Research, New York.



**420. FISHER, DOROTHY (CANFIELD), 1879-1958**

Novelist and educator. Organized relief work in France during World War I. Active in numerous humanitarian causes. Pro-Zionist.

Supported activities in aid of refugees, especially in behalf of refugee writers. Arranged for summer vacations at the homes of Vermont farmers for 52 German- and Austrian-Jewish refugee children.

**Literature.** David Baumgardt, "Dorothy Canfield Fisher: Friend of Jews in Life and Work." *Publication of the American Jewish Historical Society* 48 (June 1959): 245-255.

Elizabeth Yates, *Lady from Vermont: Dorothy Canfield Fisher's Life and World*. Brattleboro, VT: S. Greene Press, 1971.

**Papers.** Univ. of Vermont Library, Wilbur Collection: papers, 1851-1958, ca. 26 ft, include correspondence on the emigration of German Jews, e.g., with David Baumgardt, refugee philosopher who immigrated to the U.S.A. in 1939. *NUCMC* MS 64-791.

**421. FLEXNER, ABRAHAM, 1866-1959**

Educator. Founder 1930, director 1930-39, \*Institute for Advanced Study, Princeton, NJ (succeeded by \*Frank Aydelotte). Brother of \*Simon Flexner and \*Bernard Flexner and uncle of Jennie M. Flexner (librarian and chairman, \*American Library Association Committee to Aid Refugee Librarians).

Member of general committee, \*Emergency Committee in Aid of Displaced Foreign Scholars.

**Literature.** Abraham Flexner, *I Remember*. New York: Simon and Schuster, 1940. "Finding Men," chap. 28.  
—, *Abraham Flexner: An Autobiography*. New York: Simon and Schuster, 1960. "Finding Men," chap. 28.

**Papers.** Library of Congress, Manuscript Div.: papers, 1870-1955, 9 ft (ca. 11,000 items), include material relating to the Institute for Advanced Study and to refugee scholars. *NUCMC* MS 66-1404. Finding aid: unpublished inventory.

**422. FLEXNER, BERNARD, 1865-1945**

Lawyer and Jewish communal leader; active in Zionist and refugee aid activities. Brother of \*Abraham Flexner and \*Simon Flexner. President 1925-31, and chairman 1931-44, Palestine Economic Corp. (\*PEC Israel Economic Corp.). Member of executive committee, \*American Jewish Joint Distribution Committee and Jewish Agency for Palestine (\*World Zionist Organization-American Section).

Founder and member of executive committee, \*Emergency Committee in Aid of Displaced Foreign Scholars. Officer, \*Refugee Economic Corp.

**Literature.** *D.A.B.*, suppl. 3, pp. 279-280.

**Papers.** Princeton Univ., Manuscript Library: papers, 1881-1944, 16 boxes and 3 vols., consist mostly of correspondence, including an extended exchange with \*Felix Frankfurter, 1929-44, and ca. one box relating to Flexner's work for the Emergency Committee and the \*League of Nations High Commissioner for Refugees (Jewish and Other) Coming from Germany.

**423. FLEXNER, SIMON, 1863-1946**

Medical researcher. Founder 1903, and director 1903-35, Rockefeller Institute for Medical Research, New York. Brother of \*Abraham Flexner and \*Bernard Flexner. Trustee, \*The Rockefeller Foundation and \*Carnegie Corporation of New York.

Assisted in placement of refugee scholars.

**Literature.** *D.A.B.*, suppl. 4, pp. 286-289.

*Dictionary of Scientific Biography*, vol. V, pp. 39-41.

**Papers.** American Philosophical Society Library: papers, 1891-1946, ca. 200,000 items, consist of correspondence, diaries, drafts of articles, and speeches. The finding aid does not indicate subject matter of correspondence; collection is presumed to contain relevant material on refugees. *NUCMC* MS 68-1470. Finding aid: unpublished list of correspondents (126 pp.).

Rockefeller Archive Center: microfilm (128 reels) of papers at American Philosophical Society Library.

**424. FRANKFURTER, FELIX, 1882-1965**

Austrian-born American jurist; professor of law, Harvard Univ. Law School 1914-39. Held many government positions prior to his appointment in 1939 by President \*Franklin D. Roosevelt as Associate Justice of the U.S. Supreme Court.

Frankfurter acted as a link between President Roosevelt and Jewish leaders on many issues including immigration and rescue.

**Literature.** Felix Frankfurter with Harlan B. Phillips, *Felix Frankfurter Reminiscences*. New York: Reynal, 1960.

Henry L. Stimson and McGeorge Bundy, *On Active Service in Peace and War*. New York: Harper, 1948.

**Papers.** Library of Congress, Manuscript Div.: papers, 1907-65, 105 ft (ca. 70,000 items). Frankfurter considered this collection to be his "personal papers." Subject file series includes material on German refugees (box 137) and the University in Exile of the \*New School for Social Research (boxes 160 and 188). There may be other relevant material in this series and in the General Correspondence series. Available on microfilm at Harvard Univ., Law School Library. *NUCMC* MS 68-2033. Finding aid: Library of Congress, Manuscript Div., *Felix Frankfurter: A Register of His Papers in the Library of Congress*. Washington, DC, 1971.

Central Zionist Archives, Israel: papers, 1885-1965, 2.6 ft, consist of corre-



**Papers.** Bryn Mawr College Archives: papers, 1930s-60s, 2 cartons, consist of personal documents, course outlines, reprints, and AFSC materials from the 1960s. The only materials relevant to refugees are seminar notes, a reprint of an article, and one file on a refugee family Kraus had brought from Switzerland to the U.S.A. during World War II.

**465. KUBIE, LAWRENCE SCHLESINGER, 1896-1973**

Psychiatrist and psychoanalyst. Secretary, \*American Psychoanalytic Association, and cochairman of its Emergency Committee on Relief and Immigration 1938-43.

Founder and officer, \*National Committee for the Resettlement of Foreign Physicians and member of its general advisory committee.

**Literature.** *New York Times*, Oct. 28, 1973, p. 61.

*Who's Who in American Jewry*, 1938-39, p. 574.

**Papers.** Papers relating to Kubie's activities on behalf of refugee physicians, 1938-39, 2 folders, are with Bettina Warburg, M.D. (former cochairman, Emergency Committee on Relief and Immigration), 203 E. 72 St., New York, NY 10021. Photocopies are at Research Foundation for Jewish Immigration. Consist of positive and negative replies, Feb.-May, 1939, which Kubie received from physicians in response to his invitation to join the Central Advisory Council of Physicians of the newly founded National Committee for the Resettlement of Foreign Physicians; an unmailed letter to Dr. \*Ernst P. Boas, Feb. 4, 1939, in which Kubie expresses his frustration with the efforts being made to coordinate the resettlement of physicians; minutes of meetings 1938, concerning aid to refugee physicians; published report 1938, of the Resettlement Div. of the \*National Coordinating Committee; and copies of a bill proposed in the New York State Assembly 1939, about licensing of professionals.

**466. LAMPORT, ARTHUR MATTHEW, 1883-1940**

Investment banker, economist, philanthropist, and communal leader, New York. Government adviser on economic problems.

One of the key figures involved in negotiations to resettle European refugees in the Dominican Republic and to create the \*Dominican Republic Settlement Association (DORSA) in 1939. Established first free loan society for refugees in the DORSA colony at Sosúa. Treasurer, United Palestine Appeal and \*United Jewish Appeal.

**Literature.** *Who's Who in American Jewry*, 1938-39, p. 583.

**Papers.** YIVO Institute for Jewish Research: papers, 1939-40, 0.25 ft, consist of materials relating to the settlement of refugees in the Dominican Republic. Include correspondence with the Dominican government, \*James N. Rosenberg, and DORSA, minutes of meetings, notes regarding Lamport's visits to the Dominican Republic, and other documents.

**467. LANDAUER, CARL, 1891-**

German-Jewish economist, immigrated to the U.S.A. in 1933. Professor, Univ. of California, Berkeley.

Active in a variety of efforts to assist with the immigration and resettlement of refugees from Nazism. Charter member, \*Selfhelp of German Émigrés 1936. Promoted founding of the \*San Francisco branch of Selfhelp since 1937.

**Literature.** *International Biographical Dictionary*, vol. II. Lessing, *Oral History*.

**Papers.** In 1978, papers were with Landauer, 1317 Arch St., Berkeley, CA 94708. They will eventually be deposited at Stanford Univ., Hoover Institution on War, Revolution, and Peace. Include correspondence, 8 folders, relating to his efforts to assist with the immigration and resettlement of immigrants from Nazism. Organizations represented in these files include: Selfhelp, New York; Selfhelp, San Francisco; \*Jewish Council of 1933, San Francisco; \*U.S. Committee of International Student Service; San Francisco Committee for Service to Émigrés (\*Jewish Family Service Agency, San Francisco); Academic Assistance Council, London; American Committee for Émigré Scholars, Writers and Artists (\*American Council for Émigrés in the Professions); Hilfsverein der Juden in Deutschland. Photocopies are at Leo Baeck Institute Archives and at Research Foundation for Jewish Immigration.

**468. LANDAUER, GEORG, 1895-1954**

German-Jewish lawyer and Zionist leader, emigrated to Palestine in 1934.

Active primarily on behalf of the immigration and resettlement of German Jews in Palestine/Israel. Executive director, Palästina-Amt, Berlin 1925-33; executive director, Zionistische Vereinigung für Deutschland 1929-33. Director, Central Bureau for the Settlement of German Jews in Palestine (later renamed German Dept.) of the Jewish Agency for Palestine (\*World Zionist Organization) 1934-47. Director, Restitution of German-Jewish Property Dept., Jewish Agency 1947-54. His primary activities were the organization of *aliyah*, capital transfer (*Haavara*), agricultural settlement, Youth Aliyah (cofounder with \*Henrietta Szold), and German *Wiedergutmachung*. Chairman, Irgun Olei Merkaz Europa (Association of Olim from Central Europe), Israel 1948-54.

**Literature.** *International Biographical Dictionary*, vol. I.

**Papers.** Leo Baeck Institute Archives: papers, 1916-53, ca. 3 ft, include correspondence relating to Landauer's activities on behalf of Zionist organizations, the Jewish Agency, Youth Aliyah, and *Wiedergutmachung*, and newspaper clippings and articles dealing with immigration and *Wiedergutmachung*. NUCMC MS 72-233. Finding aid: unpublished inventory (27 pp.).

**469. LEHMAN, HERBERT HENRY, 1878-1963**

Banker, philanthropist, and political leader. Governor of New York State 1933-42, U.S. Senator from New York 1949-56.



A central figure in the intensive political, educational, public relations, and communal efforts of the AJC concerning Nazi Germany, international migration, immigration to the U.S.A., and rescue efforts.

**Literature.** Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee, 1906-1966*. Philadelphia: Jewish Publication Society, 1972.  
Morris D. Waldman, *Nor by Power*. New York: International Universities Press, 1953. [autobiography]

**Papers.** American Jewish Archives: papers, 1912-63, 2.9 ft (ca. 2800 items), consisting of correspondence, minutes, and other materials on the organizations in which Waldman was active, include correspondence on refugees (with \*James N. Rosenberg) and on Nazism (with AJC leaders Cyrus Adler and Sol M. Stroock). Finding aid: unpublished inventory (9 pp.).

American Jewish Committee, Archives and Records Center: papers relating to Waldman's activities as executive officer of AJC include significant documentation concerning refugees and related matters.

### 532. WARBURG, FELIX MORITZ, 1871-1937

Jewish philanthropist and communal leader. Chairman 1914-32, and honorary chairman 1932-37, \*American Jewish Joint Distribution Committee (JDC); member of executive committee, \*American Jewish Committee 1929-37; president, \*Refugee Economic Corp. 1934-37; president, \*New York Foundation 1930-37. Initiator of \*Emergency Committee in Aid of Displaced Foreign Scholars 1933.

Cochairman, Council for German Jewry, an Anglo-American group established in 1936, which coordinated the collection of considerable funds for the vocational retraining and resettlement of German-Jewish youth.

**Literature.** *D.A.B.*, suppl. 2, pp. 694-695.

David Farrer, *The Warburgs: The Story of a Family*. New York: Stein & Day, 1975.

Jerome M. Kutnick, "Felix M. Warburg and the American Jewish Community, 1929-1937." Unpublished Ph.D. dissertation, Brandeis Univ., 1978.

**Papers.** American Jewish Archives: papers, 1910-37, 103 ft. A major archival resource on the immigration of refugees during the 1930s, including materials on the numerous organizations and activities with which Warburg was connected. NUCMC MS 65-1743. Finding aid: *Manuscript Catalog of the American Jewish Archives*. Boston: G. K. Hall, 1971. Vol. 4, app. III, Catalog of the Felix M. Warburg Collection.

Harvard Univ., Graduate School of Business Administration, Baker Library, Manuscripts and Archives Dept.: papers, 1912-36, 2 boxes (ca. 1300 items). It is not known whether this collection contains relevant material. NUCMC MS 68-1278. Finding aid: unpublished inventory.

### 533. WARREN, CHARLES, 1868-1954

Legal historian, constitutional lawyer, and Pulitzer Prize winner in history.

Member, \*U.S. President's War Relief Control Board 1943-46.

**Literature.** *New York Times*, Aug. 17, 1954, p. 21.

**Papers.** Library of Congress, Manuscript Div.: papers, 1874-1954, 6 ft (ca. 6000 items), include ca. 1 ft of material on the War Relief Control Board. NUCMC MS 67-635. Finding aid: unpublished inventory.

### 534. WARREN, GEORGE LEWIS, 1890-

U.S. government official whose special area of expertise was migration and refugees. With \*International Migration Service 1928-38; U.S. government expert, \*League of Nations Temporary Commission on Assistance to Indigent Aliens, Geneva 1933, 1936, 1938; adviser to U.S. Representative [\*Myron C. Taylor] to \*Évian Conference on Refugees 1938; technical adviser, U.S. delegation to \*Bermuda Conference on Refugees 1943; consultant, U.S. Foreign Economic Administration 1943; executive secretary, \*U.S. President's Advisory Committee on Political Refugees 1938-44; Advisor on Refugees and Displaced Persons, \*U.S. Dept. of State 1944-68; U.S. representative, General Council and Executive Committee, International Refugee Organization, Geneva 1948-52; U.S. representative, Intergovernmental Committee for European Migration 1953-66.

**Literature.** *Who's Who in America*, vol. 31 (1960-61), p. 3034.

**Papers.** Harry S. Truman Library: papers, 1930-72, 10 in., include material on the international problem of refugees, 1930-64, reports on U.S. participation in aid efforts for refugees, and other documentation relating to Warren's involvement in migration affairs.

### 535. WEIL, BRUNO, 1883-1961

German-Jewish lawyer, author, politician, and community leader, emigrated to Argentina and, in the 1950s, to the U.S.A. (New York). Vice-president, Central-Verein deutscher Staatsbürger jüdischen Glaubens 1926-35, the main Jewish defense and civil rights organization in Germany, founded in 1893. Active in Kartell-Convent der Verbindungen deutscher Studenten jüdischen Glaubens and its U.S. successor, the \*American Jewish K C Fraternity.

In 1935 he traveled to North and South America to study the possible immigration of Jewish refugees. Founder and president, \*Axis Victims League, an organization calling for reparations for damages inflicted on Jews in Germany by the Nazi regime. Cofounder, \*American Association of Former European Jurists.

**Literature.** *International Biographical Dictionary*, vol. 1.

**Papers.** Leo Baeck Institute Archives: papers, 1892-1964, ca. 12 ft, include materials on the Axis Victims League and on Weil's speeches and lectures on emigration and *Wiedergutmachung* problems. NUCMC MS 72-240. Finding aid: unpublished preliminary inventory.



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## Devotion

### Professor Ernst J. Cohn

Although Comparative Law, or perhaps more correctly the Comparative method, in legal theory and practice is older than the XII Tables of Roman Law, conventional wisdom has it that it started with the Commentators of Northern Italy. This has not prevented modern scholarship from describing Comparative Law as the Cinderella of legal sciences. However, whatever the true beginning of Comparative Law and whatever the importance which lawyers have ascribed to it, it can be asserted that throughout the years or the centuries few sciences have been served better than the science of Comparative Law. A truly remarkable array of illustrious names has shown that Comparative Law is not only a sure way to wisdom and understanding, but also that humanity is the hallmark of the Comparative lawyer.

Amongst the select circle of such lawyers the co-editors of this volume have no doubt that the name of Professor Ernst J. Cohn deserves a place of distinction. It is with this aim in mind that the co-editors, representing as they do the two sides of Professor E. J. Cohn's learned activity, i. e. the Civil law and the Common law, have gathered together some of his colleagues and friends. Their learned contributions constitute the bulk of this volume which is published in his honour on his seventieth birthday.

E. J. Cohn is indeed such a well-known name in the legal circles of more than one country that a detailed presentation in the form of a biographical note may be thought superfluous. A *Festschrift* or a *Liber Amicorum*, however, is much more than a token of recognition or an act of friendship, though it is certainly both. It is also an attempt to place on record for the future the context in which a scholar – and in this case also an eminent practising lawyer – has spent most of his intellectual life. It also aims at describing the man, as well as the interests which have been predominant in his life. Hence, a biographical note follows this introduction.

The co-editors are nevertheless aware that to describe and praise a scholar is an impossible task, for a man is greater than his achievements. Moreover, in a book such as this, written by lawyers on legal subjects, there is little room for reference to the honorand's outside interests. Indeed, there is little room to say much in praise of Ernst Cohn's faith, devotion to, and selfless work for the Jewish religion and the causes to which it is attached. Nor is there room to praise his open, friendly and warm personality which make it not only a privilege, but also a pleasure, to be associated with him. No better evidence of his humanity and compassion can exist than his deep commitment to the problem of legal aid for the poor. An article of his on this topic had the unusual distinction of being



reprinted and freely distributed to all Members of Parliament, to say nothing of the evidence he gave before the Committees engaged in the preparation of the Legal Aid Act. Last but not least, there is no room to speak of his deep sense of fairness and justice which, combined with his profound knowledge of legal theory and practice as well as with his robust common sense, are the true signs of a contemporary counterpart of the Roman jurists of the past.

It is in this spirit of genuine affection and deeply felt admiration, the latter of which Ernst J. Cohn, with his natural and profound modesty would disclaim, that the co-editors took the initiative which led to this book, splendidly supported by a distinguished list of some of his colleagues and friends.

It is not, of course, possible in a case such as this, where the scholar to be honoured spans two legal worlds, the Civil law and the Common law, to do full justice either to all his interests or to all his friends. If we have failed in this respect we must accept the blame. But any attempt to do full justice would have gone beyond the limits which books of this nature normally set. Only a token was intended. We trust that it will be accepted as such.

A. G. Chloros

K. H. Neumayer

## Biographical Note

Professor Ernst J. Cohn was born in Breslau on 7th August 1904. He spent his school years there and he attended the Johannesgymnasium. He then studied law at the University of Leipzig, Freiburg i. B. and Breslau. In Breslau, where he spent the greater part of his student years, he attended in particular the classes of Professor W. Schmidt-Rimpler (now at Bonn), which left a lasting impression upon him. When he presented himself for the Doctor's degree, which he obtained with the highest mark (*summa cum laude*), he particularly impressed two of his examiners, Eberhard Schmidt and Eberhard F. Bruck, both of whom later gained considerable influence over the young Cohn. The former arranged for Cohn to spend six months in the office of Schmidt's brother, Dr. Walter Schmidt, who had a large practice in Berlin. But it was Bruck who three years later suggested to Cohn that he should enter an academic career and follow Bruck to Frankfurt am Main where the latter had been offered a Chair. Cohn spent two years as a *Privatdozent* in Frankfurt. In the following year he moved to Kiel to fill in a temporary gap in the then vacant Chair of Civil and Commercial Law. In 1932, at the very early age of 28, he was offered and accepted a newly created Chair of Civil Law at his home town Breslau.

To return to Breslau was fulfilment for young Cohn who had felt his roots strong. But Germany was entering a difficult time which began with the destruction of civilised values on home ground and which eventually led to a world holocaust. It was the beginning of the darkness which was rapidly descending upon Europe, a time of bigotry and organised hooligansim in which the emerging Nazi party excelled. Cohn's lectures were disrupted. The Nazi party and the chauvinist press had falsely accused him of social democratic leanings and of having been offered a Chair because of his political affiliation and alleged friendship with the Social-Democratic Minister of Education, Dr. Grimme. In fact, Cohn was a member of the *Deutsche Staatspartei*, which was the predecessor of the present Free Democratic Party. Denials that there was any truth in either of these allegations were ignored by the Press which was determined to create myths and secure the removal of a scholar whose liberal and humane views were totally alien, indeed an obstacle, to Nazi attempts to suppress free institutions. Finally the carefully organised student agitation led to the closure of the University for several weeks. With the Nazis now in power, Cohn was first sent on compulsory leave and was later dismissed from his post. In March 1933 he emigrated to England.

Life was by no means easy in England for a refugee with a German background and German legal qualifications. Nevertheless, with a perseverance and tenacity which are so typical of the man, Cohn managed to maintain himself by giving advice on German law, mainly to other German refugees, while at the same time he – already a Professor of Law – studied English law. At the end of his studies he was called to the Bar by Lincoln's Inn. But the outbreak of war



prevented him from engaging seriously in legal practice. In the meanwhile he had become a naturalised British subject.

In due course he was called up and served until 1944 in the Royal Regiment of Artillery. This was later followed by service in the Legal Department of SHAEF (Supreme Headquarters Allied Expeditionary Forces). After the war he continued in British Government service as a civilian, first at SHAEF and later in the various British Government Departments concerned with Military Government in Germany, as well as with post-war resettlement problems in general. It is characteristic of Cohn's sense of fairness that he refused, on grounds of conscience, to serve in the War Crimes Department, on the ground that as a Jew he did not find it proper to act or assist in the prosecution of war crimes. This view did not prevent him from writing two classic articles in English on the state of German legal science under the Nazis. Although it could hardly be expected that he should tolerate Nazis or ex-Nazis, he was among the first to attempt to re-establish contact with the new democratic forces in Germany and was the first German Professor of Jewish origin, after the end of the Nazi regime, to give a guest lecture at the Law Faculty of the University of Cologne. There he had the moving experience of an enthusiastic reception by the students, many of whom were crippled war veterans.

Cohn returned to private practice in 1950 and since then he has become a leading practitioner at the English Bar, especially in matters relating to German and Swiss law. Few other lawyers could combine so felicitously a profound knowledge of German law with a deep and extensive knowledge of the practice of English law. And hardly anyone who has been in practice for such a long time in a system to which he came late in life could so admirably marry the qualities of the scholar with those of the practising barrister. While others retired in their limited spare time to a well earned rest, Cohn would use it to digest the impressions of his legal practice of the day and rationalise and re-cast them into meaningful patterns of legal scholarship of a very high order. The result has been, and still is, a constant stream of published work, some of a penetratingly analytical kind, some of strictly utilitarian character, many devoted to questions of civil procedure and arbitration. But in both is transparent not only the best tradition of scholarship typical of the old-fashioned view of the German professor, but also the devastating and down-to-earth common sense which one associates with the Common law. Of special significance is his *Manual of German Law*, a brilliantly written textbook of German law, published in English, first in a special edition under the auspices of the British Foreign Office for the use of those engaged in legal work in post-war Germany, but later in a new edition as a general introduction to German law. Its conciseness, its practical approach and its use of the comparative method have made the *Manual* a standard work in England for all connected with the theory and practice of German and Comparative Law.

To these qualities one must add another pronounced English quality with which his personality is endowed and for which German professors are not

usually known. It is a sense of humour which is shown in a highly developed sense of the absurd and the ridiculous. It is partly also this last quality which has made Cohn a most popular lecturer whose services are in constant demand.

It is not surprising that both the demands upon Cohn's services and the distinctions came piling upon him. In 1958 he accepted the post of Honorary Professor at Frankfurt University. In 1963 he was granted an Honorary Doctorate in Law by the University of Cologne. In 1965 he obtained the LL.D. Degree of the University of London for a substantial, distinct and original contribution to legal science. In 1967 he was nominated Honorary Visiting Professor in European Law at King's College London and a little later he was made a Fellow of King's College. Although his university appointments are honorary, Cohn finds time in the midst of a busy practice to lecture regularly in Frankfurt on English law and occasionally on International Commercial arbitration, whereas in London he has been giving for several years now a regular course on German Civil Law. He has also been giving lectures at the Inns of Court School of Law on the law of International Trade. He has further acted as an *ad hoc* member of the Arbitral Tribunal under the London Debt Agreement in the dispute between Greece and the Federal Republic of Germany. The decision is probably a unique example, in an international Court, of a unanimous verdict in a case in which two *ad hoc* judges have participated. In June 1975 Professor Cohn was awarded the OBE by Her Majesty The Queen in recognition of his services to English law.

This note would not be complete without some reference to Cohn's activities as a distinguished member of the Jewish community in London. He has been active in a number of Jewish organisations, mainly in those concerned with the 'progressive' wing of the Jewish religion. Thus, he has been for many years a member of the Academic Committee of the Leo-Baeck College which trains Rabbis for the Reform and Liberal movements and is President of the North Western Reform Synagogue. He has also written on Jewish problems in a non-Jewish publication, notably an article on the historian Heinrich Graetz in the *Jahrbuch der Schlesischen Friedrich-Wilhelm-Universität in Breslau*, now published in the Federal Republic of Germany (Vol. V, 1960, 220 ff). This was later reprinted in the Memorial volume for the Breslau Rabbinical Academy (1963) 187 ff. He has contributed a further article, which is partly autobiographical, on 'Three Jewish Lawyers of Germany' in the *Year Book of the Leo-Baeck Institute*, London (1972), 155 ff.

Cohn's other activities are too numerous to record, but they include a large number of public lectures given at many German and British universities. But deserving of special mention are his annual lecture at Manchester and his courses on German Law or Comparative Procedure at the University of Surrey and at the International Faculty of Comparative Law in Luxembourg. Throughout the years he has also made a large number of contributions to learned publications, in the form of articles or book reviews or through the columns of 'The Times'. A list of his legal publications can be found below, but the list of his book reviews



or case notes, some in effect of considerable substance – in the *Law Quarterly Review*, the *International and Comparative Law Quarterly* or elsewhere, is too long to be included. References to some other minor articles have also been excluded for the same reason.



Ged





Ernst Cohn (Dresden - 1904 \* Lüneburg 1981 + )

Manual of German law a brilliantly written  
textbook written under the auspices  
of the foreign office

Kisch

None of  
the men of whom I am  
going to speak has been a  
prominent leader in Judaism  
of the Jewish community in  
Germany or the US



J 2 1974

## Glosse

## Die Bafögerin

Oder ein neuer akademischer Beruf

Es klopft. Eine hübsch aufgemachte junge Frau Anfang der Zwanzig tritt ein.

„Sie sind doch Professor Knatschke, Leiter der Fachgruppe für angewandte Linguistik?“

„Ja natürlich; was möchten Sie denn?“

„Ach, man hat mich zu Ihnen geschickt, weil Sie soviel soziales Verständnis haben. Ich brauche eine Bescheinigung, um weiter beim BAFÖG mitmachen zu können. Ich bin doch eine Ihrer treuesten Studentinnen.“

„Tut mir leid, aber ich kenne Sie gar nicht. Wo sind wir uns denn begegnet?“

„Na, das ist nicht schlimm. Der Massenbetrieb . . . Doch zu Ihrem diesjährigen Proseminar über den Ausdruck des Protests in innerafrikanischen Dialekten habe ich mich angemeldet.“

Knatschke nimmt den Hörer ab. „Fräulein Rotgeber, bitte mal die Teilnehmerliste Proseminar.“

Die Tür geht auf. Die Liste wird übergeben.

„Nun, wie heißen Sie denn?“

Die BAFÖGERIN stockt. Hat ihr etwas die Spitze zugeht.  
„Ach, verzeihen Sie, Herr Knatschke, ich habe in diesem Semester habe ich mich ja bei Ihnen gar nicht gemeldet. Ich bin nur so vergeblich sein. Nicht einmal die Seminare mehr auseinanderhalten. So viel Informationen, die Sie den Studenten ein. Wenn das Studienjahr kommt, werden Sie es sein!“

Und dann stürmt die junge Dame auf und dann geht es nicht geklappt. Fatal! Jetzt ist's wirklich mit dem BAFÖG. Was wird da Uwe sagen? („In dieser Gesellschaft! Die BAFÖGERIN sind doch getreten werden! Gut, daß Du das auch nicht tust.“)

Unsere BAFÖGERIN hatte ihr Studium wirklich in den Jahren abgebrochen. Damals wurde geheiratet. Und Sie durfte im Zeichen der Gleichberechtigung in die Ehe einziehen. Doch warum sich nicht weiter fördern lassen? Die Kinderkrippe ist zuverlässig und mit der „Überbrückung“ man wenigstens nach Afghanistan fliegen. Der Mann braucht Urlaub und Sonne.  
Fempesta A

## Glückwunsch

## Zum 70. Geburtstag von Ernst Cohn

Ein Schlesier ist er noch immer, auch wenn er seit Jahrzehnten in London lebt: *Ernst Cohn*, der am 7. 8. 1904 geboren wurde, in Breslau mit einer Arbeit über den „Empfangsboten“ promoviert und dort — nach seiner Habilitation in Frankfurt und einem Vertretungssemester in Kiel — 1932 Ordinarius wurde, aber bald schon nationalsozialistischer Verfolgung weichen mußte. Der „Fall Cohn“ hat damals Schlagzeilen gemacht wie der „Fall Dehm“ in Halle und der „Fall Gumbel“ in Heidelberg. Für *Ernst Cohn* brachte der Neubeginn in England, wo er als Barrister-at-Law der berühmten Lincoln's Inn angehört, neben allem Schwerem auch eine große Bereicherung: kontinentales und angelsächsisches Recht zugleich beherrschen wenige so wie er. Anwaltstätigkeit, zeitweise auch eine solche bei der Armee, wechselte ab mit wissenschaftlicher Lehre und Forschung, deren Früchte eine imponierende Zahl von Büchern und Aufsätzen sind, worin er im englischen Sprachraum das deutsche, im deutschen das englische Recht bekannt zu machen und auszuwerten wußte. Nicht zufällig lautet seine Telegrammadresse: *Contilaw London*! Die niemals ganz unterbrochenen Beziehungen zu deutschen Freunden und Kollegen wurden nach dem Krieg frühzeitig und mit seltener Objektivität des Urteils über das in den vergangenen zwölf Jahren Geschehene wieder aufgenommen. Vorträge, Tagungsbesuche und Vorlesungen, zumal nach der Ernennung zum Honorarprofessor in Frankfurt 1957, ließen *Ernst Cohn*, der zugleich auch seit 1967 am King's College der University of London lehrt zu einem hoch geschätzten Gast in der alten Heimat werden. We zum Beispiel seine Schilderung des Antrittsbesuchs der Privatdozenten *Schweinge* und *Cohn* bei Geheimrat *Niemeyer* in Kitzberg an siebzigsten Geburtstag des Erstgenannten mit anhören durfte, wird sie nicht vergessen!

Unter den Schriften des Jubilars ist die Habilitationsarbeit von 1931 über „Das rechtsgeschäftliche Handeln für denjenigen, den es angeht“ noch heute grundlegend. Seine Gastvorlesungen über „Das

Reich des Anwalts“ (1949) und über den „Englischen Gerichtsprozess“ (1956) bringen die dortige Rechtspflege unter ganz modernen Gesichtspunkten, z. B. der sozialen Stellung von Richtern und Anwälten, dem deutschen Leser nahe. Das von *Ernst Cohn* schon in zweifacher Auflage beim British Institute of International and Comparative Law herausgegebene, anfänglich auf die Bedürfnisse der Besondere gemacht zugeschnittene „Manual of German Law“ — an dem eine Reihe besonders kompetenter Mitarbeiter, wie *Martha Krawinkel*, *R. H. Graveson*, *Otto Giles* beteiligt waren — enthält nicht nur das bürgerliche, sondern auch Handels-, Prozeß- und Kontostunden wie Internationales Privatrecht und dazu eine ausführliche Einführung in Öffentliche Recht und die Deutsche Rechtsgeschichte beginnende Einleitung; schon allein dieses zweibändige, in drei Bänden von Gerichten und Behörden, auch denen der USA, viel gelesene Werk verdient unseren Dank und große Anerkennung. Eine große Zahl von Festschriftbeiträgen (für *F. Schulz*, *M. C. Lewald*, *H. C. Nipperdey*, *F. v. Hippel*, *W. Wengler* u. a.) nicht nur den Farbenreichtum der Palette von *Ernst Cohn* — auch Anhänglichkeit und Treue. In die gleiche Richtung seine wiederholten, heute so aktuellen Bemühungen um die Reform des Rechts und seine Reform („Legal Aid for the Poor“, 1967). Seine Schriften betreffen Themen der Rechtsvereinheitlichung — Gleichung, des Internationalen Privatrechts, der Rückwirkung des Anwaltsrechts. Durch zahlreiche eindringliche Rezensionen kritischer Natur, machte *Ernst Cohn* deutsche Veröffentlichungen angesehenen britischen Blättern publik, wie er umgekehrt in seinen Zeitschriften, namentlich auch in der *Juristenzeitung* und bereits in ihrer Vorgängerin, der *Süddeutschen Juristenzeitung*, Aufsätzen, Entscheidungsanmerkungen und Buchbesprechungen jeden Jahrgang bereichert hat. Wie er dies alles neben seiner reichhaltigen praktischen Arbeit, die auch richterliche Tätigkeit umfaßt, zu bewältigen versteht, ist zu bewundern. Wir wünschen ihm noch viele gute Jahre, und daß er auch als englischer Barrister bleiben möchte, was er seit langem ist.  
Mann in London!  
Hans THIEME

## Literatur

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Heft 12: *Wufka, Eduard*: Die verfassungsrechtlich-dogmatischen Grundlagen der Rundfunkfreiheit. Zugleich ein Beitrag zu Problemen der Rundfunkorganisation und Staatsaufsicht. 1971. 145 S. kart. 34.50

Heft 14: *Ipsen, Hans Peter*: Mitbestimmung im Rundfunk.

Verfassungsfragen zur Mitbestimmung durch Beauftragte in den Aufsichtsgremien der Rundfunkanstalten. kart. 26.—

1. In den „Beiträgen zum Rundfunkrecht“ werden Rechtsgutachten publiziert, und zwar meist Arbeiten, die über den unmittelbaren Zweck hinaus Beachtung verdienen. Der Schwerpunkt zunächst auf der zeitweilig lebhaften Problematik des Werbefernsehens. In der Schriftenreihe dazu 1965/66 verfassungsrechtliche Gutachten von *H. C. Nipperdey* (Heft 1), *P. Lerche* (Heft 2), *L. Fröhler* (Hefte 4 und 5), *O. Bachof* unter Mitarbeit von *W. Rudolf* (Heft 9)



l vom 28. Mai 1963 — 1 StR 540/62 —, mitgeteilt bei *Bauer* 1967, 625). Ebenso könnte es zu beurteilen sein, wenn jemand ein in vielen Einzelakten geplantes Betrugsunternehmen die Weise ins Werk setzt, daß er sich ganz auf die Ausarbeitung des Planes und die Vorbereitung des Einsatzes seiner Helfershelfer beschränkt, um sich dann völlig von der Sache rückzuziehen und nur noch seinen Anteil am Gesamterfolg Empfang zu nehmen. So verhielt es sich hier jedoch nicht. Die Strafkammer festgestellt, daß die Angeklagten Baustofflieferungsverträge nicht persönlich, sondern in mitararer Täterschaft durch gutgläubige Vertreter anbahnten abschlossen. Auch bei den Darlehensgeschäften wirkten sie immer in eigener Person mit. Jedoch waren die Straftaten gegenüber den Baustoffkunden nicht die unmittelbare Folge Einstellung oder Einweisung der Abschlußvertreter; diese auch die Taten gegenüber den Darlehensgebern lassen sich dem festgestellten Sachverhalt nicht auf einzelne isolierte Handlungen oder gar eine einzige Handlung der Angeklagten rückführen. Sie sind vielmehr Teil und Folge der Errichtung, Erhaltung und Fortentwicklung des betrieblichen Systems der Firma E. und damit einer Vielzahl von Einzelhandlungen, die — wie etwa die regelmäßigen Vertreterbesprechungen — über Jahre hinweg erfolgten, und an denen die Angeklagten, soweit ihnen die Taten zugerechnet sind, auch beständig irgendeiner Form teilhatten.

Zu Recht hat das Landgericht es abgelehnt, die einzelnen Handlungen der Angeklagten als in Fortsetzungszusammenhang mit Taten stehend zu betrachten, die von dem Landgericht S. abgeurteilt worden sind. Mangels eines entsprechend festgestellten Gesamtvorsatzes besteht unter diesem rechtlichen Gesichtspunkt keine Tatidentität.

Daß schließlich auch die Möglichkeit, eine Vielzahl der Handlungen im Sinne natürlicher Handlungseinheit als Tat im Rechtssinne zu begreifen, auszuschließen hat, liegt schon deshalb auf der Hand, weil es insofern an dem räumlichen und zeitlichen Zusammenhang der einzelnen

Beteiligungsakte fehlt, den der Begriff der natürlichen Handlungseinheit voraussetzt (vgl. *BGHSt.* 4, 219, 220; 10, 230, 231; *Mösl* in LK Rdn. 8 vor § 73; zur Abgrenzung von der Sammelstraftat vgl. auch *BGH NJW* 1969, 2056 m. w. Nachw.).

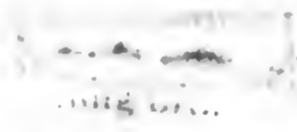
d) Aus dem gleichen Grunde, also der Verteilung der relevanten Betätigungen der Angeklagten über einen längeren Zeitraum, kann auch von einer Einheit des geschichtlichen Vorganges im Sinne des § 264 StPO, die den Rahmen der einen Tat im Sinne des sachlichen Rechts überschreitet (*BGHSt.* 23, 141, 145 [= *JZ* 1970, 327 m. Anm. v. *Grünwald*]; 24, 185, 186), nicht die Rede sein.

Zusammenfassend läßt sich folgendes sagen: Die besondere Bedingungen gerade eines arbeitsteilig organisierten Unternehmens lassen es häufig als unmöglich erscheinen, die kausalen Verknüpfungen der betrieblichen Vorgänge im einzelnen aufzuklären, weil im Regelfall erst eine Vielzahl von allgemeinen Anordnungen, Einzelweisungen und organisatorischen Maßnahmen den einzelnen Geschäftsabschluß herbeiführt. Diese Tätigkeiten des Unternehmers oder Betriebsleiters werden im allgemeinen nicht beweiskräftig festgehalten, mitunter sind sie — wie Überwachungs- und Kontrollmaßnahmen — ihrer Natur nach dazu wenig geeignet. Es kann aber keinem Zweifel unterliegen, daß sich die Leitung eines Betriebes, die in laufender Einwirkung auf Mitarbeiter und Betriebsabläufe besteht, regelmäßig in einer Kette von Einzelakten vollzieht. Eine derartige Tätigkeit kann, zumal wenn sie jahrelang ausgeübt wird, nicht ohne Verzerrung des äußeren Tatbildes als eine Handlung betrachtet werden. Vielmehr würde die Annahme nur einer Handlung in derartigen Fällen auf eine Begünstigung der Straftäter hinauslaufen, die nicht nur durch Aufbau und Einsatz eines kriminellen Unternehmens bedeutende verbrecherische Energie entfaltet, sondern es darüber hinaus verstanden haben, ihren Tatbeitrag durch besondere Methoden der Benutzung von Strohmannern zu verschleiern. Die Leitung eines auf betrügerische Geschäftsabschlüsse angelegten Betriebes kann als solche daher nicht die Annahme einer einzigen, in mittelbarer Täterschaft begangenen Betrugstat rechtfertigen. . . .

## Nachruf

### Zum Gedächtnis an Ernst Cohn

Nachdem er seinen 70. Geburtstag gefeiert hatte (vgl. *JZ* 1976, 518), ist *Ernst Cohn*, der aus Breslau stammte, aber seit Jahren in London als Anwalt und Professor wirkte, im 71. Lebensjahr nach zwei Operationen, jedoch ruhig und ohne Schmerzen dahingeshieden (1. 1. 1976). Groß war die Zahl der Teilnehmer an der Trauerfeier in der North Western Reform Synagoge in London am 1. 2. — ein Zeichen, wie sehr *Ernst Cohn* so viele Breiten gewirkt hat. Auch Freunde aus Deutschland waren in dieser Anteilnahme kam die hohe menschliche und wissenschaftliche Wertschätzung zum Ausdruck, die sich der Verstorbene über die Grenzen seines Fachgebiets, des Zivilrechts und des Rechtsvergleichens, hinaus erworben hatte. Mit gutem Grund, wie in jenem Geburtstagsartikel ausgeführt, nicht nur wegen seiner außerordentlichen Arbeitskraft, sondern auch wegen seiner vielfältigen und einflussreichen Mitarbeit an Zeitschriften und Zeitschriften im angelsächsischen und kontinentalen Rechtskreis, als ein zuverlässiger und aufmerksamer Beobachter von gesellschaftlichen und Entwicklungen im Bereich von Gesellschaft und Po-



... an innerer Anteilnahme geprägte Meinungsäußerungen lag und in die Feder floß.

„Ein sehr großer Verlust für Freunde und Wissenschaft“ — wir zittern hier seinen Jugendfreund und Schicksalsgenossen *Otto Gilex (Prauwitz)* —, dem er nahm eine fast einzigartige Stellung unter den Rechtsvergleichern ein. Wir kennen ja alle das Prozeßrecht und die Prozeßpraxis nicht, *Ernst* verband akademische Tätigkeit und Praxis, deshalb waren seine vielen Schriften so lebendig und vernünftig, frei von gleichgültiger Dogmatik.“

*Ernst Cohn* hat die Festschrift, die ihm englische und deutsche Freunde dargebracht haben — Herausgeber sind *A. G. Chloros* und *K. H. Neumayer* — an einem seiner letzten Lebenstage noch entgegennehmen und sich daran freuen dürfen; sein Sohn, Historiker an der Warwick University in Coventry, hat ihm daraus vorgelesen. Das ist für seine Freunde, die den Wert dieses Mannes, die Leistung seines Lebens überdenken und die um ihn trauern, ein Trost.

Hans THEME, Freiburg i. Br.

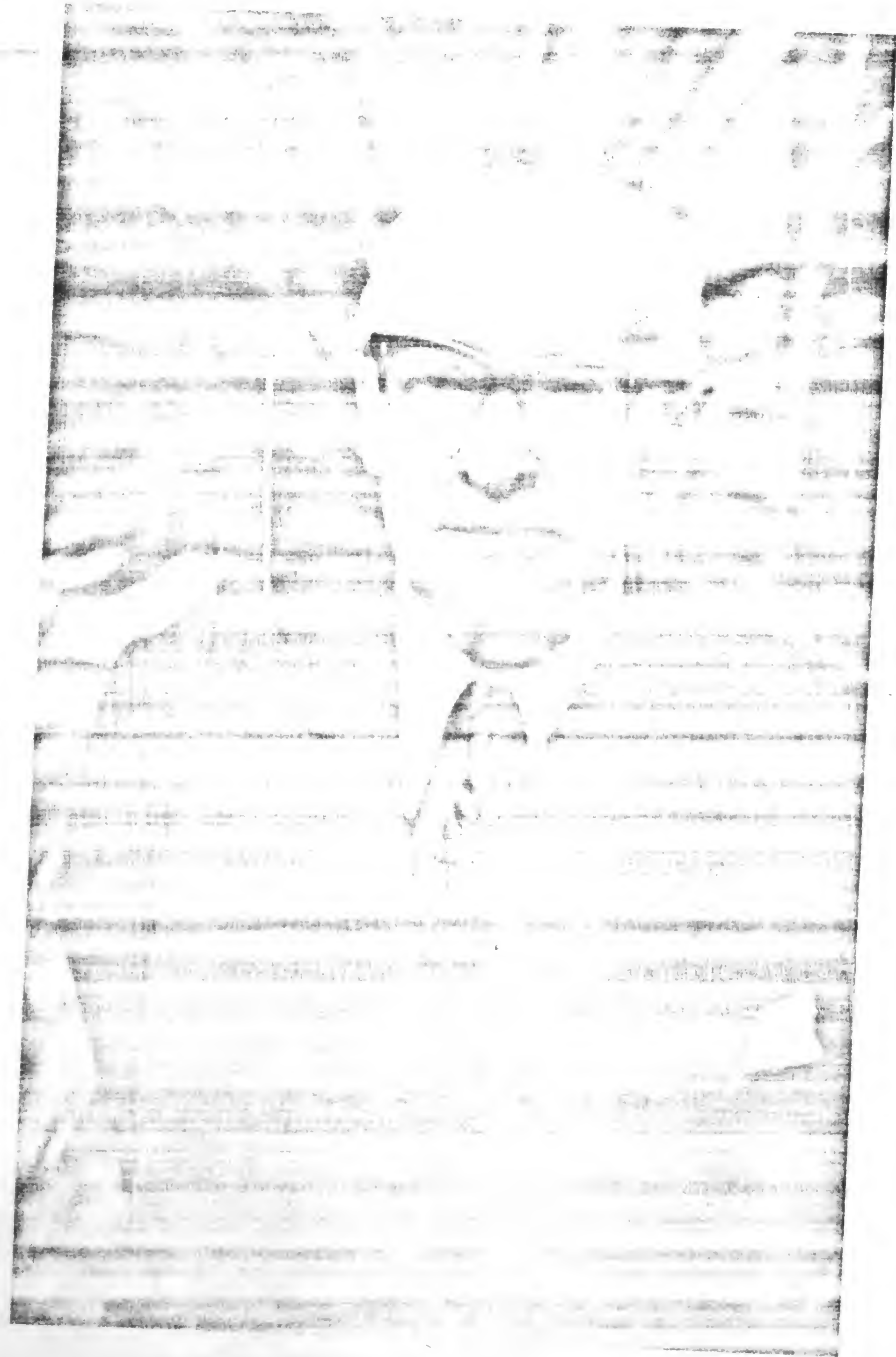
## Berichte

### Der Zukunftsweg des landwirtschaftlichen Bodeneigentums

Dem Thema stand einer der beiden Generalberichte des rechtlichen Kolloquiums, das von dem Comité Européen des Juristes (C.E.D.R.) vom 6. bis 9. 11. 1975 in Paris durchgeführt wurde (Generalreferent: Notar *Dr. Alfred Pikalo*, Düren). Dem Kolloquium gehörten zur Zeit zwölf agrarrechtliche Vereinigungen in der Bundesrepublik Deutschland, Frankreich, Großbritannien, Irland, den Niederlande, Österreich, Schweiz und Spanien sowie Agrarvereinigungen in weiteren westeuropäischen Ländern an; es befaßt sich mit Fragen der Agrarrechtsvergleichung und des euro-

... agrarrechtsvergleichung. Seit 1961 werden alle zwei Jahre Kolloquien veranstaltet, die jeweils ein auf nationaler Ebene aufbauendes rechtsvergleichendes und ein gemeinschaftsrechtliches Generalthema zum Gegenstand haben. Der diesmalige zweite Generalbericht analysierte die landwirtschaftlichen Streitigkeiten vor dem Europäischen Gerichtshof, ohne daß wir hier näher darauf eingehen können (Generalreferent: Rechtsanwalt *Jean Rozier*, Bordeaux). Die Bedeutung des gut besuchten und von der französischen Gesellschaft für Agrarrecht unter Vorsitz von Rechtsanwält *Jean Megret*, Paris, musterhaft vorbereiteten Kolloquiums wurde unterstrichen durch Ansprachen des französischen Justizministers, eines Vertreters des französischen Landwirtschaftsministers,





LIBER AMICORUM ✓  
ERNST J. COHN

FESTSCHRIFT FÜR  
ERNST J. COHN  
ZUM 70. GEBURTSTAG

HERAUSGEGEBEN VON  
A. G. CHLOROS      K. H. NEUMAYER

A 2  $\frac{49}{1600}$



VERLAGSGESELLSCHAFT RECHT UND WIRTSCHAFT  
HEIDELBERG



den 19. Juni 1986

Lieber, sehr geehrter Herr Professor Stiefel!

Meinen besten Dank für Ihre freundlichen Grüsse und das beigefügte Verzeichnis Ihrer Anschriften, das es mir ermöglicht, Sie schriftlich zu erreichen.

Ich möchte Ihnen zunächst mein sehr grosses Bedauern aussprechen, dass es mir nicht möglich sein wird, bei Ihrem Vortrag am 23. Juni vor dem Industrierechtlichen Seminar der Universität Bonn dabei zu sein. Wie ich schon Herrn Professor Lutter, der mir Ihre freundliche Einladung übermittelte, schrieb, werde ich an diesem Tag in den Staaten sein. Meine Reisepläne liessen sich leider nicht mehr ändern. Es ist wirklich sehr schade, dass ich dann gerade in Amerika bin, wenn Sie hier in Deutschland sind. Ich hoffe sehr, dass es doch noch einmal zu einer Begegnung kommen wird.

Ich hatte inzwischen einen Brief und auch einen Anruf von Herrn Dr. Frank Mecklenburg und habe mit ihm ausgemacht, dass wir uns in Madison, Wisconsin, treffen werden.

Mit besten Wünschen und Grüssen

Ihr  
Joachim von Elbe



ERICH SCHWINGE

Dr., em. ord. Professor für Strafrecht, Strafprozeßrecht, Rechtsphilosophie und öffentliches Recht, Universität Marburg

Prosper Mérimée und die französische Strafjustiz . . . . . 179

REINHOLD TRINKNER

Schriftleiter des „Betriebs-Beraters“ und des „Rechts der Internationalen Wirtschaft“, Heidelberg

Vorrang der Individualabrede bei Verwendung Allgemeiner Geschäftsbedingungen . . . . . 191

B. A. WORTLEY

OBE, QC, LL.D., Professor of Jurisprudence and International Law, University of Manchester

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Devotion

Professor Ernst J. Cohn

Although Comparative Law, or perhaps more correctly the Comparative method, in legal theory and practice is older than the XII Tables of Roman Law, conventional wisdom has it that it started with the Commentators of Northern Italy. This has not prevented modern scholarship from describing Comparative Law as the Cinderella of legal sciences. However, whatever the true beginning of Comparative Law and whatever the importance which lawyers have ascribed to it, it can be asserted that throughout the years or the centuries few sciences have been served better than the science of Comparative Law. A truly remarkable array of illustrious names has shown that Comparative Law is not only a sure way to wisdom and understanding, but also that humanity is the hallmark of the Comparative lawyer.

Amongst the select circle of such lawyers the co-editors of this volume have no doubt that the name of Professor Ernst J. Cohn deserves a place of distinction. It is with this aim in mind that the co-editors, representing as they do the two sides of Professor E. J. Cohn's learned activity, i. e. the Civil law and the Common law, have gathered together some of his colleagues and friends. Their learned contributions constitute the bulk of this volume which is published in his honour on his seventieth birthday.

E. J. Cohn is indeed such a well-known name in the legal circles of more than one country that a detailed presentation in the form of a biographical note may be thought superfluous. A *Festschrift* or a *Liber Amicorum*, however, is much more than a token of recognition or an act of friendship, though it is certainly both. It is also an attempt to place on record for the future the context in which a scholar – and in this case also an eminent practising lawyer – has spent most of his intellectual life. It also aims at describing the man, as well as the interests which have been predominant in his life. Hence, a biographical note follows this introduction.

The co-editors are nevertheless aware that to describe and praise a scholar is an impossible task, for a man is greater than his achievements. Moreover, in a book such as this, written by lawyers on legal subjects, there is little room for reference to the honorand's outside interests. Indeed, there is little room to say much in praise of Ernst Cohn's faith, devotion to, and selfless work for the Jewish religion and the causes to which it is attached. Nor is there room to praise his open, friendly and warm personality which make it not only a privilege, but also a pleasure, to be associated with him. No better evidence of his humanity and compassion can exist than his deep commitment to the problem of legal aid for the poor. An article of his on this topic had the unusual distinction of being

S. 7



reprinted and freely distributed to all Members of Parliament, to say nothing of the evidence he gave before the Committees engaged in the preparation of the Legal Aid Act. Last but not least, there is no room to speak of his deep sense of fairness and justice which, combined with his profound knowledge of legal theory and practice as well as with his robust common sense, are the true signs of a contemporary counterpart of the Roman jurists of the past.

It is in this spirit of genuine affection and deeply felt admiration, the latter of which Ernst J. Cohn, with his natural and profound modesty would disclaim, that the co-editors took the initiative which led to this book, splendidly supported by a distinguished list of some of his colleagues and friends.

It is not, of course, possible in a case such as this, where the scholar to be honoured spans two legal worlds, the Civil law and the Common law, to do full justice either to all his interests or to all his friends. If we have failed in this respect we must accept the blame. But any attempt to do full justice would have gone beyond the limits which books of this nature normally set. Only a token was intended. We trust that it will be accepted as such.

A. G. Chloros

K. H. Neumayer

## Biographical Note

Professor Ernst J. Cohn was born in Breslau on 7th August 1904. He spent his school years there and he attended the Johannesgymnasium. He then studied law at the University of Leipzig, Freiburg i. B. and Breslau. In Breslau, where he spent the greater part of his student years, he attended in particular the classes of Professor W. Schmidt-Rimpler (now at Bonn), which left a lasting impression upon him. When he presented himself for the Doctor's degree, which he obtained with the highest mark (*summa cum laude*), he particularly impressed two of his examiners, Eberhard Schmidt and Eberhard F. Bruck, both of whom later gained considerable influence over the young Cohn. The former arranged for Cohn to spend six months in the office of Schmidt's brother, Dr. Walter Schmidt, who had a large practice in Berlin. But it was Bruck who three years later suggested to Cohn that he should enter an academic career and follow Bruck to Frankfurt am Main where the latter had been offered a Chair. Cohn spent two years as a *Privatdozent* in Frankfurt. In the following year he moved to Kiel to fill in a temporary gap in the then vacant Chair of Civil and Commercial Law. In 1932, at the very early age of 28, he was offered and accepted a newly created Chair of Civil Law at his home town Breslau.

To return to Breslau was fulfilment for young Cohn who had felt his roots strong. But Germany was entering a difficult time which began with the destruction of civilised values on home ground and which eventually led to a world holocaust. It was the beginning of the darkness which was rapidly descending upon Europe, a time of bigotry and organised hooligansim in which the emerging Nazi party excelled. Cohn's lectures were disrupted. The Nazi party and the chauvinist press had falsely accused him of social democratic leanings and of having been offered a Chair because of his political affiliation and a alleged friendship with the Social-Democratic Minister of Education, Dr. Grimme. In fact, Cohn was a member of the *Deutsche Staatspartei*, which was the predecessor of the present Free Democratic Party. Denials that there was any truth in either of these allegations were ignored by the Press which was determined to create myths and secure the removal of a scholar whose liberal and humane views were totally alien, indeed an obstacle, to Nazi attempts to suppress free institutions. Finally the carefully organised student agitation led to the closure of the University for several weeks. With the Nazis now in power, Cohn was first sent on compulsory leave and was later dismissed from his post. In March 1933 he emigrated to England.

Life was by no means easy in England for a refugee with a German background and German legal qualifications. Nevertheless, with a perseverance and tenacity which are so typical of the man, Cohn managed to maintain himself by giving advice on German law, mainly to other German refugees, while at the same time he – already a Professor of Law – studied English law. At the end of his studies he was called to the Bar by Lincoln's Inn. But the outbreak of war



prevented him from engaging seriously in legal practice. In the meanwhile he had become a naturalised British subject.

In due course he was called up and served until 1944 in the Royal Regiment of Artillery. This was later followed by service in the Legal Department of SHAEF (Supreme Headquarters Allied Expeditionary Forces). After the war he continued in British Government service as a civilian, first at SHAEF and later in the various British Government Departments concerned with Military Government in Germany, as well as with post-war resettlement problems in general. It is characteristic of Cohn's sense of fairness that he refused, on grounds of conscience, to serve in the War Crimes Department, on the ground that as a Jew he did not find it proper to act or assist in the prosecution of war crimes. This view did not prevent him from writing two classic articles in English on the state of German legal science under the Nazis. Although it could hardly be expected that he should tolerate Nazis or ex-Nazis, he was among the first to attempt to re-establish contact with the new democratic forces in Germany and was the first German Professor of Jewish origin, after the end of the Nazi regime, to give a guest lecture at the Law Faculty of the University of Cologne. There he had the moving experience of an enthusiastic reception by the students, many of whom were crippled war veterans.

Cohn returned to private practice in 1950 and since then he has become a leading practitioner at the English Bar, especially in matters relating to German and Swiss law. Few other lawyers could combine so felicitously a profound knowledge of German law with a deep and extensive knowledge of the practice of English law. And hardly anyone who has been in practice for such a long time in a system to which he came late in life could so admirably marry the qualities of the scholar with those of the practising barrister. While others retired in their limited spare time to a well earned rest, Cohn would use it to digest the impressions of his legal practice of the day and rationalise and re-cast them into meaningful patterns of legal scholarship of a very high order. The result has been, and still is, a constant stream of published work, some of a penetratingly analytical kind, some of strictly utilitarian character, many devoted to questions of civil procedure and arbitration. But in both is transparent not only the best tradition of scholarship typical of the old-fashioned view of the German professor, but also the devastating and down-to-earth common sense which one associates with the Common law. Of special significance is his *Manual of German Law*, a brilliantly written textbook of German law, published in English, first in a special edition under the auspices of the British Foreign Office for the use of those engaged in legal work in post-war Germany, but later in a new edition as a general introduction to German law. Its conciseness, its practical approach and its use of the comparative method have made the *Manual* a standard work in England for all connected with the theory and practice of German and Comparative Law.

To these qualities one must add another pronounced English quality with which his personality is endowed and for which German professors are not

usually known. It is a sense of humour which is shown in a highly developed sense of the absurd and the ridiculous. It is partly also this last quality which has made Cohn a most popular lecturer whose services are in constant demand.

It is not surprising that both the demands upon Cohn's services and the distinctions came piling upon him. In 1958 he accepted the post of Honorary Professor at Frankfurt University. In 1963 he was granted an Honorary Doctorate in Law by the University of Cologne. In 1965 he obtained the LL.D. Degree of the University of London for a substantial, distinct and original contribution to legal science. In 1967 he was nominated Honorary Visiting Professor in European Law at King's College London and a little later he was made a Fellow of King's College. Although his university appointments are honorary, Cohn finds time in the midst of a busy practice to lecture regularly in Frankfurt on English law and occasionally on International Commercial arbitration, whereas in London he has been giving for several years now a regular course on German Civil Law. He has also been giving lectures at the Inns of Court School of Law on the law of International Trade. He has further acted as an *ad hoc* member of the Arbitral Tribunal under the London Debt Agreement in the dispute between Greece and the Federal Republic of Germany. The decision is probably a unique example, in an international Court, of a unanimous verdict in a case in which two *ad hoc* judges have participated. In June 1975 Professor Cohn was awarded the OBE by Her Majesty The Queen in recognition of his services to English law.

This note would not be complete without some reference to Cohn's activities as a distinguished member of the Jewish community in London. He has been active in a number of Jewish organisations, mainly in those concerned with the 'progressive' wing of the Jewish religion. Thus, he has been for many years a member of the Academic Committee of the Leo-Baeck College which trains Rabbis for the Reform and Liberal movements and is President of the North Western Reform Synagogue. He has also written on Jewish problems in a non-Jewish publication, notably an article on the historian Heinrich Graetz in the *Jahrbuch der Schlesischen Friedrich-Wilhelm-Universität in Breslau*, now published in the Federal Republic of Germany (Vol. V, 1960, 220 ff). This was later reprinted in the Memorial volume for the Breslau Rabbinical Academy (1963) 187 ff. He has contributed a further article, which is partly autobiographical, on 'Three Jewish Lawyers of Germany' in the *Year Book of the Leo-Baeck Institute*, London (1972), 155 ff.

Cohn's other activities are too numerous to record, but they include a large number of public lectures given at many German and British universities. But deserving of special mention are his annual lecture at Manchester and his courses on German Law or Comparative Procedure at the University of Surrey and at the International Faculty of Comparative Law in Luxembourg. Throughout the years he has also made a large number of contributions to learned publications, in the form of articles or book reviews or through the columns of 'The Times'. A list of his legal publications can be found below, but the list of his book reviews



or case notes, some in effect of considerable substance - in the *Law Quarterly Review*, the *International and Comparative Law Quarterly* or elsewhere, is too long to be included. References to some other minor articles have also been excluded for the same reason.

## Contract in the French Civil Code and in the Common Law: A Comment

By A. G. Chloros

### 1. Introduction

It is nearly twenty years since an article was published on the structure, formation and form of contract in the French Civil Code from the standpoint of the Common law.<sup>1</sup> In a thought provoking article, which has lost nothing of its interest in spite of the passage of time, Professor Arthur von Mehren attempted to explain and account for the two areas of the *Code civil*, formation and form, in which that Code seemed to be superior to the Common law. After stating that in comparison with the Common law in the field of contract, the achievements of French law are those of the *jurisprudence* rather than of the Code, he put forward the view that formation and form are the two aspects in which the Code has the edge over the Common law.<sup>2</sup> It is interesting, however, that he attributes the weakness of the Common law in these two aspects to the doctrine of consideration. As he puts it, assuming that "option arrangements when clearly understood by both parties should be binding, a general theory of contract formation that blocks enforcement is today, to this extent at least, unsatisfactory."<sup>3</sup> He also found the Common law wanting in regard to unilateral contract where a promise is made in return for an act. Here also a legal system which permits the promisor to withdraw his promise "even though he knows that the promisee has begun to prepare for performing"<sup>4</sup> is artificial.

It is not intended in this article to repeat or elaborate these points, which are eloquently made with a wealth of logical arguments and historical explanations. My purpose is in a sense more modest, that is, simply to touch upon some of the other aspects of Contract upon which a useful comparison may be made between the *Code civil* and the Common law. However, in another sense it is slightly more ambitious, for it is intended to range widely over a larger part of the law of Contract in the Code rather than simply upon formation and form. For my purposes I propose to deal with consent, *cause*, *lésion*, mistake, frustration, breach and third party rights. My object is first to evaluate the relative merits of the rules of Contract in each system, and secondly to consider whether there are any advantages which a codified law can confer upon Contract.

1 See "The Code and Contract - a Comparative Analysis of Formation and Form", published as Chapter 7 in Schwarz (ed.), *The Code Napoléon and the Common law World*, 1956, pp. 110 et seq.

2 *Op. cit.* at p. 111.

3 *Op. cit.* at p. 113.

4 *Ibid.*



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Herrn Stiefel an.  
Herzlichen Dank  
Ihr T.B.

# Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil

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Sonderdruck

Rechtsnorm und richterliche Entscheidung  
im Wettbewerbsrecht

Der Beitrag Rudolf Callmanns zur deutschen und amerikanischen Rechtsentwicklung

Theodor Baums

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# Rechtsnorm und richterliche Entscheidung im Wettbewerbsrecht

## Der Beitrag Rudolf Callmanns zur deutschen und amerikanischen Rechtsentwicklung\*)

Theodor Baums\*\*)

### I. Einführung

Amerikanisches und deutsches Recht zur Bekämpfung unlauteren Wettbewerbs unterscheiden sich in ihrer Entwicklung wie in rechtspolitischen Grundüberzeugungen. Es läßt sich sogar eine auf den ersten Blick verblüffende Verkehrung der Ansätze, mit denen man hier vielleicht gerechnet hätte, feststellen. Das deutsche Recht wird nicht etwa von fest umrissenen gesetzlichen Tatbeständen, sondern von einer umfassenden Generalklausel beherrscht, mit der das Gesetz gegen den unlauteren Wettbewerb seinen Auftakt nimmt (§ 1). Dem Richter wird dadurch der denkbar weiteste Spielraum eingeräumt zu beurteilen, welche geschäftlichen Handlungen als wettbewerbswidrig anzusehen sind. Die Entwicklung des amerikanischen Rechts ist anders verlaufen. Hier steht zu Beginn die große Masse des common law, dessen Fortbildung in den Händen der Gerichte liegt. Die Gerichte sind aber bei der Fortentwicklung in diesem Bereich und der Zuerkennung privater Klagerechte<sup>1)</sup> gegen unlauter handelnde Wettbewerber äußerst vorsichtig verfahren aus Gründen, die noch zu erörtern sind. Ein allgemeiner Tatbestand rechtswidrigen wettbewerbslichen Verhaltens ist von der Rechtsprechung nicht entwickelt worden. Erst in jüngerer Zeit haben dann der Bundesgesetzgeber und zunehmend auch die Einzelstaaten hier eingegriffen und Wettbewerbern und Verbrauchern gesetzliche Ansprüche bei unlauterem wettbewerbslichem Verhalten eingeräumt, zunächst in tatbestandlich eng umschriebenen Sonderfällen<sup>2)</sup>, inzwischen auch auf der Grundlage von Katalogen wettbewerbswidriger Verhaltensweisen oder gar auf der Grundlage einer Generalklausel<sup>3)</sup>.

Rudolf Callmann, zu Beginn der dreißiger Jahre einer der führenden deutschen Wettbewerbsrechtler, ist durch seine Vertreibung in diese andersartige Entwicklung hineingestellt worden. Er hatte bereits in Deutschland eine Fülle von Denkanstößen vermittelt, die zum Teil heute noch diskutiert werden. Vor allem aber ist faszinierend zu beobachten, wie der kontinentaleuropäisch geschulte Jurist nach seiner Emigration in seiner neuen Heimat die Entwicklung eines umfassenden Sachgebiets der „Unfair Competition“ in die Hand nimmt, die Materien dieses Gebietes systematisiert und begrifflich ordnet und die Rechtsprechung drängt, die nun sichtbar werdenden weißen Flecken auf dieser Landkarte auszufüllen. Er wird bald – neben Milton Handler, Walter Derenberg<sup>4)</sup> und anderen – zu einem der maßgeblichen Gesprächspartner der Rechtsprechung in diesem Bereich, zum „leading commentator“<sup>5)</sup>, und kann die Gerichte jedenfalls teilweise auch zu einer Fortentwicklung bewegen.

Bevor dem nachgegangen werden kann, sei zunächst kurz über die äußeren Stationen des Lebens dieses ungewöhnlichen Mannes berichtet<sup>6)</sup>.

### II. Biographie

Rudolf Callmann ist am 29.9.1892 als Sohn des Justizrats Dr. Max Callmann und seiner Frau Clara geb. Meyer in Köln geboren. Der Vater war angesehener Kölner Rechtsanwalt, Stadtverordneter in seiner Vaterstadt Köln, Logenpräsident und Präsident der Jüdischen Gemeinde. Rudolf Callmann selbst berichtet von jüdisch-liberaler Erziehung<sup>7)</sup>. Im Ersten Weltkrieg meldet sich Callmann als Kriegsfreiwilliger. Einen Eintritt in die Offizierslaufbahn lehnt er allerdings ab. Er wird schwer verwundet. Nach seiner Entlassung kann er sein Jurastudium fortsetzen, das ihn an die Universitäten Bonn, Berlin und Freiburg führt. 1919 wird er in Freiburg zum Dr. jur. promoviert<sup>8)</sup> und in Köln als Anwalt zugelassen. Im selben Jahr heiratet er Maria Hess; die Tochter aus dieser Ehe, Ellen Callmann, lebt heute als Kunsthistorikerin in New York. 1923 tritt Rudolf Callmann zusammen mit seinem Bruder in die väterliche Praxis ein. Neben seiner anwaltlichen Tätigkeit findet er Zeit zu zahlreichen Artikeln und Anmerkungen in

\*) Zum 100. Geburtstag Rudolf Callmanns. – Der Aufsatz geht auf einen Vortrag des Verf. auf dem in Bonn vom 12. – 14.9.1991 veranstalteten Symposium „Der Einfluß deutschsprachiger juristischer Emigranten auf die Rechtsentwicklung in den USA und in Deutschland“ zurück. Die Beiträge werden in einem gesonderten Tagungsband veröffentlicht werden. Für wertvolle Hinweise und Unterstützung danke ich den Herren Prof. Dr. Ahrens/Osnabrück, Prof. Dr. Dres. h.c. Friedrich-Karl Beier/München, Prof. Richard Buxbaum/Berkeley, Dr. Mecklenburg/New York, Prof. Dr. Stefan Riesefeld/Berkeley, Prof. Dr. Ernst Stiefel/New York; für ihre Mitarbeit bei der Zusammenstellung des Materials Herrn Marnix van Keirsbilck/Kortrijk sowie meinen Mitarbeitern in Osnabrück, insbesondere Frau A. Luda und Frau A. Mokrys.

Abkürzungen: KR = Kartellrundschau; LJ = Law Journal; LR = Law Review; ZBLH = Zentralblatt für Handelsrecht.

\*\* Prof. Dr. jur., Universität Osnabrück.

1) Auf die bedeutsame Rolle der Federal Trade Commission und einzelstaatlicher Behörden (State Attorneys General) bei der Verfolgung unlauteren Verhaltens im Wettbewerb sei hier nur hingewiesen.

2) Zum Verbot irreführender Angaben in Sec. 43(a) Trademark Act 1946 („Lanham Act“) s. noch unten Text zu N. 63.

3) Zunächst – nach 1964 bis 1971 – Erlaß einzelstaatlicher Gesetze auf der Grundlage des Uniform Deceptive Trade Practices Act; seit 1970 Einführung des (Uniform) Unfair Trade Practices and Consumer Protection Law in nahezu allen Bundesstaaten.

4) Zu Derenberg etwa Göppinger, Juristen jüdischer Abstammung im „Dritten Reich“, 2. Aufl. 1990, S. 275; Stiefel, Die deutsche juristische Emigration in den U.S.A., in: Festschrift für W. Oppenhoff (1985) S. 433, 447; Stiefel/Mecklenburg, Deutsche Juristen im amerikanischen Exil (1933 – 1950) [1991] S. 46; E. Ulmer, Nachruf Walter J. Derenberg, GRUR Int. 1975, 392.

5) S. nur 659 F. 2d 695 N. 6 und 497 F. 2d 433 N. 10.

6) Die folgenden biographischen Angaben stützen sich vor allem auf Ellscheid GRUR 1981, 897 f.; ferner Göppinger (N. 4) S. 272; Stiefel (N. 4) S. 447; Stiefel/Mecklenburg (N. 4) S. 126 f.

7) Oral History Account of the Research Foundation for Jewish Immigration (Leo Baeck Institute, N.Y.) No. 39.

8) Dissertationsthema: „Der Kauf von Markenwaren“ (m.c.l.; Referent: Hoeniger).



Fachzeitschriften, vornehmlich auf dem Gebiet des unlauteren Wettbewerbs und des gewerblichen Rechtsschutzes<sup>9)</sup>. 1929 erscheint bei *J. Bensheimer* sein Kommentar zum Gesetz gegen den unlauteren Wettbewerb und zum Warenzeichenrecht mit über 500 Seiten, der von der Kritik durchgehend als ausgezeichnet gelobt wird<sup>10)</sup>. Bereits 1932 folgt eine weitere noch umfangreichere Auflage. Das Buch, zusammen mit einer Fülle weiterer einschlägiger Fachaufsätze, läßt ihn sehr bald zu einem der am meisten zitierten Autoren auf diesem Gebiet werden. Seine Veröffentlichungen in Deutschland brechen zunächst 1934 ab, infolge der nationalsozialistischen Maßnahmen gegen Veröffentlichungen sogenannter Nichtarier<sup>11)</sup>. Ihm gelingt allerdings, noch im selben Jahr einen 721 Seiten umfassenden Kommentar zum deutschen Kartellrecht zu veröffentlichen, und zwar im Philo-Verlag, dem Verlag des Central-Vereins, der damit sein erstes juristisches Werk herausbrachte. Die juristischen Fachverlage hatten den Druck abgelehnt<sup>12)</sup>. Wirksamkeit hat dieses Werk, eine Kombination aus systematischer Darstellung und Kommentierung, freilich nicht mehr entfalten können.

Ein weiterer Wirkungskreis erschließt sich *Callmann* durch seine Tätigkeit für die jüdische Gemeinde: 1930 wird er Vorsitzender des linksrheinischen Bezirks des Central-Vereins, später Präsidiumsmitglied des Central-Vereins. 1931 veröffentlicht er ein Rechtsgutachten über die Rechtswidrigkeit des Aufrufs zum Boykott jüdischer Geschäfte in einer nationalsozialistischen Tageszeitung. Nach der Gründung der „Reichsvertretung der deutschen Juden“ 1933 wird er dort Präsidiumsmitglied.

Als sogenanntem „Frontkämpfer“ ist es *Callmann* möglich, über 1933 hinaus als Rechtsanwalt tätig zu bleiben<sup>13)</sup>. Als die Verhältnisse immer erschreckender und bedrohlicher werden, emigriert er schließlich 1936 mit seiner Familie in die USA, unter dem von den Behörden in Köln akzeptierten Vorwand eines vorübergehenden Forschungsaufenthalts<sup>14)</sup>. Dieser Aufenthalt in Harvard wird ihm ermöglicht durch einen Forschungsauftrag (Research Fellowship), der auf der Vermittlung durch den dortigen Wettbewerbsrechtler *Zechariah Chafee, Jr.* beruhte, und ihm gestattet, den L.L.B. (1939) zu erwerben<sup>15)</sup> und die Anwaltszulassung zu betreiben. 1943 wird *Callmann*, der 1937 mit seiner Familie in Deutschland ausgebürgert worden war, amerikanischer Staatsbürger und erhält die Anwaltszulassung in New York.

Bereits 1940 erscheinen mehrere Aufsätze in amerikanischen Fachzeitschriften aus seiner Feder. Bemerkenswert ist, daß er sich wegen der nach 1933 noch in Deutschland erschienenen günstigen Rezensionen seines „Kartellrechts“ gegen den in der amerikanischen

Literatur erhobenen absurden Vorwurf zur Wehr setzen muß, ein typischer Vertreter nationalsozialistischer Ideologie zu sein<sup>16)</sup>. Weder Verdächtigungen dieser Art, die Vertreibung aus Deutschland, noch die Kriegszeit halten *Callmann* davon ab, in seinen Veröffentlichungen Vergleiche mit der Rechtslage in Deutschland anzustellen und in breitem Umfang Werke deutscher Autoren bis hin zu *Savigny* und *Goethe* zu zitieren<sup>17)</sup>. 1945 erscheint bei *Callaghan* in Chicago sein dreibändiges Werk „The Law of Unfair Competition and Trademarks“, das seinen Ruf als „leading commentator“ in diesem Bereich begründet. Schon 1950 folgt die auf fünf Bände erweiterte zweite Auflage. Das Werk wird bis heute in Loseblattform (seit dem Tode *Callmanns* durch *Louis Altman*) fortgesetzt. Eine Fülle von Aufsätzen im Bereich des Wettbewerbsrechts einschließlich des Kartellrechts und des gewerblichen Rechtsschutzes folgen.

Dies alles tritt neben *Callmanns* hauptberufliche Tätigkeit als Anwalt vor allem auf dem Gebiet des gewerblichen Rechtsschutzes, von 1949 bis 1969 als Partner der Praxis *Greene, Callmann & Durr*, von 1971 bis zu seinem Tode als Counsel der Praxis *Golenbock and Barell*. Im Laufe der Zeit kommen zahlreiche weitere Aufgaben hinzu, so als Vizepräsident des Committee on International Copyright and Trademark Relations der American Bar Association und als Mitglied mehrerer amerikanischer Vereinigungen auf dem Gebiet des gewerblichen Rechtsschutzes. Mehrfach wird er als sachverständiger Zeuge zu Anhörungen vor Kongreßausschüssen geladen. Hinzu tritt vor allem sein Engagement für die jüdische Gemeinschaft: Er wirkt bei der Vorbereitung und Durchführung des Wiedergutmachungswerkes mit, als Angehöriger der Exekutive der „Conference of Material Claims against Germany“; er wird Vorstandsvorsitzender, später Boardvorsitzender der „American Federation of Jews from Central Europe“, Präsidiumsmitglied des Rates der Juden aus Deutschland, Boardmitglied des New Yorker Leo Baeck Instituts, und engagiert sich in mehreren jüdischen Selbsthilfe- und Wohlfahrtsorganisationen.

Als bald nach dem Kriege reicht er auch seine Hand nach Deutschland hinüber: Persönliche Vorkriegsbeziehungen werden aufgenommen<sup>18)</sup>; er wird erneut in der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht („Grüner Verein“) tätig und publiziert auch wieder, ab 1951, zahlreiche Beiträge in deutschen Fachzeitschriften.

Für sein Lebenswerk ist *Callmann* mit zahlreichen Auszeichnungen geehrt worden: Mit dem großen Bundesverdienstkreuz für seine Verdienste um die Aussöhnung Deutschlands mit den Juden; für sein wissenschaftliches Werk 1959 mit einer Honorarprofessur an der Universität seiner früheren Heimatstadt Köln sowie, kurz vor seinem Tode, mit der Jefferson-Medaille, die mit ihm erstmals ein Anwalt erhält. Seit 1981 verleiht der „Grüne Verein“ eine „Rudolf-Callmann-Medaille“ für hervorragende Verdienste um das Fachgebiet Gewerblicher Rechtsschutz und Urheberrecht. *Rudolf Callmann* ist am 12. 3. 1976 in seinem 84. Lebensjahr in New York gestorben.

16) *Callmann* (wie N. 12).

17) Vgl. den Aufsatz in N. 12 sowie 55 Harvard L R 595 (1942).

18) Dazu *Ellscheid* GRUR 1981, 898 f.

9) Bibliographie unten unter V. – Damit steht *Callmann* in einer besonderen Kölner Tradition, die bereits vor dem Hintergrund ihrer Erfahrungen mit dem rheinischen (französischen) Recht maßgeblich zur Einführung der Generalklausel (§ 1 UWG) im Jahre 1909 beigetragen hatte; vgl. Einzelheiten bei *Bachem/Roeren*, Das Gesetz zur Bekämpfung des unlauteren Wettbewerbs (3. Aufl. 1900) S. 3 ff.

10) Nachweise der Rezensionen unten unter V. A.

11) Vgl. dazu *Göppinger* (N. 4) S. 142.

12) Vgl. *Callmann* 28 Georgetown L J 585, 601 N. 45 (1940).

13) *Göppinger* (N. 4) S. 87 ff.

14) Eingehend zur Immigrationspolitik der USA in den 30er Jahren, zur Integration und Assimilationsproblemen *R.-M. Leuschen-Seppel*, Refugees from Nazi Germany and the Scientific Study of Antisemitism, Simon Wiesenthal Center Annual Vol. 4 (1987) S. 139, 145 ff.

15) Mit der Thesis „Anti-Trust Law in Courts and Commissions“.

### III. Werk und Wirkung in Deutschland

Die Rechtsliteratur der Weimarer Zeit, der kurzen Periode „zwischen den Mühlsteinen“, wie sie *Knut Wolfgang Nörr* in seinem Versuch einer rechtsgeschichtlichen Periodisierung bezeichnet hat<sup>19)</sup>, greift im Recht des unlauteren Wettbewerbs vor allem eine Grundfrage auf, an deren Diskussion sich auch *Callmann* eingehend beteiligt: Die Frage nach der wettbewerbsrechtlichen Bedeutung der Generalklausel, und damit nach ihrem Schutzzumfang und ihrer Konkretisierung. Diese Diskussion kann hier nicht in ihren sämtlichen Aspekten und Facetten wiedergegeben werden. Ich beschränke mich auf wenige Einzelpunkte und die Stellungnahmen *Callmanns* hierzu.

#### 1. Die Generalklausel als „Blankettnorm“

§ 1, mit dem das UWG seinen Auftakt nimmt, verweist als Maßstab für die Beurteilung, wann Wettbewerbshandlungen als unlauter zu gelten haben, auf die nicht näher konkretisierten „guten Sitten“. *Hermann Isay* hatte in seiner 1929 erschienenen Abhandlung „Rechtsnorm und Entscheidung“ gerade diese Vorschrift zum Ausgangspunkt einer allgemeinen Lehre von der richterlichen Entscheidungsfindung genommen: Nicht die Normen bildeten die Grundlagen der richterlichen Entscheidung. Der Richter entscheide nach Rechtsgefühl und praktischer Vernunft. Eine etwa bereits vorhandene Gesetzes- oder richterlich entwickelte Norm diene nur der Kontrolle der getroffenen Entscheidung, tue bei deren Begründung ihre Allgemeingültigkeit dar, und ermögliche schließlich dem Publikum die Berechenbarkeit der Entscheidung („Rechtssicherheit“). *Callmann* kritisiert diese Ansicht als zu weitgehend<sup>20)</sup>: Es ist zwischen Entscheidungen bei Vorhandensein einer echten Gesetzesnorm und einer „Blankettnorm“ zu unterscheiden. Nur im letzteren Falle gibt das Gesetz „das Heft aus den Händen“. § 1 UWG mit dem Verweis auf die „guten Sitten“ stellt eine solche „Blankettnorm“ dar. Aber selbst in diesem Falle wird die Entscheidung nicht allein nach Rechtsgefühl und praktischer Vernunft des Richters getroffen. Es darf nicht außer Betracht bleiben, daß bereits vorhandene gesetzliche oder auch durch frühere Entscheidungen gebildete Normen allein durch ihr Bestehen das Rechtsbewußtsein des Richters beeinflussen. Auch führt die einzelne richterliche Fallentscheidung selbst noch nicht zur Herausbildung einer „Norm“. Eine Norm entsteht nach *Callmann* aus einer oder aus einer Reihe von Entscheidungen nur unter der weiteren Voraussetzung der „Rechtsüberzeugung“ der beteiligten Mitglieder der Rechtsgemeinschaft. Damit ist nach *Callmanns* Ansicht auch die Aufgabe der Rechtswissenschaft in diesem Prozeß der Rechtentstehung und damit insbesondere in dem von der Generalklausel beherrschten Gebiet des unlauteren Wettbewerbs bezeichnet: Sie ordnet nicht nur die gesetzlichen und richterlich geschaffenen Normen nach bestimmten Prinzipien und übergeordneten Gesichtspunkten, sondern wirkt dadurch auch bei der Bildung der Rechtsüberzeugung mit.

Diese Auffassung kann *Callmann* später in das System des amerikanischen „case law“ nicht mit hinübernehmen. Auch hier sieht er zwar seine Aufgabe keines-

19) *Knut Wolfgang Nörr*, Zwischen den Mühlsteinen (1987).

20) Der unlautere Wettbewerb (2. Aufl. 1932) S. 89 ff.

wegs nur darin, Gesetzesrecht und Fallentscheidungen überschaubar darzustellen. Er entwickelt vielmehr ein „basic concept“<sup>21)</sup> und kritisiert immer wieder richterliche Entscheidungen als zu restriktiv oder konzeptionslos<sup>22)</sup>. Aber auch für die seiner Rechtsauffassung nach unrichtigen Entscheidungen gilt hier eindeutig: „this remains the law of the land“<sup>23)</sup>. Der Beitrag des Rechtswissenschaftlers zur Rechtsfortbildung ist eindeutig und klar begrenzt. Die richterliche Entscheidung bedarf keiner positivgesetzlichen oder gewohnheitsrechtlichen Legitimation. Ausführungen zu diesen Fragen finden sich in seinen amerikanischen Arbeiten nicht mehr.

#### 2. Die Diskussion um das Schutzobjekt

Zahllose Lehren sind zur Frage nach dem Schutzobjekt des Wettbewerbsrechts entwickelt worden<sup>24)</sup>: Ist es der Schutz der Persönlichkeit des Mitbewerbers, seines Unternehmens, seiner Wettbewerbsstellung; geht es um die Aufrechterhaltung eines im öffentlichen Interesse gegebenen Regelwerks, der Wettbewerbsordnung, um die Verhütung der Schädigung der Marktgegenseite, oder gar um eine Kombination dieser Ziele? Die ältere Lehre, die den Individualschutz in den Vordergrund gestellt hatte, betrachtete als Schutzobjekt die Persönlichkeit des Mitbewerbers (*Kohler, Lobe, Rosenthal*)<sup>25)</sup>. *Callmann* entwickelt hierzu eine Gegenposition<sup>26)</sup>. Die zur Entpersönlichung des Wirtschaftslebens drängende Entwicklung mache erforderlich, nicht die Person des Mitbewerbers, sondern das konkurrierende Unternehmen in seiner wirtschaftlichen Betätigung als Schutzobjekt des Wettbewerbsrechts anzusehen. Bezugspunkt ist hier für *Callmann* die vom Reichsgericht entwickelte Figur des Rechts am eingerichteten und ausgeübten Gewerbebetrieb, die er in das Wettbewerbsrecht hinübernehmen will.

Mit dieser Auffassung hat sich *Callmann* nicht durchsetzen können. Die Schwierigkeit besteht darin, daß sich zahlreiche nach dem UWG mit einer Sanktion bedrohte Wettbewerbsverstöße nicht oder nur in einem sehr weiten Sinn als Unternehmensverletzungen begreifen lassen<sup>27)</sup>. Irreführende Angaben, die keinen Bezug auf bestimmte Mitbewerber enthalten, oder Werbemaßnahmen, die den Kunden unsachlich beeinflussen, mögen zwar zu Umsatzeinbußen der Mitbewerber führen. Der Grund für die Bedrohung solchen Verhaltens mit Sanktionen ist aber nicht, Beeinträchtigungen der Mitbewerber zu verhindern, sondern, Verfälschungen des Marktprozesses durch derartiges Verhalten zu verhüten. Ein subjektives Recht an der vorhandenen Wettbewerbsstellung kann in einer Wettbewerbswirtschaft nicht anerkannt werden<sup>28)</sup>.

21) S. nur Unfair Competition, Trademarks and Monopolies (3rd ed.) Vol. 1 Part 1.

22) S. nur die Kritik an der grundlegenden Entscheidung zum „false advertising“, *American Washboard Co. v. Saginaw Mfg. Co.* (103 F 281, 50 L R A 609) a.a.O. S. 597 ff.

23) A.a.O. S. 600.

24) Überblick bei *Baumbach/Hefermehl*, Wettbewerbsrecht (16. Aufl. 1990) Einl. UWG Rdz. 44 ff.

25) Eingehender dazu *Callmann*, Der unlautere Wettbewerb (N. 20) S. 28 ff.; *Baumbach/Hefermehl* a.a.O. Rdz. 45 m. Nachw.

26) Der unlautere Wettbewerb (N. 20) S. 31 ff.; vgl. auch S. 43 f. Ebenso der im selben Jahr wie die 1. Auflage des *Callmannschen* Werkes (1929) erschienene Kommentar von *Baumbach*, Das gesamte Wettbewerbsrecht (1. Aufl. 1929).

27) *Fikentscher*, Wettbewerb und gewerblicher Rechtsschutz (1958) S. 224.

28) Ähnlich und eingehender *Baumbach/Hefermehl* (N. 24) Rdz. 46.



Callmann hat seine Auffassung vom Schutzobjekt des Wettbewerbsrechts später in das amerikanische Recht übertragen: „It is the purpose of the law of unfair competition to protect the competitive position of the business enterprise“<sup>29)</sup>. Allerdings konstatiert er selbst wenig später auch hier, daß die Gerichte den von ihm zum Recht des unlauteren Wettbewerbs zusammengefaßten verschiedenartigen Klagen und Regeln verschiedene Schutzzwecke beilegen<sup>30)</sup>. Ansprüche getäuschter Kunden etwa hängen nicht von der Beeinträchtigung des Absatzes von Mitbewerbern ab<sup>31)</sup>.

### 3. System der Wettbewerbshandlungen

Einen weiterführenden Beitrag hat Callmann mit seinem Versuch der Systematisierung der Wettbewerbshandlungen und damit der Konkretisierung der Generalklausel geleistet. Kohler hatte zwischen „Irreleitungen“ und „Feindseligkeiten“ unterschieden. Dieses System wird von Callmann durch eine Dreiteilung ersetzt<sup>32)</sup>. Im Anschluß an eine ähnliche Gliederung des Sozialwissenschaftlers Sombart<sup>33)</sup> teilt er die Wettbewerbshandlungen in Kräfteentfaltung („Leistungswettbewerb“), Einwirken auf die öffentliche Meinung („Suggestionswettbewerb“) und unmittelbare Bedrängung des Wettbewerbers („Gewaltwettbewerb“) ein<sup>34)</sup>. Hier klingt bereits die von Nipperdey später formulierte Unterscheidung von Leistungs- und Behinderungswettbewerb<sup>35)</sup> an, die dann vom Reichsgericht im Benrather Tankstellenfall übernommen worden ist<sup>36)</sup>. Leistungs- und Suggestionswettbewerb sind nur unzulässig, wenn sie sich unerlaubter Mittel bedienen; dagegen ist der Gewaltwettbewerb per se unzulässig<sup>37)</sup>. Die Callmannsche Einteilung ist später verfeinert und fortentwickelt worden, insbesondere in der mit ihr noch nicht beantworteten Frage, nach welchen Grundsätzen die Unlauterkeit von Maßnahmen des Leistungs- oder Suggestionswettbewerbs im einzelnen zu beurteilen ist<sup>38)</sup>. – Eine vergleichbare, etwas veränderte Einteilung legt Callmann auch seinen „Maxims of Competitive Equity“ zugrunde<sup>39)</sup>.

## IV. Werk und Wirkung in den USA

Schon die bisherigen Seitenblicke auf die späteren Arbeiten Callmanns zum amerikanischen Recht lassen erkennen, wie sich dieser im deutschen Rechtsdenken mit seinen grundsätzlichen Fragestellungen und Systembildungen geschulte und dieses Recht mitgestaltende Jurist später gegenüber der völlig anderen Ordnung

des amerikanischen Rechts verhält. Callmann hat versucht, das amerikanische Recht in diesem Bereich zu einem System mit allgemeinen Prinzipien fortzuentwickeln, nicht nur, um die von ihm konstatierte Rückständigkeit des amerikanischen Rechts in diesem Gebiet<sup>40)</sup> zu überwinden, sondern letzten Endes, um Rechtsangleichung und das Ideal der „einen Welt“<sup>41)</sup> zu erreichen. Das ist im folgenden in Grundzügen darzustellen (1.). Die weitere Frage dagegen, wie weit Callmann Erfolg beschieden war, in welchen Fällen seine Arbeiten die weitere Rechtsentwicklung beeinflusst haben, ist sehr viel schwerer zu beantworten. Aus Zeit- und Raumgründen müssen sowohl die literarische Diskussion und Wirkung seiner Thesen wie die von seinen rechtsvergleichenden Kenntnissen geprägten Beiträge zur Diskussion im Gesetzgebungsprozeß hier völlig ausgeklammert werden. Bedeutsamste Rechtsquelle im Gebiet des unlauteren Wettbewerbs ist – trotz zunehmender Kodifizierung – das Fallrecht. Hier, in der Diskussion der Arbeiten Callmanns in den veröffentlichten Entscheidungsgründen, wird sein Einfluß am leichtesten greifbar. Das zeigt sich zunächst in den umfangreichen Zitaten seiner Arbeiten, insbesondere seines Hauptwerkes „Unfair Competition“, in den mit Literaturzitaten sonst sehr sparsam umgehenden Gerichtsurteilen<sup>42)</sup>. Aus der Fülle dieses Materials sollen nur zwei grundlegende Entscheidungen, die das Recht des unlauteren Wettbewerbs in dem von Callmann vorgezeichneten Sinne fortentwickeln und sich dabei ausdrücklich auf ihn beziehen, im folgenden herausgegriffen werden (unten 2., 3.).

### 1. Fallrecht und Systembildung im Wettbewerbsrecht der USA

a) Die Materien, die nach deutscher Rechtsauffassung das Recht des unlauteren Wettbewerbs ausmachen, bilden im amerikanischen Recht eine Gemengelage von Fallrecht und bundes- und einzelstaatlichem Gesetzesrecht, die sich im Laufe der Zeit entsprechend den praktischen Bedürfnissen und rechtspolitischen Überzeugungen allmählich herausgebildet hat. Dabei haben sich die Rechtssätze des common law gegen den unlauteren Wettbewerb aus dem Recht der unerlaubten Handlungen entwickelt. Im Anschluß an Oppenheim lassen sich drei verschiedene Wurzeln feststellen<sup>43)</sup>:

Eine erste Doktrin des common law gegen den unlauteren Wettbewerb rührt von der Auffassung her, daß alle klagbaren Eingriffe unter eines der sogenannten benannten Delikte (nominat torts) fallen müssen. Der Kläger muß dartun, durch eine bestimmte unerlaubte Handlung, z.B. durch arglistige Täuschung (fraud or misrepresentation), geschädigt worden zu sein. In diesem Sinne ist auch der „unlautere Wettbewerb“ ein benanntes Delikt, das allerdings ursprünglich auf das sogenannte „passing off“ beschränkt war. „Passing off“ ist eine Spielart der arglistigen Täuschung. Es liegt z.B. vor, wenn ein Unternehmen die gleiche Marke wie ein Wettbewerber oder eine verwechslungsfähige Marke verwendet, dadurch den Abnehmern vorspiegelt, das

von ihm angebotene Produkt sei das seines Wettbewerbers, und diesem dadurch Kundschaft entzieht. Diese ursprünglich als „unfair competition“ bezeichnete Gestaltung ist später, wie noch zu zeigen sein wird, schrittweise um weitere Fälle vermehrt worden.

Die Doktrin der Haftung für „nominat torts“ wird ergänzt durch die Lehre von der Haftung für vorsätzliche Schadenszufügung. Die klassische Umschreibung dieses „prima facie tort“ findet sich in der Begründung des Urteils des Supreme Court in Sachen *Aikens v. Wisconsin*<sup>44)</sup> durch Judge Holmes: „Prima facie gilt die vorsätzliche Zufügung eines Schadens als Anspruchsgrundlage, die dem materiellen Recht zugehörig, ungeachtet der Form des Vorbringens die Einwendung eines Rechtfertigungsgrundes notwendig macht, wenn der Beklagte einer Verurteilung entgehen will.“ Diese Lehre ist in geeigneten Fällen als Klagegrundlage auch in Wettbewerbsstreitigkeiten herangezogen worden.

Die Beschränkung auf „passing off“ (unlauterer Wettbewerb im ursprünglichen Sinne) und vorsätzliche Schadenszufügung hat sich im Laufe der Zeit als unzureichend erwiesen. Die Gerichte sind daher dazu übergegangen, den Deliktstatbestand des unlauteren Wettbewerbs („passing off“) um andere Gestaltungen zu erweitern.

Grundlegend ist die 1918 ergangene Entscheidung *International News Service v. The Associated Press*<sup>45)</sup>. Callmann selbst schildert den Fall wie folgt: „Ein Nachrichtenbüro in Chicago nutzte den Zeitunterschied zwischen Chicago und New York aus, indem es sich von einem Vertreter in New York die neuesten Nachrichten nach Chicago telephonieren ließ, nachdem dieser sie den Zeitungen entnommen hatte, die von einer anderen Nachrichtenagentur gespeist waren; ein typischer Fall von Ausbeutung fremder Arbeit“<sup>46)</sup>.

In Fällen wie in diesem erntet das unlauter handelnde Unternehmen dort, wo es nicht gesät hat. Anstatt, wie im Falle des „passing off“, mittels arglistiger Täuschung durch Verkauf von Waren diese als von einem anderen Unternehmen stammend auszugeben, gibt das betreffende Unternehmen hier vor, es sei selbst der Schöpfer dessen, was es in Wirklichkeit von seinem Wettbewerber entnommen hat. Man hat dieses Verhalten als „umgekehrtes passing off“ bezeichnet.

Die Entscheidung ist ein hübsches Beispiel für die Methode der schrittweisen Rechtsfortbildung durch ein Fallrecht, das die Ähnlichkeit mit bereits entschiedenen Fällen („umgekehrtes passing off“) sucht und betont. Zugleich markiert sie den Punkt, an den Callmann mit seiner Systembildung und dem Versuch, die Gerichte zur Entwicklung eines allgemeinen Rechts zur Bekämpfung unlauteren Wettbewerbs zu bewegen, anknüpfte.

b) Die Regeln des amerikanischen Rechts gegen unlauteren Wettbewerb, die Callmann im Fallrecht vorfand, wiesen nach seiner Ansicht zwei entscheidende Schwächen auf: Erstens ließen sie, gemessen an der gewissermaßen flächendeckenden deutschen Generalklausel, entscheidende Lücken, sei es gewollt, sei es mangels einschlägiger Fälle. „Täuschende Reklame, abträgliche aber wahre Behauptungen gegen einen Mitbewerber, Preiskampf, Bestechung [hatten] im Recht der unerlaubten Handlungen [noch] keinen Platz [ge-

funden]“<sup>47)</sup>. Und zweitens fehlte es an einer konzeptionellen Fundierung und systematischen Zusammenfügung der verschiedenen Ansätze. Beides, die Entwicklung eines Grundkonzeptes wie Vorschläge zur Fortentwicklung des vorgefundenen Rechts zu einem umfassenden, weit über das ursprüngliche enge Verständnis von „unfair competition“ im Sinne von „passing off“ hinausreichenden Recht des unlauteren Wettbewerbs, nahm Callmann unverzüglich in Angriff.

Bereits sein erster 1940 veröffentlichter Aufsatz mit dem Titel „What is unfair competition?“<sup>48)</sup> zeigt sein Anliegen mit aller Deutlichkeit. Er sieht in den vorliegenden Gerichtsentscheidungen zum Wettbewerbsrecht nur einen Haufen Rohmaterial ohne Fundierung<sup>49)</sup>. Er arbeitet dann die diesen Fällen gemeinsame Besonderheit heraus, nämlich ihren Bezug auf Markt und Wettbewerb, entwickelt eine Definition wettbewerblichen Verhaltens und allgemeine Grundsätze unfairen Handelns im Wettbewerb<sup>50)</sup>.

Eine ausgebaut Theorie unlauteren Verhaltens im Wettbewerb findet sich dann im ersten Band seines dreibändigen, später fünfbandigen Buches „Unfair Competition, Trademarks and Monopolies“. Hier entwickelt er in einem Allgemeinen Teil „Basic Concepts“. Unlauterer Wettbewerb ist nach Callmann ein „tort sui generis“, wobei Verhaltensweisen in sehr viel umfassenderem Ausmaß von diesem Tatbestand erfaßt werden sollen als diejenigen, die ursprünglich unter dem Begriff unlauteren Wettbewerbs („passing off“) verstanden oder später von den Gerichten derselben Regel unterstellt worden waren<sup>51)</sup>. Kennzeichnend für den Wettbewerb ist nicht ein Kampf der Wettbewerber gegeneinander, sondern ein einem sportlichen Wettstreit oder Wettrennen nebeneinander vergleichbares, nach fair-play-Regeln auf ein bestimmtes Ziel hin gerichtetes Bestreben. Unlauter sind alle Verstöße gegen die Regeln des fair play, insbesondere unmittelbare Attacken gegen die Mitbewerber. Wettbewerb ist eine Beziehung („relationship“) zwischen Marktteilnehmern mit gegenseitigen Rechten und Pflichten, deren Verletzung zur Haftung führt<sup>52)</sup>. In der Folge entwickelt er dann, welche Verhaltensweisen im einzelnen als Regelverstöße, als unlauter anzusehen sind<sup>53)</sup>.

Es kann billigerweise von einer Rechtsprechung, die sich auf die Entscheidung von Einzelfällen beschränkt, nicht erwartet werden, daß sie ein derartiges systematisches Konzept in Bausch und Bogen übernimmt. Einfluß und Erfolg kann sich hier nur in Einzelpunkten zeigen, und hier hat sich Callmanns Konzept als fruchtbar erwiesen, wie an zwei Beispielen dargestellt werden mag.

### 2. Capitol Records v. Spies

Die Klägerin, Capitol Records, stellte Schallplatten und Tonbänder mit Aufnahmen berühmter Künstler her. Sie hatte dabei erhebliche Lizenzgebühren und Herstellungskosten aufzuwenden. Der Beklagte kaufte diese Platten und Tonbänder jeweils im Einzelhandel, überspielte sie auf eigene Tonbänder und verkaufte diese Tonbänder erheblich billiger als die Aufnahmen der

29) Unfair Competition (N. 21) S. 25.

30) S. die Nachweise in Unfair Competition (N. 21) S. 92 ff.

31) S. etwa Schechter, Unfair Trade Practices & Intellectual Property (1986) S. 181 ff.

32) Der unlautere Wettbewerb (N. 20) S. 24, 50 ff.

33) Sombart, Der moderne Kapitalismus (1927) III/2 S. 557.

34) A.a.O. S. 24.

35) Nipperdey, Wettbewerb und Existenzvernichtung, Kartell-Rundschau 1930, 127, 140 ff.

36) RGZ 134, 342, 352. Callmann war in dem Rechtsstreit als Gutachter tätig; vgl. RGZ a.a.O.

37) Der unlautere Wettbewerb (N. 20) S. 52.

38) S. nur die Darstellung bei Baumbach/Hefermehl, Wettbewerbsrecht (N. 24) Rdz. 159 ff.; vgl. aber auch bereits das Schema bei Callmann, Der unlautere Wettbewerb (N. 20) S. 52 f.

39) Unfair Competition (N. 21): § 8.1. Direct Attack Against a Competitor; § 8.2. Denying a Customer the „Opportunity To Judge Freely“; § 8.3. Misappropriation of a Competitor's Business Values; § 8.4. Unlawful Conduct of Business.

40) Vgl. WuW 1961, 778, 779.

41) 49 Virginia L. R. 426 (1963).

42) Eine Überprüfung mittels „Lexis“ ergab Zitate in 337 Urteilen von Bundesgerichten und in 112 Urteilen einzelstaatlicher Gerichte.

43) In: The Patent, Trademark, & Copyright Journal of Research & Education 116 ff. (1958).

44) 195 U.S. 194 (1904).

45) 248 U.S. 215 (1918). Dazu – und zu späteren Einschränkungen dieser Entscheidung aufgrund der dissenting opinion von Justice Brandeis – s. Callmann, Unfair Competition (N. 21) Vol. 2 S. 501 ff.

46) MA 1955, 593, 596.

47) Callmann, MA 1955, 593, 596.

48) 28 Georgetown L. J. 585–607 (1940).

49) A.a.O. S. 588.

50) A.a.O. S. 604 ff.

51) Unfair competition (N. 21) Vol. 1 S. 175 und passim.

52) A.a.O. S. 176, 181 f.

53) A.a.O. S. 194 ff.



Klägerin. Die Tonbänder des Beklagten waren mit Aufklebern versehen, die eine Verwechslung mit den Produkten der Klägerin ausschlossen.

Der Sachverhalt entspricht völlig dem eines Falles, den das deutsche Reichsgericht im Jahre 1910 zu entscheiden hatte<sup>54</sup>). Das Reichsgericht hat das Verhalten des Beklagten als sittenwidrig (§§ 826 BGB, 1 UWG) beurteilt. Das Verfahren, mittels dessen die Klägerin ihre Platten hergestellt habe, genieße zwar keinen spezialgesetzlichen (urheber- oder patentrechtlichen) Schutz; es hätte daher vom Beklagten ohne weiteres nachgeahmt werden können. Der Beklagte habe aber nicht das Verfahren nachgeahmt, sondern das mit erheblichen Aufwendungen erstellte Arbeitsergebnis der Klägerin einfach übernommen. Dagegen sei die Klägerin zwar nicht durch besondere gewerbliche Schutzrechte<sup>55</sup>), wohl aber durch die allgemeinen bürgerlich-rechtlichen Vorschriften geschützt. Die Sonderrechte des gewerblichen Rechtsschutzes ständen dem nicht entgegen, weil der in Frage stehende Tatbestand von ihnen nicht erfaßt werde.

Das Gericht in der Sache *Capitol Records, Inc., v. Gary A. Spies* stellt, im Anschluß an *Callmann*, ähnliche Erwägungen an<sup>56</sup>). Dabei muß es sich allerdings mit zwei Entscheidungen des US-Supreme Court<sup>57</sup>) auseinandersetzen, in denen ein Rechtsschutz des Klägers gegen sklavischen Nachbau seiner Produkte mit folgender Begründung verneint worden war: „When an article is unprotected by a (sc. federal) patent or copyright, state law may not forbid others to copy that article because the patent law allows free access to copy whatever the federal patent and copyright laws have in the public domain“<sup>58</sup>). Die Einzelstaaten dürften nicht durch Fortentwicklung ihres common law Rechtsschutz gegen Nachahmung gewähren, wo das Bundesrecht ein rechtlich geschütztes Monopol gerade verweigert habe. Das Recht gegen unlauteren Wettbewerb dürfe nicht zur Entwicklung von Monopolrechten eingesetzt werden und dadurch letzten Endes wettbewerbsbeschränkend wirken. Antitrust-Überlegungen begrenzen, wie in anderen Zusammenhängen, so auch hier eine als zu weitgehend empfundene Entwicklung des Rechts gegen unlauteren Wettbewerb; ein Gedanke, der sich im deutschen Recht mit seiner ganz anderen Tradition nicht hat entwickeln können. *Callmann* hatte diese Begrenzung des Rechts gegen unlauteren Wettbewerb als „Monopolphobie“ gegeißelt und eine einschränkende Interpretation der Entscheidungen *Sears* und *Compco* gefordert<sup>59</sup>). Das Gericht folgt dem unter ausdrücklichem Hinweis auf *Callmann*. Es liege nicht bloß ein Nachbauen oder Abkupfern nicht spezialgesetzlich geschützter Werke oder Ideen vor. Sondern der Beklagte habe darüber hinaus das Produkt der Leistungen der Klägerin selbst ohne eigene Aufwendungen durch einfache Kopie unmittelbar übernommen und sich zu eigen gemacht. Dies stelle eine besondere Form unlauteren Wettbewerbs dar, die vom common

law des Staates Illinois erfaßt werde, ohne gegen Bundesrecht und die in *Sears* und *Compco* niedergelegten Grundsätze zu verstoßen.

### 3. L'Aiglon Apparel v. Lobell

„Der Schutz gegen irreführende Werbung ist ein trauriges Kapitel im amerikanischen Wettbewerbsrecht“ klagt *Callmann* noch in einem 1955 veröffentlichten Aufsatz<sup>60</sup>). Die Gerichte, die nach common law über irreführende Werbung zu entscheiden hatten, lehnten sich dabei eng an das anerkannte „passing off“-Delikt, den Absatz eigener Waren als angeblich von einem Wettbewerber stammend, an, und forderten deshalb, der Kläger müsse dartun, durch die irreführende Werbung sei in ein individuelles Recht des Klägers eingegriffen, und ihm dadurch Kundschaft entzogen worden.

Grundlegend ist die Entscheidung *American Washboard Co. v. Saginaw Manufacturing Co.*<sup>61</sup>). Der Kläger stellte um die Jahrhundertwende Aluminium-Waschbretter her, der Beklagte Zink-Waschbretter, die er aber als echte Aluminium-Waschbretter anpries und verkaufte. Das Gericht räumte zwar ein, daß in derartigen Fällen die Verbraucher getäuscht würden. Dies gebe aber dem einzelnen Wettbewerber, der keine Verletzung eigener Rechte und einen daraus herrührenden Schaden dartun könne, nicht das Recht, Unterlassung eines solches Verhaltens zu fordern.

*Callmann*, der die „kleine Generalklausel“ des § 3 UWG und die deutsche Rechtsprechung zu irreführenden Werbeangaben vor Augen hat, kritisiert diese Auffassung bereits in der ersten Auflage seines „Unfair Competition“ und einer Abhandlung in der *Columbia Law Review* heftig: „The court ignored the fact that the action for unfair competition is not founded upon a violation of property rights but upon the failure to respect an affirmative code of ethics that stems from the competitive relationship“<sup>62</sup>).

1946 wurde das Bundes-Markenschutzgesetz (Lanham Trade-Mark Act) eingeführt, dessen Sec. 43 (a) irreführende Angaben zu Wettbewerbszwecken verbot und damit Gelegenheit gegeben hätte, jedenfalls in Fällen mit bundesrechtlichem Bezug über die restriktive Washboard-Entscheidung hinauszugehen<sup>63</sup>). Dies wurde von *Callmann* auch gefordert<sup>64</sup>), von den Gerichten aber zunächst durchweg mit der Begründung abgelehnt, das Verbot irreführender Werbung besage noch nicht, daß das Gesetz über die bisherige Rechtsprechung hinausgehend jedem Wettbewerber ein individuelles Klagerecht habe zuerkennen wollen<sup>65</sup>). Diese Rechtsprechung wurde dann aber durch die grundlegende Entscheidung *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, im Jahre 1954 unter ausdrücklicher Be-

60) Erlaubte, unerwünschte und verbotene Wettbewerbsmethoden in USA, MA 1955, 593, 600.

61) 103 F. 281 (6th Cir. 1900).

62) False Advertising as a Competitive Tort, 48 *Columbia L R* 876 – 888 (1948); hier zitiert nach: 38 *The Trademark Bull.* 1048, 1050 (1948).

63) Um Mißverständnisse auszuschließen, sei darauf hingewiesen, daß die Federal Trade Commission nach dem FTC-Act ebenfalls gegen unfaire und täuschende Akte und Praktiken vorgehen kann. Im Text geht es um privatrechtliche Behelfe von Mitbewerbern.

64) 48 *Columbia L R* 876 (1948) = 38 *Trade-Mark Bull.* 1048 (1948).

65) Nachweise bei *Callmann*, *Unfair Competition* (N. 21) Vol. 1 S. 619 N. 13.

zugnahme auf *Callmann* aufgegeben<sup>66</sup>). In dem betreffenden Rechtsstreit hatte die Beklagte für ihre Produkte (Kleidung) mit Fotos von teureren und qualitativ besseren Produkten der Klägerin geworben. Das Gericht entschied, es komme nach dem Lanham-Act nicht wie nach common-law darauf an, ob eine dem „passing off“ vergleichbare unerlaubte Handlung vorliege. Der Lanham-Act stelle Pflichten im Wettbewerb auf, zu denen das Verbot irreführender Werbung gehöre. Verletzungen dieser Pflicht führten zu Klagerechten auch der Wettbewerber, ohne daß die engen Voraussetzungen des common law erfüllt sein müßten.

*Callmann* hatte sich damit in diesem Punkt zwar nicht auf der Ebene des einzelstaatlichen common law, wohl aber auf der Ebene des bundesgesetzlich geordneten Wettbewerbsrechts mit seinem Konzept des Wettbewerbsverhältnisses als eines rechtlich geordneten Verhältnisses mit gegenseitigen Pflichten und u. U. daraus erwachsenden Ansprüchen durchgesetzt. Heute haben auch sämtliche Einzelstaaten Gesetze über täuschende Werbung eingeführt, so daß die Rechtsprechung zum common law in diesem Bereich praktisch kaum noch eine Rolle spielt<sup>67</sup>).

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ZWEI DENKMETHODEN IM RECHT  
DEUTSCHLAND UND DIE VEREINIGTEN STAATEN  
VON AMERIKA

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Wenn ich versuche, das Rechtsdenken dieser beiden Völker miteinander zu vergleichen, so befaße ich mich mit einem Problem, das mich über 20 Jahre lang unausgesetzt beschäftigt hat, nämlich in der Zeit, in der ich auf den Schulbänken der Harvard Universität zu vergessen hatte, was ich auf den deutschen Universitäten gelernt hatte, und mich als ein Doctor utriusque juris in einem besonderen Sinne in den Rechten beider Völker theoretisch und praktisch bemühte. So wurde die Erkenntnis dieses Unterschieds für mich zur Lebensfrage.

〈Oft hat man die Frage an mich gerichtet, ob Kenntnis und Praxis des deutschen Rechts mir in Amerika vorteilhaft gewesen seien. Die Antwort hierauf deutet im Kerne schon den Unterschied an, der in Rechtsdenken und -praxis der beiden Völker so auffallend ist: Für das Studium war die Vertrautheit mit dem deutschen Recht ausgesprochen lästig und nachteilig, denn die Gewohnheit an das deduktiv-analytische Denken meiner Vergangenheit leitete meine intellektuelle Reaktion zumeist in Geleise, auf denen das induktiv empirische Denken des Amerikaners nicht weiterführte. Später aber in der Praxis des Anwalts wie auch in der theoretischen Arbeit kam mir die Erziehung im deutschen Denken und, wie ich hinzufügen muß, das jüdische Erbe des analytisch denkenden Talmudisten, sehr zustatten.

Worin liegt nun der Unterschied in der Auswirkung dieser beiden Denkmethoden? Es scheint mir vorteilhaft, von dem Unterschied in den Begabungen der Völker und dem verschiedenen Gewicht ihrer Lebensinteressen auszugehen, wie sie durch Volkserbe, Umgebung und Geschichte geformt worden sind. Wie bedeutsam die verschiedene Betonung der Lebensinteressen sein kann, sehen wir an einer der größten Revolutionen der Geistesgeschichte, die stattfand, als sich SOKRATES von den Betrachtungen der Naturphilosophen über Entstehung und Wesen



der Welt und ihrer Urelemente als unfruchtbaren Spekulationen, als leerem Rätselraten abkehrte und sich dem Wesen des Menschen, dem Sinn menschlichen Lebens und dem Wesen der menschlichen Beziehungen als den wichtigeren Problemen zuwandte. Wie würde SOKRATES staunen, wenn er sehen könnte, wie weit unsere Naturwissenschaftler es in der Erkenntnis des Universums gebracht haben.

Teilen wir in großem Zug die Lebensinteressen ein, so können wir unterscheiden zwischen den Interessen an der Lebensgestaltung und den Interessen an der Lebenserkenntnis. Lebensgestaltung ist nicht möglich ohne Lebenserkenntnis, und dennoch ist Lebenserkenntnis noch keine Gewähr für gute Lebensgestaltung. Lebenserkenntnis ist die Erkenntnis der Materie und der sie bewegenden oder beherrschenden Kräfte, sei es die Erkenntnis des Weltbildes, sei es die des menschlichen Individuallebens; und ihr dienen die Naturwissenschaften, soweit es die Materie betrifft, und die Wissenschaften der Philosophie, der Geschichte, Soziologie und Psychologie, soweit es sich um das Walten der inneren Kräfte handelt. Der praktischen Gestaltung des Lebens dienen Politik, Wirtschaft, Gesundheitspflege, Sozialfürsorge, Rechtspflege und andere, und seiner Verschönerung und Vertiefung die Kunst. Alles aber wird schließlich beherrscht von dem, was sich angeblich von selbst versteht, der Moral, d. h. den Wissenschaften der Ethik und Metaphysik.

Wie im gesamten Leben ist es auch im Teilgebiet des Rechts; die Interessen der Juristen sind gegliedert wie die Interessen, die ihnen als Menschen am Herzen liegen. Recht ist nichts anderes als Leben aus einem bestimmten Aspekt gesehen. Diejenigen, die erkennen wollen, was die Welt im Innersten zusammenhält, drängt es zur Rechtsphilosophie und Rechtsgeschichte; andere bemühen sich um die Verfeinerung der der praktischen Rechtsgestaltung dienenden Handwerkzeuge, also um Rechtsbegriffe und Rechtssystematik, und der praktische Jurist, dem es auf eine bestimmte Gestaltung von Lebensverhältnissen ankommt, benutzt sie mehr oder weniger bewußt nach den Normen seines jeweiligen Tätigkeitsfeldes. Welchen dieser Interessen sich der Einzelne zuwendet, hängt im wesentlichen von Begabung, Neigung und Temperament ab. Es hängt davon ab, ob er ein Intellektueller, also ein Mensch ist, der hinter den Erscheinungen des Lebens die Prinzipien zu erkennen sucht oder ob er als Praktiker mehr dazu neigt, Interessen zu vertreten und sich an den Tricks der Berufsausübung zu erfreuen. Und die Weite seines Horizonts und sein Temperament bestimmen, ob er sich



mehr um die rechtliche Wahrnehmung der ihm anvertrauten Interessen bemüht oder mehr als ein Kämpfer für die Gerechtigkeit über die reine Rechtswissenschaft und -pflege hinausdrängt in die Gebiete des sozialen und politischen Kampfes. Sehr oft sind die Menschen vielseitig genug, um sich mehreren dieser Interessen zu widmen.

Und so ist es auch mit den Völkern; ihre Begabung und ihr Charakter bestimmen ihre Interessen. Von den kontinental-europäischen Völkern können wir sagen, daß sie in besonderem Maße die Fähigkeit zum analytisch-deduktiven Denken und den Respekt vor der Intellektualität besitzen. Deshalb waren sie imstande, das Erbe der Römer zu erwerben, um es zu besitzen, indem sie es in Gesetzbüchern verarbeiteten, nachdem sie sich jahrhundertlang der Klärung juristischer Begriffe und der Ausarbeitung von Systemen hingegeben hatten. Deutsche Juristen haben bis zu ihren psychischen Wurzeln Begriffe verfolgt wie Willenserklärung, Handlung, Irrtum, Schuld, Zurechnungsfähigkeit, usw. und haben daran eine solche Freude gehabt, daß in ihren eigenen Reihen Bewegungen gegen die Begriffsjurisprudenz entstanden. Und weil der Deutsche in seinem Wesen mehr ein Erkenntnissucher als ein praktischer Lebensgestalter ist, so hat er sich mit heißem Bemühen der Rechtsphilosophie und -geschichte hingegeben und zudem eine starke Begabung zur Begriffsklärung und Systematik gezeigt.

Ganz anders die amerikanischen Juristen. Der Amerikaner als Typus ist kein Intellektueller; die Schicht der Intellektuellen in Amerika ist dünner als in Europa und hat bis jetzt in der Achtung des Volkes eine klägliche Stellung eingenommen. Erst unter dem Einfluß des Völkerwettbewerbs auf dem Gebiete der Atomwissenschaften flackerte „Anno Sputniki“ plötzlich ein Flämmchen der Erkenntnis über den praktischen (!) Wert der geistigen Arbeit auf; aber einmal meinte man damit nur die Naturwissenschaften, und ferner war dieses Flämmchen das Produkt eines hysterischen Anfalls und erlosch so schnell wie Sputnik. Der Amerikaner interessiert sich im wesentlichen für praktische Lebensgestaltung, was seinen Grund in seinem durch die Geschichte geformten Charakter und in dem Mangel an Begabung für analytisch-deduktives Denken hat; der Amerikaner ist Empiriker. Wenn der Deutsche sich an seinen Schreibtisch setzt und denkend seine Schlußfolgerungen, Formeln und Rechnungsergebnisse zu finden sucht, macht der Amerikaner seine Experimente und experimentiert so lange, bis er ein Ergebnis gefunden hat. Das dauert länger und kostet mehr; aber das kann er sich leisten.



Dies zeigt sich in der Jurisprudenz ebenso wie in allen anderen Lebensgebieten und steht durchaus im Einklang mit dem, was man seine Philosophie nennen kann, die eine „Philosophie“ der praktisch-experimentellen Lebensgestaltung ist.

Was verstehen wir unter Philosophie? Verstehen wir darunter nichts anderes als das theoretische Interesse an einer einheitlichen Gesamtanschauung des Sinnes und der Bedeutung aller Dinge, so hat jedes Volk Philosophie, auch die primitivsten Naturvölker haben eine Antwort auf die Frage nach dem Woher und Wohin der Dinge und sehen zwischen den kosmischen Begebenheiten und dem menschlichen Leben einen sinnvollen Zusammenhang. Diese Philosophie kann aber auch eine Religion sein; sie ist nicht das, was der übliche Sprachgebrauch als Philosophie bezeichnet. Philosophie ist nicht mythisch-religiöse Weltvorstellung; sie ist die verstandesmäßige wissenschaftliche Erkenntnis der Wirklichkeit.

Wenn wir mit den Vertretern der spekulativen Philosophie diese als ein von den Wissenschaften getrenntes eigentümliches Wissensgebiet absondern, so ist eine solche Philosophie rein europäisch. Die Philosophie ist aber nicht nur das, was die spekulative Philosophie unter ihr verstand. Sie ist mehr. Allerdings kann ein Gebiet als typisch philosophisches abgesondert werden, nämlich Metaphysik und Erkenntnistheorie. Diese Philosophie im engeren Sinn befaßt sich mit der Ansicht über das Wesen der Dinge, über Gott und Welt, über das Verhältnis unserer Erkenntnis zur Wirklichkeit und selbst in dieser Beschränkung wird die Philosophie sehr aufpassen müssen, will sie Grenzüberschreitungen z. B. in das Gebiet der Naturwissenschaften und gar der Religion vermeiden.

Was wir unter Philosophie aber heute zumeist verstehen, ist nicht eine Disziplin des Wissens, sondern die Gewohnheit, ohne Rücksicht auf einen praktischen Zweck das Leben als Ganzes zu betrachten, um es als Ganzes zu erkennen. Dieses tut der Philosoph, der, gleichviel in welchem Lebensgebiet er sich theoretisch oder praktisch betätigt, in seiner Arbeit erfüllt ist von der Hingabe an die reine Betrachtung und die Richtung auf das Allgemeine. Sokrates ist das typische Vorbild und bei PLATO finden wir die Philosophoi, die Weisen, den sophoi oder sophistai gegenübergestellt. Die Sophisten lehrten nicht „um der Betrachtung willen“ sondern, um durch Stundengeben Geld zu erwerben. Der Philosoph, der kein Weiser, sondern ein Liebhaber der Weisheit ist, hat keinen praktischen Zweck im Auge. Als KRÖSUS dem SOLON begegnete,



begrüßte er ihn mit den Worten: das Gerücht ist zu mir gedrungen, „daß Du philosophierend einen großen Teil der Erde um der Betrachtung willen besucht hast.“ Kurz: ein Philosoph ist ein Mensch der Kontemplation um ihrer selbst willen. Was GOETHE vom Dichter sagt, gilt in einem bestimmten Sinn auch von ihm:

„Sein Ohr vernimmt den Einklang der Natur  
Was die Geschichte reicht, das Leben gibt.  
Sein Busen nimmt es gleich und willig auf;  
Das weit Zerstreute sammelt sein Gemüt,  
Und sein Gefühl belebt das Unbelebte.“

Tasso, I, 1

Die Philosophie Amerikas erschien bis vor kurzem fast ausschließlich im Gewande der Theologie, und die Theologen, die ängstlich über der Wahrung alter Traditionen wachten, übten selbst in nicht-religiös geleiteten Colleges einen starken Einfluß aus. Die Schriften dieser Männer zeigen eine so trostlose Antiquiertheit, daß man in ihnen nicht ein einziges der großen Probleme wirksam findet, die die Geschichte dieses Volkes so interessant machen, weder die Gedanken der kolonialen Organisation und des Unabhängigkeitskrieges, noch des Sklavenkampfes und des Bürgerkriegs, noch des Pionierlebens und der Immigration fanden in den sogenannten philosophischen Arbeiten ihren Niederschlag. Europäische Philosophie war fast ohne Einfluß. Erst um die Mitte des vorigen Jahrhunderts entstand eine Art Philosophie, die man als typisch amerikanisch bezeichnen kann, der durch CHARLES S. PIERCE, WILLIAM JAMES and JOHN DEWEY begründete Pragmatismus.

Der Pragmatismus ist eine Philosophie, die auf menschlicher Erfahrung, Intelligenz und Zielstrebigkeit begründet ist. Befruchtet von den Entwicklungsgedanken des Darwinismus betrachtete man als die treibende Kraft des Weltgeschehens das durch praktische Erfahrung und Intelligenz bestimmte Verhalten des Menschen mit dem Ziel einer Anpassung an die wechselnden Lebensumstände. Nur was diesem Ziel dienlich war, hatte Sinn, und das war eine lebensnahe Betrachtung, frei von Abstraktionen, ewigen Wahrheiten und Moralvorschriften, die mit der Erfahrung nicht erkannt werden können. Wahrheit ist, was der menschliche Verstand auf Grund der Entdeckungen der Wissenschaft als sozial wünschenswert anerkennt. Was funktioniert ist richtig, und was nützlich ist, ist gut.

Da der Einzelne nicht imstande ist, diese Erkenntnisse zu gewinnen,



muß er mit andern und zwar in Gruppen mit sozialen, wirtschaftlichen und politischen Zielen auf der Grundlage einer demokratischen Zusammenarbeit an der verantwortlichen Gestaltung der Lebensverhältnisse teilhaben. *Der Mut der Verantwortlichkeit liegt in der Bereitschaft, Irrtümer zu wagen und durch ständige Versuche aus der Erfahrung und dem Experiment zu lernen und praktische Schlußfolgerungen zu ziehen.*

Die typisch pragmatische Lebensanweisung: Füge andern nicht zu, was Du nicht willst, daß man Dir zufüge, – die berühmte goldene Regel – wird als Glaubensbekenntnis gepredigt. Sie ist aber weder ein religiöses noch philosophisches Glaubensbekenntnis. Sie ist lediglich eine höchst naive Lebensweisheit; ein negativer Verhaltensvorschlag, der über Wesen oder Wert von Lebenserscheinungen nichts aussagt. Wie denn überhaupt der Pragmatismus keinen Prüfstein für moralische Wertung gibt, denn was ich aus rein egoistischen Gründen wünsche oder nicht wünsche, was mir gut oder schlecht bekommt oder erscheint, ist nicht identisch mit dem, was moralisch gut oder schlecht ist. Und philosophisch ist so etwas erst recht nicht, denn Verstand oder wissenschaftliche Erkenntnis kennen Prädikate wie gut oder schlecht, wertvoll oder wertlos überhaupt nicht; sie unterscheiden nur zwischen wirklich und unwirklich, zwischen wahr und falsch.

Der Pragmatismus ist eine Philosophie, die auch heute noch in Amerika herrschend, wenn auch nicht ohne Gegner ist, und dem Geist des amerikanischen Pioniers und Selfmademan wie auf den Leib geschnitten ist. Das ist die Philosophie des Menschen, der mit Energie und Intelligenz das Glück versucht und es zu finden strebt, wie er es sich vorstellt, der den Wagemut besitzt, Fehler zu machen, für sie zu zahlen und aus ihnen zu lernen, der stolz auf die Wendigkeit ist, mit der er sich wechselnden Umständen anzupassen weiß.

„Trial and Error“, das ist das Lösungswort für das amerikanische Leben; in seinem Erfolg findet der Amerikaner die Bestätigung für die Richtigkeit der Darwinschen Lehre vom „Survival of the Fittest“, die von HERBERT SPENCER ins Wirtschaftsleben transponiert wurde und die Geister beherrscht ohne Rücksicht darauf, daß schon vor 70 Jahren der Engländer THOMAS HUXLEY gegen die Unmoral dieser Lehre der brutalen Rücksichtslosigkeit im menschlichen Leben gepredigt hatte.

Der pragmatische Charakter im amerikanischen Recht zeigt sich vor allem in dem Charakter des „Trial and Error“-Verfahrens, in einer großen Freiheit von formalem, methodischem Rechtsdenken. Es ist Bil-



ligkeitsrecht im Privatrecht, mit dem Ziel, durch Abwägung von Interessen ein gerechtes Zusammenleben von Menschen zu ermöglichen. Es ist Weltanschauungsrecht im öffentlichen Recht, wo es darum geht, die Persönlichkeits- und Menschenrechte des Individuums gegen Übergriffe der Kollektivmächte, insbesondere der Staatsgewalt, der Großunternehmen und der Gewerkschaften zu schützen.

Dieses Weltanschauungsrecht hat sich im Laufe eines Jahrhunderts so entwickelt wie es der Entwicklung der Einzeldisziplinen der Wissenschaft entspricht. Vom naturrechtlichen Charakter ist es unter dem Einfluß der wirtschaftlichen Interessenkämpfe zum Sozialrecht und nach den gewaltigen Fortschritten in Psychologie und Soziologie zur „soziologischen Jurisprudenz“ geworden. Hier geht die Linie der großen juristischen Lebensgestalter von JOHN MARSHALL, dem Chief Justice, der der Vater des amerikanischen Verfassungsrechts genannt werden kann, über OLIVER WENDELL HOLMES und LOUIS BRANDEIS, den beiden juristischen Freiheitshelden im Obersten Gerichtshof, zu ROSKOE POUND, dem Dekan der juristischen Fakultät an der Harvard Universität, der als der Gründer der soziologischen Jurisprudenz gilt und der erkannte, wie auch die Rechtswissenschaft, wie jede andere eine Hilfswissenschaft ist; für den Rechtswissenschaft nur den Rahmen abgibt, in dem jeder Zweig des Lebens sich so darstellt wie er von den Einzelwissenschaften wie Naturwissenschaften, Technik, Betriebs- und Wirtschaftslehre, Psychologie, Soziologie, ja Politik geregelt wird. Uns ist es heute nichts Erstaunliches mehr, daß z. B. in einem Patent- oder Kartellprozeß die entscheidenden juristischen Gedanken zumeist völlig klar und sogar unangefochten sind, und daß der Gegenstand des Streites fast ausschließlich in der Anwendung einfacher juristischer Regeln auf einen komplizierten technischen oder wirtschaftlichen Tatbestand liegt. Wir wundern uns heute, wenn wir hören, daß es den amerikanischen Juristen zuerst als eine Verrücktheit, später erst als eine revolutionäre Tat erschien, als BRANDEIS, der Anwalt, in einem Prozeß um die Gesetzwidrigkeit der übertriebenen Frauenarbeit in seinem Schriftsatz seine Rechtsausführungen auf 2 Seiten beschränkte und 100 Seiten mit Nachweisen über die Schädlichkeit der Frauenarbeit füllte. So machte die soziologische Bewegung im Recht dieses zu einem brauchbaren Instrument sozialen Aufbaus, und POUND führte aus, daß diese Bewegung eine Bewegung für Pragmatismus als Rechtsphilosophie sei, für Anerkennung des Menschen und seiner Bedürfnisse als Zentrum der Rechts-



pflege, und daß die Logik nur ein Handwerkszeug sei, das diesem Zweck dienen sollte.

Nur als einen Gedanken des Pragmatismus verstehen wir HOLMES' berühmten Ausspruch, daß Recht nicht Logik, sondern Erfahrung sei (hätte er doch wenigstens gesagt, „nicht *nur* Logik“); ein ständiges Experimentieren ohne abstrakte Theorien. Das Laboratorium des Rechts ist der Gerichtssaal und das Beratungszimmer, wo in einem Verfahren von „Trial and Error“, Versuch und Irrtum, das richtige, d. h., das den jeweiligen Umständen des Einzelfalles entsprechende angemessene Recht gefunden wird.

So muß die Deutung des anglo-amerikanischen Richterrechts, des Common Law, sein, des Rechts, das im wesentlichen Privatrecht ist und sich als eine unsystematische, den praktischen Erfordernissen menschlichen Zusammenlebens gerecht werdende Interessenabwägung entwickelt hat. Richterrecht arbeitet langsamer als Gesetzesrecht, so wie das Experimentieren im Laboratorium länger dauert als die analytische Forschungsarbeit am Schreibtisch des Gelehrten. Zwar sollte die Bindung an Präjudizien eine gewisse Kontinuität sichern, aber in der fast unübersehbaren Menge der im Laufe der Jahrhunderte angesammelten Entscheidungen findet man Präjudizien für jede Meinung und das Streben der Richter, sich von veralteten Bindungen frei zu machen und den Weg eigener Rechtsfindung zu gehen, beeinträchtigt die Kontinuität und erzeugt ein starkes Schwanken im Auf und Ab der Rechtsentwicklung; dies bedeutet infolge des Mangels einer theoretischen Fundierung eine oft durch die Willkür des Opportunistischen bestimmte Langsamkeit in der Entwicklung des Institutionellen. Zwar haben sich in den letzten Jahrzehnten starke Bemühungen gezeigt, in den Wust der Entscheidungen Ordnung zu bringen, sowohl durch eine im wesentlichen von Universitätsprofessoren vorgenommene Darstellung des Rechts im sog. Restatement of Law, wie auch durch Kodifizierungen in Gesetzen, aber das amerikanische Gesetzesrecht trägt die Spuren der Empirie und ist im allgemeinen infolge des Mangels an abstraktem Denken eine unerquickliche Lektüre. Hinzu kommt, daß manche Zustände eine raschere Regelung verlangen als das Richterrecht sie geben kann, und so gibt es eine Fülle von Gesetzen, die die Unübersichtlichkeit des amerikanischen Rechts nur vergrößern.

In dieser Entwicklung aber sehen wir eine Angleichung der beiden Systeme des Gesetzes- und des Richterrechts und so wie in den anglo-



amerikanischen Rechten das Gesetzesrecht zugenommen hat, so in den kontinentaleuropäischen Systemen des Gesetzesrechts das Richterrecht. Zwar scheut sich der deutsche Richter, sich als einen Rechtsschöpfer zu bezeichnen; er gibt vor, daß er nur den Tatbestand des Prozesses unter die bestehende Rechtsnorm „subsummiere“, aber dem widerspricht die Wirklichkeit. Nicht nur sind in Deutschland wichtige Rechtsinstitute und -begriffe wie die Unterlassungsklage, die Sicherheitsübereignung und in gewissem Sinn die Stimmrechtsaktie reine Schöpfungen des Reichsgerichts, sondern wir haben Blankettnormen wie die §§ 138, 157, 823, 826 BGB, § 1 UWG und andere, denen die Rechtsprechung nicht gewachsen wäre, wenn dem Richter nicht eine große Freiheit in der Rechtsfindung gelassen würde. Dem § 826 BGB entspricht in Frankreich Art. 1382 des Code Civil, und auf der Grundlage dieser Blankettnormen haben beide Länder ein Richterrecht der unerlaubten Handlungen geschaffen. Was man im bürgerlichen Recht dem § 826 BGB verdankt, verdankt man im Wettbewerbsrecht der Generalklausel des § 1 UWG. Nirgendwo ist dies offener anerkannt worden als im Art. 1 des Schweizer Zivilgesetzbuches, wonach der Richter bei der Ausfüllung von Lücken des positiven Rechts so vorzugehen hat, wie wenn er selbst der Gesetzgeber wäre, wobei er sich von bewährter Lehre und Überlieferung leiten lassen soll.

Theoretisch aber ist der Unterschied der, daß die Rechtsschöpfung des amerikanischen Richters von keinem Zwang der Systematik eingengt wird, so daß sein Urteil das Ergebnis einer freien Billigkeitsjurisprudenz ist. Er ist kein Analytiker, er ist kein Begriffsjurist und will dies auch nicht sein. Wenn auch der Satz „omnis definitio perniciosa“ nicht von den Amerikanern, sondern von den so begriffstüchtigen Römern stammt, der Amerikaner würde dem zustimmen, schon weil er sich damit einer Mühe enthoben fühlt, für die ihm die Begabung fehlt. Es ist ein Beispiel für die intellektuelle Indifferenz des amerikanischen Juristen, wenn er die Systematik des Rechts dem praktischen Nutzen opfert, wenn er z. B. die Ausschreitungen der Gewerkschaften in Ermanglung eines besseren Rechts mit Mitteln des Antitrustrechts bekämpfen will, obwohl es sich hier um eine Wirtschaftsbeschränkung handelt, die einen völlig andern Charakter aufweist, als die Wettbewerbsbeschränkung des Antitrustrechts. „Welchen Unterschied macht es schon, unter welchem Gesetz jemand verurteilt wird, wenn wir wissen, daß er schuldig ist.“

Aber der Amerikaner hat eine andere Begabung. Er ist ein „Zoon



politicon“, wobei Politik als Lebensgestaltung zu betrachten ist. Wie die amerikanische Philosophie, dieser merkwürdige Pragmatismus, keine Philosophie der Lebenserkenntnis und deshalb gar keine Philosophie ist, sondern eine Ideologie der Lebensführung und Lebensweisheit ist, so auch seine Politik eine Ideologie der Lebensgestaltung, des menschlichen Zusammenlebens. Politik bedeutet also in diesem Zusammenhang in der amerikanischen Terminologie das, was man in Deutschland innere Politik nennt, nicht aber die Politik der äußeren Angelegenheiten der Nation. Es ist „politics“ und nicht „foreign policy“. „Politics“ umfaßt sowohl das wissenschaftliche Fachgebiet der „political science“ oder der „science of government“ wie auch die Machinationen der Parteimaschine (z. B. TAMMANY HALL) und die Tricks der kleinen Politiker („ward heeler“), in deren Bereich eine Hand die andere wäscht, ohne daß sie beide dadurch sauberer werden. Es bedeutet sowohl die Vertretung von Interessentengruppen in Lobbies und Kommissionen des Kongresses und es bedeutet schließlich den Kampf um die Freiheitsrechte des Individuums, um die Wahrung seiner „civil rights and liberties“. Das in Deutschland so beliebte Zitat, „ein politisch Lied ein garstig Lied“ ist dem Amerikaner unverständlich. Befassung mit „politics“ ist Bürgerpflicht. Die Völker des europäischen Kontinents mögen die besseren Denker, die erfolgreicherer Intellektuellen sein, die Amerikaner und auch die Engländer haben ein größeres politisches Gefühl und ein größeres Verständnis für die Bedeutung der Freiheitsrechte des Menschen, für die Atmosphäre, die bestehen muß, wenn Menschen verschiedener Art und Herkunft in ihr frei atmen sollen.

Es ist kein neuer Gedanke, wenn man im Gebiet der Politik Intellektualität für überflüssig, ja sogar für schädlich hält. In einem kürzlich erschienenen Buch (BARZUN, *The House of Intellect*, New York, 1959) finden wir die folgende Betrachtung (S. 149): „Ein Volk mit einer von ihm gewählten Regierung sollte es deshalb nur ja vermeiden, aus der Intellektualität einen Fetisch zu machen. Insbesondere sollte ein Land, das so groß ist wie die Vereinigten Staaten, dessen Länderinteressen notwendigerweise weit voneinander differieren, eine Intellektualisierung seiner Politik vermeiden. Vielmehr sollte es sich beglückwünschen, daß es zwei große Parteien besitzt, die beide imstande sind, innere Gegensätze auszugleichen. Der Versuch, in die Politik der Anpassung, der Mannigfaltigkeit und Vielheit, Festigkeit und Starrheit einzuführen, würde sofort zur Entstehung eines Dutzend von Gruppen



führen, die sich als Todfeinde bekämpfen würden. Je mehr jede dieser Gruppen ‚einer Idee ergeben‘ wäre, um so weniger könnte sie den anderen gestatten, ungehindert zu leben; um so mehr würde jede Gruppe für ihr Lebensrecht fürchten und um so mehr würde das Leben der Bevölkerung ein Kampf werden, zuerst ein Kampf der Reden und dann der Waffen. Bei der einen großen Gelegenheit, als eine Idee das amerikanische Volk zur Erhebung brachte (im Bürgerkrieg), da riß sie zwischen Nord und Süd einen Abgrund auf, den eine Million Leichen nicht füllen konnte.“ Der Verfasser bezieht sich auf Walter Bagehot, der in seinen „Letters on the French Coup d’Etat“ folgendes bemerkt: „ein wirklich praktisches Volk wird in seinen politischen Geschäften von allen vorstellbaren Regulierungen die absurdesten, schwächsten und widersprüchlichsten aussuchen . . . und die besten Institutionen können nicht verhindern, daß eine Nation einen falschen Weg geht, wenn sie dies will . . . Ich fürchte, sie werden mich auslachen, wenn ich ihnen sage, was ich für die fast wichtigste Eigenschaft eines freien Volkes halte, eines Volkes, dessen Freiheit fortschrittlich, dauernd und von weitem Ausmaß sein soll; es ist ein gutes Quantum *Stupidität*. (Kursiv vom Verfasser) . . . Ich brauche nicht zu sagen, daß in wirklicher gesunder Stupidität die Engländer ohne Rivalen sind.“ Unglücklicherweise für sie selbst, fährt Bagehot fort, schätzen die Franzosen diejenigen Eigenschaften, die der „Stupidität genau entgegengesetzt sind, und geben ihnen Macht über ihr Kollektivleben: den feinsten Takt im öffentlichen Leben, die vollendetste Geschicklichkeit in den Einzelheiten des Handelns und der Verwaltung . . . eine erstaunliche Bereitschaft in der Erfassung neuer Ideen und der Unterstützung neuer Theorien, eine geistige Wendigkeit, die alles erfaßt und begreift, wie es gerade kommt, eine Konzentration auf alles, was geschieht, um es für jede beliebige Erklärung zu benutzen. Und das Ergebnis?“

Wie die Engländer sind die Amerikaner unintellektuell, ja der Intellektualität feindlich. Gewissermaßen als Rationalisierung der Talentlosigkeit berufen sie sich in völligem Mißverstehen der Demokratie auf diese und empfinden eine Unterscheidung zwischen Menschen unter dem Gesichtswinkel der Intellektualität als eine gehässige Grenziehung und ungerechte Diskriminierung, ja als einen Verstoß gegen den demokratischen Grundsatz: „Alles für Alle.“

Aber wir sehen, wie das amerikanische Volk auch ohne Intellektualität eine politisch-juristische Leistung größten Ausmaßes zu vollbringen



imstande war. Der tiefere Grund für den verschiedenen Wert der Intellektualität in verschiedenen Lebensgebieten wie Rechtswissenschaft und politischer Rechts- und Lebensgestaltung, liegt nämlich darin, daß Intellektualität eine Fähigkeit des Individuums ist, und nicht die einer Gruppe oder gar des Volkes sein kann. In keinem Lande ist die Masse intellektuell; den Maßstab für den vorhandenen Grad von Intellektualität gibt die führende Schicht des Landes. Die Feindseligkeit des gemeinen Mannes gegen Intellektualität ist auch da, wo ein Volk nicht den „regular guy“ zum Idol macht; sie ist allgemein, ohne Rücksicht auf Zeit und Land, und während die Wissenschaften durch die Intellektualität der Einzelnen gestaltet werden, muß Politik auf die Massen wirken und von ihnen verstanden werden. Selbst dort, wo die Politik sich um Ideen formt, wie in einer Verfassung, müssen die Ideen von klarer, ungekünstelter, unumstrittener, ja primitiver Wahrheit sein.

Will man die Ideologie der amerikanischen Politik der Lebensgestaltung mit wenigen Worten im Kerne kennzeichnen, so müssen wir von menschlicher Würde, Freiheit und Gerechtigkeit sprechen, obwohl man, auch ohne ein Zyniker zu sein, nach den Jahrzehnten unserer politischen und menschlichen Enttäuschungen kaum umhin kann, bei diesen Worten einen unangenehmen Geschmack zu empfinden. Aber mit diesen Begriffen, mit denen Amerika die französische Revolution befruchtet hat, ist es den Amerikanern sehr ernst, und hier finden wir einen wunderbaren Idealismus als wohltuenden Ausgleich ihres Materialismus.

JACQUES MARITAIN sagt in seinen „Reflections on America“ (New York, 1958, S. 167): „In USA hat jeder einfache Mensch ein Gefühl für die Würde des Menschen, und dieses lebt im kollektiven Wertbewußtsein eines jeden. Wir haben hier einen spirituellen Gewinn von unendlichem Wert, der in so einfacher menschlicher Form erscheint, daß pretentiöse und pedantische Menschen ihn oft gar nicht zu erkennen vermögen.“ Das liegt wohl daran, daß Amerika ein einzigartiges politisches Phänomen ist, insofern als es, ohne von den geschichtlichen Zwangsvorgängen anderer Völker, wie z. B. der Herrschaft fremder Eroberer oder eines heimischen Feudalismus, bedrückt worden zu sein, als ein in Freiheit entstandenes und unter freier Selbstbestimmung gewachsenes Volk in die Geschichte getreten ist.

Nicht zu Unrecht wird der sog. europäischen Schule der amerikanischen Historiker der Vorwurf gemacht, daß sie dem europäischen Ursprung des amerikanischen Volkes zu große Bedeutung beilegen und es



zu stark mit der europäischen Gemeinschaft identifizieren. Die amerikanische Demokratie ist auch deshalb einzigartig, weil sie ihre Formung den besonderen Umständen, den außergewöhnlichen Möglichkeiten verdankt, vor die die Pioniere dieses Landes gestellt worden waren, und es ist sogar von europäischen Soziologen, wie z. B. von JUNG, anerkannt worden, daß der Charakter des amerikanischen Volkes in außerordentlichem Maße von den kolonialen Erfahrungen vor der Revolution bestimmt worden ist. So wird mit Recht das Fehlen jeden Militarismus festgestellt – und unter Militarismus verstehen wir den preußischen Zustand, in dem das Zivilleben des Volkes in seinem Rhythmus von den Militärs bestimmt wird, das Leben der Gebildeten durch Offizier und Reserveoffizier, das Leben des Volkes durch Militäranwärter – und das Fehlen dieses Militarismus wird damit erklärt, daß in der Pionierzeit jeder Bürger sich selbst verteidigen, d. h. ein Soldat sein mußte und somit der Soldat nicht als Vertreter einer Kaste, sondern als ein notwendiges Übel betrachtet wurde. Ich möchte fast sagen, so wie in Deutschland der Bürger ein verkleideter Soldat ist, so ist in Amerika der Soldat ein verkleideter Bürger.

So entstand als das Ergebnis einer eigenen geschichtlichen Entwicklung das, was wir „The American Way of Life“ nennen. Darunter versteht der Amerikaner das Leben als die ständige Manifestation des politischen und wirtschaftlichen Liberalismus. Selbstregierung des Volkes, Ablehnung jeder Art von autoritärer Herrschaft, Freiheit des Individuums als höchstes Ziel. Der Staat ist ein Instrument der Gesellschaft, ein Diener seiner Bürger, denen er für die Erfüllung seiner Pflichten verantwortlich ist. Diese Pflichten sind, wie LINCOLN es formuliert hat, beschränkt auf diejenigen Bedürfnisse des Volkes, die es ohne Mitwirkung der Regierung nicht oder nur unzureichend befriedigen kann.

Die Magna Charta dieses politischen Glaubens, die Magna Charta der Freiheit des Individuums von der Autorität und der Gleichheit aller vor dem Gesetz und den Aufstiegsmöglichkeiten des Lebens ist die Verfassung, insbesondere die „Bill of Rights“, und die Worte der Verfassung sind keine toten Buchstaben. Der Amerikaner lebt seine Verfassung von Kindheit an; von den frühesten Schuljahren steht das Kind unter dem Einfluß der Schlagworte, die die Kampflösung des politischen Liberalismus sind. In späteren Schuljahren werden die Ereignisse des politischen Lebens als „current events“ gelehrt, und so verfolgt der Amerikaner sein ganzes Leben hindurch, wie die Verfassung ausgelegt



und zur Geltung gebracht wird, wenn die wandelnden Zeiten neue Probleme zur Entscheidung stellen. Diese Entscheidung liegt vor allem beim Supreme Court.

Der Supreme Court kann nicht verglichen werden mit den deutschen höchsten Gerichtshöfen. Diese sind im echten Sinne Gerichte und sie sind nur Gerichte, deren wesentliche Aufgabe darin besteht, in letzter Instanz individuelle Konflikte des Privatrechts zu entscheiden. Der amerikanische Supreme Court ist in erster Linie neben Präsident und den gesetzgebenden Körperschaften eine der drei Säulen der Regierung.

Wie ein schwacher Präsident sein Amt und das Verhalten der Kongreßmitglieder die gesetzgebende Körperschaft diskreditieren kann, so steht auch der Supreme Court im Feuer der öffentlichen Kritik, die von den Zeiten JOHN MARSHALLS bis heute in den verschiedenen Formen des Respekts und der Geschmacklosigkeit aufgetreten ist. Gerade heute wird dem Supreme Court vorgeworfen, daß er durch seine Entscheidungen in Fragen der Negerintegration und der prozessualen Rechte der wegen Kommunismus Angeklagten den Frieden und die innere Sicherheit des Landes gefährde. (Heftige Erregung hat ein hemmungsloser Angriff aus den Kreisen der „American Bar Association“ hervorgerufen, so daß der „Chief Justice“ sich gezwungen fühlte, aus der Vereinigung auszutreten, und die kürzliche Debatte über eine Gehaltserhöhung der höchsten Richter im Kongreß erreichte in Form und Ablehnung den Gipfel der Niveau- und Geschmacklosigkeit.) Solche Kritiker sollten bedenken, daß von ihnen derselbe geistige Abstand von den Fragen der inneren Politik und dieselbe ruhige Abwägung einer philosophischen Lebenshaltung verlangt wird, die sie selbst vom Supreme Court erwarten. Justice BRANDEIS, der juristische Freiheitsheld der amerikanischen Demokratie, hat oft genug GOETHES Wort von der Selbstbeschränkung des Meisters zitiert.

So hören wir heute immer wieder die Forderung nach der Selbstbeschränkung des Supreme Court, und keiner hat diese Forderung eindeutiger und energischer gestellt als Judge LEARNED HAND, der davor warnte, daß der Supreme Court als eine Art „dritte gesetzgebende Kammer“ handele, und Supreme Court Justice FRANKFURTER, der allerdings darunter nicht nur Zurückhaltung bei der Behandlung politischer Fragen verstand, sondern auch Selbstbeschränkung in der Zulassung von Rechtsstreitigkeiten zur Entscheidung durch den Supreme Court, der nicht dazu da sei, den jeweiligen Interessen der Parteien zu die-



nen, sondern allgemeine Prinzipien zur Anerkennung zu bringen. FRANKFURTER war es auch, der die treffende Formulierung gefunden hat, daß der Supreme Court im wesentlichen politische Funktionen ausübe. Ja, man kann geradezu sagen, daß er ein Träger politischer Macht, eine politische Institution ist. Hier haben wir das glänzendste Beispiel für Recht, das vom Richter geschaffen wird. Die obersten Richter in USA „finden“ nicht einfach vorher festgelegte Rechtsgrundsätze, die ihre Entscheidungen bestimmen; im Gegenteil, sie schaffen ständig neues Recht, sie sind richterliche Gesetzgeber, deren Gesetzestätigkeit niemals mechanisch und unpersönlich sein kann. Wenn auch die von ihnen zu entscheidenden Probleme in der Form eines privaten Rechtsstreits vor sie kommen, ihre Entscheidungen sind politische, sie sind der Ausfluß ihrer politischen Aufgabe und Macht. Das erklärt auch, warum das Volk sich so sehr für die politische Einstellung der einzelnen Richter interessiert, warum die Presse in jedem wichtigen Urteil des Supreme Court über die Abstimmung bei der Beratung berichtet, warum die Persönlichkeiten des Supreme Court so bekannt sind wie Senatoren und Repräsentanten des Kongresses und beinahe so bekannt wie Sportgrößen und Filmstars. Darin liegt auch der Schlüssel zu dem merkwürdigen Mißgriff des so genialen Staatsmannes ROOSEVELT, als er unter fadenscheinigen Vorwänden im Jahre 1936 einen reaktionären Supreme Court zu einem den New Deal-Gedanken zugänglicheren politischen Instrument machen wollte und damit die einmütige Empörung des Volkes erregte. Die Befassung der Gerichte mit öffentlichem Recht erklärt es auch, daß die Richter entweder vom Volke gewählt oder nach ihrer Parteirichtung vom Präsidenten, d. h. von der Exekutive, ernannt werden.

Es war eine geradezu geniale Beobachtung des Franzosen TOCQUEVILLE, als er vor ungefähr 100 Jahren feststellte, daß in den Vereinigten Staaten kaum eine politische Frage entstehen könne, die sich nicht früher oder später in eine juristische auflöse. So kommen wir zu der großen Leistung des amerikanischen Rechts, zum politischen oder, wie man vielleicht sagen kann, zum öffentlichen Recht, zum Recht der Lebensprinzipien als Gegensatz zum Recht der Individualkonflikte, des Privatrechts, zum Recht der gemeinschaftspolitischen Ideologie. Der große Chief Justice JOHN MARSHALL, ein Staatsmann mehr als ein Jurist, war es, der im Anfang des vorigen Jahrhunderts dafür kämpfte, daß bei der Teilung der Gewalten von Gesetzgebung, Verwaltung und



Rechtspflege der Supreme Court als der Interpret und Wahrnehmer der Verfassung anerkannt wurde. Die Verfassung ist das höchste Recht des Landes und was dieses Recht ist, entscheidet der Supreme Court. Mehr als 80% seiner Urteilstätigkeit befaßt sich damit, darüber zu wachen, daß im Zusammenleben der Bundesstaaten und der Menschen den höchsten Prinzipien menschlicher Weisheit Rechnung getragen wird. Dies beruht auf der besonderen Struktur des amerikanischen Rechtssystems, in dem das Privatrecht fast ausschließlich Sache der Einzelstaaten ist; es ist gewachsen aus den geschichtlichen und kulturellen Besonderheiten der Länder, was in den meisten Rechtsgebieten zu einer unerträglichen Vielgestaltigkeit der Rechtsverhältnisse geführt hat. (Eine Ausnahme bilden die Gebiete des Kartellrechts, des gewerblichen Rechtsschutzes und des Urheberrechts, die aus dem Geist der Weltwirtschaft entstanden und aus diesem Grunde der ausschließlichen Zuständigkeit der Bundesgerichte zugewiesen worden sind.)

Die Entscheidungen des Supreme Court spiegeln deshalb in besonderem Maße den weltanschaulichen Wandel der Zeiten wider und werden mit Spannung in allen Ländern der Welt aufgenommen. Er entscheidet über die Befugnisse der Einzelstaaten im Rahmen des Bundesstaates, über ihr politisches Selbstbestimmungsrecht, ihr Recht zur Besteuerung, ihr Recht zur Ausübung der Polizeigewalt, d. h. das Recht im Interesse der Gesundheit, der Moral und des allgemeinen Wohls, im Interesse wirtschaftlicher und sozialer Notwendigkeit, ohne Willkür in die Betätigung der Bürger einzugreifen. Er entscheidet über die Verfassungsmäßigkeit der Gesetze der Bundesregierung und der Staaten und hat darauf zu sehen, daß keinem Menschen das Recht beschnitten oder gar genommen wird, gegen die Akte der Staatsgewalt, insbesondere der Verwaltungsbehörden, die Gerichte anzurufen, damit in dem gesetzlich vorgesehenen Verfahren, „in due process of law“ und, wenn er will, vor Geschworenen, seine Interessen, vor allem seine persönliche Freiheit, sein Recht auf freie Rede, freie Religionsausübung, freie Betätigung und nicht zuletzt auch sein Eigentum geschützt werde.

Ich glaube nicht, daß irgend ein Volk der Erde sich gekränkt zu fühlen braucht, wenn man ihm dieses Recht des amerikanischen Volkes über die Prinzipien der höchsten Güter der Menschheit als Beispiel vorhält. Es wäre ein Ziel, „aufs innigste zu wünschen“, daß die höchsten Gerichte der Nationen im Bestreben nach äußerstem Schutze der menschlichen Freiheitsrechte und dem Schutz der menschlichen Persönlichkeit



sich vereinigten, um ihre Entscheidungen aufeinander abzustimmen und ein Corpus Juris der vereinigten Kulturvölker der Welt zu schaffen, in dem die grundlegenden Gegensätze unserer Zeit: Individualismus und Kollektivismus, Freiheit und Autorität, Staat und Kirche und nicht zuletzt die menschlichen Gruppen in ihrer Gegensätzlichkeit ihren Ausgleich finden.



Callman



ter bei Zivilkammer in New York. Ab 1970 Präs. der Washington-Heights-Inwood Community Council (Vertretung der orthodox. jüd. Gde. bei der Stadt), Mitgl. K'hal Adath Jeshurun Congr., Agudat Israel, New York City Community Board 12, *Democratic Club*, *New York County Lawyers Assn.*, *New York State Bar Assn.*, *Harvard Law School Assn.* Lebte 1977 in New York.

D: RFJl. Qu: Fb. Hand. Pers. - RFJl.

**Callam, Albert**, Parteifunktionär; geb. 1887; *StA*: deutsch. Weg: F; 1941 Mex.; 1946 Deutschland (SBZ).

Fliesenleger. Vor 1914 pol. Tätigkeit in der Schweiz in Verb. mit → Fritz Heckert. 1916 Mitgl. *Spartakusgruppe* Chemnitz, 1918 KPD. Geschäftsf. von KPD-Verlagen, Verlagslfr. Zentralorgan *Die Rote Fahne*. Emigr. nach Frankr., für den Druck illeg. Materialien der KPD-Auslandsltg. zuständig. Dez. 1941 nach Mexiko, Verlagslfr. der Okt. 1941 von der KPD gegr. Zs. *Freies Deutschland*, Mitgl. BFD Mexiko seit Grdg. Anfang 1942. Mai 1946 zus. mit → Alexander Abusch u. → Paul Merker auf sowj. Schiff Rückkehr über Wladiwostok nach Deutschland.

L: Kießling, Alemania Libre; Dahlem, Vorabend. Qu: Publ. - IfZ.

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Soldat im 1. WK, Stud. Rechtswiss. Berlin u. Bonn, 1919 Prom. Freiburg. 1922-36 Teilh. väterl. RA-Praxis, spezialisiert auf Markenschutz- u. Kartellrecht, 1929 Veröffentl. des Standardkommentars zum unlauteren Wettbewerb. 1930-36 Vors. linksrheinischer Landesverband Rheinland u. Mitgl. Hauptvorst. des CV, tätig für *Keren Hayessod*, 1931-32 durch Öffentlichkeitsarb. gegen natsoz. Propaganda überregional hervorgetreten. 1933-36 Mitgl. Präsidialausschuß der *Reichsvertretung*. 1936 Emigr. USA, 1936-39 Stud. Rechtswiss. u. Forschungsarb. an der Harvard Univ., 1939 LL.B., 1939-45 Forschungsarb. u. Arbeit am Kommentar zum internat. Recht gegen unlauteren Wettbewerb in Cambridge/Mass., nach 1941 in New York als Mitgl. der *Temporary Nat. Econ. Commission* i. A. des US-Senats Untersuchung monopolist. Machtballungen im Ausland. Ab 1947 Privatpraxis als RA, spezialisiert auf Probleme des unlauteren Wettbewerbs, des Markenschutzes u. des Anti-Trust-Rechts. Berater der RA-Firma Golenbock and Barell New York. Zugl. 1941 Mitgr., 1941-46 Präs., 1946-47 Vorst. Vors. A.F.J.C.E., ab 1955 Vizepräs. u. Mitgl. Hauptvorst. der *Claims Conf.*, Präsidiumsmitgl. *Council of Jews from Germany*, Mit-Initiator der Wiedergutmachungsgespräche mit Konrad Adenauer u. Theodor Heuss, Mitgl. Hauptvorst. des LBI New York, Mitarb. *Selfhelp*. Mitgr. Altersheim Kew Gardens Nursing Home (später Margaret Tietz - Center for Nursing Care). Mitgl. *Am. Bar Assn.*, *New York Bar Assn.*, *Am. Assn. of Internat. Law*, *New York Patent Law Assn.*, *US Trade Mark Assn.* - *Ausz.*: 1959 Honorar-Prof. Univ. Köln.

W: Der unlautere Wettbewerb. 1929; Zur Boykottfrage. 1932; Das deutsche Kartellrecht. 1934; Anti-Trust Law in Courts and Commissions (Administrative Law Thesis). 1939; The Law of Unfair Competition and Trademarks. 1945, 3. Aufl. 1967; Unfair Competition. 1946; Trade Marks and the Lanham Act. 1947; Art. in rechts- u. wirtschaftswiss. Zs. D: RFJl; LBI New York. Qu: Arch. Hand. Pers. Publ. Z. - RFJl.

**Capell, Hans**, Dr. jur., Verbandsfunktionär; geb. 23. März 1908 Düren/Rheinl.; *StA*: deutsch, IL. Weg: 1938 GB, 1951 IL.

1930 Prom. Köln; 1933-36 Sekr. ZVfD, 1936-38 Sekr. KKL für Deutschland. 1938 Emigr. GB, 1938-47 Sekr. KKL für GB in London, VorstMitgl. AJR, VorstMitgl. *Council of Jews from Germany* London, *Brit. Zion. Fed.*, Vors. *Herzl Soc.* London. 1951 nach Israel, Dir. Investitionsabt. der RASSCO, Dir. der Development Corp. Ltd. des Weizmann Inst. of Science, 1972 Präs. K. J. V. Lebte 1972 in Ramat Hen.

W: Der Aufsichtsrat der Aktiengesellschaft in der Rechtsprechung des Reichsgerichts und in den Satzungen der Aktiengesellschaft (Diss.). 1930; Beiträge in dt. u. isr. Ztg. u. Zs. L: Meilensteine. Qu: Publ. - RFJl.

**Carlebach, Alexander**, Dr. en droit, Rabbiner; geb. 26. März 1908 Köln; V: Dr. phil. Emanuel Shalom Carlebach (geb. 1874 Lübeck, gest. 1927 Köln), 1904-27 Rabbiner der orthodoxen Austrittsgde. Adass Jeshurun Köln u. Dir. jüd. Lehrerseminar Köln, während 1. WK zus. mit → Pinchas Kohn bei der dt. Zivilverw. in Polen als Berater für jüd. Schulfragen; M: Minna, geb. Joel (geb. 1873 Pfungstadt/Hessen, gest. 1948), 1939 Emigr. B, 1946 nach Pal.; G: David (geb. 1899 Memel, gest. 1952), Rabbiner in Köln, 1937 Emigr. Pal., Lehrer in Jerusalem; Joseph (geb. 1901 Memel, gest. 1961), Zahnchirurg, 1938 Emigr. GB, 1940 Emigr. USA; Daniel (geb. 1903 Memel, gest. 1949), Kaufm., 1936 Emigr. B, 1940 Internierung in F, 1942 CH, 1945 B; ∞ 1937 Marga Löwenstein (geb. 1910 Gemen/Westf.), jüd., Stud. Med., landwirtschaftl. Hachscharah, 1933 Emigr. F, 1935 GB, Schneiderin; K: Susan Jean Stern (geb. 1944); Tirza Rachel Jacobs (geb. 1946); *StA*: deutsch; brit.; 1966 IL. Weg: 1933 F, 1935 GB.

1926-27 Stud. Jeschiwah Slobotka/Litauen, 1927-32 Stud. Köln, Paris, Leipzig u. Straßburg, Referendar, daneben Hg. Zs. *La Tribune Juive*; Mitgl. BJA, Jugendorg. *Agudas Jisroel*. 1933 Emigr. Frankr. mit StudVisum, 1934 Prom. Straßburg; 1935 nach GB, Unterstützung durch *Jewish Refugees Committee* London, 1935-49 Stud. Jews' Coll., Rabbinerexamen, 1949 Fellow Jews' Coll., gleichz. Privatlehrer u. Teiln. an Ausbildungskurs für jüd. Lehrer in London, zugl. 1937-46 stellv. Prediger, Lehrer u. Kantor Golders Green Beth Hamidrash London; 1946-47 bei jüd. Hilfestelle der UNRRA in Deutschland (BBZ), Mithilfe bei Grdg. neuer jüd. Gden.; 1947-54 Rabbiner N. Hendon Syn. London u. Dir. *Union of Orthodox Hebr. Congr.*, Educ. Officer des *Board of Orthodox Jew. Educ.* London. Mitgl. VerwRat für jüd. Mittelschulen, *Board of Deputies of Brit. Jews*. Beratungsausschuß der Kunstgalerie Ben Uri, *Sabbath Observance Employment Bureau Council*. 1954-65 Rabbiner Belfast Hebr. Congr. u. Jew. Community of Northern Ireland in Belfast, Vizepräs. *Mizrachi Fed. of Great Britain and Ireland*, *Friends of Midrashia of Great Britain and Ireland*, *Brit. Committee of Keren Yaldenu* (Fond für unsere Kinder), einer gegen christl. Missionstätigkeit gerichteten Org.; 1966 nach Israel, 1966-71 RedMitgl. *Encyclopedia Judaica* u. Mitarb. *El-Am Talmud*, gleichz. freiberufl. Rabbiner u. Lehrer, Gr. u. Vors. *Union für eingewanderte Rabbiner aus dem Westen*, VorstMitgl. Yeshiva Coll. in Pardes Hannah u. Yeshiva Coll. in Kefar Saba, engl. Red. der Zs. *Niv haMidrashiyah*, Aufbau von Wohnheimen für Flüchtlingskinder, Mitgl. *Komitee zur Unterstützung von Flüchtlingen*. Lebte 1978 in Jerusalem.

W: The Future of German Jewry. In: *Jewish Monthly*. 1949; Rabbi Juda Ha-Nasi, His Life and Times. 1953, 2. Aufl. 1962; A German Rabbi Goes East. In: *Yearbook LBI*. 1961; Le Problème de la Faute et sa Place dans la Norme du Droit International. 1962; The German-Jewish Immigration and its Influence on Synagogue Life in the USA. In: *Yearbook LBI*. 1964; Beiträge in jüd. Zs. L: Carlebach, N. H., Joseph Carlebach and His Generation. 1959. Qu: Fb. Hand. Pers. Publ. - RFJl.

**Carlebach, Azriel** (urspr. Esriel), Dr. jur., Journalist; geb. 6. Nov. 1908 Leipzig, gest. 12. Febr. 1956 Tel Aviv; V: → Ephraim Carlebach; ∞ 1940 Havah Goldrei; K: Tekumah Nizah; *StA*: deutsch, 29. März 1934 Ausbürg. Weg: 1933 PL, 1934 GB, 1936 Pal.

Stud. Jeschiwah Slobodka u. Telsiai in Litauen sowie Univ. Berlin u. Hamburg, Prom. Berlin; 1929 Mitarb. *Weltbühne*, 1929 Org. des 1. Kongresses des Weltverbandes für Sabbatenschutz *Schomre Schabbos*, später Geschäftsf. des Verbandes;



*Jan 10/1960*

GREENE, PINELES, CALLMANN & DURR

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TAX COUNSEL

MURRAY HILL 6-9009

CABLE ADDRESS: "GREPINDUR"

May 31, 1960

Mrs. Margaret T. Muehsam-Edelheim  
Leo Baeck Institute, Inc.  
1239 Broadway  
New York 1, N. Y.

Dear Mrs. Muehsam:

The following is a copy from the "Who's Who  
in America" Vol. 31.

"CALLMANN, Rudolf, lawyer; b. Cologne, Germany, Sept. 29, 1892; s. Max and Claire (Meyer) C; LL.D., U. of Freiburg, Germany, 1919; LL.B. Harvard (research fellowship, 1936-39); LL.D. (hon), University of Cologne, 1958; married Marie Hess, Apr. 19, 1919; 1 dau. Ellen. Came to U.S. 1936, naturalized 1943. Practicing atty. Cologne, Germany, 1926-1936; admitted to N.Y. State bar, 1943, since practiced under own name in New York City, specializing in law of unfair competition, trademarks, copyrights and anti-trust, 1943--; honorary professor law University of Cologne, 1959. Member Am., N.Y. State and N.Y. City bar assns., Am. Assn. Internat. Law, New York Patent Law Ass'n., U.S. Trade Mark Ass'n. Author: The Law of Unfair Competition and Trade Marks, 5 vols. 1945 (2d ed., 1950). Home: 117-14 Union Turnpike, Kew Gardens 15, N.Y. Office: Ten East 40th Street, New York City 16."

In addition to this, we could mention my  
Jewish activities:

*Deutscher Zentralverein*  
Vice President of the Zentral Verein, 1930-1936; Mitglied  
des Präsidialausschusses der Reichsvertretung *to 1936;*  
President, American Federation of Jews from Central Europe, *under direction of*  
Inc. 1941-46; Chairman of the Board of the Federation *of Jews* 1946 --.;  
Mitglied des Präsidiums des Council of Jews from Germany,  
London; Mitglied des Board of Directors, Leo Baeck Institute.  
I believe this is everything. A photo is enclosed.

Cordially yours,

*Rudolf Callmann*  
Rudolf Callmann

RC/iw  
enc



6. 2. 1981

### Posthume Ehrung für Rudolf Callmann

Eine «Callmann-Medaille» ist vor kurzem erstmals verliehen worden. Empfänger war der 76-jährige Kölner Rechtsanwalt Dr. Walter Oppenhoff. Die von der vor etwa 90 Jahren ins Leben gerufenen «Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht» (wegen ihrer grün eingebundenen Zeitschrift kurz «Grüner Verein» genannt) gestiftete Medaille erinnert an den in Praxis wie in Wissenschaft herausragenden Fachmann auf diesen und benachbarten Gebieten, Dr. Rudolf Callmann (Köln 1892 – New York 1976). Bis 1936 war er ein angesehener und begehrter Anwalt in seiner Vaterstadt, und nach seiner erzwungenen Auswanderung und erneutem Studium in Amerika praktizierte er von 1943 an in New York. Callmanns Kommentare zum Wettbewerbs-, Kartell- und Warenzeichenrecht, ob in deutscher oder – später – in englischer Sprache, hatten (und haben) in der Fachwelt hohen Rang. 1960 ernannte ihn die Universität Köln zum Honorarprofessor. Auch im jüdischen Leben Deutschlands und der USA war Rudolf Callmann eine bekannte Persönlichkeit. Lange Zeit Vorsitzender des linksrheinischen Landesverbands des C.-V. (Central-Verein deutscher Staatsbürger jüdischen Glaubens), gehörte er seit 1933 sowohl zum Präsidium dieser einst grössten jüdischen Organisation in Deutschland als auch zum Präsidialausschuss der damals entstandenen Reichsvertretung der deutschen

Juden. In und von New York aus wirkte er sichtbar und aktiv in den Vorständen von Spitzenorganisationen via der «American Federation of Jews from Central Europe», der Claims Conference und des Leo-Baeck-Instituts. Der Ueberreichung der «Callmann-Medaille» an Dr. Oppenhoff im Kölner Dom-Hotel wohnte auch Callmanns einzige Tochter, Professor Ellen Callmann (New York). bei. E. G. L.





## Rudolph Callmann, 83, Dies; Lawyer Aided Jewish Refugees

Dr. Rudolf Callmann, lawyer, author and a leader in aiding Jewish refugees from Nazi Germany, died Friday at his home in Kew Gardens, Queens. He was 83 years old.

Dr. Callmann, a specialist in unfair competition, trademark, copyright and antitrust law, was counsel to the firm of Golenbock & Barell here.

His best-known work was "Unfair Competition, Trademarks and Monopolies," in five volumes. He was working on the fourth edition at his death.

### On German Claims Panel

Dr. Callmann served as vice president and member of the executive committee of the Conference on Jewish Material Claims Against Germany, board chairman of the American Fed-

eration of Jews from Central Europe, and member of the presidium of the Council of Jews from Germany.

He was born Sept. 29, 1892, in Cologne, Germany, and received his legal education at the universities of Berlin, Freiburg and Bonn. He was an honorary professor of law of the University of Cologne.

He practiced law in Cologne from 1922 to 1936, when he came to the United States, under the sponsorship of the late Zechariah Chafee Jr., University Professor of Harvard, and became a research fellow and student there. He received a law degree from Harvard in 1939.

A daughter, Prof. Ellen Callmann, an art historian, of Muhlenberg College, survives.

## THE NEW YORK TIMES, SUNDAY, MARCH 14, 1976

**CALLMANN—Rudolf.** Beloved husband of the late Marie, devoted father of Ellen, dear uncle of Henry Callman, loving brother-in-law of Otto Noether. Services Sun., 3:30 P.M., at Schwarz Brothers, "Forest Park Chapels," Queens Blvd., and 76th Rd., Forest Hills, N.Y.

**CALLMANN—Rudolf.** The Council of Jews from Germany records with grief the death of a universally beloved and respected member of its Presidium. He made a lasting contribution to righting the wrongs done to victims of Nazi persecution.

Council of Jews from Germany,  
W. BEHR (London),  
H. GERLING (Jerusalem),  
and CURT C. SILBERMAN (New York),  
Co-Chairmen.

**CALLMANN—Rudolf.** The American Federation of Jews from Central Europe records with deep sorrow the passing of its Chairman of the Board, one of the founders and its first President. His scholarship, counsel and friendship guided community activities for 35 years. They can never be replaced.

American Federation of Jews from  
Central Europe,  
CURT C. SILBERMAN,  
HERBERT A. STRAUSS,  
WALTER STRAUSS,  
ULLI TIETZ.

**CALLMANN—Rudolf.** We regret mournfully the loss of our esteemed Counsel and extend our deepest sympathy to his bereaved family.

GOLENBOCK & BARELL

## THE NEW YORK TIMES, TUESDAY, MARCH 16, 1976

### Deaths

**CALLMANN—Rudolf.** The Officers and the Board of the Leo Baeck Institute mourn the passing of their fellow Board member and co-founder of the Institute. His eminent scholarship and wise counsel were apparent in every phase of the work of our Institute. Our sympathy goes out to the bereaved family.

MAX GRUENEWALD, President.

**CALLMANN—Rudolf.** The Officers and Directors of the Conference on Jewish Material Claims Against Germany mourn the passing of our longtime colleague, Dr. Rudolf Callmann, who was among the founders of the Conference, and extend sincere sympathy to the family.

NAHUM GOLDMANN, President  
A. J. SHERMAN, Secretary  
SAUL KAGAN, Treasurer



## baum

age 8

year passed, in not carry one or im or reviewing ooks.

relationship, there hip between his f other former l already known times they had many. They feel s with his wife, er, Michael and in-law, and, last a, whom he loved deeply attached

at the following of condolence, Dr. Robert

h Dr. Maybaum uch so manches ndnis fuer das ieles was dort v oder auch s aber etwas hes war, auch or langer Ver-erlin ueberein- nistischen und lie Maybaum selbstaendiger en als auch in ch niemals mit ieden gegeben. dische Denken angesichts all die wir durch- befruchtet. Er liess sich nicht ige Menschen ieser Hinsicht die nicht aus-

schaetzte ich warmen und kann mitfueh- vor allem die Kreis von liedern seiner ern. Ich hoffe eiterhin ihren

R

at Mr. Emil J. th year. Having e Zionist youth s active in the ter his emigra- he started his nking firm of l Dresden) and régime, joined e Anglo-Conti- When the AJR one of its first ears, belonged all the more eriod most of eadv "settled" and his con- vices to build beginnings. He e end. At the o a number of as Chairman ident of the ether with his riends of the r will be grate- new him. We s to his wife, rests.

## OBITUARY

DR. RUDOLF CALLMANN

The Jews from Germany have suffered a severe loss by the death of Professor Dr. Rudolf Callmann at the age of 84. He was an outstanding personality, both in his profession as a jurist and in his services to the German Jews before and after their dispersion.

A partner to his father's lawyers' firm in Cologne, he was a specialist on questions of unfair competition and protection of trade marks and wrote commentaries on the relevant laws in 1932 and 1934 respectively. What made his books and articles on legal subjects particularly attractive, was the rare combination of concise scholarship with an admirable elegance of style. His legal expertise also became important for the Jews in Germany before 1933 in connection with the anti-Jewish boycott propaganda. On the occasion of a civil litigation in 1931 he published an opinion on the subject at the request of the Central-Verein.

He held leading positions with the C.V., first as chairman of the Rhineland district and later as a member of its Presidium. When, in 1929, the extension of the Jewish Agency to non-Zionists was heatedly debated in the C.V., Rudolf Callmann, like Leo Baeck, Otto Hirsch and Ludwig Tietz, belonged to the pro-Agency wing. He also became a member of the Presidium of the "Reichsvertretung" after its foundation in 1933.

In 1936, Rudolf Callmann emigrated to the United States where, after having obtained his American legal qualifications, he resumed his work as a lawyer and soon had many well-known big firms among his clients. He also published a book under the title "Unfair Competitions, Trade Marks and Monopolies", which has become a standard work.

At the same time, as in Germany, Dr. Callmann took a leading part in the work of Jewish organisations, built up by the Jews from Germany. Especially in the field of restitution and compensation, his constructive expert activities were of greatest value to the victims. He was president, and later board chairman, of the American Federation of Jews from Central Europe and a member of the Presidium of the Council of Jews from Germany, where his counsel will be sadly missed. For a number of years, he represented the Council at the Claims Conference. He equally took an active interest in the work of the German-Jewish welfare organisations and institutions in the U.S., especially Selfhelp and the Margaret Tietz Nursing Home.

Last but not least, aware of the heritage of German Jewry, he was associated with the American branch of the Leo Baeck Institute. It was only three years ago that several of his former fellow-workers from London met him at the LBI's Scholars' Conference at Arden House near New York. Though then already an octogenarian, he was as alert as we always used to know him.

The University of Cologne appointed him an Honorary Professor in 1959, and his guest lectures made a great impact on the students. In the interest of the Nazi victims from Germany, he also resumed contacts with leading German politicians, among them Heuss and Adenauer. He knew both of them from the pre-Hitler years.

Summing up the personality of Rudolf Callmann, our EGL correspondent, who also stems from Cologne, writes: "Die elegante Erscheinung, die geistvolle Persoenlichkeit, das heitere Naturell dieses kultivierten, stets charmant-liebenswuerdigen Mannes wird so leicht nicht vergessen werden. Er haette Traeger des 'Ordens wider den tierischen Ernst' werden koennen". W.R.

MAX TAU

The author Max Tau died in Oslo on March 13. He was born in Beuthen 79 years ago, and after completion of his university studies became literary adviser to the Bruno Cassirer publishing house. He always took a special interest in Scandinavian literature and, in 1938, emigrated to Norway. During the occupation he found refuge in Sweden, but returned to Oslo after the end of the war. The reputation he had built up for himself in his country of adoption is symbolised by the fact that the Norwegian Government granted him citizenship during the war, while it was in London Exile. Max Tau considered it as one of his most important tasks to promote cultural understanding between the nations, especially between Norway and Germany. The translation of Thomas Mann's works into Norwegian is also to a high extent due to his initiative. He was equally concerned with the work for German-Jewish and Christian-Jewish understanding.

His attitude was recognised by the award of the first Peace Prize of the German Book Trade in 1950, the Nelly Sachs Prize and the Grand Federal Cross of Merit with Star. He also received the highest Scandinavian literary award and was honoured by several Festschriften.

His works include a three volume autobiography, the titles of which reflect his attitude: "Das Land, das ich verlassen musste" (1961); "Ein Fluechtling findet sein Land" (1964); "Auf dem Weg zur Versoehnung" (1968).

ELLEN LACHS

Mrs. Ellen Lachs passed away on March 17 at the age of 71 after a long, grave and painful illness, borne with great fortitude and endurance. The only daughter of Alfred Baumgarten, formerly one of the directors of the German State Railways, and his wife Sofie, she came to this country in 1933. In 1938, she married Dr. Reinhold Lachs, a distinguished lawyer and member of the English Bar.

When in 1950 the Jewish Trust Corporation for Germany (JTC) was established, Dr. Lachs was appointed its General Manager. In agreement with the British Occupation Authorities it was decided to establish the operational Headquarters in Hamburg, where Dr. and Mrs. Lachs moved in August 1950. Tribute was paid to Dr. Lachs's splendid achievements in the History of the JTC, published by that organisation.

Today it is difficult to imagine the strange circumstances in which a number of lawyers under the leadership of Dr. Lachs started the Corporation's work in Germany. That the *esprit de corps* prevailed was in no small measure due to Mrs. Lachs' personality, who succeeded in creating in the Hamburg home of the Lachs family a focal point for the Allied Staff of the Corporation and their spouses. She was the true First Lady of that group on foreign soil, always friendly, always smiling and endowed with the invaluable gift of bringing together a group of people, who before the establishment of the Corporation were hardly known to each other and who by call of duty found themselves in a City still largely in ruins. Those who had the good fortune of meeting Ellen Lachs will for ever remember with grateful affection her charm and innate kindness, and last but not least her wisdom. C.K.

The AJR which is one of the beneficiaries of the work of the JTC wishes to associate itself with this tribute to a remarkable lady and expresses its condolences to her husband (for many years a member of the Management Committee of the Old Age Homes) and to her daughter Leah.



10 EAST 40TH STREET  
NEW YORK 16, N. Y.

MURRAY HILL 6-9009

FROM: RUDOLF CALLMANN

Date: March 12, 1959

To: Ernest Steefel, Esq.

- Enclosed letter from.....of.....
- Enclosed copy for your information.
- Enclosed copy of my letter to.....

Please let me have your approval or suggestions.

- Please sign, have your signature notarized and return to me.
- The enclosed is returned at your request.
- Please return to me.



"Man is not an isolated individual living in a social vacuum, but a social being destined to live and to work out his salvation in association with his fellow beings," said the Administrative Board of the National Catholic Welfare Conference in 1940. "He is a member of a community and he has, in consequence, duties of social justice and duties of charity which emerge from this relationship. On no other foundation can man build that good society which is desired so ardently by the great mass of mankind."

The Institute for Religious and Social Studies of the Jewish Theological Seminary of America noted that "the problem of group relations in our country is basic to the survival of civilization. The moral influence of America is indispensable to the establishment of world understanding and this influence can be exerted only if America sets its own moral house in order. American failure to overcome infringement of minority rights compromises our standing in the world and makes our pleas for cooperation among men of different cultures seem hypocritical."

\* \* \* \* \*

Vortrag Dr. Rudolf Callmann

Juden im amerikanischen Recht.

In der Vortragsserie "Portraits of American Jews" (The Role of the Jew in American Society) sprach Dr. Rudolf Callmann ueber "The Law - Louis Brandeis". Wie es das allgemeine Programm zu dieser Vortragsreihe ankuendigte, war im Vortrag Dr. Callmanns der Name des bedeutendsten und bekanntesten juedischen Juristen Amerikas nur der Ausgangspunkt fuer eine grundlegende Auseinandersetzung ueber die Rolle des Juden im amerikanischen Recht ueberhaupt, und dies Thema wurde vollends ins Klaerende und Allgemeine gehoben, als der Redner die Besonderheit des amerikanischen Juristen mit der des deutschen verglich.

Dr. Callmann ging davon aus, dass Amerika ueberhaupt nur zwei wirklich grosse juedische Juristen hervorgebracht habe, die allerdings unter die zwolf besten Juristen der gesamten amerikanischen Geschichte zu zaehlen sind. Knapp

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und klar umriss er Leben und Werk von Brandeis und Cardozo, deren Gestalten um so deutlicher hervortraten, als er die Gegensätze in Charakter und Wirksamkeit beider darstellte.

Louis D. Brandeis, 1856 als Sohn reicher tschechisch-oesterreichischer Emigranten geboren, ging als sechzehnjähriger nach Deutschland zurück, und studierte später in Harvard, wo seine uebertragende juristische Begabung derart anerkannt wurde, dass man ihm eine akademische Taetigkeit anbot, die er aber ablehnte, um Anwalt zu bleiben, bis er nach Jahrzehnten in den Supreme Court berufen wurde. Er stand als leidenschaftlicher Kaempfer in der Oeffentlichkeit fuer die Sache der Freiheit und der Armen; er kaempfte mit dem Volk gegen Trusts und Raeuberbarone und fuer die Organisation der Arbeiter gegen das Unternehmertum; er kaempfte fuer diese Ziele im Gerichtssaal, in oeffentlichen Reden, in aggressiven Schriften und war in mancher Hinsicht ein Vorlaeuer der Ideen Franklin D. Roosevelts. Aber nicht nur in seinem Kampfgeist bestand seine Groesse, sondern ebenso in der damals neuen Forderung, dass der Jurist auch Nationaloekonomie und Soziologie studieren muesse. Wie richtig dies ist, bewies er in seinen vernichtenden Statistiken in dem beruehmten Prozess gegen die mehr als zehnstuendige Frauenarbeit. Seine Gegner fuerchteten, Praesident Wilson wuerde Brandeis zum Attorney General ernennen; dies geschah zwar nicht, aber Wilson berief ihn 1912 in den Supreme Court; es dauerte fuef Monate, bis ihn der Congress bestaetigte. Auch hier blieb er der grosse Opponent, der staendige "Dissenter" in fast all den 600 Entscheidungen, an denen er mitarbeitete; und merkwuerdigerweise stand dem Ultra-Liberalen in der Minoritaet fast immer zur Seite der konservative Ultra-Yankee Oliver Wendel Holmes. Als Brandeis 1939 sein Amt niederlegte, waren jene Minoritaetsideen bereits zur Majoritaet, zum Gemeingut geworden.

Benjamin Nathan Cardozo, geboren 1870, war im Gegensatz zu Brandeis ein stiller Gelehrter, der die Kaempfe der Oeffentlichkeit scheute. Er wurde von Anfang an als Wunder des Wissens bestaunt, seine Schriftsaetze galten als Dokumente der Weisheit. So wurde er sehr bald oberster Richter des buergerlichen Rechts. Trotz der Trivialitaet seiner Faelle des Common Law wurde die fast unglauubliche Klarheit seiner Entscheidungen und Begrueudungen so populaer, dass noch heute jeder Jurist in Amerika sie gelesen hat, und dass, als 1932 Justice Holmes zuruecktrat, eine Volksbewegung entstand, die forderte, dass Cardozo in den Supreme Court berufen wurde. Dies geschah auch, aber in den wenigen Jahren bis zu seinem Tode im Jahre 1938 konnte seine stille Feinarbeit waehrend der unruhigen Zeit der Roosevelt-Reformen keine bedeutende Rolle spielen.

Ausser diesen beiden traten andere juedische Juristen im amerikanischen

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Recht kaum hervor; sie arbeiteten meist anonym in den Anwaltsbueros, - im Gegensatz zu Deutschland, wo jede groessere Stadt ein paar ueberragende, weitbekannte juedische Anwaelte hatte. In Deutschland lag auch die eigentliche Rechtswissenschaft zum grossen Teil in juedischen Haenden, und das Reichsgericht folgte den Ergebnissen dieser Wissenschaft. Die Juden sind immer ein Volk von Kommentatoren gewesen; durch die Art der deutschen Erziehung und die Ausbildung in der analytischen Methode mussten diese Kommentatoren zu Rechtswissenschaftlern ersten Ranges werden. In Amerika ist die Situation voellig anders: der Anwalt ist ein blosser Praktiker; ein guter Anwalt schreibt hier keine Buecher, sondern er wird im Anwaltsbuero erzogen und studiert die Entscheidungen. Denn der Richter dominiert in Amerika derart, dass nicht die Rechtswissenschaft, sondern die richterlichen Entscheidungen massgebend sind.

So stieg Dr. Callmann immer mehr ins Kulturphilosophische empor. Er schied zwischen Lebensgestaltung und Lebenserkenntnis. In Amerika ist die Lebensgestaltung die Hauptsache, der die Wissenschaften dienen muessen. Es gibt aber speziell analytisch, erkenntniskritisch veranlagte Voelker, wie die Franzosen und die Deutschen, denen Lebenserkenntnis mehr bedeutet als Lebensgestaltung. Aus diesem allgemeinen Gegensatz ergibt sich der Unterschied zwischen der europaeischen und der amerikanischen Justiz, der Unterschied zwischen dem intellektuellen Analytiker und dem Praktiker. In Amerika wird Intellektualitaet und Lebenserkenntnis gering geschaetzt, aber um so mehr alles anerkannt, was dem Experiment, der Lebensgestaltung dient. Deshalb ist in den gelehrten Buechern in dem ersten Jahrhundert der amerikanischen Republik kein Niederschlag der europaeischen Wissenschaft zu finden; erst mit dem Pragmatismus beginnt in Amerika eine eigene Philosophie, in der ruecksichtslose Nuetzlichkeit ohne Abstraktionen dominiert. Dieser Pragmatismus mit "Trial and Error" ist noch heute die Philosophie Amerikas mit dem Grundprinzip, durch staendige neue Versuche zum Erfolg zu gelangen.

Hieraus erklart sich die Besonderheit des amerikanischen Rechts, - ein Recht, das durch den Richter, den Praktiker geschaffen und immer neu geschaffen wird. Aber der Amerikaner ist ein eminent politischer Mensch, die Politik ist das Mittel zur Lebensgestaltung, und die ernstgemeinten Ideale der Freiheit, Gleichheit und Gerechtigkeit sind die Komponenten zu seinem Materialismus geworden. Dies politische Prinzip wird auch zum Rechtsprinzip; die hoechsten Entscheidungen des Supreme Court werden weltanschaulich entschieden, und seine Richter sind weniger Rechtsgelehrte als Maenner der Lebens- und Staatsweisheit, deren Mission es ist, zu zeigen, wie ein Riesenvolk auf demokratischer Basis rechtsmaessig leben kann. Von diesem amerikanischen Klima der praktischen Lebensgestaltung sind die Juden Amerikas erfasst worden und haben sich ihm angepasst, auch auf dem Gebiet des Rechts. Aber man sollte nicht vergessen, dass es zwei Voelker gab,

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die Roemer und die Juden, die sich durch die Vereinigung jener beiden Prinzipien der Lebensgestaltung und der Lebenserkenntnis ueberall in der Welt durchgesetzt haben.

An Dr. Callmanns weitgreifenden, grossartigen und geradezu spannenden Vortrag schloss sich eine ergaenzende Diskussion, die schliesslich Dr. Hahn zu einer kritischen Eroerterung des Pragmatismus fuehrte.

Dr. Kurt Pinthus

\* \* \* \* \*

A N N U A L M E E T I N G

The annual meeting of Congregation Habonim will be held

T u e s d a y , February 24th, 1959 at 8.15 P.M.

at the Community Center, 44 West 66 Street.

In this meeting the reports concerning the last year will be rendered and the necessary elections held.

All our members are cordially invited to attend this meeting.

Personal invitations will follow.

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Stanford University's ninth president, Gerhard Casper, is one of the most sought-after academic administrators in the country. It is no accident that he has brought substantial changes to Stanford, despite

the perceived tranquillity. "It's clear that I'm a little more reticent than what Stanford is perhaps used to," said Mr. Casper. "But I think people have come to understand that there's a reason why I am reticent."

## New Leader at Stanford Fosters a Calm (Mostly)

By ANTHONY DePALMA  
Special to The New York Times

STANFORD, Calif. — When the time came to pick the one person who had the greatest impact on Stanford University in the first year of its second century, the student editors of The Stanford Daily ignored Gerhard Casper, the new president, and named Bill Walsh, the head coach who last season led Stanford's football team to its most victories in 50 years.

"Bill Walsh has had more of an invigorating effect on campus than the president," said June E. Cohen, editor of the Stanford Daily. "Casper hasn't come out with anything that's gotten people real riled up or real excited."

It may be that a great football coach will always beat an erudite university president for the hearts of students, but Mr. Casper's first few months have, in fact, brought substantial changes to Stanford. Yet the perceived tranquillity is no accident.

### Pressure-Filled Position

Reticence, introspection, even institutional soul-searching were some of the things Stanford hoped to find when Mr. Casper was chosen last year to become its ninth president.

Other major universities, Columbia, Duke and the University of Chicago among them, have also selected new chief executives in the past year. But no other new president has felt the pressure that Mr. Casper has.

Last September he took over a university that had just gone through some of the worst years in its history, years surrounding the 1991 centennial in which the university's sterling reputation was tarnished by allegations that Stanford had misspent millions of dollars in Federal research money.

Many people on campus think a low-key period of comparative obscurity is just what the university needs to recuperate. But Mr. Casper has been busy behind the scenes.

### Making Changes

He has reorganized the university administration, eliminating five of nine vice presidents and simplifying the chain of command. He has suggested a plan for streamlining the university's largest academic unit, the School of Humanities and Sciences, and begun a huge study — one he will lead — of how to better coordinate Stanford's medical school and two hospitals

In December, Stanford became one of the first major American universities to extend health insurance and other benefits to the homosexual partners of its faculty and staff. Mr. Casper, 55, has even raised expectations and some concerns when he publicly championed in a local newspaper article the idea of squeezing an undergraduate education into three years instead of four.

Mr. Casper, one of the most sought-after academic administrators in the country and a finalist for the presidency of Harvard University, has also managed to return an air of academic purpose to a university that over the last few years has been shaken to its core by spending scandals, curriculum controversies and even an earthquake.

### After the Ball

Mr. Casper, a German-born legal scholar with longish grey hair and a European demeanor, is more likely to read Rabelais than Robert Reich, more likely to pine for a stroll in the tranquil woods of Stanford's Jasper Ridge Biological Preserve than to attend a high-society function.

"In some ways the past few months have been a ball," Mr. Casper said in an interview at his comfortable second-floor study at Hoover House, the home that Stanford provides for its president. "But from a ball you go home at three o'clock in the morning totally exhausted."

In a time of trouble for American higher education, there may be no tougher position than Mr. Casper's. The fuss over the indirect costs of Federal research — basically the overhead paid to the university in connection with scientific work by professors — started at Stanford in 1990 and soon spread to most other major universities. But nowhere else did it reach the howl of protest that it did here.

Mr. Casper's predecessor, Donald Kennedy, suffered the embarrassment of being dressed down in front of a Congressional committee that wanted to know why Stanford had included such items as depreciation on 72-foot yacht and a \$1,200 19th-century Italian fruitwood commode in Hoover House on lists of reimbursable research expenses. Mr. Kennedy resigned last year.

"It is quite clear that excesses occurred, almost none of them venal," Mr. Casper said. "Everyone was very busy and there was a lot of bureau-

happened. But we can never have a zero error rate."

An assistant to Representative John D. Dingell, chairman of the House Subcommittee on Oversight and Investigations that has been pursuing Stanford, said the investigation had concluded. But remaining is a separate effort to recover \$230 million from Stanford in alleged cost overruns.

Stanford was criticized even before the investigation into Government spending. In one of the most widely reported higher-education squabbles of 1988, the university changed its core curriculum, which had focused strongly on the classic literature of Western civilization, to include the study of non-Western literature and

## Welcome relief from a bad couple of years at a premier university.

culture. It said it was making its education more diverse, but critics said it was giving up educational standards for political expediency.

Given how bad the last years have been for Stanford, it is not surprising that Mr. Casper, or anyone else who might have taken over the presidency, would be unable to address all concerns satisfactorily.

### Complaints Arise

Mr. Casper unknowingly introduced several controversies on campus this year. For example, he mildly criticized the action by 200 faculty members who took out a newspaper advertisement deploring the conditions that had led to the Los Angeles riots. He said he was concerned that the advertisement might have been interpreted as a statement of university policy. To his surprise, he was accused of censoring free speech.

In addition, the president's style of withholding his opinion while hearing all sides of an issue has led to criticism by students and some faculty that he is reluctant to act decisively. Mostly though, people here are unsure what to make of him.

"We can't make a good judgment

said Matthew A. Kelso, news editor of The Stanford Review, a weekly student newspaper that takes a conservative view.

Some faculty members said they considered Mr. Casper to have a more conservative view of academic issues than Mr. Kennedy did and they think he will have less tolerance for academic innovations like cross-disciplinary studies than his predecessor did.

### An Age of Limits

In some ways, Mr. Casper may have little choice on such issues. Even without the \$230 million reimbursement cloud hanging over it, Stanford has had substantial budget shortfalls over the last several years — \$44 million last year, \$41 million this year in a budget of \$452 million. Mr. Casper anticipates another shortfall next year of about \$25 million. But by continuing to cut costs and raise revenues (by increasing the number of graduate students), Stanford may come close to a balanced budget in the 1994-1995 academic year.

"I don't think this is a disaster," Mr. Casper said of the budget adjusting that has been going on. "Universities such as Stanford and its main competitors will have to make choices. We cannot be catholic any longer in what we are offering."

In general, the Stanford community has withheld public criticism of Mr. Casper that might prolong the university's hard times. A few professors expressed concern because of his background in law — he was dean of the law school at the University of Chicago when Stanford hired him — he might not be strongly supportive of the hard sciences.

But over all, said William H. Northway, Jr., a professor of pediatric radiology and chairman of the Faculty Senate, members of the faculty are grateful for the calm that hugs Stanford this year.

"While all our problems are not completely behind us, and we realize that there probably will have to be more budget reductions, the faculty really wants to get back to the things we were hired to do — teaching and research," Mr. Northway said.



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**CASON, MARILYNN JEAN, manufacturing company executive;** b. Denver, May 18, 1943; d. Eugene Martin and Evelyn Lucille (Clark) C. B.A. in Polit. Sci., Stanford U., 1965; J.D., U. Mich., 1969, M.B.A., Roosevelt U., 1977. Bar: Colo. 1969, Ill. 1973. Assoc. Dawson, Nagel, Sherman & Howard, Denver, 1969-73; atty. Kraft Inc., Glenview, Ill., 1973-76; corp. counsel Johnson Products Co., Inc., Chgo., 1976-78, v.p., corp. counsel, 1978—, mng. dir. Johnson Products of Nigeria, Ltd., Lagos, 1980—. Bd. dirs. Arthritis Found. Ill., 1978—. Mem. ABA, Cook County Bar Assn., Chgo. Bar Assn., U. Mich. Law Fund. Club: Stanford of Ill. General corporate. Private international. Home: Apt 2 Mosafejo Close Apt 1 Lagos Nigeria Office: 8522 S Lafayette Ave Chicago IL 60620 also Ikosi Rd Oregon Industrial Estate Ikeja Lagos Nigeria

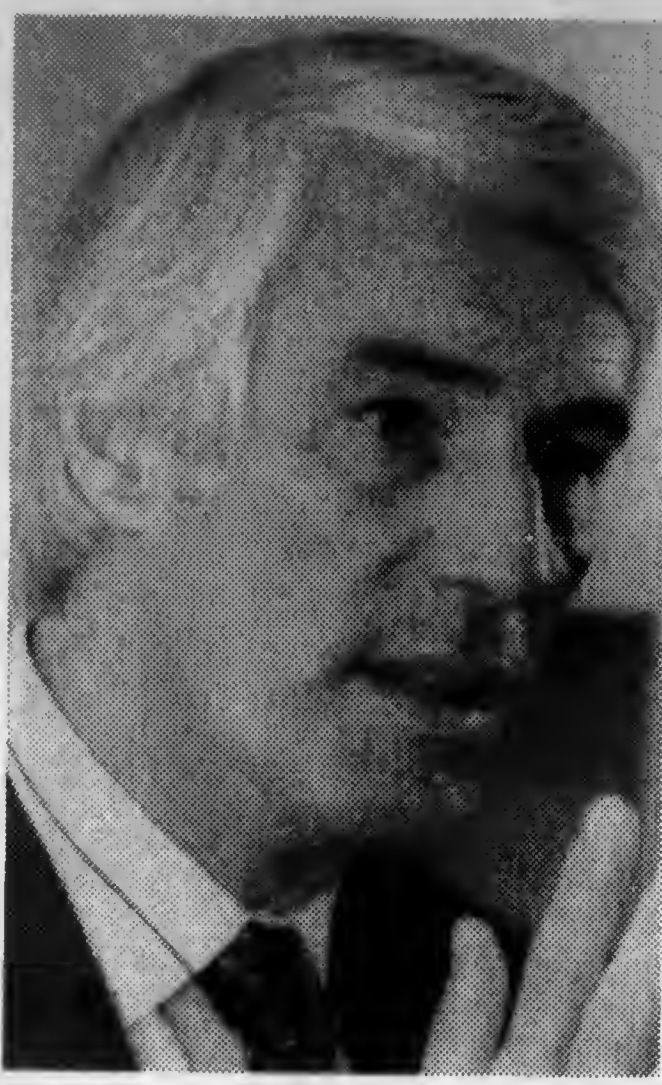
**CASPAR, GEORGE J., III, lawyer;** b. 1933. B.S., Ohio State U., 1954; LL.B., U. Mich., 1957; LL.M., NYU, 1958. Assoc., White & Case, 1962-65; asst. gen. counsel Heublein Inc., Farmington, Conn., 1965-69, sec., assoc. gen. counsel, 1969-71, sec., gen. counsel, 1971-72, v.p., sec., gen. counsel, 1972—. General corporate. Office: Heublein Inc Munson Rd Farmington CT 06032\*

**CASPER, GERHARD, lawyer, university dean;** b. Hamburg, Germany, Dec. 25, 1937; s. Heinrich and Hertha Casper; m. Regina Koschel, Dec. 26, 1964; 1 dau., Hanna. Legal state exam, Hamburg, 1961; LL.M., Yale U., 1962; Dr. iur. utr., U. Freiburg, Germany, 1964; LL.D., John Marshall U., 1982. Asst. prof. polit. sci. U. Calif.-Berkeley, 1964-66; assoc. prof. law and polit. sci. U. Chgo., 1966-69, prof., 1969-76, Max Pam prof. law, 1976-80, William B. Graham prof. law, 1980—, dean, Law Sch., 1979—; vis. prof. law Catholic U., Louvain, Belgium, 1970. Bd. dirs. Am. Bar Found. Fellow Am. Acad. Arts and Scis.; mem. Am. Law Inst. (council 1980), Am. Polit. Sci. Assn., Chgo. Bar Assn., Chgo. Council Lawyers (bd. gov. 1973-75). Author: Realism and Political Theory in American Legal Thought, 1967; (with Richard A. Posner) The Workload of the Supreme Court, 1976. Co-editor: The Supreme Court Rev., 1977—. Constitutional, Legal history, Legal education. Office: U Chgo Law Sch 1111 E 60th St Chicago IL 60637



Fu 10, 1992

Frankfurter Allgemeine Zeitung



Gerhard CASPER

Foto dpa

geb 1938

## Bildungs-Reformer

Er sei ja nur deshalb zum Präsidenten der Stanford-Universität gewählt worden, so scherzte Gerhard Casper bei seiner Amtseinführung, weil er das Motto der Hochschule richtig aussprechen könne. Es lautet – tatsächlich auf deutsch – „Die Luft der Freiheit weht“. Die Gründer dieser renommierten Universität im kalifornischen Palo Alto hatten diesen Leitspruch einer Schrift Ulrich von Huttens aus dem Jahre 1521 entnommen. Nach nur vier Monaten im Amt zeigt sich inzwischen aber, daß der vor 55 Jahren in Norddeutschland geborene Jurist Casper mehr als nur „Krisenmanager“ einer in Schwierigkeiten geratenen Eliteuniversität ist. Seine Vorschläge zur Reform des Hochschulstudiums sind geeignet, das starre amerikanische Bildungswesen grundlegend zu verändern.

Casper machte im Jahre 1957 Abitur und begann danach in Hamburg Jura zu studieren. Später ging er an die Yale-Universität in Connecticut, kehrte dann aber nach Deutschland zurück und promovierte mit einer verfassungsrechtlichen Arbeit in Freiburg. Anschließend bekam Casper eine Assistenzprofessur in Berkeley und ging im Jahre 1966 nach Chicago. Dort wurde er im Jahre 1979 – noch als deutscher Staatsbürger – Dekan der „Law School“. Nach zehn Jahren in diesem Amt – inzwischen hatte er einen amerikanischen Paß – nahm er den Posten des „Vizepräsidenten“ der Universität von Chicago an. Drei Jahre später folgte der Ruf auf den „Chefsessel“ nach Palo Alto.

Zu dieser Zeit steckte die Stanford-Universität in einer Krise. Das Ansehen der Hochschule hatte gelitten, weil Forschungsgelder angeblich für die Renovierung einer Yacht, Repräsentationsmöbel und Empfänge verwendet wurden. Dem neuen Präsidenten kommt die Aufgabe zu, den Ruf Stanfords wiederherzustellen. Casper überraschte jedoch viele, als er schon kurz nach seiner Amtseinführung an den Grundfesten des amerikanischen Bildungssystems zu rütteln begann.

Amerika verfügt im Gegensatz zu Deutschland nicht über ein mehrgleisiges System. Statt zwischen Hauptschule, Realschule oder Gymnasium wählen zu können, gibt es für amerikanische Jugendliche lediglich die „High-School“. Wer deren Abschluß geschafft und eine mehr oder weniger anspruchsvolle Aufnahmeprüfung abgelegt hat, kann zum „College“ gehen. Mindestens vier Jahre lang betreiben die Studenten dort ein „Studium generale“ und lernen dabei das, was man ihnen in Deutschland schon in der Oberstufe eines Gymnasiums beibrächte. Eine solche College-Ausbildung kostet an Elitehochschulen wie Stanford, MIT oder Yale allerdings etwa 100 000 Dollar. Die staatlich geförderten öffentlichen Universitäten wie Berkeley sind zwar billiger, Eltern müssen aber dennoch mit Kosten von mindestens 25 000 Dollar für die vier Jahre rechnen. Die eigentliche akademische Ausbildung findet erst nach dem College statt, denn nur in der „Graduate School“ kann man zielgerichtet auf einen Abschluß hin studieren. Caspers Vorschlag, das College auf drei Jahre zu verkürzen, hat weitreichende Konsequenzen. Sie reichen von der Straffung des Lehrplans über geringere Einnahmen für die Universitäten bis zur Steigerung der Qualität des Unterrichts in den ohnehin überlasteten High-Schools. Casper hat die Diskussion über Bildungsreform in Amerika in Gang gebracht.

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## David Daube 75

Der aus Freiburg im Breisgau stammende und heute in Berkeley (Kalifornien) lebende Rechtsgelehrte Prof. Dr. David Daube ist am 8. Februar 75 Jahre alt geworden. Daube gilt als Autorität insbesondere für römisches, biblisches und talmudisches Recht. In der Emigration hat er einen ungewöhnlichen Weg zurückgelegt: der Göttinger Dr. jur. des Jahres 1932 erwarb 1935 im englischen Cambridge das Doktorat der Philosophie. Zunächst wirkte er an der zur Universität London gehörenden Abteilung für Orientalische Studien, ab 1949 lehrte er römisches Recht in Jerusalem, von 1951 an in Aberdeen (Schottland), und von 1955 bis zu seiner ehrenvollen Berufung an die Universität in Berkeley war er Ordinarius für Zivilrecht in Oxford. Daneben hatte er zeitweilig eine Gastprofessur an der jungen Universität Konstanz. Daube ist mehrfacher Ehrendoktor, u.a. des Hebrew Union College (Cincinnati/Ohio) und der Universität München.

e.g.l.

# AUFRAU

Friday Feb 17, 1984



# MARTIN DRUCKER

zum 65. Geburtstage

in Freundschaft und kollegialer Verehrung

überreicht von

ALSBERG† - Berlin, BECKER I - Köln, BREIT - Dresden,  
CLAD - Leipzig, EYCK - Berlin, FLEISCHHAUER - Dresden,  
FRANZ - Leipzig, Max FRIEDLAENDER - München,  
FÜRST - Heidelberg, GOLDSCHMIDT - Leipzig,  
Max HACHENBURG - Mannheim, HALLY II - Dresden,  
HEILBERG(Breslau)-Berlin, HEILBRUNN - Frankfurt Main,  
HERZFELDER - München, HESS - Stuttgart,  
FREIHERR VON HODENBERG - Celle, KANN - Berlin,  
KRAEMER - Leipzig, LEMBERG - Breslau, MAGNUS - Berlin,  
MAINZERI - Stuttgart, MAMROTH - Breslau,  
Paul MARCUSE - Berlin, GRAF VON PESTALOZZA - München,  
Heinz PINNER - Berlin, QUABBE - Breslau,  
ROBINOW - Hamburg, SAUER - Köln, SUPPES - Dresden,  
TARNOWSKI - Breslau, WACHTEL - Leipzig,  
L. WERTHEIMER - Frankfurt/Main, Ernst WOLFF - Berlin.

6. Oktober 1934



Sehr verehrter, lieber Herr Kollege!

Die Gabe, die wir heute in Ihre Hände legen, beansprucht nicht, sich in Wissenschaft und organisatorischer Fassung den grossen Ehrengaben an die Seite zu stellen, die andere Meister und Vorbilder unseres Berufsstandes zu ihren Gedenktagen erhielten oder die bei Gelegenheiten anderer Jubiläen und Feiern erschienen.

Ursprünglich hatten auch wir etwas anderes geplant. Es sollte eine Übersicht über das Werden und Wirken der deutschen Anwaltschaft in Vergangenheit und Gegenwart werden. Unser Wunsch war es, eine Geschichte der deutschen Anwaltschaft in den einzelnen Landesteilen zu schaffen, eine Gesamtdarstellung des Wirkens der Anwaltschaft im Wirtschaftsleben, im sozialen Leben und in der Öffentlichkeit, eine Reihe von Einzelschriften aus der Feder besonders berufener Sachkenner, aber fest zusammengefügt durch einen einzigen grossen, alles beherrschenden Plan. Dieser Wunsch blieb ein Traum, vielleicht ein schöner, aber ein zu kühner für unsere schwachen Kräfte.

Wohl enthält die Arbeit prächtige Bausteine zu diesem von uns geplanten einheitlichen Bau. Mögen Sie aus diesen und den weiteren trefflichen Arbeiten ersehen, wie das Ganze gedacht war!

Denn unser Trost ist, dass der Kenner auch aus einem Torso das dem geistigen Auge des Schöpfers vor-schwebende Kunstwerk sich vorzustellen vermag. Und Sie sind ein solcher Meister, Kenner und Köhner! Sie besitzen nicht nur den klaren Blick des Künstlers, sondern auch die Fachkunde des mit der Geschichte und den Geschicken des uns allen so teuren Berufsstandes verbundenen Mannes, der vom



schlichten Mitkämpfer sich zum Feldherrn in dem Kampf um die Wertgeltung der deutschen Anwaltschaft aufgeschwungen hatte.

So möge denn dieses Werk, wenn es auch gegenüber dem, was wir planten, ein Torso ist, von Ihnen freundlich aufgenommen werden.

Sie werden es vollends freundlich aufnehmen, weil Sie den Einzelwert jeder Leistung zu erfassen in der Lage sind; schlägt doch jeder einzelne Aufsatz - abgesehen von seiner wissenschaftlichen Bedeutung und praktischen Tragweite - eine Saite an, die auch in Ihrem Innern klingt. Und Sie werden auch fühlen, was es bedeutet, Leistungen dieser Tragweite darzubieten, ohne an die breite Öffentlichkeit dringen zu wollen, ohne den Wunsch, nach aussen wirken und Verdienst und Ruhm ernten zu wollen, sondern allein aus Liebe zur Sache, aber auch aus dem Wunsch, Ihnen, sehr geehrter Herr Kollege, eine Freude zu bereiten, Ihnen zu zeigen, wie weite Kreise an Ihrer Person und an Ihrem Wirken in verehrungsvoller Liebe und Dankbarkeit hängen. Dies im Auftrag aller Mitwirkenden auszusprechen und darüber hinaus als negotiorum gestor aller beteiligten Kreise der deutschen Anwaltschaft gereicht mir, der ich wie wenig andere in Ihr Wirken und Schaffen Einblick gewinnen durfte, zu einer besonderen Freude.

Auch für die Anwaltschaft ist es ein „stolzes Wort“, das alle anderen Gefühle „gewaltig übertönt“, wenn sie Ihrer gedenkend aussprechen darf: „Denn er war Unser!“ und ein freudiges Bekenntnis, wenn sie weiter sagen darf:

Er war Unser, er ist Unser und wird es in - wolle es Gott! - noch vielen, für Sie und unglücklichen Jahren bleiben!

Magnus.

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INHALT.

ERSTER TEIL.

**Der Rechtsanwalt.**

Geschichte der Rechtsanwaltschaft.

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# dt Is Dead; man Was 87

ongress after he lost a Senate bid

r his unsuccessful race for the  
Mr. Van Zandt was named by  
William W. Scranton as volunteer  
ary of the Pennsylvania Congres-  
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Representative Joseph M.  
Democrat of Pennsylvania,  
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roup's Distin-



Associated Press, 1962

James E. Van Zandt

## Henry Field, Anthropologist Who Aided Presidents, Dies

## Leo Drachsler, a Prosecutor At War Trials in Nuremberg

Leo M. Drachsler, a Manhattan law-  
yer who was a prosecutor at the Nu-  
remberg war crimes trials in 1945-46,  
died of a heart attack Friday at Alexan-  
dria (Va.) Hospital. He was 86 years  
old and lived in Alexandria.

Mr. Drachsler was a counsel in 1948  
to the Displaced Persons Commission  
in the United States Zone of Occupied  
Germany, and in the same year he was  
appointed a judge in the zone's courts.

From 1942 to 1943, he was regional  
counsel in New York for the War Labor  
Board. In 1943 he was appointed a spe-  
cial assistant attorney general in the  
Justice Department's antitrust divi-  
sion in New York.

Mr. Drachsler resumed his law prac-  
tice in Manhattan in 1950 and retired in  
1965. In the 1970's, he was a legal con-  
sultant to the New York City Human  
Resources Administration.

He was born in Czechoslovakia and  
graduated from City College in New  
York and the Columbia University  
School of Law.

Mr. Drachsler is survived by two  
sons, Peter J., of San Francisco, and  
David A., of Alexandria, a sister, Helen  
Drachsler of New York City and three  
grandchildren.

DR. C. EUGENE SCALIA



Aufge

Jan 17, 1981

Im Alter von 86 Jahren starb in Alexandria (Virginia) der aus der Tschechoslowakei stammende **Leo M. Drachsler**, der 1945-46 einer der amerikanischen Ankläger im Nürnberger Kriegsverbrecherprozess war. 1948 war er Rechtsberater der Displaced Persons Commission in der amerikanischen Besatzungszone und wurde anschliessend zum Richter an den Zonengerichten ernannt. 1950-65 arbeitete er als Anwalt in Manhattan und Anfang der siebziger Jahre als Rechtsberater der Human Resources Administration in New York City. Vor dem Kriege war Drachsler, ein Absolvent der Columbia University School of Law, in der Rechtsabteilung des War Labor Board und in der Antitrust-Abteilung des Justizministeriums in New York tätig.

\*\*\*



Jacob Dolinger

Prof. - Inst. Law  
State University of Rio Janeiro Brazil  
TO: Ernst Stiefel

FROM: PROF. ROY MERSKY

DATE: 10/19/83

I thought you might  
be interested in seeing  
this.

Here is the article by  
Jacob Dolinger that  
I mentioned to you.

AN OUTSTANDING LEGAL SCHOLAR, EDUCATOR AND  
RIO, BRAZIL, WHERE HE IS DIRECTOR OF THE  
OF THE UNIVERSITY OF THE STATE OF RIO  
TY, HE COORDINATES THE PROGRAMS OF THE  
CS, PUBLIC FINANCE, BUSINESS ADMINISTRATION,  
ULL PROFESSOR, WHOSE SPECIAL FIELD IS  
ONFLICTS). HE HAS AUTHORED BOOKS ON  
PRIVATE INTERNATIONAL LAW" AND  
ND THE INTERNATIONAL MONETARY FUND."



PROFESSOR JACOB DOLINGER IS AN OUTSTANDING LEGAL SCHOLAR, EDUCATOR AND PRACTITIONER OF RIO DE JANEIRO, BRAZIL, WHERE HE IS DIRECTOR OF THE CENTER FOR SOCIAL SCIENCES OF THE UNIVERSITY OF THE STATE OF RIO DE JANEIRO. IN THAT CAPACITY, HE COORDINATES THE PROGRAMS OF THE DEPARTMENTS OF LAW, ECONOMICS, PUBLIC FINANCE, BUSINESS ADMINISTRATION, AND SOCIAL WORK. HE IS A FULL PROFESSOR, WHOSE SPECIAL FIELD IS PRIVATE INTERNATIONAL LAW (CONFLICTS). HE HAS AUTHORED BOOKS ON "PUBLIC POLICY PRINCIPLES IN PRIVATE INTERNATIONAL LAW" AND "PRIVATE INTERNATIONAL LAW AND THE INTERNATIONAL MONETARY FUND."



D<sup>r</sup> Herbs Donn

1931-1936

Präsident der P. F. I. von

Vaterland, Dr. C. Handöffer  
Tunnen Doppelbecken

1943-1947 B.

Wirtschaftssekretär der  
Kubanische Regierung (B. R. I.)

1947-1952

Univ. Professor



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November 9, 1983

MKG/615/3- FG

Dr. Ernst C. Stiefel  
Attorney at Law  
200 Park Avenue, Suite 1300  
New York, N.Y. 10017

Dear Dr. Stiefel:

I am herewith returning the rough manuscript of the paper that you read in Bonn and the introduction spoken by Professor Marcus Lutter. I read both of them with great interest and would like to congratulate you on the excellent paper which already in this rough form makes for exciting reading. I am sure you have me on your list for a copy of the finished product. I am also reading the Kobler article which we already had in the Institute and the xerox copies of the article by Kisch and the papers that were published in "Die Justiz 1965" as well as the famous Nazi suada from the "Juristische Wochenschrift, 1938". Do you have any idea what happened to the fellow Noack after the Tausendjaehrige Reich was bombed to smithereens? Did he get his well-deserved retribution, or is he holder of one of the innumerable Persilscheine? With your permission I took copies of the three latter items. Finally, you find our confirmation of the xerox copies of the Mueller paper and of the correspondence concerning your lecture given in Tel Aviv.

It was a pleasure talking with you about things which for both of us were personal experience and for the Leo Baeck Institute history to be researched.

With kindest regards,

Sincerely yours,

Fred Grubel  
Secretary

encls.

CONTRIBUTIONS TO THE LEO BAECK INSTITUTE ARE TAX DEDUCTIBLE

Our annual report is on file and available at the Leo Baeck Institute and at the New York State Board of Social Welfare, Albany, N. Y.



Martin Drucker (1869-1947)

Anwalt des Rechts

"Mein lieber Drucker, 65 Jahre ist eigentlich kein Alter fuer eine Festschrift. Aber die Umstaende, in denen wir jetzt leben, erlauben uns nicht zu warten. Gott allein weiss, was in den naechsten fuef Jahren ueber uns hereinbrechen wird. Und deshalb nehmen Sie mit unseren heissesten und herzlichsten Wuenschen die wohlverdiente 70-Jahr-Festschrift im voraus zum 65. Geburtstag!" Der greise Geheimrat Adolf Heilberg, der von den NS Haeuptlingen unter Todesdrohung aus Breslau verjagte fruehere Praesident der Schlesischen Anwaltskammer und der Breslauer Stadtverordneten, Vizepraesident des Deutschen Anwaltvereins, uebergab mit diesen Worten diese Festschrift dem Jubilar am 6. Oktober 1934. Unter der Leitung von Julius Magnus, Berlin, dem hervorragenden Herausgeber der Juristen Wochenschrift, hatten sich fuehrende deutsche Anwaelte der versunkenen Weimarer Republik und des vergangenen glitzernden Kaiserreichs zusammengeschlossen, um Martin Drucker, Ehrenpraesidenten des Deutschen Anwaltvereins und persona non grata des Hitler Regimes, Respekt, Ehre und Dank durch diese Festschrift zu bezeugen. Druckers Sohn Heinrich, Kriegsoffer des Zweiten Weltkriegs, und ich, waehrend und ueber die Referendarzeit hinaus mit dem "Justizrat" beruflich und mehr und mehr persoendlich verbunden, waren Magnus' Assistenten fuer Korrespondenz und technisches Detail. Die Leipziger Firma Brandstaetter uebernahm den Druck und die Ausstattung des schoenen Lederbandes, in dem die Festschrift dem Jubilar uebergeben wurde. Wir waren stolz darauf, dass jeder um wissenschaftlichen oder zumindest finanziellen Beitrag gebetene Anwalt (ohne Unterschied der Religion - um nicht das Hasswort von "Rasse" zu gebrauchen) bereitwillig seine Beteiligung erklart hatte. Besonders bewegt hat uns die grosse und schoene Geste der Witwe des bedeutenden Strafverteidigers, des Strafrechtlers Max Alsberg, der Vertreibung und Exil kurz vorher durch Selbstmord beendet hatte. Sie stellte uns den bis dahin unveroeffentlichten Aufsatz "Das Plaidoyer" als posthumes Freundschaftsgeschenk fuer die Festschrift zur Verfuegung.



Wir alle, Martin Drucker und seine Familie, und die Gruppe von Freund-Kollegen unter der Fuehrung Heilbergs als dem Senior, fuehlten dass der letzte Lichtschein von auf dem Prinzip absoluter Gerechtigkeit basierter Rechtspflege in Deutschland aus dieser Drucker-Festschrift herausleuchtete, waehrend um uns herum die Nacht der Tyrannei und der nach dem Gutduenken der neuen Machthaber zurechtgebogenen Unrechtspflege ueber Deutschland hereinsank.

Ein Satz der leider nicht ueber die Zeit der Kindheit hinausgehenden Lebenserinnerungen Martin Druckers charakterisiert ihn aufs treffendste als Mensch, Rechts-Anwalt, Standesfuehrer. Drucker schreibt im Mai 1945:

"Meine Unnachgiebigkeit gegenueber Vorhalten, wenn ich sie fuer unberechtigt hielt, hat mich durch mein ganzes Leben begleitet .... eine Ueberzeugung darf nicht preisgegeben werden, wenn der Mensch sich nicht selbst verleugnen, sich untreu werden, sich selbst beluegen und betruegen will."

Der aufrechte Mann, der dieser Maxime auch in schwersten und schlimmsten Zeiten getreu geblieben ist, ist am 6. Oktober 1869 in Leipzig geboren. Am Anfang seiner Memoiren spricht er ueber seine Abstammung "nicht um widerlicher Rasseschnueffelei ein paar Brocken hinzuwerfen, sondern lediglich als Beitrag zur Familiengeschichte."

Sein 1834 in Magdeburg geborener Vater, der spaetere Leipziger Oberjustizrat Martin Drucker, war der Sohn eines juedischen Ehepaars. Ein aus Holland eingewanderter Vorfahre war Hofjude der Kurfuersten von Hessen gewesen. Druckers Grossvater uebersiedelte spaeter nach Leipzig und gruendete eine Seidenhandlung von nicht nur lokaler, sondern internationaler Bedeutung. Er war ein fuehrendes Mitglied der erst Anfang des 19. Jahrhundert nach dem sehr spaeten saechsischen Judenemanzipationsrecht gegruendeten Israelitischen Religionsgemeinde zu Leipzig. Seine Ehefrau war Amalie Fraenkel aus Frankfurt/Oder. Als bereits Erwachsener ist Druckers Vater zur evangelisch-lutherischen Kirche uebergetreten. Rechtsberater der Israelitischen



Religionsgemeinde ist er jedoch geblieben, wie ich selbst aus den nunmehr verschwundenen alten Gemeindeakten ersehen habe.

Martin Druckers Mutter stammt aus protestantischen Familien. Sie ist die Tochter des in Altenburg geborenen Leipziger Stadtverordnetenvorstehers, des Advokaten und Notars Karl Klein und der Altenburgerin Konstanze Doelitzsch. Die Familie Klein kann nach Stettin zurueckverfolgt werden. Die Doelitzsch sind seit Generationen Altenburger.

Der als Protestant geborene Martin Drucker betrachtete sich sein Leben lang als christlicher Religion angehoerend. Es ist jedoch bezeichnend, dass er in seinen Lebenserinnerungen nicht nur mit Liebe und Verehrung von seinem juedischen Grossvater berichtet, sondern auch woertlich sagt: "Dass mein Vater von Juden abstammt, erhoehete in eigenartiger Weise meine Selbstachtung". Ich selbst erinnere mich, von ihm gehoert zu haben, dass er Anfang dieses Jahrhunderts als erfolgreicher wohlsituierter junger Anwalt es abgelehnt hat, sich in die Evangelisch-Lutherische Synode mit Aussicht auf spaetere Praesidentschaft waehlen zu lassen, "weil dies fuer den Sohn eines getauften Juden nicht passend war."

Martin Drucker ist als aeltester Sohn im Sechs-Kinderhaushalt seiner seit 1865 verheirateten Eltern aufgewachsen. Seine Lebenserinnerungen spiegeln das uns heute maerchenhaft erscheinende Leben der grossbuergerlich-liberalen Gesellschaft des neuentstandenen aufbluehenden Deutschen Reichs wider, des Leipzig eines selbstbewussten handelsstolzen Bildungsbuergertums ohne Untertanergeducktheit. In groesster Verehrung und Sohnesliebe beschreibt Drucker seines Vaters Leben, Erfolg und aufrechten Charakter ohne eine Spur von Oedipuskomplex. Nach Absolvierung der Thomasschule, des feinsten und aeltesten humanistischen Gymnasiums der Stadt, studierte Drucker die Rechte und promovierte 1896 zum Dr. jur. in Leipzig. Wetterleuchten in dieser sonnigen Zeit der 90er Jahre waren seines Vaters freiwilliger Verzicht auf die Alte-Herrenschaft in der Pauliner Saengerschaft-Verbindung wegen



deren Einfuehrung des "Arier Paragraphen" und ein Saebelduell, zu dem Drucker einen laut antisemitischen Kommilitonen herausgefordert hat. Es ist tragische Ironie, dass der Duellgegner - spaeter einer der fruehesten Nationalsozialisten unter den Juristen - bald nach Hitlers Machtuebernahme Selbstmord beging, da er - so ging das Geruecht - nicht ueberleben konnte, dass absolute Gerechtigkeit abgeschafft und Recht nur sein sollte, "was Deutschland nuetzt."

Druckers Auffassung vom Anwaltsberuf spiegelt sich bereits in einem Referendarerlebnis, von dem er gern und schmunzelnd berichtete. Als "bestellter Vertreter" eines bereits als Rechtsanwalt etablierten Freundes verwies er "fuer immer" einem Klienten das Betreten des Bueros, weil er beim Herrn Rechtsanwalt juristische Rueckendeckung fuer reichlich unsaubere Geschaefte gesucht hatte. Der aus den Ferien heimgekehrte Freund stellte fest, dass dieser "fuer immer" verwiesene Geschaeftsmann seiner jungen Anwaltspraxis bester Klient gewesen sei. Einige Zeit spaeter, Drucker praktizierte bereits als junger Anwalt, erschien besagter Klient in Druckers Buro und gestand, dass Drucker ihm seinerzeit so imponiert hatte, dass er ihn von nun an zum staendigen Rechtsberater haben wolle. "Worauf ich den Mann zum zweiten Mal und nunmehr endgueltig hinauswarf", war das Ende der Geschichte. Die absolute Integritaet, die aus dieser Episode spricht, ging soweit, dass Drucker - wie er mir, dem jungen "Kollegen", versicherte - in dem Augenblick die Verbindung mit einem Klienten loeste, da es sich ergab, dass mehr als ca. 20% des Praxiseinkommens von diesem Klienten kam. Es war seine Ueberzeugung, dass der Anwalt nicht nur moralisch, sondern auch finanziell unabhaengig bleiben muss.

Die Zulassung zur Anwaltschaft (Landgericht Leipzig) erhielt er 1896, wurde Partner seines Vaters und gruendete zwei Jahre spaeter seine eigene Familie. Er heiratete Margarethe Mannsfeld, Schwester des spaeteren saechsischen Oberlandesgerichtspraesidenten und Justizministers. Sie starb nach 40-jaehriger Ehe kurz vor Ausbruch des Zweiten Weltkriegs. Zwei Soehne, obwohl in der Stallsprache der Nuernberger Gesetze "Mischlinge 2. Grades", also genau wie ihr Vater "Menschen 2. Grades" in den Augen der Nationalsozialistischen Despotie, mussten



im Heer dienen und sind im Zweiten Weltkrieg gefallen, einer unter Hinterlassung von Witwe und zwei Kindern. Eine Tochter ist Professorin an der Universitaet Leipzig, die andere Sanitaetsraetin.

Wie Martin Drucker seinen Kollegen erschienen ist, hat Heinrich Dittenberger, der als Erster Geschaeftsleiter des Deutschen Anwaltsvereins jahrelang in taeglicher Zusammenarbeit mit Drucker gestanden hat, in dem Nachruf ausgedrueckt (siehe Sueddeutsche Juristenzeitung, Jahrgang 3, (1948), Nr. 7, Sp. 421/2), in dem er unter anderem ausfuehrt:

"Drucker verkoerperte das Ideal des Rechtsanwalts. Er verfuegte ueber hervorragende Intelligenz und durchdringende Verstandesschaerfe, ueber ein universales, immer bereites Wissen auf allen Rechtsgebieten, ein vorzuegliches treffsicheres Judiz, ueber Menschenkenntnis und Verstaendnis fuer Menschliches, ueber Geistesgegenwart und Schlagfertigkeit und eine ausgezeichnete ungewoehnliche rednerische Begabung.....

Es ist nicht moeglich, hier auch nur die wichtigsten Arbeiten aufzuzaehlen, die Drucker geleistet hat. Hervorgehoben sei lediglich noch sein entschiedenes, unbedingt kompromissloses Eintreten fuer die Freiheit der Advokatur, die ihm Herzenssache war und deren Bedrohung ihn mit heiligem Zorn erfuellte. Er erkannte nur eine einzige Beschraenkung jener Freiheit an, und das war die durch das von ihm selbst geuebte hohe Berufsethos, die klare, verantwortliche und unabdingbare Erkenntnis von der Wuerde und den Verpflichtungen des Standes."

Drucker war nicht "Fachanwalt" im modernen Sinn. Er hat jedoch auf einigen Spezialgebieten grosse Bedeutung als Anwalt und als Rechtswissenschaftler gewonnen. Das vor ca. 100 Jahren neue Feld des sogenannten "Immaterialgueterrechts" war schon durch seinen Vater ein wichtiger Teil der Druckerschen Praxis geworden und wurde vom "Junior partner" weiter gepflegt und entwickelt. Darueber hinaus wandte er sich ganz allgemein dem Handels- und Gesellschaftsrecht zu und wurde ein vielgesuchter Berater im immer komplizierter werdenden Recht der grossen Geschaeftswelt. Mit Klugheit, Takt und superber Sach- und Rechtskenntnis



hat er schwierige Konfliktsituationen gelöst. Die Entwicklung der Aktienrechtsnovelle von 1931 und der damals neuen Institution des Wirtschaftsprüfers ist von ihm stark beeinflusst worden. "Die Qualität eines Rechtsanwalts zeigt sich nicht in der Anzahl der Prozesse, die er gewonnen, sondern in der Anzahl der Prozesse, die er vermieden hat", gab er mir auf meinen juristischen Lebensweg als grundlegende Maxime mit.

In der Allgemeinheit hat aber wohl seine zum Teil Staunen und Aufsehen erregende Tätigkeit als Strafverteidiger, Kriminologe und Strafrechtswissenschaftler seinen weit über Leipzig hinausgehenden Ruf begründet. Diese Reputation etablierte er eklatant, als er in den ersten Jahren dieses Jahrhunderts als junger Anwalt im Strafprozess nach dem international erschütternden Zusammenbruch der Leipziger Bank, einer der Grossbanken jener Zeit, Freispruch von der Anklage des betrügerischen Bankrotts erzielte. Dieser sensationelle Erfolg war nicht Geschworenenreaktion auf ein emotionelles Plaidoyer, sondern das Ergebnis von Druckers scharfsinniger Analyse kompliziertester Wirtschaftsvorgänge und bis dahin praktisch kaum erprobter Gesetzesvorschriften. Bezeichnend ist seine Ansicht, dass ein Plaidoyer für Gewährung mildernder Umstände den Verdacht .... der Geistesfaulheit und juristischen Ignoranz des Verteidigers nahe legt.

Was der deutsche Rechtsanwaltsstand Martin Drucker verdankt, ist am besten von Dittenberger in dem schon zitierten Nachruf zum Ausdruck gebracht. Er schreibt über ihn:

"Vornehmlich ihm ist es zu verdanken, dass der Deutsche Anwaltverein im ersten Jahrzehnt des Jahrhunderts zu einer wahren Vertretung der Anwaltschaft ausgebaut wurde. Der Verein hatte sich bis dahin im wesentlichen auf wissenschaftliche Erörterungen beschränkt, die Vertretung der Interessen des Standes aber, insbesondere die Befassung mit seiner wirtschaftlichen Lage, bewusst abgelehnt. Gegen heftige Widerstände setzte Drucker durch, dass der Deutsche Anwaltverein sich auch der wirtschaftlichen Fragen des Standes annahm und sich überhaupt in erster Linie allen Berufs- und



Standesfragen widmete. Die Organisation des Vereins wurde deshalb von Grund auf umgestaltet. Das Organisationstalent Druckers bewahrte sich hierbei bestens, sodass aus dem Umbau ein Instrument hervorging, das sich in mehr als zwanzigjaehriger Arbeit voll bewahrt hat. Das Instrument ist dann durch den Nationalsozialismus zerschlagen worden."

Seine Arbeit im Deutschen Anwaltverein wurde durch Kriegsdienst im Ersten Weltkrieg unterbrochen. Als ueber 40-jaehriger wurde er eingezogen und hatte den Rang eines Vizefeldwebels, weil er als junger Mann nach Beendigung des Einjaehrigenjahres sich geweigert hatte, das Formalgesuch um Offizierspatent Seiner Majestaet zu unterbreiten. Laut und deutlich gegebene Erklaerung dieses fuer seine Zeit und seine Gesellschaft unerhoerten Affronts: "Ich wollte nicht zu Deutschlands arrogantester Kaste gehoeren!" Erst nach einer rein zufaelligen Begegnung zwischen dem Staatssekretaer des Reichsjustizamts mit dem uniformierten Vizefeldwebel Drucker in den Couloirs des Reichsgerichts fuehrte zu seiner Freistellung vom Heeresdienst.

Der 1917 zum Justizrat ernannte wurde 1924 Praesident des Deutschen Anwaltvereins. Im Herbst 1932 trat er von diesem Amt zurueck, als gegen seinen energisch verfochtenen Widerstand die Verlegung des Sitzes des Deutschen Anwaltvereins von Leipzig nach Berlin beschlossen wurde. Drucker war ueberzeugt, dass die uebermaechtige Organisation der Berliner Anwaltschaft den Deutschen Anwaltverein als solchen erdruecken und zum Anhaengsel Berlins machen wuerde. Die Ernennung zum Ehrenpraesidenten aenderte nichts an seinem Entschluss, keine weitere Verantwortung fuer die von Berlin aus gefuehrten Geschaefte zu uebernehmen. Vielleicht hat ihm diese Haltung viel Unheil erspart; denn es ist kaum zweifelhaft, dass er der wenige Wochen nach der Sitzverlegung dekretierten Nationalsozialistischen Gleichschaltung der Anwaltschaft sich weniger zahm gefuegt haette als seine Berliner Nachfolger.

Am schicksalstraechtigen 30. Januar 1933 war ich in Druckers



Arbeitszimmer und berichtete ihn, dass soeben die Hakenkreuzfahne auf der Universitaet gehisst, aber nach kurzer Zeit wieder herunter geholt worden sei. Wie soviele andere, war ich "weise" genug zu erklaren, dass doch nichts so heiss gegessen wie gekocht wuerde und dass der ganze Spuk wohl bald wieder verschwaende. Drucker war ganz anderer Ansicht. Er nahm die Dinge so ernst wie nur moeglich. Nur schwerste aussenpolitische Komplikationen wuerden dem deutschen Volk die Augen oeffnen, so dass es der zu erwartenden Gewaltherrschaft bewusst werden und sich der Staatsumwaelzung erwehren wuerde. Freund und Berater von Karl Goerdeler, damals Oberbuergemeister von Leipzig, gehoerte er zu den wenigen, die die Katastrophe voraussahen. Seine Anwaltsarbeit dauerte an. Mehr und mehr Verfolgte suchten Druckers Rat und Hilfe, und er scheute sich nicht, auch bei den neuen Machthabern gegen Willkuer und Verfolgung zu protestieren. Sein juedischer Sozius, Erich Cerf, verlor die Anwaltszulassung und die lokale NS Zeitung warnte in einem Artikel "So geht das nicht, Herr Justizrat!", dass Drucker und sein anderer Partner Curt Eckstein die "Konsequenzen" auf sich nehmen muessten, wenn die Juden Cerf und Grubel noch weiter Zutritt zu ihrem Buero haetten.

Nicht viel spaeter wurde ein Ehrengerichtsverfahren gegen Drucker eingeleitet. Er war 1930 in seiner Eigenschaft als Praesident des Deutschen Anwaltvereins von dem Oficialverteidiger eines vom deutschen Geheimdienst illegal aus Frankreich nach Deutschland verschleppten Spions um Rat gefragt worden. Der Anwalt hatte, ohne Erfolg, bei der Reichsanwaltschaft die Niederschlagung des Verfahrens wegen der Illegalitaet der Festnahme beantragt. Als letzten Ausweg wollte er schriftlich die franzoesische Regierung auf diese in keiner Weise geheime Sache aufmerksam machen. Drucker vertrat im Prinzip die Ansicht, dass ein Strafverteidiger rechtlich verpflichtet sei, alles zu unternehmen, was der Sache des Klienten guenstig sein koennte, solange keine Gesetzesvorschrift dagegen steht. Von diesem Grundsatz aus hielt er den Plan des Verteidigers fuer legal und standesgeboden, riet jedoch, eine Durchschrift des Schreibens nach Paris offiziell zu den Akten des Reichsanwalts zu geben. Diesem Rat folgte der Verteidiger. Paris antwortete mit keinem Wort. Der Spion wurde verurteilt. Der



Verteidiger wurde wegen des Pariser Kontakts vom Ehrengericht angeklagt, in erster Instanz freigesprochen, und auf Berufung erteilte ihm 1932 der Ehrengerichtshof beim Reichsgericht eine Warnung wegen fahrlässiger Verletzung der Standespflichten. Wegen dieser vier Jahre zurückliegenden Konsultation verfügte nun im Jahre 1934 das Ehrengericht der Saechsischen Anwaltskammer Druckers Ausschluss aus der Rechtsanwaltschaft. Auf Druckers Berufung wurde das Urteil 1935 vom Ehrengerichtshof auf eine Geldstrafe von RM 1000 reduziert.

Drucker konnte also seine Anwaltspraxis fortsetzen und tat dies unter sich steigernden Anfeindungen und Anpöbelungen. Er scheute sich nicht, immer riskanter werdende Verteidigungen vor dem Sondergericht zu übernehmen. Die Verbindung mit Karl Goerdeler und seinen auf die Befreiung vom Nazijoch hoffenden und darauf hinarbeitenden Freunden hielt er aufrecht. Lediglich seine Schwiegertochter wusste von gelegentlichen Zusammenkünften und einmal im Jahre 1942 bemerkte Drucker zu ihr, dass sie keinesfalls auch nur das geringste darüber verlauten lassen durfte. Es handle sich um Ueberlegungen, wie nach Beendigung des Naziterrors Deutschland zu organisieren und zu regieren sei. Er sei gebeten worden, die Reorganisation der Justiz zu übernehmen. Es ist ein beinahe unglaublicher Gluecksfall, dass diese Verbindung ganz offenkundig der Gestapo unbekannt geblieben ist und Drucker nach dem missglueckten Attentat vom 20. Juli 1944 unbehelligt blieb.

Am 4. Dezember 1943 wurde das Gebauede, in dem Drucker seit Jahrzehnten seine Anwaltspraxis hatte, das Opfer eines Bombeneinschlags. Er verlor seine und seines Vaters reiche und grosse Fachbibliothek. Das Buero uebersiedelte in Druckers Privatwohnung, aber noch im Dezember erhielt er einen Bescheid vom Reichsjustizminister, dass er gemaess der Verordnung zur Aenderung und Ergaenzung der Reichs-Rechtsanwaltsordnung vom 1.3.1943 mit Wirkung vom 1.1.1944 wegen Erreichung der Altersgrenze und "da die Beduerfnisse der Rechtspflege sein Verbleiben im Beruf nicht erfordern", ohne Ruhegehalt in den Ruhestand versetzt werde und unter Strafandrohung sich jeder juristischen Taetigkeit zu enthalten haette.



Im Einverstaendnis mit seinem Sozius Eckstein war Drucker trotzdem auch weiterhin insgeheim juristisch taetig, bis im Februar 1945 auch das Wohnhaus, wohin das Buero verlegt worden war, ausgebombt wurde. Drucker verlangte fuer sich und seine kriegsverwitwete Schwiegertochter und beide kleine Enkel Zuweisung einer neuen Wohnung, nur um durch einen Gestapo- Angestellten zu erfahren, dass dies Verlangen des Halbjuden als "Unverschaeamtheit" angesehen wurde. Jeden Augenblick musste daher die ganze Familie mit Verhaftung rechnen. Flucht nach Jena war die Rettung. Freunde beherbergten ihn und die Seinen und verbargen sie, bis die amerikanische Armee das Gebiet besetzte. Die Militaerregierung liess Drucker aufsuchen und bot ihm an, das Amt des Oberbuergemeisters von Leipzig zu uebernehmen. Der Wirrwarr des Kriegsendes machte jedoch seine rechtzeitige Ruecksiedlung von Jena nach Leipzig unmoeglich. Erst Anfang Juni 1945 kehrte er nach Leipzig zurueck, um die Anwaltspraxis neu aufzunehmen und bei der Rehabilitation des Anwaltstandes im Heimatbezirk zu helfen. Als er bei der amerikanischen Militaerbehoerde vorsprach, um nach den Besatzungsvorschriften zu beschwoeren, dass er in keiner Weise mit dem NS Regime verbunden gewesen war, stellte es sich heraus, dass der fuer diese Angelegenheiten zustaeendige amerikanische Offizier der Sohn eines alten Freundes und Klienten war, des von den Nationalsozialisten als Juden verfolgt und verjagten Inhabers des bedeutenden Leipziger Musikverlags "Edition Peters", Geheimrat Henry Hinrichsen. Major Hinrichsen nahm es auf sich, Martin Drucker ohne weiteres wieder zur Anwaltschaft zuzulassen und zwar ohne Eidesleistung. Druckers Versicherung seiner freiheitlichen Gesinnung unter Eid zu nehmen, waere unter seiner Wuerde gewesen, eine Beleidigung, deren sich die amerikanischen Militaerbehoerden nicht schuldig machen wollten.

Moeglichkeiten auszuwandern oder nach dem Westen zu uebersiedeln, bevor die amerikanische Armee im Juli 1945 Sachsen und Thueringen raemte, wollte Drucker nicht ausnuetzen. Er fuehlte, dass er es seiner engeren Heimat schuldig sei, von Leipzig aus am Wiederaufbau von Recht und Gerechtigkeit zu arbeiten. Er versuchte, in Sachsen die Anwaltschaft nach seinen Grundsuetzen der Freiheit und Rechtlichkeit neu zu beleben.



Er hatte noch die Genugtuung, von der Leipziger Universitaet 1946 zum Goldenen Doktorjubilaeum gefeiert zu werden. Am 22. Februar 1947 schied er aus diesem Leben. Sein Werk an einer neuen Rechtsanwaltsordnung konnte er nicht mehr vollenden.

Er schrieb zwar in seinen Memoiren: "Die geistige und sittliche Persoenlichkeit des Menschen wird durch seine Umwelt und seine Schicksale geformt, nicht durch die Ahnen." Trotzdem liegt der Gedanke nahe, dass Martin Drucker, Anwalt des Rechts, geformt war nicht nur durch Erlebnis und Erfahrung, sondern auch durch das glueckliche Zusammenwirken der ethischen Traditionen und der intellektuellen Erbanlagen seiner juedischen und christlich-deutschen Vorfahren, ein schlagender Beweis gegen den Irrsinn des Rassenwahns, der solch unsagbares Unheil ueber Deutschland und die ganze Welt gebracht hat.

Fred Grubel

New York, 6. Oktober 1983





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November 1, 1983

MKG/586/3- FG

Dr. Ernst C. Stiefel  
Attorney at Law  
200 Park Avenue  
New York, N.Y. 10017

Dear Dr. Stiefel:

It was nice meeting you at the Schulze-Boysen reception. As promised I am enclosing a manuscript copy of my biographical introduction to the Drucker Festschrift. I already received the galley proofs and think that the reprint of the Festschrift will soon be available.

Since I assume that you are also interested to see the table of contents I am enclosing a xerox copy of the latter.

Looking forward to hearing from you about an appointment which you told me you are planning I am with kindest regards,

Sincerely,

Fred Grubel  
Secretary

encls.: copy of introduction to Drucker Festschrift  
and table of contents

**CONTRIBUTIONS TO THE LEO BAECK INSTITUTE ARE TAX DEDUCTIBLE**

Our annual report is on file and available at the Leo Baeck Institute and at the New York State Board of Social Welfare, Albany, N. Y.



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Herrn Rechtsanwalt  
 Dr. jur. Fritz Ostler  
 Ottostrasse 11-12/1  
 D-8000 Muenchen

Sehr geehrter Herr Dr. Ostler:

Besten Dank fuer Ihr Schreiben vom 15. d.M.  
 Es tut mir leid, dass die Subskriptionsan-  
 zeige dem Brief nicht beigelegt hat. Anbei  
 eine Ablichtung. Die Adresse von Scientia  
 ist Ihnen doch wahrscheinlich bekannt, aber  
 um sicher zu gehen, meine Korrespondenz ist  
 mit Herrn G. Schilling, Scientia Verlag und  
 Antiquariat, Postfach 1660, 708 Aalen.

Ihren weiteren Nachrichten gern entgegen-  
 sehend bin ich

mit freundlichen Gruessen

*Fred Grubel*  
 Dr. Fred Grubel  
 Direktor

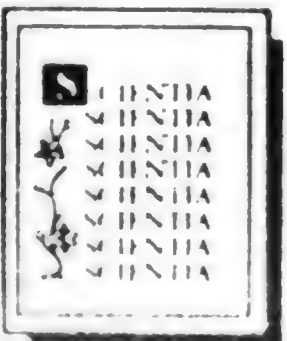
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lieferbare  
**JURISTISCHE  
FESTSCHRIFTEN**



**Scientia**





*Wir stellen erstmals zur Subskription*

**FESTSCHRIFT  
MARTIN DRUCKER**

zum 65. Geburtstage in Freundschaft und kollegialer  
Verehrung gewidmet, 6. Okt. 1934

Herausgegeben von Julius Magnus

Neudruck der Ausgabe 1934 mit Einführung von  
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Es handelt sich um die Faksimileausgabe eines Privatdrucks,  
der zu Ehren des ehemaligen Präsidenten des Deutschen An-  
waltvereins in kleinster Auflage hergestellt worden war. Die  
Originalausgabe erschien ohne das Titelwort "Festschrift".

Mit Beiträgen von M. Alsberg, J. Breit, C. Clad, M. Drucker sen.,  
E. Eyck, E. Fleischhauer, M. Friedlaender, R. Fürst, M. Hachen-  
burg, Heilberg, L. Heilbrunn, F. Herzfelder, Heß, R. Kann,  
W. Kraemer, Lemberg, R. Mainzer, Mamroth, P. Marcuse,  
A. v. Pestalozza, H. Pinner, R. Robinow, G. Tarnowski, L. Wert-  
heimer.

Einteilung: Der Rechtsanwalt. Strafrecht. Bürgerliches  
Recht. — Recht und Dichtung.



# MARTIN DRUCKER

zum 65. Geburtstage

in Freundschaft und kollegialer Verehrung

überreicht von

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TARNOWSKI - Breslau, WACHTEL - Leipzig,  
L. WERTHEIMER - Frankfurt/Main, Ernst WOLFF - Berlin.

6. Oktober 1934



Sehr verehrter, lieber Herr Kollege!

Die Gabe, die wir heute in Ihre Hände legen, beansprucht nicht, sich in Wissenschaft und organisatorischer Fassung den grossen Ehrengaben an die Seite zu stellen, die andere Meister und Vorbilder unseres Berufsstandes zu ihren Gedenktagen erhielten oder die bei Gelegenheiten anderer Jubiläen und Feiern erschienen.

Ursprünglich hatten auch wir etwas anderes geplant. Es sollte eine Übersicht über das Werden und Wirken der deutschen Anwaltschaft in Vergangenheit und Gegenwart werden. Unser Wunsch war es, eine Geschichte der deutschen Anwaltschaft in den einzelnen Landesteilen zu schaffen, eine Gesamtdarstellung des Wirkens der Anwaltschaft im Wirtschaftsleben, im sozialen Leben und in der Öffentlichkeit, eine Reihe von Einzelschriften aus der Feder besonders berufener Sachkenner, aber fest zusammengefügt durch einen einzigen grossen, alles beherrschenden Plan. Dieser Wunsch blieb ein Traum, vielleicht ein schöner, aber ein zu kühner für unsere schwachen Kräfte.

Wohl enthält die Arbeit prächtige Bausteine zu diesem von uns geplanten einheitlichen Bau. Mögen Sie aus diesen und den weiteren trefflichen Arbeiten ersehen, wie das Ganze gedacht war!

Denn unser Trost ist, dass der Kenner auch aus einem Torso das dem geistigen Auge des Schöpfers vor-schwebende Kunstwerk sich vorzustellen vermag. Und Sie sind ein solcher Meister, Kenner und Köhner! Sie besitzen nicht nur den klaren Blick des Künstlers, sondern auch die Fachkunde des mit der Geschichte und den Geschicken des uns allen so teuren Berufsstandes verbundenen Mannes, der vom



schlichten Mitkämpfer sich zum Feldherrn in dem Kampf um die Wertgeltung der deutschen Anwaltschaft aufgeschwungen hatte.

So möge denn dieses Werk, wenn es auch gegenüber dem, was wir planten, ein Torso ist, von Ihnen freundlich aufgenommen werden.

Sie werden es vollends freundlich aufnehmen, weil Sie den Einzelwert jeder Leistung zu erfassen in der Lage sind; schlägt doch jeder einzelne Aufsatz - abgesehen von seiner wissenschaftlichen Bedeutung und praktischen Tragweite - eine Saite an, die auch in Ihrem Innern klingt. Und Sie werden auch fühlen, was es bedeutet, Leistungen dieser Tragweite darzubieten, ohne an die breite Öffentlichkeit dringen zu wollen, ohne den Wunsch, nach aussen wirken und Verdienst und Ruhm ernten zu wollen, sondern allein aus Liebe zur Sache, aber auch aus dem Wunsch, Ihnen, sehr geehrter Herr Kollege, eine Freude zu bereiten, Ihnen zu zeigen, wie weite Kreise an Ihrer Person und an Ihrem Wirken in verehrungsvoller Liebe und Dankbarkeit hängen. Dies im Auftrag aller Mitwirkenden auszusprechen und darüber hinaus als negotiorum gestor aller beteiligten Kreise der deutschen Anwaltschaft gereicht mir, der ich wie wenig andere in Ihr Wirken und Schaffen Einblick gewinnen durfte, zu einer besonderen Freude.

Auch für die Anwaltschaft ist es ein „stolzes Wort“, das alle anderen Gefühle „gewaltig übertönt“, wenn sie Ihrer gedenkend aussprechen darf: „Denn er war Unser!“ und ein freudiges Bekenntnis, wenn sie weiter sagen darf:

Er war Unser, er ist Unser und wird es in - wolle es Gott! - noch vielen, für Sie und unglücklichen Jahren bleiben!

Magnus.

Fehler  
der Zu  
Zulass  
von

1\*



INHALT.

ERSTER TEIL.

**Der Rechtsanwalt.**

Geschichte der Rechtsanwaltschaft.

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Col Journal of Transnational Law  
1986 No 3

## Gestapo Informants: Facts and Theory of Undercover Operations\*

WALTER OTTO WEYRAUCH\*\*

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\* The present essay is written in honor of David Daube, formerly Regius Professor of Civil Law, Oxford University and Professor Emeritus and Director of the Robbins Hebraic and Roman Law Collection, University of California School of Law, Berkeley, California, and was given to him on the occasion of his 75th birthday. This article is an abridged version of a manuscript to be published as a monograph, which includes more extended theoretical discussion.

A draft of the article was discussed at the Legal Theory Workshop, Yale Law School, and at the Institute for Legal Studies, University of Wisconsin Law School. I am grateful for the stimulating comments at these occasions. I am also indebted to the following persons for their helpful suggestions: Professor Gunther Arzt, Universität Bern, Kriminalistisches Institut, Bern, Switzerland; Professors Stanley Ingber and Winston P. Nagan, University of Florida College of Law; Professor Lynn M. LoPucki, University of Wisconsin Law School; Professor Hanna F. Pitkin, University of California, Berkeley, Department of Political Science; Bundesanwalt a.D. Walter Wagner, Karlsruhe, West Germany; and my wife, attorney Jill Carolyn White, Gainesville, Florida. I am solely responsible for the essay's opinions and conclusions.

\*\* Professor of Law, University of Florida, Gainesville, Florida; Honorarprofessor, Johann Wolfgang Goethe Universität, Fachbereich Rechtswissenschaft, Frankfurt, West Germany. Dr. iur. 1951, University of Frankfurt, West Germany; LL.B. 1955, Georgetown University; LL.M. 1956, Harvard University; J.S.D. 1962, Yale University.



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## I. INTRODUCTION

The question of what alternative should be taken if an enemy or tyrant threatens to destroy an entire group unless it surrenders a person who is in its power for execution was extensively explored by David Daube.<sup>1</sup> This problem is well-recorded in Jewish history and appears in various contexts.<sup>2</sup> Whatever the variations of the basic problem, and regardless of the specificity of the proposed solution, Daube has pointed out huge gaps left open by the historical sources.<sup>3</sup> What if the threat were not execution but torture, slave labor, or imprisonment? Or if the demand were not for a named individual but any member of a named group or family? At what point does a surrender become a "betrayal," the person who complied with the threat a "traitor"? What role should compassion play in judging conduct, even if there is a betrayal?

Daube's study was unique because of the nature of its sources. The sources were religious texts dealing with unrelated events, scattered over centuries. It thus has the quality of an ancient mosaic, where pieces and sometimes large chunks are missing. The present article focuses on such a vacant spot and fills it with details taken from the history of the Nazi period.<sup>4</sup> Specifically, I am concerned

1. See D. DAUBE, *COLLABORATION WITH TYRANNY IN RABBINIC LAW* (1965).

2. *Id.* at 18-27, 40-48.

3. *Id.* at 94-95.

4. The term "Nazi," as I have used it throughout the analysis, could possibly be viewed as prejudicial because of its origin as an epithet of moral condemnation. However, the term is used today so universally in the United States that its more neutral alternatives have acquired undesirable secondary meanings. Feelings on this issue are subject to cultural variations. In Germany, for example, use of the term Nazi, especially in a scientific context, could be viewed as offensive or at least unscholarly. These differences in usage pose a communication problem



with the confidential informant (*V-Mann*)<sup>5</sup> for the *Geheime Staatspolizei* ("Gestapo").<sup>6</sup> The confidential informant does not surrender persecuted individuals to the ruler directly, but informs on them and, often acting under threats, otherwise collaborates secretly with the police.

The present essay is not merely an exercise in legal history. U.S. government expenses for undercover operations, specifically payments

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for publications such as this that are addressed to a potential readership in the United States and elsewhere.

Further communication problems arise because of the fundamentally different interests in the Nazi era in the United States and Germany. U.S. legal scholarship on the subject was assisted by émigré authors and written during World War II and in the immediate postwar years of the Allied occupation of Germany. See, e.g., Loewenstein, *Reconstruction of the Administration of Justice in American-Occupied Germany*, 61 HARV. L. REV. 419 (1948) [hereinafter cited as *Reconstruction*]; Loewenstein, *Law and the Legislative Process in Occupied Germany, Part I*, 57 YALE L.J. 724 (1948), *Part II*, 57 YALE L.J. 994 (1948); Loewenstein, *Law in the Third Reich*, 45 YALE L.J. 779 (1936); Shartel & Wolff, *Civil Justice in Germany*, 42 MICH. L. REV. 863 (1944); Wolff, *Criminal Justice in Germany*, 42 MICH. L. REV. 1067 (1944).

Most recently, a methodological controversy has raged among American historians about the role and impact of Marxist ideology on historical studies of the Nazi period. See, e.g., Joll, *Business as Usual*, N.Y. REV. OF BOOKS, Sept. 26, 1985, at 5. In contemporary American legal scholarship the issues are essentially relegated to the historians. By contrast, the German scholarly interest in Nazi law, as selectively represented in the references to the present article, has substantially increased in recent years and seems to be motivated by a need for introspection. The current revived interest has been aided by the materials collected in the Bundesarchiv, Koblenz, West Germany.

5. The abbreviation *V-Mann* for *Vertrauensmann* was used by the German police long before the Gestapo and continues to be used by the police and courts. See Lüderssen, *Verbrechensprophylaxe durch Verbrechensprovokation?*, in E. DENNINGER & K. LÜDERSSEN, *POLIZEI- UND STRAFPROZESS IM DEMOKRATISCHEN RECHTSSTAAT* 238, 284 n.5 (1978).

The Federal Bureau of Investigation uses the abbreviation "C.I.," which initially stood for confidential informant but now is supposed to mean cooperating individual. See, e.g., Magnuson, *The Bottom Line . . . Busted*, TIME, Nov. 1, 1982, at 30-31.

6. The Gestapo, established by local German legislation soon after the Nazi take-over, had in Prussia the following sources of authority: Gesetz über die Errichtung eines Geheimen Staatspolizeiamts, 1933 Preussische Gesetzessammlung 122; Gesetz über die Geheime Staatspolizei, 1933 Preussische Gesetzessammlung 413; Gesetz über die Geheime Staatspolizei, 1936 Preussische Gesetzessammlung 21; Verordnung zur Ausführung des Gesetzes über die Geheime Staatspolizei, 1936 Preussische Gesetzessammlung 22. The substantive jurisdiction of the Gestapo was based on the Verordnung des Reichspräsidenten zum Schutz von Volk und Staat, 1933 Reichsgesetzblatt [RGBl] I 83, which suspended provisions of the Weimar constitution. After 1936 the locally established Gestapo offices in German states were unified under Heinrich Himmler. See Erlass über die Einsetzung eines Chefs der Deutschen Polizei im Reichsministerium des Inneren, 1936 RGBl I 487.

The outer trappings of legality, although observed in style, are misleading to the extent that the most important sources of authority for the Gestapo, according to then prevailing practice, were never published in the official gazettes. See A. WAGNER, *DIE UMGESTALTUNG DER RICHTSVERFASSUNG UND DES VERFAHRENS- UND RICHTERRECHTS IM NATIONAL-SOZIALISTISCHEN STAAT* 193 (1968). The Gestapo was declared to be a criminal organization in the Nuremberg trials. See Judgment of Oct. 1, 1946, International Military Tribunal, Nuremberg, reprinted in 41 AM. J. INT'L L. 172, 256-62 (1947). See also Wright, *The Law of the Nuremberg Trials*, 41 AM. J. INT'L L. 38, 69-70 (1947).



# Prof. Walter J. Derenberg Dies; Lawyer Was Copyright Expert

By PETER B. FLINT

Prof. Walter J. Derenberg, a leading expert in copyright and trademark protection laws, died yesterday of a heart ailment in St. Vincent's Hospital. He was 71 years old and lived at 29 Washington Square West.

Mr. Derenberg was professor emeritus of trademark and copyright law at the New York University Law School, a founder and longtime executive director of the Copyright Society of the United States of America and a frequent adviser to the Federal Government on modernization of copyright and trademark laws.

He was the pioneer of courses at the law school on copyright, trademark registration and protection and unfair trade practices. Since 1953, he had taught an advanced seminar in literary and artistic property.

For the last 25 years, Professor Derenberg was also a senior member of the law firm of von Maltitz, Derenberg, Kunin & Janssen at 60 East 42d Street.

## Many Scholarly Articles

The professor wrote many scholarly articles in law journals, and his colleagues and students admiringly referred to him variously as "Mr. Copyright," "Mr. Trademark" and "Mr. Literary Property."

His book "Trademark Protection and Unfair Trading," published in 1936 by Matthew Bender Company, is considered a foremost textbook.

In 1946, as counsel to the United States Trademark Association, Professor Derenberg testified in support of modernization of trademark legislation. In the following year, the Lanham Trademark Act, named for its sponsor, Representative Fritz Garland Lanham, Democrat of Texas, took effect.

Professor Derenberg was then appointed trademark counsel to the United States Patent Office and drafted regulations for administering the new law. Under the act, anyone whose trademark is infringed can get court redress in the form of treble damages, or the infringer's profits or, in some cases, by halting the import of similarly labeled products.

## Great Teacher Award

Each year since 1947, Professor Derenberg has submitted an annual report to the American Bar Association on the administration of the landmark act.

The professor won many honors, including a Great Teacher award from New York University in 1967. Colleagues and students recalled him yesterday as a warm, enthusiastic

and inspiring teacher who occasionally punctuated his lectures with demonstrations of cereal boxes and lifesize dolls to illustrate a point.

Professor Derenberg's interest in protecting literary property was attributed in part to his witnessing the burning of the books and the Reichstag fire in Nazi Germany. He was born in Hamburg in 1903, won a Doctor of Jurisprudence degree at the university there in 1926 and was admitted to the German bar in 1928. He came to this country in 1934.

The next year, he became a lecturer at the New York University Law School while he attended classes there for a B.A. degree in United States law, which he received in 1938. He was named assistant professor in 1947, associate professor in 1951 and a professor in 1954.

## Retired in 1974

He retired last September but he had been asked, and accepted assignments to teach three courses at the school, beginning this month.

The law school plans to establish in November a special library on copyright law, to be called the Walter J. Derenberg Center. The school also plans to establish a chair in his name within a year.

Professor Derenberg's expertise was honored abroad with many translations of his work and invitations to scores of international law conferences. From 1950 to 1967 he was chairman of the Trademarks Committee of the International Law Association.

He was admitted to the New York State bar in 1940, accepted to appear before the Supreme Court in 1943 and admitted to the District of Columbia bar and Court of Customs and Patent Appeals in 1944.

Among his Government assignments, he was assistant general counsel in the Office of Price Administration from 1943 to 1946 and a special counsel at the Nuremberg war crime trials in 1946.

Despite his many legal activities and membership in a dozen professional groups, Professor Derenberg was also an accomplished pianist and a skilled chess player.

He is survived by his widow, the former Emily Hess; a stepson, Robert Hess; a brother, Carl J. Hess, and two sisters, Ruth Domela and Gabrielle Schiff.

A funeral service will be held tomorrow at 10 A.M. at Frank E. Campbell's, Madison Avenue at East 81st Street.

## ESS REHABILITATES MODERN ART

WALTER J. DERENBERG  
DANIEL J. BAUM

*us image of America is on the way out. Congress, ury and the art community have finally joined in nd enlightened cooperation this year to rewrite the stomas law on the entry of art works.—N.Y. Times\**

s have willed that all free, fine art enter this country hey rebelled against tariff provisions that smiled on cer- and taxed others. They resented a mosaic by Picasso us "bits of glass on stone"<sup>1</sup> or a collage by Burri being manufacture . . . of vegetable fiber"<sup>2</sup> (for examples of see illustrations 1 and 2) and then taxed on its value <sup>3</sup> Almost without opposition they remedied what they ong. The instrument for correction, a new amendment of 1930,<sup>4</sup> was approved by the Senate and House and on September 14, 1959, by the President.<sup>5</sup>

berg is a Professor of Law at New York University School of Law, pyright Society of the U.S.A., and a member of the Panel of Experts ight Law of the United States.

is a Teaching Fellow at New York University School of Law and hio Bar.

ish to acknowledge the cooperation of, and valuable assistance by, e Museum of Modern Art, and particularly Miss Dorothy M. Dudley, eum, the officials of the Bureau of Customs, New York City, and fter, editor of Art News, in the preparation of this article.

s used in this article have been made available to the authors e of the Museum of Modern Art, New York City, with the exception ich was lent by the artist Cesar Domela.

Aug. 8, 1959, p. 16, col. 2.

May 22, 1959, p. 18, col. 3: "It is a vari-colored mosaic that ect and shows a French harbor and two men on boats. The men ver with poles and the mosaic is called "Les Joutes" . . . Picasso ny all this," Mr. Hoffman [the petitioner's attorney] said: "He's cted States Custom inspectors can be so—shall we say—uncultured."

Nov. 22, 1958, p. 23, col. 7. The case involved was Peters v. United l Treas. Dec. No. 48, at 35 (Cust. Ct. 1958).

his customs policy have been frequently to prevent exhibition s; of leading works of contemporary art. For example, recently a tly sought to put on a special exhibition of the works of Cesar tiple of Mondrian, and a leading artist in the field of nonobjective structions and sculpture. Since the works sought to be exhibited vere of this character, the customs officials advised that, under duties would have to be paid on each item based on the materials ion. In view of the expense and the fear of damage to the art process, the exhibit was cancelled and the works returned to

330), 19 U.S.C. § 1201, ¶ 1807 (1958).

nd paragraph 1629 of the Tariff Act of 1930 so as to provide on of tourist literature, to liberalize the tariff laws for works of



## CONGRESS REHABILITATES MODERN ART

WALTER J. DERENBERG  
DANIEL J. BAUM

*A ridiculous image of America is on the way out. Congress, the Treasury and the art community have finally joined in splendid and enlightened cooperation this year to rewrite the archaic customs law on the entry of art works.—N.Y. Times\**

THE reformers have willed that all free, fine art enter this country duty free. They rebelled against tariff provisions that smiled on certain forms of art and taxed others. They resented a mosaic by Picasso being classified as "bits of glass on stone"<sup>1</sup> or a collage by Burri being described as a "manufacture . . . of vegetable fiber"<sup>2</sup> (for examples of the collage form see illustrations 1 and 2) and then taxed on its value as a work of art.<sup>3</sup> Almost without opposition they remedied what they considered a wrong. The instrument for correction, a new amendment to the Tariff Act of 1930,<sup>4</sup> was approved by the Senate and House and signed into law on September 14, 1959, by the President.<sup>5</sup>

Walter J. Derenberg is a Professor of Law at New York University School of Law, President of The Copyright Society of the U.S.A., and a member of the Panel of Experts to Revise the Copyright Law of the United States.

Daniel J. Baum is a Teaching Fellow at New York University School of Law and a member of the Ohio Bar.

The authors wish to acknowledge the cooperation of, and valuable assistance by, the officials of the Museum of Modern Art, and particularly Miss Dorothy M. Dudley, registrar of the Museum, the officials of the Bureau of Customs, New York City, and Dr. Alfred Frankfurter, editor of Art News, in the preparation of this article.

The illustrations used in this article have been made available to the authors from the Collection of the Museum of Modern Art, New York City, with the exception of illustration 2, which was lent by the artist Cesar Domela.

\* N.Y. Times, Aug. 8, 1959, p. 16, col. 2.

<sup>1</sup> N.Y. Times, May 22, 1959, p. 18, col. 3: "It is a vari-colored mosaic that measures 3 by 2½ feet and shows a French harbor and two men on boats. The men are jostling each other with poles and the mosaic is called "Les Joutes" . . . 'Picasso is much annoyed by all this,' Mr. Hoffman [the petitioner's attorney] said: 'He's annoyed that the United States Custom inspectors can be so—shall we say—uncultured.'"

<sup>2</sup> N.Y. Times, Nov. 22, 1958, p. 23, col. 7. The case involved was *Peters v. United States*, C.D. 2042, 93 Treas. Dec. No. 48, at 35 (Cust. Ct. 1958).

<sup>3</sup> The results of this customs policy have been frequently to prevent exhibition in the United States of leading works of contemporary art. For example, recently a New York art gallery sought to put on a special exhibition of the works of Cesar Domela, a Dutch disciple of Mondrian, and a leading artist in the field of nonobjective three-dimensional constructions and sculpture. Since the works sought to be exhibited (cf. illustration 2) were of this character, the customs officials advised that, under prevailing law, heavy duties would have to be paid on each item based on the materials used in the construction. In view of the expense and the fear of damage to the art during the inspection process, the exhibit was cancelled and the works returned to Europe.

<sup>4</sup> 46 Stat. 684 (1930), 19 U.S.C. § 1201, ¶ 1807 (1958).

<sup>5</sup> An act to amend paragraph 1629 of the Tariff Act of 1930 so as to provide for the free importation of tourist literature, to liberalize the tariff laws for works of



**Domke, Martin**, Dr. jur., Rechtsanwalt, Hochschullehrer; geb. 11. Sept. 1892 Berlin; jüd.; V: Leopold D. (geb. 1855 Wongrawitz/Posen, gest. 1933 Berlin), Kaufm.; M: Meta, geb. Lebram (geb. 1862 Neustettin/Pommern, gest. 1929), jüd.; ∞ I. 1920 Lucie Helene Loebinger (1896-1963), Schriftstellerin (Ps.

Lucie Martin, Gabriele Eckehard). 1933 Emigr. F. 1939-63 Korr. für schweizer. u. a. Ztg., gesch.; II. 1960 Dr. med. Eva Charlotte Dienst, geb. Jacoby (geb. 1904 Berlin), Augenärztin, 1936 Emigr. USA; K: George (geb. 1921), 1933 Emigr. F, 1941 USA, Hochschullehrer; StA: deutsch, 1947 USA. Weg: 1933 F, 1941 USA.

1911-14 Stud. Berlin, stellv. Vors. *Freie Studentenschaft*, 1915 Prom. Greifswald. Teiln. I. WK (EK II u.a. Ausz.). 1920 Assessor, 1921-22 Berater für Union-Bauges. in Berlin, 1923-33 RA in Berlin. Febr. 1933 Emigr. Frankr. mit Familie, Mitarb. in Flüchtlingsorg., 1933-40 Berater franz. Anwälte in internat. Recht. 1940 Internierung, Prestataire, Freiw. in franz. Armee. Juni 1941 in die USA mit Familie, 1943-45 Forschungsdir., 1945-67 Vizepräs. *Am. Arbitration Assn.*; 1967 Ruhestand. Ab 1950 Prof. für Rechtswiss. New York Univ., ab 1946 Chefred. *Arbitration Journal*, Schiedsrichter u. Berater für Anwaltsfirmen, US-Reg. u. UN-Agenturen bei der Schlichtung von Handelsrechtsfällen, 1958 Vors. Kommission zur Schlichtung internat. Handelsrechtsfälle der *Internat. Law Assn.* London. VorstMitgl., seit 1953 Dir. *Am. Foreign Law Assn.*, Mitgl., seit 1959 Treuhänder *Consular Law Soc.*, *Am. Soc. Internat. Law* (zeitw. Mitgl. des Exekutiv-Komitees), Mitgl. *Assn. of Bar* der Stadt New York. Lebte 1978 in New York. - Ausz.: 1967 Großes BVK, 1967 Sylvan Gotshal Med. für außerordentl. Verdienste auf dem Gebiet internat. Schiedsgerichte, 1976 Faculty Service Award New York Univ. Law School, 6 weitere Auszeichnungen.

W: Die Veräußerungen von Handelsgeschäften. 1922; Die Berliner Wertzuwachssteuerordnung. 1929; Die Wertzuwachssteuer in der Praxis. 1929; Die Auflösung von Grundstücksgesellschaften in steuerlich begünstigter Form. 1933; Internationaler Schutz von Anleihegläubigern. 1934; La Clause „Dollar-Or“. 2. Aufl. 1935; Trading with the Enemy in World War II. 1943; The Control of Alien Property. 1947; American-German Private International Law. 1956; International Trade Arbitration. 1958; Commercial Arbitration. 1965; The Law and Practise of Commercial Arbitration. 1968 (Cumulative Supplement 1977); über 200 Art. in Fachzs. L: Sanders, P. (Hg.), International Arbitration. Liber Amicorum for Martin Domke (Festschrift mit Bibliographie). 1967. Qu: Fb. Hand. - RFJI.

**Donnebaum, Leopoldo**, Fabrikant; geb. 15. März 1913 Wien; jüd.; V: Leopold D. (geb. um 1870 Wien, gest. 1913 Wien), jüd., Schürzenfabrikant; M: Bertha, geb. Beck (geb. Ungarisch-Brod/Mähren, umgek. im Holocaust), jüd.; G: Walter (geb. um 1903, umgek. um 1944 KL Theresienstadt), jüd., Rektor jüd. Schule Brünn/ČSR; Herbert (geb. um 1906), Abitur, 1939 Emigr. Argent.; Hans (Jan) (geb. um 1911), Gymn., landwirtschaftl. Schule, A: Bratislava/ČSSR; ∞ 1954 Nora Goldenberg Fuks (geb. 1925 Proskurov/UdSSR), jüd., Emigr. Chile, höhere Schule in Santiago; K: Walter Daniel (geb. 1958 Santiago), Stud.; Eduardo Jaime (geb. 1959 Santiago), Stud.; StA: ČSR, 1951 Chile. Weg: 1939 I, Chile.

1927-39 kaufm. Angest., 1918-35 Mitgl. *Blau-Weiß*, zeitw. Haft, nach 1935 Bratislava, Umschulung als Friseur. 1939 Emigr. Chile über Italien, 1939-40 Handelsvertr., 1941-45 Gr. u. Inh. Importgeschäft für Reißverschlüsse, ab 1946 Hersteller von Reißverschlüssen. Ab 1939 Mitgl. der Einwanderergde. Sociedad Cultural Israelita, ab 1967 Mitgl. *Circulo Israelita*, 1961 Stiftung für geistig Behinderte (Schule, Werkstätte u. Heim), 1965 Stiftung eines Gebäudes an Univ. Chile zur Ausbildung von Behindertenlehrern. 1969-74 Red. Zs. *El Nino Limitado* (später Übernahme u. Weiterführung durch Erziehungsmin.). Lebte 1976 in Santiago/Chile. - Ausz.: 1975 Diploma de Honor.

L: El Nino Limitado. 1974. Qu: Fb. - RFJI.

Handlungsgehilfe; ab 1929 KPD, KJVD-Führerpartal. Ab 1931 Red. *Bergische Volksstimme* u. Ltr. F. terbez. Solingen, 1932 Hagen. Nach natsoz. Machtübernahme Haft, 2. Sept. 1933 Flucht aus Gef. Remscheid nach später Frankr.; Okt. 1936 nach Spanien, PolK. Edgar-André-Btl. in XI. Internat. Brigade, Oberst. I nach Frankr., Internierung in Gurs u. Le Vernet, Nordafrika. Im 2. WK Soldat der amerikan. Armee Berlin Mitgl. KPD/SED, Polizeipräs. in Potsdam, ab Herbst 1950 Doz. SED-Parteihochschule Karl Marx. Kulturdir. Volkswerft Stralsund, ab 1956 stellv. *Vorschaft für Sport und Technik*. - Ausz.: u.a. 1958 VVO (1968 Banner der Arbeit.

W: Zur Rolle des moralischen Faktors im Kampf der brigadisten. In: Interbrigadisten, S. 369 ff. L: Pasaremba brigadisten. Qu: Arch. Hand. Publ. Z. - IfZ.

**Dorn, Herbert**, Dr. jur. et rer. pol., Finanzpolitiker, Hochschullehrer; geb. 21. März 1887 Berlin, gest. 11. Aug. 1957 Wien; Österr.; StA: deutsch. Weg: 1939 Emigr.; 1943 Kuba USA.

Stud. Rechts- u. Wirtschaftswiss. Univ. Berlin, F. München u. Würzburg; ab 1914 im dt. Justizmin. u. 1917 Reichsfinanzmin. tätig, als MinDir. der Abt. für gemeinl. Rechtsangelegenheiten u.a. stellv. Vors. der Kriegslasmission u. Mitgl. Sachverständigenkomitee des Völkerrechts für Fragen des internat. Finanzrechts, ständiges Mitgl. des Reichsjuristentag; 1931-34 Präsident des Reichsfinanzministeriums. Daneben akadem. Forschungs- u. Lehrtätigkeit, 1919-22 auftrag für Wirtschaftswiss. Univ. Berlin, ab 1927 Honorarprof. Handelshochschule Berlin, umfangreiche publizistische Tätigkeit insbes. auf dem Gebiet der internat. Doppelbesteuerung einer der Wegbereiter des internat. Steuerrechts. Nach Machtübernahme Amtsenthörung aufgrund jüd. Herkunft, 1939 Emigration; 1943-47 Wirtschaftsberater in England, 1947-52 Prof. für Wirtschaftswiss. Univ. Delaware, 1947-52 Vors. Inst. für Interamerikanische Studien, 1955 Prof. emeritus. Mitgl. versch. wiss. Gesellschaften in den USA u. Europa.

W: u.a. Nachkriegsprobleme im Wandel der Zeiten. Internationalisierung der menschlichen Freiheiten. 1944; *Archiv der Friedensverträge* sowie mehrerer wirtschaftswissenschaftl. Zs.; Bibliographie in: Kürschners Deutscher Gelehrtenlexikon. 1954. Qu: Hand. Publ. - IfZ.

**Dornemann, Louise**. Weg: GB.

Nach 1941 Mitarb. des von der KPD initiierten *Allies Germany Council*, ab 1943 VorstMitgl. FDKB in GB.

W: German Women under Hitler Fascism. A Brief Study of the Position of German Women up to the Present Day. I (Allies Inside Germany Council) 1943. Qu: Publ. - IfZ.

**Doron, Aharon** (urspr. Weilheimer, Erwin), Offizier; geb. 17. Febr. 1922 Ludwigshafen; jüd.; V: Siegfried Weill (geb. 1884 Ludwigshafen, gest. 1932 Ludwigshafen), Inhaber Großhandlung; M: Franzi, geb. Neuburger (geb. 1899 Wien, gest. 1976 Tel Aviv), Säuglingsschwester, 1939 Lager Gurs/F, 1942 Emigr. USA, 1973 IL; ∞ 1948 Hanan (geb. 1927 Haifa, gest. 1975 Ramat Hasharon/IL), Ingenieurin; K: Ehud (geb. 1950 IL), Stud.; Nirith (geb. 1950 IL), Stud.; StA: deutsch, Pal./IL. Weg: 1938 Pal.

1933-36 Gymn. Ludwigshafen, 1936-37 jüd. Aufbauschule Mannheim (9. Schuljahr), 1937-38 Klempnerlehre, Mitglied *deutscher Pfadfinderbund*, *Habonim*, *Bar Kochba* Mannheim. Dez. 1938 Emigr. Palästina mit B III-Zertifikat, 1939-41 in Tietz-Handwerkerschule Köln. - Ausz.: 1975



THOMAS MENCK

Fg Rip

## Doppelbesteuerungsabkommen – Abgrenzungsfunktion und Ordnungsfunktion

– Gedanken zur Rechtsentwicklung seit Herbert Dorn –

Die bilateralen Abkommen zur Vermeidung der Doppelbesteuerung (DBA) stellen eine unübersehbare Sondermaterie des Völkervertragsrechts dar. Sie sind stark standardisiert; auffällig ist das große Regelungsdetail und die Entwicklung einer international anerkannten Anwendungspraxis. Zu verdanken ist dies Arbeiten internationaler Organisationen, vorab des Völkerbundes, der schon in den 20er Jahren Musterabkommen schuf. *Herbert Dorn*,<sup>1</sup> dessen Äußerungen die vorliegenden Betrachtungen zum Ausgangspunkt nehmen, war daran maßgeblich beteiligt und hat die deutschen DBA jener Zeit geschaffen. Die heutigen Abkommensnetze sind am stärksten durch ein Musterabkommen der OECD (1963/1977) und der Vereinten Nationen geprägt.

Diese reiche Sondermaterie des Völkervertragsrechts befaßt sich zunächst mit einem einzigen Phänomen: der „Doppelbesteuerung“, d. h. – in einer Formulierung *Dorn*'s<sup>2</sup> – der „Erhebung vergleichbarer Steuern in zwei (oder mehreren Staaten) von demselben Steuerpflichtigen, für denselben Steuergegenstand und denselben Zeitraum“. Es ist eine in der Entwicklung von Recht, aber auch sonst zu beobachtende Erscheinung, daß scheinbar eng begrenzte, als mehr technisch-juristisch erscheinende Probleme Anlaß zu Fortbildungen geben, die viel weiter reichende Ordnungsgedanken verwirklichen. Die folgenden Darlegungen sollen versuchen, die so spröde Rechtsmaterie der Doppelbesteuerungsabkommen in diesem Licht zu sehen.

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<sup>1</sup> *Herbert Dorn*, geb. 21. März 1887, gest. 11. August 1957, deutscher Steuerrechtler. 1920 bis 1931 im Reichsfinanzministerium tätig, 1931 bis 1934 Präsident des Reichsfinanzhofs. Lebte seit 1939 nach Emigration in New York, seit 1949 Professor an der Universität Delaware (USA). *Dorn*, dessen Geburtstag sich bei Abfassung dieses Beitrags zum 100. Male jährte, war Schöpfer zahlreicher Doppelbesteuerungsabkommen und Wegbereiter des internationalen Steuerrechts.



## MEMORIES OF A COLLEAGUE

Memorials to individuals of the academic distinction achieved by Martin Domke should most properly be written by their academic superiors in rank, their close professional associates or their personal friends. While not qualifying in any of these categories, as a colleague of his whose professional interest in arbitration overlapped that of Professor Domke's, I deeply wish to record an appreciation.

At the age of 88, Professor Domke's life journey from his birthplace in Berlin, Germany, finally concluded last November. Trained in the stringent European educational regimen, he came to full flower in this country, with its perhaps more diverse approaches to expertise and training. His immense knowledge in the field of international trade arbitration led him to share that training and expertise not only with world organizations such as the United Nations, but also with students and colleagues at this Law School for some three decades. Starting as a lecturer in law, he rose to the rank of Adjunct Full Professor of Law. At the same time, he conducted an extensive program of writing and creative activity in the arbitration field. That activity had impact far beyond the area of international trade; it was a pioneering effort in the field of arbitration as an adjudicatory process with its individual worth and problems.

Professor Domke's work will, of course, survive as the most meaningful and valuable testimony to his life. With due deference to that fact, I would like to underline some of the aspects of that life that I was fortunate enough to glimpse in our professional association on this faculty.

Professor Domke's academic career leading to a full professorship was in the "adjunct" capacity. The word "adjunct," of course, is hardly indicative of any diminished status as an academician. The value of those at this school who share both our scholarly activities and, contemporaneously, a separate professional career cannot be overstated, although it may be overlooked. Professor Domke was a prime example of the enormous contribution of such individuals to legal education. His field, that of inter-



national trade arbitration, was, of course, but one of the many chambers in the mansion called arbitration. His efforts in that one chamber clearly left an imprint on other rooms and greatly contributed to the growth and value of that mansion as we see it today.

I shall not soon forget meeting, on my arrival at this school in 1962, a slightly stooped figure who was omnipresent in the faculty library and whose very physical appearance and bearing epitomized what I conceived to be a scholar. My personal perception of Martin Domke then, as one who viewed the process of "teaching" as but one facet of eternal inquiry, was confirmed and reconfirmed in the many years that followed. As is the final triumph of such individuals, the almost palpable impression of their dedication to learning will remain in this school long past any physical departure.

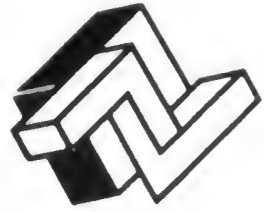
THOMAS G.S. CHRISTENSEN\*

\* Professor of Law, New York University School of Law.



*Doppellex.*

# Anwalts blatt



Deutscher **Anwalt** Verein

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1/90

Deutscher Anwaltverein e.V.  
Adenauerallee 106, 53 Bonn

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Bocholder Str. 259, 43 Essen





# Deutsche Anwalts- Akademie

im  
Deutschen Anwaltverein

Veranstaltungen im 1. Halbjahr 1990

## Probleme bei Ratenkrediten

Einzelkredit; wucherähnliches Rechtsgeschäft, Zinsvergleich, „Packing“, Kopplungsgeschäft, zusätzliche Sicherheiten, Haftung von Zweitschuldnern und Bürgen, arglistige Täuschung, Aufklärungspflicht, Kettenkredit (Umschuldung), Vorliegen eines rechtskräftigen Vollstreckungsbescheides

Termin: 3. Februar 1990 im Hotel Ramada Renaissance in Karlsruhe

**Dozent: Vors. Richter am OLG a. D. Prof. Rolf Bender, Stuttgart**

Teilnehmergebühr: 240,- DM für DAV-Mitglieder, 340,- DM für Nichtmitglieder, 50 % Ermäßigung für Referendare und junge Rechtsanwälte, die noch nicht länger als 2 Jahre zugelassen sind

Veranstaltungs-Nr.: 1.80 S1/90

## Besondere Probleme des sozialrechtlichen Verwaltungsverfahrens und des Sozialgerichtsprozesses

Anhörung Beteiligter, Rücknahme und Aufhebung von Verwaltungsakten, Erstattung zu Unrecht erbrachter Sozialleistungen, Widerspruchsverfahren, Klagearten, Prozeßkostenhilfe, Klageerhebung, Anträge, Wiedereinsetzung, Sachverständigengutachten, Berufungsverfahren, Nichtzulassungsbeschwerde und Revision, Kostenentscheidung, Höhe der Gebühren

Termin: 3. Februar 1990 im Hotel Holiday Inn in München

**Dozent: Richter am Bayer. LSG Klaus Niesel, München**

Veranstalter: Arbeitsgemeinschaft Sozialrecht des DAV in Zusammenarbeit mit dem Gemeinnützigen Verein Deutsche Anwaltsakademie e. V.

Teilnehmergebühr: 120,- DM für DAV-Mitglieder, 90,- DM für Mitglieder der AG Sozialrecht, 220,- DM für Nichtmitglieder

Veranstaltungs-Nr.: 2.17 S1/90

## Ersatzansprüche bei Personenschäden

Erwerbsschaden des Arbeitnehmers, Heilbehandlungskosten, vermehrte Bedürfnisse, Schmerzensgeld, Unterhaltsschaden bei Tod eines Erwerbstätigen, Beerdigungskosten, Anrechnung der Leistungen von Sozialversicherungsträgern, Mithaftung beim Forderungsübergang, Verletzung oder Tötung einer Hausfrau, Verjährung, Kapitalabfindung

Termin: 3. Februar 1990 im Hotel Stuttgart International in Stuttgart

**Dozent: Rechtsanwalt Dr. Gerhard Küppersbusch, Haar b. München**

Teilnehmergebühr: 240,- DM für DAV-Mitglieder, 340,- DM für Nichtmitglieder, 50 % Ermäßigung für Referendare und junge Rechtsanwälte, die noch nicht länger als 2 Jahre zugelassen sind

Veranstaltungs-Nr.: 2.40 S1/90

## Scheidungsvereinbarungen

Das Seminar dient dem Erfahrungsaustausch zwischen Rechtsanwälten, Notaren und Familienrichtern.

Termin: 16. Februar 1990 im OLG Stuttgart in Stuttgart

Beginn der Veranstaltung: 10.00 Uhr

**Dozenten: Richterin am OLG Dr. Meo-Micaela Hahne, Karlsruhe**

**Notar Prof. Dr. Gerrit Langenfeld, Karlsruhe**

Veranstalter: Deutsche Anwaltsakademie in Zusammenarbeit mit dem Minister für Justiz, Bundes- und Europaangelegenheiten von Baden-Württemberg

Teilnehmergebühr: 90,- DM für DAV-Mitglieder, 120,- DM für Nichtmitglieder

Veranstaltungs-Nr.: 1.38 S1/90

## Übrigens

Weitere Veranstaltungen aus unserem aktuellen Programm finden Sie in unserem Veranstaltungsverzeichnis des 1. Halbjahres 1990, das Ihnen auf Wunsch kostenlos zugesandt wird.

Anmeldungen und weitere  
Auskünfte:

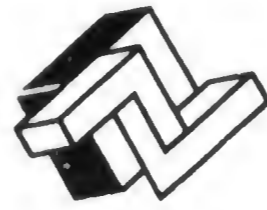
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## Rechtsprechung

BGH, Urt. v. 28. 9. 1989 – IX ZR 180/88

Alternativanträge sind im Zivilprozeß grundsätzlich unzulässig, weil ihnen die nach § 253 Abs. 2 Nr. 2 ZPO erforderliche Bestimmtheit fehlt – S. 37

OLG Koblenz, Beschl. v. 3. 2. 1989 – 5 W 63/89

Das von Rechtsprechung und Lehre bejahte Rechtsschutzinteresse für eine Leistungsklage trotz Vorliegens eines Vollstreckungstitels (Vergleich, vollstreckbare Urkunde) wegen bereits erhobener Einwendungen des Vollstreckungsschuldners ist dann nicht gegeben, wenn der Vollstreckungsschuldner sich gegen die Vollstreckung einer vollstreckbaren Urkunde mit dem Einwand „unverschuldeter mangelnder Liquidität“ wehrt – S. 40

OLG Koblenz, Urt. v. 19. 1. 1989 – 5 U 425/88

Tritt ein Kl nach Rechtshängigkeit die Klageforderung an einen Zessionar ab, so steht der neuen Klage des Zessionars gegen den Bekl die Einrede der Rechtshängigkeit (§ 261 Abs. 3 Satz 1 ZPO) entgegen, weil ein Urteil im Erstprozeß auch für und gegen den Zessionar wirkt (§§ 265, 325 Abs. 1 ZPO) – S. 41

BGH, Beschl. v. 17. 5. 1989 – I ARZ 254/89

§ 281 Abs. 2 Satz 2 ZPO steht einer Rückverweisung des Rechtsstreits nach Klageänderung vor dem zurückverweisenden Gericht nicht entgegen – S. 41

BGH, Urt. v. 11. 7. 1989 – VI ZR 234/88

Zu den Anforderungen an die Zuerkennung eines Anspruchs auf Feststellung der Verpflichtung zum Ersatz zukünftiger immaterieller Schäden – S. 42

LAG München, Beschl. v. 13. 1. 1989 – 8 Ta BV 10/88

Der Beschluß einer Einigungsstelle gemäß §§ 76, 112 BetrVG ist unverbindlich, soweit er einen Interessenausgleich i. S. v. § 112 BetrVG enthält – S. 42

OLG Koblenz, Beschl. v. 6. 5. 1989 – 5 U 198/83

Eine Niederschlagung findet nur hinsichtlich solcher Kosten statt, die bei richtiger Sachbehandlung nicht entstanden wären – S. 43

Hess. VGH, Beschl. v. 16. 1. 1989 – 1 TH 4320/88

Auch in beamtenrechtlichen Verfahren auf Gewährung vorläufigen Rechtsschutzes ist der Streitwert auf einen Bruchteil des Hauptsachestreitwerts festzusetzen – S. 44

BGH, Beschl. v. 7. 4. 1989 – V ZR 34/88

Das Rechtsmittelgericht kann den Streitwert der unteren Instanz erstmalig nur solange abändern, als das Verfahren wegen der Hauptsache oder wegen der Entscheidung über den Streitwert, den Kostenansatz oder die Kostenfestsetzung in der Rechtsmittelinstantz schwebt – S. 44

OLG München, Beschl. v. 24. 10. 1988 – 11 WF 1139/88

Die Beteiligung nur eines Streitgenossen an der Beweisaufnahme kann allein in der Kostengrundentscheidung berücksichtigt werden – S. 45

BGH, Beschl. v. 23. 5. 1989 – VI ZR 5/87

§ 58 Abs. 2 GKG betrifft lediglich die Geltendmachung solcher Gerichtskosten, die noch ausstehen, wenn bereits ein anderer Entscheidungsschuldner bestimmt ist – S. 46

OLG Hamm, Beschl. v. 7. 3. 1989 – 20 W 10/89

Ist ein Kl aufgrund seiner Einkommens- und Vermögensverhältnisse zur Zahlung des Gerichtskostenvorschusses auf Dauer außerstande, so ist er nur im Falle der Bewilligung von Prozeßkostenhilfe nach § 65 Abs. 7 Satz 1 Nr. 1 GKG vorschußfrei – S. 46

OLG Koblenz, Beschl. v. 5. 1. 1989 – 14 W 4-7/89

Die Geltendmachung von zusammenhängenden Ansprüchen in verschiedenen Prozessen (Verfahren) ist ohne Kostennachteile nur dann zulässig, wenn vertretbare Gründe für die getrennte Geltendmachung gegeben sind – S. 46

OLG Koblenz, Beschl. v. 1. 12. 1988 – 14 W 706/88

Holt das Gericht ein Gutachten ein und ist nur eine Partei fachkundig (Fachbehörde), so kann es aus Gründen der Waffengleichheit notwendig sein, daß der Gegner sich bei der Überprüfung des gerichtlichen Gutachtens durch einen Privatgutachter beraten läßt – S. 47

OLG München, Beschl. v. 7. 3. 1989 – 11 W 934/89

Die Kosten eines Schiedsgutachtens sind auch dann, wenn es erst während des Rechtsstreits eingeholt wurde, keine Kosten des Rechtsstreits und daher nicht im vereinfachten Verfahren nach § 104 ZPO festsetzbar – S. 47

OLG Frankfurt a. M., Beschl. v. 3. 11. 1986 – 6 W 243/86

Für die Höhe der Korrespondenzanwaltskosten kann sich die erstattungsbe-rechtigte Partei nicht auf eine Gebührenvereinbarung berufen – S. 48

OLG Hamm, Beschl. v. 3. 2. 1989 – 20 W 4/89

Nach übereinstimmender Erledigterklärung in der Hauptsache erfordert die Kostenentscheidung auch dann keine Beweisaufnahme, wenn die Zeugen bereits geladen und erschienen sind – S. 48

OLG Koblenz, Beschl. v. 30. 5. 1988 – 5 U 1450/87

Gemäß § 98 ZPO können die Parteien eine von der gegenseitigen Kostenaufhebung abweichende Bestimmung treffen – S. 48

OLG Nürnberg, Beschl. v. 3. 7. 1989 – 3 AR 2037/89

Zur Zuständigkeit für eine gerichtliche Entscheidung nach Art. XI § 1 KostÄndG bei Aufrechnung mit der Kostenforderung einer Staatskasse gegen Verteidigergebühren, die durch Kostenfestsetzungsbeschluß gegen die Staatskasse festgesetzt worden sind – S. 49

LAG Hamburg, Beschl. v. 30. 3. 1989 – 6 Ta 32/88

Der Beschäftigungsanspruch ist im Regelfall mit einem Monatseinkommen zu bewerten – S. 49

OLG München, Beschl. v. 17. 10. 1988 – 11 W 2561/88

Der der Erinnerung voll abhelfende Beschluß des Rechtspflegers (§ 21 Abs. 2 Satz 2 RpfLG) ist sachlich ein selbständiger Kostenfestsetzungsbeschluß, gegen den ein neues Erinnerungsverfahren eröffnet wird – S. 50

LG Mannheim, Beschl. v. 7. 4. 1989 – 4 T 52/89

Die durch den vor dem Arbeitsgericht zu führenden Drittschuldnerprozeß veranlaßten Kosten sind erstattbare Kosten der Zwangsvollstreckung – S. 50

OLG Düsseldorf, Beschl. v. 18. 7. 1988 – 1 Ws 420/88

Zur Kosten- und Auslagenentscheidung im Falle des fiktiven Teilfreispruches – S. 51

AG Euskirchen, Beschl. v. 23. 8. 1988 – 5 Ls 20 Js 720/85 (77/86)

Bei Einstellung des Verfahrens gemäß § 153 StPO kann der Kostenansatz gegen den Angekl nicht auf eine freiwillige Übernahmeerklärung des Angekl gestützt werden – S. 52

BGH, Urt. v. 13. 7. 1989 – III ZR 64/88

Der Notar kann für nicht rechtzeitig entrichtete Notarkosten Verzugszinsen und Verzugschaden nicht beanspruchen – S. 52

OLG Düsseldorf, Beschl. v. 27. 9. 1988 – 10 W 95/88

Das Ersetzungsverfahren (§ 7 Nr. 2 ZSEG) bleibt zulässig, falls der Gutachter sein Gutachten noch nicht erstattet hat und die Parteien die Kosten des Rechtsstreits vergleichsweise gegeneinander aufgehoben haben – S. 54

OLG Saarbrücken, Beschl. v. 27. 7. 1989 – 9 WF 128/89

Die Beiordnung eines Rechtsanwaltes ist im isolierten Sorgerechtsverfahren grundsätzlich erforderlich – S. 54

Hess. VGH, Beschl. v. 28. 12. 1988 – AO TP 4824/88

Maßgebender Zeitpunkt für die Beurteilung der Voraussetzungen für die Bewilligung von Prozeßkostenhilfe in einem Beschwerdeverfahren ist die Entscheidung des Verwaltungsgerichts in Abhilfungsverfahren (Anschluß an Hess. VGH, B. v. 1. 12. 1987 – 12 TP 2840/87) – S. 55

OLG Koblenz, Beschl. v. 1. 6. 1988 – 14 W 288/88

Beantragt der PKH-Anwalt namens seiner Partei zunächst die Erstattung von deren gesamten Kosten (Gesamtentstrickung) und reduziert er anschließend diesen Kostenfestsetzungsantrag um die Summe, deren Erstattung er inzwischen unmittelbar von der Staatskasse begehrt hat, so lebt insoweit (Forderung an Staatskasse) die Verstrickung (§ 126 ZPO) wieder auf und die Forderung geht bei Zahlung der Summe durch die Staatskasse an den PKH-Anwalt im verstrickten Zustand auf die Staatskasse gemäß § 130 I 1 BRAGO über – S. 56



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Nachrichten für die Mitglieder  
des Deutschen Anwaltvereins e.V.

Schriftleitung:  
Dr. Peter Hamacher  
Rechtsanwalt  
Bonn, Adenauerallee 106

Jahrgang 40  
Januar 1990

# Anwalts blatt



## Leipzig

### **Reise der Delegation des Deutschen Anwaltvereins vom 21. bis 24. Oktober 1989**

*Der Deutsche Anwaltverein hat die im Januar 1989 aufgenommenen und anlässlich des 45. Deutschen Anwaltstages in München fortgesetzten Gespräche und Begegnungen mit Rechtsanwälten in der DDR im Oktober 1989 weitergeführt.*

*Vom 21. bis 24. Oktober 1989 besuchte eine 30 Personen starke Delegation des Deutschen Anwaltvereins die Stadt Leipzig. An der Spitze der Delegation stand der Präsident des Deutschen Anwaltvereins, Rechtsanwalt Erhard Senninger, München.*

*Lange vor den befreienden Ereignissen in der DDR und nicht ohne Komplikationen geplant, sollte die Reise dazu dienen, Grundlagen zu legen für weitere Gespräche und die Aufnahme von Arbeitskontakten zwischen den Rechtsanwälten in den beiden deutschen Staaten, an denen beiderseits Interesse besteht. Aus der Natur der Sache ergab es sich, daß die Kollegien der Rechtsanwälte in der DDR und vor allem der Rat der Vorsitzenden der Kollegien der Rechtsanwälte in der DDR Gesprächspartner des Deutschen Anwaltvereins waren.*

*Anlaß der Reise war – so das Konzept – eine gemeinsam vom Deutschen Anwaltverein und von dem Rat der Vorsitzenden der Kollegien der Rechtsanwälte in der DDR getragene Gedenkveranstaltung zum 120. Geburtstag von Martin Drucker (1869 bis 1947), Präsident des Deutschen Anwaltvereins von 1924 bis 1932.*

*Die Veranstaltung fand statt am 22. Oktober 1989 im Museum der Bildenden Künste, dem Gebäude des Reichsgerichts. Frei von den politisch-ideologischen Verkrampfungen des soeben zu Ende gehenden zeitgeschichtlichen Abschnitts, war die Gedenkstunde beeindruckend und tief bewegend, indem sie*

*die Katastrophen der Politik und des Rechts in diesem Jahrhundert, aber auch die Idee des Rechts als die einzig dauerhaft den Frieden in Gesellschaft, Staat und Völkergemeinschaft bewahrende Kraft unmittelbar heraufführte.*

*Die großartige, ernste, leidgeprüfte, unbestechliche und unabhängige Persönlichkeit des Menschen und Rechtsanwalts Martin Drucker trat in den Vorträgen von Professor Dr. Manfred Unger, Direktor des Staatsarchivs Leipzig und Dr. Fred Grubel, Generalsekretär der Leo-Baeck-Institute, New York, dem vertrauten Mitarbeiter Martin Druckers, deutlich und als Mahnung und Auftrag der Gegenwart hervor.*

*Die Leipziger Tage waren erregend. Es waren jene Tage, in denen jeder sehen und merken konnte, daß die befreienden Bestrebungen, die das Volk in Wort und Demonstration so ernst und umsichtig, aber mit bezwingender Notwendigkeit aus der tiefen Sehnsucht nach Freiheit vortrug, durchdringen würden. Niemand ahnte freilich, daß die Entwicklung sich so schnell vollziehe.*

*Über die Ereignisse selbst, die unmittelbaren Folgen und auch alle denkbaren Konsequenzen daraus war ein völlig offenes Gespräch mit den Rechtsanwälten in der DDR möglich, auch mit denen, die in den Kollegien Verantwortung trugen. Dasselbe gilt für das Gespräch mit den Bürgern der Stadt Leipzig.*

*Aus Besorgnis und wohl auch auf Hinweis bemühte sich die Spitze des Rates der Vorsitzenden der Kollegien der Rechtsanwälte in der DDR darum, die Mitglieder der Delegation des Deutschen Anwaltvereins am Montag, dem 23. Oktober 1989 nachmittags nicht in Leipzig zu haben. Dieser Wunsch gefiel vielen Leipziger Kollegen überhaupt nicht. Es war der Tag, an dem erstmals mehr als 200 000 Leipziger Bürger im Anschluß an das Friedensgebet demonstrierten. Die Mitglieder der DAV-Delegation gewannen davon einen unmittelbaren Eindruck.*





*Am Montag vormittag konnten die Mitglieder des DAV einige Zweigstellen des Kollegiums der Rechtsanwälte im Bezirk Leipzig besuchen und das Gespräch mit den Rechtsanwälten vor Ort aufnehmen. Die Fachdiskussionen waren freimütig und ohne jeden belastenden politischen Zungenschlag. Die aus der Sicht des Rechtsstaates in der DDR vor allem im Verfahrensrecht bestehenden Defizite und die Behinderungen frei sich entfaltender anwaltlicher Tätigkeit wurden offen erörtert und von allen Gesprächsteilnehmern kritisiert. Die Rechtsanwälte in der DDR arbeiten durchweg in den Rechtsgebieten, die das tägliche Leben der Bürger betreffen. Wo der Fall und die anstehende Rechtsfrage, aus welchen Gründen auch immer, keinen Anlaß zur Behinderung oder gar Entziehung der Sacharbeit bieten, arbeiten die Rechtsanwälte in der DDR anwaltlich, d. h. am Interesse des Mandanten orientiert, engagiert, mutig und oft unter Inkaufnahme von Risiken und Bedrückungen, die man sich hier nicht vorstellen kann. Es läßt sich eben die Idee einer freien und unbehinderten Anwaltschaft auch in einer sehr langen Zeit nicht ganz unterdrücken.*

*Die Arbeitsbedingungen der Kollegen in der DDR sind archaisch. Ihr Engagement verdient angesichts dieser Umstände großen Respekt.*

*Der äußere Zustand der Stadt Leipzig bewegt das Herz und deprimiert zutiefst. Wieviel Kraft, Fleiß, Ausdauer und Mühe haben die Bürger der Stadt Leipzig wohl aufwenden müssen, um z. B. das alte Rathaus zu renovieren und das herrliche Gewandhaus neu zu bauen. Wieviel Bürgersinn war wohl vergeblich, weil er sich nicht entfalten konnte.*

***Die Leipziger Kollegen haben den Mitgliedern der Delegation des Deutschen Anwaltvereins unvergeßliche und bewegende Tage geschenkt. Danke!***

*Rechtsanwalt Dr. Peter Hamacher, Köln*

## Martin Drucker

**Gedenkveranstaltung aus Anlaß seines 120. Geburtstags im Museum der Bildenden Künste (vormals: Reichsgericht) zu Leipzig**

**Ansprache: Dr. Gregor Gysi, Berlin**

Im Namen des Rates der Vorsitzenden der Kollegien der Rechtsanwälte in der Deutschen Demokratischen Republik begrüße ich Sie zu unserer Gedenkveranstaltung anläßlich des 120. Geburtstages von Dr. Martin Drucker in diesem Jahr.

Mit besonderer Freude stelle ich fest, daß sich unter unseren Gästen der Stellvertreter des Vorsitzenden des Ministerrates der DDR und Minister der Justiz, der stellvertretende Vorsitzende der Liberal-Demokratischen Partei Deutschlands, Herr Dr. Heusinger, befindet. Ich begrüße den stellver-

tretenden Vorsitzenden des Rates des Bezirkes Leipzig, Herrn Dr. Reitmann.

Ich freue mich, den Vizepräsidenten der Jüdischen Gemeinden in der DDR und Vorsitzenden der Jüdischen Gemeinde von Berlin, Herrn Dr. Kirchner, und den 1. Vizepräsidenten und Generalsekretär der Vereinigung der Juristen der DDR, Herr Dr. Roehl, begrüßen zu können. Wir freuen uns über die Anwesenheit von Mitarbeitern des ZK der SED, des Ministeriums der Justiz, der Bezirksleitung der SED Leipzig, des Rates der Stadt Leipzig, der Direktoren des Bezirksgerichts Leipzig, der Vorsitzenden der Bezirksvorstände Leipzig der LDPD, der CDU, der NDPD und der DBD.

Mit besonderer Herzlichkeit heiße ich die Angehörigen von Dr. Martin Drucker, unter ihnen die Töchter, Frau Prof. Dr. Renate Drucker und Frau Sanitätsrätin Martina Drucker willkommen.

Ich begrüße unsere Festredner, Herrn Prof. Dr. Unger, Leiter des Staatsarchivs Leipzig und mit besonderer Freude, Herrn Dr. Fred Grubel, Direktor des Leo-Baeck-Instituts New York, früherer Mitarbeiter von Dr. Martin Drucker.

Ihm möchte ich herzlich danken, daß er die weite Reise in Kauf genommen hat, um Dr. Martin Drucker zu ehren.

Zu seinem heutigen Geburtstag spreche ich ihm noch einmal die herzlichsten Glückwünsche aus.

Aus der Bundesrepublik Deutschland heiße ich den Leiter der Ständigen Vertretung in der Deutschen Demokratischen Republik, Herrn Staatssekretär Dr. Bertele, und die Delegation des Vorstandes des Deutschen Anwaltvereins mit seinem Präsidenten, Herrn Rechtsanwalt Erhard Senninger, an der Spitze, herzlich willkommen.

Die Rechtsanwälte in der DDR haben sich verpflichtet, die humanistischen Traditionen der Deutschen Anwaltschaft zu pflegen. Ich bin deshalb dem Kollegen Senninger dankbar für den Hinweis auf dieses Jubiläum und für die von ihm ergriffene Initiative, die uns zur Durchführung dieser Gedenkveranstaltung veranlaßte.

Traditionspflege hat etwas mit Geschichte zu tun und nicht selten liegt der Schlüssel der Erkenntnis zur Lösung von Problemen für die Zukunft in der Geschichte.

Auch deshalb ist Traditionspflege wichtig.

Dr. Martin Drucker war ein unbeugsamer mutiger Antifaschist und Demokrat, ein Mann des Rechts stets im Kampf gegen das Unrecht, ein Anwalt mit hoher Berufsethik. Dadurch ist er ein Vorbild für den Berufsstand des Rechtsanwalts geworden.

Ich will den Festansprachen nicht vorgreifen, aber dennoch zur Bedeutung dieser 3 Seiten seiner Persönlichkeit für uns und unsere Zeit einige Gedanken äußern.

Der Antifaschismus von Dr. Martin Drucker hat nichts an Aktualität verloren. Mit großer Sorge verfolgen wir in der DDR und die große Mehrheit der Menschen in der Bundesrepublik Deutschland und in anderen westlichen Ländern, wie sich dort Kräfte breit machen, die die reaktionärsten Gedanken der Vergangenheit versuchen, in die Gegenwart zurückzuholen.

Alte und neue Nazis sind immer eine Gefahr für Menschlichkeit, eine Gefahr für die Kultur und letztlich für den Frieden.

Es ist deshalb das Gebot der Stunde, solche Gefahren bereits im Keim zu ersticken, ihnen gemeinsam zu begegnen, unabhängig davon, was die Menschen ansonsten alles unterscheiden mag, Hauptsache sie sind sich einig im Antifaschismus und in ihrer Friedensliebe.





Auch wir wissen, daß wir gegen jede Erscheinung von nazistischem und intolerantem Gedankengut bei uns vorzugehen haben. Dies ist eine große und wichtige Übereinstimmung in der Bevölkerung der DDR.

Dr. Martin Drucker hat auch als Kämpfer für das Recht nichts an Aktualität eingebüßt. Niemandem von uns ist verborgen geblieben, daß unser Land in Bewegung geraten ist, vieles neu durchdacht und sicherlich bald auch neu gemacht wird. Dabei wird der Ausbau der Rechtsordnung eine wichtige Rolle spielen. Wir Anwälte sind verpflichtet, uns in diesen Prozeß mit eigenen Vorstellungen und Forderungen einzumischen, ihn zu befördern und aktiv am Dialog in unserem Land teilzunehmen. Sozialistische Rechtsstaatlichkeit wird von uns als ein Prozeß verstanden, der insbesondere durch 3 Kriterien bestimmt wird.

Sie bestehen in einem ausgeprägten Rechtsbewußtsein der Menschen, in der Einhaltung des Rechts durch jeden, und ich meine wirklich durch jeden und in der Existenz der richtigen Gesetze, die von der Mehrheit der Bevölkerung getragen werden und die den gesellschaftlichen Erfordernissen und Möglichkeiten entsprechen müssen.

Rechte und Pflichten sind so unabdingbar wie möglich zu formulieren. Wir brauchen die öffentliche Diskussion wichtiger Gesetze ebenso wie deren rechtzeitige Verabschiedung.

Hier wartet viel Arbeit auf die Juristen unseres Landes und die Rechtsanwälte sind bereit, mitzudenken und mitzuarbeiten, um überholtes Recht so schnell wie möglich durch zeitgemäßes zu ersetzen.

Unsere Vorstellungen reichen vom Strafrecht über das Verwaltungsrecht bis hin zum Steuerrecht. Es muß uns einfach gelingen, daß DDR, Sozialismus und Rechtsstaatlichkeit zu untrennbaren Begriffen im Leben unserer Gesellschaft und in den Köpfen unserer Menschen werden.

Otto Nuschke, der erste Vorsitzende unserer CDU, sagte sinngemäß etwas, was auch Martin Drucker hätte sagen können, nämlich, daß die höchste Sicherheit des Staates die Rechtssicherheit ist.

Die Berufsethik hat Dr. Martin Drucker stets beschäftigt, und er hat auf diesem Gebiet Aussagen getroffen, die noch heute gültig sind. Der Rechtsanwalt soll vor keiner anderen Autorität als der des Rechts Halt machen. Diese seine Aussage besagt viel und gilt nach wie vor. Anwälte sind Streiter für ihre Mandanten und damit für das Recht. Und wenn wir um ihre Befugnisse ringen, dann geht es uns um die Rechte unserer Mandanten, d. h., unserer Bürger und damit um Bürgerrechte.

Während andere Länder unter einer „Anwaltsschwemme“ leiden, brauchen wir einfach mehr Rechtsanwälte, damit jedes Mandat in hoher Qualität bearbeitet werden kann. Bei uns gibt es keine Konkurrenz zwischen den Rechtsanwälten, und es droht auch keine übermäßige Kommerzialisierung des Berufsstandes.

Das soll und wird auch so bleiben.

Aber der Ausbau der Anwaltschaft ist schon wegen der steigenden Bedeutung des Rechts erforderlich. Eine hohe Berufsethik muß in jeder Zeit gewährleistet werden, auch und gerade in schwierigen Zeiten. Mit dem Beschluß unseres Rates vom Juni 1989 haben wir deutlich gemacht, welch hohen Stellenwert wir Fragen der Berufsethik beimessen. Indem wir auch zahlreiche bürgerlich-demokratische Anforderungen an den Beruf in unseren Beschluß mit aufgenommen haben, glaube ich, daß wir auch einen Beitrag zur Verwirklichung des Vermächnisses von Dr. Martin Drucker geleistet haben.

## Martin Drucker Anwalt des Rechts \*

Professor Dr. Manfred Unger, Leipzig

In einem Nachruf auf den einstigen Präsidenten des Deutschen Anwaltvereins schrieb 1947 der langjährige Vereinsgeschäftsführer Heinrich Dittenberger den Satz: „Martin Drucker verkörperte das Ideal eines Rechtsanwalts.“ Nahezu ein halbes Jahrhundert ist er Anwalt gewesen, vom Zeitpunkt seiner Zulassung am Leipziger Landgericht 1898 bis zum Berufsverbot, das ihm die Nazijustiz 1942/43 auferlegte. Im größten Teil dieser Zeitspanne zählte er zu den namhaftesten Rechtsanwälten Deutschlands. Er war es durch die Universalität seines Wissens auf allen Rechtsgebieten, seines Berufsethos und seiner Courage wegen, und das im Kaiserreich, in der Republik Weimarer Provenienz und als „persona non grata“ unter dem Naziregime, selber bedroht, verfolgt und zugleich gefürchtet. Schon hoch in den 70er Jahren seines Lebens stehend war er es aufs Neue, als er nach der Befreiung vom Faschismus sein ganzes Ansehen für die demokratische Erneuerung der Rechtspflege in die Waagschale legte. Martin Drucker hatte schon seit 1909 im Vorstand des DAV gewirkt, war Schriftführer und zuletzt stellvertretender Vorsitzender gewesen, als er 1924 in das Präsidentenamt gewählt wurde, das er acht Jahre lang, bis 1932, versah.

Eine Vorbemerkung ist nicht zu umgehen, wobei sich ein Zitat anbietet, das weit hergeholt erscheinen mag. Vor 200 Jahren, kurz vor Ausbruch der Französischen Revolution, wurde in Jena eine Antrittsvorlesung bei Übernahme der dortigen Geschichtspräsesur zu dem Thema gehalten „Was heißt und zu welchem Ende studiert man Universalgeschichte?“ Friedrich Schiller behandelte das immer einmal wieder besonders aktuelle Bezugsnetz zwischen Erfahrungswerten der Geschichte und gegenwärtiger Situation. Mehr beiläufig äußerte er: „Weil die Weltgeschichte von dem Reichtum und der Armut an Quellen abhängig ist, so müssen eben so viele Lücken in der Weltgeschichte entstehen, als es leere Strecken in der Überlieferung gibt“<sup>1</sup>. Das gilt freilich nicht nur universell, sondern nicht minder personell. Die Armut an Quellen ist es, die es schwer erscheinen läßt, den Reichtum der Lebensleistung des Mannes nachzuvollziehen, dessen zu gedenken ist: Die Anwaltskanzlei in der Leipziger Ritterstraße mit der vom Vater stammenden kostbaren juristischen Bibliothek wurde ebenso ein Opfer der Bomben wie die Wohnung der Familie. Auch das Archiv der Juristenfakultät ist im Dezember 1943 verbrannt, so daß es nicht einmal mehr die Promotionsakte gibt. Beim gleichen Angriff ging auch die Verlagsregistratur der zum Brandstetter-Konzern gehörigen Firma Moeser in der Leipziger Inselstraße samt aller Vorräte an alten Jahrgängen der „Juristischen Wochenschrift“ und des „Anwaltsblatt-

\* Dem Beitrag liegt der Vortrag zugrunde, der zur Martin-Drucker-Ehrung in Leipzig aus Anlaß seines 120. Geburtstages im Klinger-Saal des ehemaligen Reichsgerichts gehalten wurde.

<sup>1</sup> Schillers Werke, Nationalausgabe, 17. Bd.: Histor. Schriften 1. Teil, herausgegeben von K.-H. Hahn, Weimar 1970 S. 372.





tes“ in Flammen auf, genau 99 Jahre nach der Gründung des Verlagshauses, das aufs engste mit dem DAV verbunden gewesen ist<sup>2</sup>. Immerhin war Martin Drucker zeitweilig – am Beginn des ersten Weltkrieges – in der Redaktion der Wochenschrift, stand durch die zahlreichen Publikationen des Vereins gerade in der Zeit seiner Präsidentschaft über die Jahre in engem Kontakt zu dem Verlag, bei dem sie alle erschienen sind. Allerdings hatte er vordem, 1904, sein Buch über die Gebührenordnung noch an anderer Stelle herausgebracht<sup>3</sup>. Daß seine Freunde ihm zum 65. Geburtstag 1934 eine Festschrift als Privatdruck überreichen konnten, hängt damit zusammen, daß Brandstetter die gleichsam illegale Herstellung des Buches übernahm<sup>4</sup>.

Martin Drucker stammte aus bürgerlich-liberalem Haus. Seine Familie fußte zudem in jüdischen Traditionen. Der Großvater – ein Kaufmann – gehörte zu den Gründungsmitgliedern der Leipziger Israelitischen Religionsgemeinde, aber eben zu jenem Gemeindevorstand, der 1848 Robert Blum für die Frankfurter Nationalversammlung mit dem Mandat ausstattete, dort für absolute Toleranz, für die bürgerliche volle Gleichheit der Menschen aller Religionen einzutreten – ganz im Sinne der Ideen der französischen wie deutschen Aufklärung, von Lessings „Nathan“. Und man bedenke, daß die Messestadt als Zentrum des deutschen Liberalismus galt, der Enkel Moses Mendelssohns – Felix Mendelssohn Bartholdy – im Vormärz an die Spitze des Gewandhauses treten und die Musikhochschule gründen konnte. In dieses Umfeld gehört, daß Martin Druckers Vater Rechtsvertreter der jüdischen Gemeinde blieb, obgleich er zur evangelisch-lutherischen Konfession konvertiert war. In seinen Lebenserinnerungen, die er um 1943 zu schreiben begann, die aber nur Kindheit und Jugend umfassen, hielt er fest „daß mein Vater von Juden abstammt, erhöhte in eigenartiger Weise meine Selbstachtung“<sup>5</sup>. Martin Drucker sen. hatte 1862 die Advokatur in Leipzig erlangt. Das Ansehen, das er Zeitlebens genoß, ist dem Sohn zu Maßstab und Ausgangsbedingung der eigenen Lebensposition geworden. Übrigens wurde der Vater, weil er u. a. die Rechtsgeschäfte des französischen Generalkonsulats in Leipzig besorgte, im Jahre 1905 mit dem Ritterkreuz der französischen Ehrenlegion gewürdigt. Die Auszeichnung war ein hochdiplomatischer Vorgang, der Eingang in die Akten des sächsischen Justizministeriums fand und dadurch erhalten geblieben ist<sup>6</sup>. Welche Atmosphäre für dieses Bildungsbürgertum als charakteristisch gelten kann, deutet sich darin an, daß der Vater in einem Quartett befreundeter Gewandhausmitglieder privat musizierte und Gedichte schrieb. 1882 erschien in dritter Auflage ein Bändchen „Blüten aus dem Treibhaus der Lyrik“, das Max Klinger, der bekannteste bildende Künstler Leipzigs dieser Zeit, illustriert hat. Alte Motive werden hier in intellektueller Distanz aufgegriffen wie die „Lorelei“: „Ist zwar ihr Singen noch fürchterlich, nur kostet es keinem das Leben . . .“<sup>7</sup>.

Wenigstens zwei Episoden seien aus den Jugenderinnerungen herausgegriffen. Martin Drucker schreibt über das Familienfest, das zu seiner Konfirmation veranstaltet wurde: „Ich fühlte mich allerdings einigermaßen bewegt durch meine Funktion als Mittelpunkt . . . Gefeierte zu werden, ist mir stets als erster Grad der Folter erschienen . . .“ Die zweite Stelle bezieht sich auf die Thomasschule, diese älteste, schon Mitte des 13. Jahrhunderts nachweisbare Schule der Stadt, die seinerzeit als das vornehmste Gymnasium galt. Traditionsgemäß vergab die Schule jährlich für die Oberprima einen Preis für den besten Deutsch-Aufsatz. Das geschah in der Weise, daß ein Klassenaufsatz zu schreiben war, wobei für die Bewertung der Name des Abiturienten verdeckt blieb. Das The-

ma hieß: „Die alten Griechen und der deutsche Patriotismus“. Vorher war gerade Sedan-Feier gewesen. Martin Drucker verspürte zu solch' einem Thema keine Lust und meldete sich krank. Auf dem Heimweg, aber noch im Schulhaus, traf ihn der Rektor, der den ausgezeichneten Schüler zur Umkehr brachte. Wutentbrannt stellte sich der Oberprimaner dem verhaßten Thema und schrieb, wie er es verstand, nämlich daß es eine Beleidigung des humanistischen Geistes der Griechen sei, sie mit dem spießigen „Patriotismus“ gleichzusetzen. Nun kam der Festakt in der Aula – und ausgerechnet ihm wurde der 1. Preis zuerkannt. Es sei die Anmerkung gestattet: Auch dem deutsch-nationalen Lehrer einer solchen Schule kam es ganz auf die intellektuelle Leistung an, wohl wissend, daß es mit gleichsam genormten jugendlichen Durchschnittsköpfen letztendlich im Lande nichts zu machen sei. Den Preis nahm er übrigens in Empfang wie einst auch sein Vater ihn an derselben Schule erhalten hatte und ihn dann 1923 sein ältester Sohn entgegennehmen konnte. Und es sei hinzugefügt: Für einen überzeugten Thomaner stand die Welt der Antike an erster Stelle. Als Martin Drucker 1934 seinen schon erwähnten Geburtstag beging – erzählt hat es der katholische Kaplan Josef Gülden in Leipzig, ein Gast der Feier – bediente sich der Jubilar bei der Erwiderungsrede auf die Gratulationen des Lateinischen und wiederholte, sozusagen der Abwechslung wegen, auf Griechisch, und das in freier Rede.

Martin Drucker studierte nach 1889 Rechtswissenschaft in München und Leipzig. Er legte 1893 die 1. Staatsprüfung ab und promovierte 1896 mit dem Prädikat „magna cum laude“ zum Doktor juris utriusque mit einer Arbeit über die Konstruktion der „Auslobung“ im justinianischen Recht in der Bedeutung für das „heutige gemeine Recht“. Seine akademischen Lehrer in Leipzig gehörten zu den namhaftesten Gelehrten jener Zeit: Es waren Adolph Wach, Karl Binding – dieser für Strafrecht und Strafprozeßrecht – und Emil Friedberg. Zu nennen sind Lujo Brentano – für Nationalökonomie –, Eduard Hölder – für römisches Recht –, Rudolph Sohm, Otto Warschauer – dieser für Staatswissenschaften –, aber man saß auch in Kollegs des großen Historikers Karl Lamprecht und bei Wilhelm Wundt. Die Leipziger war stets eine der großen deutschen Universitäten gewesen, und sie erlebte gerade in jenen Jahren die Glanzzeit ihrer bürgerlichen Ära<sup>8</sup>. Manchen seiner Lehrer kannte er schon als Vater von Mitschülern an der Thomasschule, bevor er im Hörsaal zu seinen Füßen saß. Dieses Einanderbekanntsein von der familiären Sphäre her gehörte auch zur Vermittlung, zur Weitergabe geistiger Werte. Und man darf nicht übersehen: Leipzig war seit 1879 der Sitz des Reichsgerichts. Zusammen mit der Juristenfakultät konnte die Stadt daher als ein Zentrum von Justiz und Rechtswissenschaft gelten, das Berlin nicht nachstand. Als Martin Drucker seine Ausbildung abschloß, war der Reichsgerichtsgebäude – in seiner Monumentalität eine Art Konterbau zum Reichstagsgebäude in Berlin – gerade fertig; 1895 fand die Einweihungsfeier statt. Und dieser zentralen

2 Staatsarchiv Leipzig (StAL), Börsenverein der deutschen Buchhändler F 1016, F 6413.

3 M. Drucker, Die Gebührenordnung für Rechtsanwälte vom 7. 7. 1879, Leipzig 1904.

4 F. Grübel besorgte von New York aus die Neuausgabe: Festschrift Martin Drucker zum 65. Geburtstag (6. 10. 1934) in Freundschaft und kollegialer Verehrung überreicht, herausgegeben von J. Magnus, Privatdruck Leipzig 1934, Faksimiledruck Aalen, 1983.

5 Manuskript, in der Familie verwahrt.

6 Staatsarchiv Dresden, Justizminister D 167 Bl. 35.

7 M. Drucker (sen.), Blüten aus dem Treibhaus der Lyrik, Leipzig 1882.

8 Alma mater Lipsiensis. Geschichte der Karl-Marx-Universität Leipzig, herausgegeben von L. Rathmann, Leipzig 1984 S. 191 ff.





Stellung wegen hatte auch der Deutsche Anwaltverein – 1871 in Bayreuth gegründet – 1879 Leipzig als Sitz gewählt.

Über die ersten Prozesse des jungen Rechtsanwalts ist nichts mehr bekannt. Aufsehen erregte er erstmalig als Verteidiger des Hauptangeklagten im Leipziger-Bank-Prozeß 1902. Der Zusammenbruch dieser Bank scheint von Berliner Großbanken geradezu letztlich provoziert worden zu sein, um in der Messemetropole Fuß fassen zu können, wo viele Fäden des sächsischen Industriegebietes, des zweitwichtigsten im Reich nächst dem Ruhrgebiet, zusammenliefen. Der Prozeß machte Schlagzeilen. Wochenlang berichteten alle Zeitungen am Ort, und selbst Berliner Blätter äußerten sich ausführlich<sup>9</sup>. Daß Martin Drucker den Freispruch vom Anklagepunkt des betrügerischen Bankrotts durchsetzen konnte, wertete Fritz Grübel, der um 1930 Mitarbeiter des Justizrats war „als das Ergebnis von Druckers scharfsinniger Analyse komplizierter Wirtschaftsvorgänge und bis dahin kaum erprobter Gesetzesvorschriften“<sup>10</sup>.

Als 1929 aus Anlaß des fünfzigjährigen Bestehens des örtlichen Leipziger Anwaltvereins eine Festgabe publiziert wurde, ist darin auch von den beiden Druckern die Rede. Der Senior hatte den Verein mitgegründet und viele Jahre im Vorstand gesessen. Das Jahr 1879 ist ja eines der herausragenden in der deutschen Rechtsgeschichte, denn es vollzog sich damals der Prozeß der Vereinheitlichung des Rechts gegenüber den Ländern, eine der großen Leistungen des Bismarck-Reiches. Das Gerichtsverfassungsgesetz, die einheitliche Straf- und die Zivilprozeßordnung traten in Kraft, dazu die Rechtsanwaltsordnung, die geradezu die Anwälte herausforderte, sich zu organisieren. Auch Martin Drucker jr. ist in der Festschrift genannt, weil er 1906–1909 Vorstandsmitglied war. Dann wurde er in den Vorstand des Deutschen Anwaltvereins, der Dachorganisation, gewählt, sichtlich aufgrund einer Nominierung durch die örtliche, den Leipziger Landgerichtsbezirk umfassende Organisation. Es heißt dort 1929: „... daß es unserem Verein vergönnt war, dem deutschen Anwaltsstande in Justizrat Dr. Drucker den opferwilligen und erfahrenen Führer von durchdringendem Verstande und nie ermüdenden Sinn für die Ideale unseres Berufes zu präsentieren“<sup>11</sup>.

Martin Drucker sah sich in dieser Verantwortung mit nicht wenigen problematischen Seiten in der Stellung der deutschen Rechtsanwälte konfrontiert. Der DAV hatte in der Zahl seiner Mitglieder gerade die 10 000 überschritten. Bis zum Ende von Druckers Präsidentschaft näherte er sich den 20 000. Blättert man das Anwaltsblatt und die Wochenschrift durch, die von Heinrich Dittenberger und Julius Magnus redigiert wurden, treten einem die dringlichen Themen dieser Jahre entgegen, wie sie auch auf den Vertreterversammlungen und oft streitbar – sozusagen im Parlament des Vereins – debattiert wurden. Einige der Themen waren die umfassende anwaltliche Vertretung sowohl vor Gericht wie vor Behörden und in diesem Zusammenhang Grundfragen des Arbeitsrechts, die Simultanzulassung, die Anwaltsgenossenschaft – sie stand besonders 1928 zur Diskussion –, die eigenen sozialen Probleme der Anwaltschaft – sie traten in den Inflationsjahren und erneut während der Weltwirtschaftskrise in den Vordergrund –, vor allem aber, und dies mit allem politischen Akzent: der Schutz der freien Anwaltschaft.

Man muß sich dazu die Position der Justiz in der Weimarer Republik vergegenwärtigen. Viele Staatsanwälte und Richter waren nach 1918/19 antirepublikanisch eingestellt, übten Milde gegenüber gewissen Verbrechen, wie sich schon bei der Untersuchung und Ahndung der Morde an Karl Liebknecht und Rosa Luxemburg zeigte. Im Unterschied, ja im Gegen-

satz dazu kann gesagt werden, daß die Mehrheit der Anwaltschaft zu den Anhängern der Republik zählte und ausgesprochen demokratisch eingestellt war; auf alle Fälle galt das für den Anwaltverein. Und das kam auch in der Person seines Präsidenten zum Ausdruck. Allerdings ist zu beachten, daß es daneben noch, wenn auch weit kleineren Umfangs, z. B. den „Reichsbund deutsch-nationaler Rechtsanwälte und Notare“ gab, die Rechtsanwaltsvereinigung „Schwarz-weiß-rot“ bestand und offen faschistische Kräfte sich auch unter den Anwälten zu organisieren angingen.

Was nun den Präsidenten des Anwaltvereins anbelangt, so sei folgendes hervorgehoben: Von ihm stammt, und zwar zuerst geäußert 1923, noch in seiner Stellvertreter-Zeit, die Forderung nach umfassender anwaltlicher Vertretung bei ausnahmslos allen Gerichten wie vor Behörden. Martin Drucker legte dazu 1923 dem Reichsjustizminister einen Gesetzentwurf zur Zulassung „bei den Verwaltungsgerichten“ vor. In der Begründung schrieb er, daß es bis dahin der Anwaltschaft nicht gelungen sei, „dem Grundsatz, daß der Anwalt als berufsmäßiger und staatlich bestellter Parteivertreter überall und ausnahmslos als Bevollmächtigter und Beistand zu wirken befugt ist, zu allgemeiner Anerkennung zu verhelfen“. Er kam damit nicht durch, auch als er in den folgenden Jahren mehrmals darauf zurückgekommen ist, wie die Akten des Reichsjustizministeriums auszuweisen. So verlangte er 1927 namens des Anwaltvereins, „den Anwaltszwang“ festzuschreiben und formulierte dazu acht Grundsätze. Im dritten Grundsatz hieß es: „Der Rechtsanwalt darf von keiner Behörde, keinem Gericht und keinem Schiedsgericht . . . bei der Vertretung oder Beistandschaft zurückgewiesen werden und darf auch nicht im Laufe des Verfahrens umgangen werden.“ Er drängte darauf im Sinne eines „allgemeinen Rechtspflegeinteresses“<sup>12</sup>.

Im Jahre 1924 setzte er sich dafür ein, im Reichsjustizministerium einen Anwaltsreferenten einzusetzen. Ein Resultat ist nicht erkennbar. Im folgenden Jahr sah er sich veranlaßt, einen Protest an den Reichsjustizminister zu richten. Das Berliner Polizeipräsidium ermittelte damals gegen zwei Anwälte in Hagen/Westf., weil sie Verteidiger im Auftrage der „Roten Hilfe“ waren. Wir möchten Martin Drucker so oft als möglich selbst sprechen lassen und daher aus seinem Schriftsatz zitieren. Er schrieb damals: „Wir halten es aber für völlig unzulässig, ein derartiges Vorgehen gegen den Rechtsanwalt lediglich aufgrund der Tatsache einzuleiten, daß der Anwalt in einem gewissen Verfahren oder in einer gewissen Gruppe von Strafprozessen die Verteidigung geführt hat oder sonst berufstätig geworden ist. Wir erblicken darin eine außerordentliche Gefährdung der freien Berufsausübung . . ., deren Aufgabe es ist, nach pflichtgemäßem Ermessen sich dem rechtsuchenden Publikum gegenüber dem Strafanspruch des Staates zur Verfügung zu stellen.“ Beide Anwälte gehörten nicht zur KPD, standen ihr persönlich ganz fern. In denkbar deutlichen Worten wendet er sich gegen Verdächtigungen: „Wir halten diesen Standpunkt für gänzlich unmöglich“, und er verlangt, daß der Anwalt „unversehrt bleiben muß“. Immerhin hat sich der Reichsminister daraufhin an den preußischen Innenminister gewandt<sup>13</sup>. Eine große Auseinandersetzung wurde um das

<sup>9</sup> Als Beispiel sei nur verwiesen auf den Bericht über den 29. Verhandlungstag in der Leipziger Volkszeitung v. 19. 7. 1902.

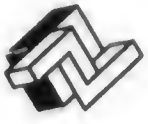
<sup>10</sup> Zitiert nach der Einleitung zur Festschrift von 1934.

<sup>11</sup> Festschrift zur Feier des fünfzigjährigen Bestehens des Leipziger Anwaltvereins 1879–1929, Leipzig 1929 S. 23.

<sup>12</sup> Zentrales Staatsarchiv Potsdam (ZStAP), Reichsjustizmin. 4407 Bl. 11 ff., 84 ff., 179, 184; ebd. 4409 Bl. 175.

<sup>13</sup> Ebd. Bl. 48 ff.





Arbeitsgerichtsgesetz geführt, denn es schloß den Anwalt von Arbeitsgerichtsprozessen aus. Es ist keine unmittelbare Äußerung Martin Druckers dazu überliefert, aber Heinrich Dittenberger schrieb im Januar 1926: „Der Vorsitzende des Deutschen Anwaltvereins hat im Oktober vergangenen Jahres treffend hervorgehoben, daß nicht der Stand der Anwälte als solcher das Angriffsobjekt dieser Ausschlußbestrebungen ist, sondern daß der Angriff sich gegen die Aufgabe . . . richtet . . ., die er sich nicht entwinden lassen werde: Es handle sich nicht darum (das ist der entscheidende Satz von Martin Drucker, und er ist einer der wichtigsten überhaupt), den Rechtsanwalt aus dem Gerichtssaal hinauszusweisen, sondern darum, das Recht hinauszusweisen“. Und es ist der Finger auf die gefährliche Wunde der Weimarer Republik gelegt, wenn es dann heißt: „Der . . . zur unbeirrbar Vertretung des Rechtsgedankens erzogene Rechtsanwalt ist allen denen ein Dorn im Auge, die anderes anstreben als die Verwirklichung des Rechts“<sup>14</sup>.

Wenn der Historiker die Quellenbasis – in zugegeben ungewöhnlicher Weise – wechseln darf, dann sei erinnert an Worte von Franz Kafka in seinem Romanfragment „Der Prozeß“, das Max Brod 1925 aus dem Nachlaß herausgegeben hat. Im 7. Kapitel heißt es dort über den Advokaten: „Unter diesen Verhältnissen ist natürlich die Verteidigung in einer sehr ungünstigen und schwierigen Lage . . .“ Sie „ist nämlich durch das Gesetz nicht eigentlich gestattet, sondern nur geduldet, und selbst darüber, ob aus der betreffenden Gesetzesstelle wenigstens Duldung herausgelesen werden soll, besteht Streit . . .“<sup>15</sup>.

Der Präsident wie der gesamte Vorstand verteidigten in einer hellwachen, immer im Kampf um einen Rechtsstaat stehenden Position die Ergebnisse und Chancen des November 1918. Es nimmt daher nicht wunder, was im Frühjahr 1933 mit dem DAV geschah.

Der Anwaltverein ist auch international wirksam geworden. Beispielsweise veranstaltete er gemeinsam mit der Leipziger „Deutsch-Französischen Studiengesellschaft“ einen Vortrag des Strafverteidigers Maurice Garçon über Justizirrtümer, der in der Forderung nach Abschaffung der Todesstrafe gipfelte. Anschließend würdigte der Presse zufolge „der Präsident des DAV, Justizrat Martin Drucker, in einer herzlichen Dankansprache an den Pariser Gast dessen Methode . . ., von der Aetiologie schließlich doch zu einer Therapie der Justizirrtümer vorzudringen“. Der Gast erwiderte darauf, Leipzig sei ihm „als klassische Stätte der Jurisprudenz und der Bücher schon in seiner Schulzeit ein bedeutungsvoller Begriff gewesen“<sup>16</sup>. Unter den Teilnehmern ist übrigens Karl Goerdeler genannt, der gerade zum Oberbürgermeister gewählt worden war. Vermutlich sind beide bei dieser Gelegenheit einander sogar zum ersten Mal begegnet. Martin Drucker gehörte im Kriege zu den Leipziger Kräften des 20. Juli um Goerdeler und Walter Cramer, dem Chef des Stöhr-Konzerns, der gleichfalls in Plötzensee hingerichtet wurde.

Zu den internationalen Aktivitäten des DAV zählte 1931 der Juristenkongreß in Luxemburg, der sich vor allem mit dem Frieden und dem Asylrecht befaßte. Es ging um die Forderung, Kriegsprovokationen unter Strafe zu stellen. Julius Magnus hat die deutsche Delegation geleitet, jener vertraute Freund Druckers, der 1934 der Herausgeber der Festschrift gewesen ist und neben Fritz Grübel zu ihren Initiatoren zählte<sup>17</sup>.

Man kann den Eindruck gewinnen, daß der DAV 1927/28 seinen Höhepunkt erreichte, als sich die damals etwa 40, später 50 örtlichen Anwaltsorganisationen im Reich ihm voll integrierten. Bis dahin standen sie in einer nur losen Verbin-

dung zu ihm. Damit war eine neue Satzung verbunden. Das Personal der Geschäftsstelle am Leipziger Nikischplatz – das Haus blieb von den Bomben verschont – nahm zu. Aber mit dieser Entwicklung wuchs auch die „Gefahr der Verlegung nach Berlin“<sup>18</sup>, wie das 1928 aus Leipziger Sicht hieß. Martin Drucker war an diesen neuen organisatorischen Grundlagen maßgeblich beteiligt. Es sei erwähnt, daß er zahlreichen Beratungsgremien des Vereins vorstand. Im Anwaltsblatt sind Protokolle publiziert, die seine souveräne Art zeigen, Debatten zu leiten und selbst bei den strittigsten Fragen einen Ausgleich herbeizuführen. Als es 1925 im vornehmen Gesellschaftshaus „Harmonie“ in Leipzig um die Simultanzulassung ging, meinte er, mit Hilfe solcher Kollegen den Konsens herbeiführen zu können, die keiner der beiden gegensätzlichen Gruppierungen angehörten. Er fand wieder einmal den Kompromiß, und das Protokoll vermerkt: „Hierauf wurde dem Antrag Druckers gemäß beschlossen“<sup>19</sup>.

Als bekannter Strafverteidiger hatte Martin Drucker schon 1910 den Vorsitz im Strafrechtsausschuß des Anwaltvereins übernommen. Bei der nach 1919 geplanten Strafrechtsreform setzte er sich u. a. für die Ausweitung des Rechtsmittels der Berufung ein, kämpfte gegen die „Nichtachtung der Rechte der Beschuldigten“ und warnte vor der Gefahr einer „Rückkehr zu den Praktiken des Obrigkeitsstaates“. Das „auffallende Verblässen des Rechtsstaatsgedankens“ bis hin zur Möglichkeit einer „Legalität der Diktatur“ hat die demokratischen Kräfte der Anwaltschaft gerade 1932 stark beschäftigt. Zu seinen letzten Aktivitäten im Präsidentenamt gehörte, daß er sich Anfang 1932 in einer Stellungnahme zu Ersparnisabsichten der Justiz energisch gegen die Zulässigkeit schriftlicher Zeugenaussagen wehrte und das Prinzip der Mündlichkeit und Unmittelbarkeit verteidigte<sup>20</sup>.

Daß Martin Drucker mit der 28. Abgeordnetenversammlung, die im April 1932 noch einmal in Leipzig abgehalten wurde, aus seinem Amt ausschied, hing mit der Sitzverlegung nach Berlin zusammen. Er hatte sich für den Verbleib stark gemacht und wurde überstimmt. Der DAV schuf eigens für ihn das Amt des Ehrenpräsidenten, „um die unersetzliche Mitarbeit des bisherigen Präsidenten . . . zu erhalten“<sup>21</sup>. Und dieses Votum, das ausschließlich seiner Person galt, fiel einstimmig aus. Eine tatsächliche Mitarbeit Druckers hat es danach aber nicht gegeben. Dazu hatten sich auch die politischen Gewichte unmittelbar nach der Entscheidung zu sehr verschoben, wie das Juli-Heft des Anwaltsblattes deutlich genug zu erkennen gibt. Der neue Präsident, der Berliner Rudolf Dix, sah sich veranlaßt, gegen die Anwaltschaft gerichtete antisemitische Ausfälle, zu denen es im preußischen Landtag gekommen war, zurückzuweisen. Andererseits glaubte man Freisler nachgeben zu müssen, als er in diesem Zusammenhang den Abdruck seines Briefes verlangte.

Historiker kommen zu dem Ergebnis, daß Anfang 1933 eine durchaus schon gemeinsame Plattform von Justiz und Faschismus existierte auf der sich der Marsch von Richtern und Staatsanwälten in das „tausendjährige Reich“ vollzog. Es gab dieses grausige Phänomen der problemlosen Integration, die „Normalität der Selbsteingliederung der deutschen Ju-

14 AnwBl 1926, S. 2.

15 F. Kafka, *Der Prozeß*, Leipzig (Reclam) 1989.

16 Neue Leipziger Zeitung v. 8. 6. 1930.

17 ZStAP, Reichsjustizmin. 4409 Bl. 163, 171; vgl. J. Magnus, *Die Rechtsanwaltschaft*, Leipzig 1929.

18 Stadtarchiv Leipzig, Kap. 35, 1243 Bl. 11.

19 AnwBl 1926, S. 23.

20 Jurist. Wochenschrift 1932, S. 918 ff., 1331.

21 AnwBl 1932, S. 115, 122.





stiz“<sup>22</sup>. Das galt nicht ausnahmslos und läßt sich nicht ohne Beachtung einiger Schattierungen aussprechen. Dazu sei hier die These gewagt: Diese „Normalität“ galt nicht für den größten Teil der Anwälte! Kein anderer als Freisler – er war damals Staatssekretär im preußischen Justizministerium – hat drohend und schließlich unter Nennung von Tag und Uhrzeit dem Vorstand des Anwaltvereins ein Ultimatum gestellt. Hier fiel den Nazis die „Gleichschaltung“ nicht so leicht. Rudolf Dix wollte die verlangte Auflösung wenigstens noch satzungsgemäß abwickeln, da wurde er schon von den Braunen im eigenen Lager überholt. Und gleich folgten eilfertige Telegramme; „den Stand (der Anwälte) von politisch unzuverlässigen Persönlichkeiten zu säubern“, wie sich ein örtlicher Anwaltverein äußerte. In dieser Art wurden sogar noch schärfere Bestimmungen gegen „jüdische und marxistische“ Anwälte verlangt, als sie die Naziführung anfangs für zweckmäßig hielt<sup>23</sup>. Das „Schlucken des Anwaltvereins“ durch die faschistische Juristenorganisation ereignete sich am 18. Mai 1933. Mit dem Juni-Heft eignete sich Frank die Herausgeberschaft der Wochenschrift an und löste die bisherige Redaktion gewaltsam ab<sup>24</sup>. Ende September 1933 folgte der groß aufgezogene Juristentag in Leipzig. Zu diesem Zeitpunkt war das Unrecht schon zur gesellschaftlichen Norm gemacht, „die Revolution des deutschen Rechts“ vollzogen, wie das damals im „Völkischen Beobachter“ hieß. Der schrieb übrigens zur Vorbereitung des Juristentages, er sei von „ungeheurer Bedeutung“. Tatsächlich war er so ungeheuerlich wie der Reichstagsbrandprozeß, dessen Inszenierung in Leipzig gerade lief.

Die Zahl der Verfahren, in denen Martin Drucker als Verteidiger fungierte, ist Legion. Aber nur ganz wenige sind dokumentiert; und auch diese nur fragmentarisch. Kein einziger ist von seiner Seite, aus Schriftgut seiner Kanzlei greifbar. Immerhin lassen sich drei nennen: je einer von 1918, 1934 und 1942. Der Justizrat – den Titel hatte er 1917 erhalten – verteidigte gegen Ende des ersten Weltkrieges Bruno Apitz, den später bekannten Autor des Buchenwaldromans „Nackt unter Wölfen“. Apitz zählte damals kaum 18 Jahre. Er hatte 1917 in Leipzig ein Flugblatt an Rüstungsarbeiter gerichtet, in dem es hieß: „Unter dem trügerischen Schein der Vaterlandsverteidigung werden seit drei Jahren Väter und Brüder zur Schlachtbank geschleppt . . . Von dem Willen des Volkes hängt es ab, die schreckliche Kriegsfurie zu ersticken. Der Zorn über die Millionen bereits gefallener und verkrüppelter Mitmenschen muß . . . die Brandfackel in das tyrannische Gebäude brutaler Willkür und Unterjochung zündend werfen . . .“ Das Ziel war ein Demonstrationsstreik, um Friedensverhandlungen zu erzwingen. Apitz, der zum Arbeiterjugendbildungsverein gehörte, hat auf einer Streikversammlung vor Tausenden gesprochen. Er wurde wegen „versuchten Landesverrats“ vom Oberreichsanwalt angeklagt. Im Mai 1918 kam es zum Urteil gegen ihn und vier weitere Angeklagte, weil sie „der Kriegsmacht des Deutschen Reiches Nachteil zuzufügen“ beabsichtigt hätten. Es scheint bemerkenswert, daß man in der spärlichen Überlieferung in den Reichsgerichtsakten viel suchen muß, um den Namen des Verteidigers überhaupt zu entdecken. Weder in der Anklageschrift noch im Urteil findet er sich. Er ist nur beiläufig erwähnt<sup>25</sup>. Wir würden viel darum geben zu wissen, was Martin Drucker zur Verteidigung seines mutigen Mandanten vorgebracht hat. Ohne die originären Anwaltsakten enthält auch die dichteste Überlieferung von der Seite der Anklage und des Gerichts nur die halbe Wahrheit für die Geschichte!

Im Juli 1934 wollte er die Verteidigung des Widerstandskämpfers Richard Hofmann vor dem Volksgerichtshof – angeklagt wegen „Vorbereitung zum Hochverrat“ – überneh-

men. Bekannt ist das nur aus der beim Landgericht Leipzig über Martin Drucker geführten Personalakte, denn der Landgerichtspräsident schickte daraufhin an den Vorsitzenden des I. Senats des Volksgerichtshofes ein Schreiben mit seiner geharnischten Ablehnung. Aber daraus ist etwas zu zitieren: „Er (Martin Drucker) ist einer der klügsten Menschen und Juristen, die ich kenne, ein – wie sich ein guter Bekannter von ihm ausdrückte – talmudistisches Genie. Als solcher wird er hier allgemein für ungemein gefährlich beachtet . . .“ Wie schwer muß es dem Landgerichtspräsidenten gefallen sein hinzuzufügen: „Persönlich halte ich den Justizrat Dr. Drucker für einen durchaus anständigen Mann.“<sup>26</sup> Manches deutet darauf hin, daß Martin Drucker über seinen Sozius Eckstein doch noch wirksam werden konnte.

Und der dritte Prozeß sei erwähnt, der zugleich sein letzter sein sollte. Im Jahre 1942 war ein Arbeiter litauischer Nationalität namens Galeckas des Diebstahls beschuldigt worden. Martin Drucker verteidigte ihn und erreichte Freispruch mangels Beweises. Mit dem Freispruch in der Hand klagte er anschließend für den Arbeiter, der in der Zeit der Haft in einem Rüstungsbetrieb beschäftigt war und da pro Tag nur 10 Pfennige erhalten hatte, konsequenterweise den vollen Lohn ein. Das war den Machthabern zu viel, von „typisch liberalistischer Denkweise“ ist die Rede. Sie brachen den Stab über ihn, er wurde endgültig mit Berufsverbot belegt<sup>27</sup>.

Kehren wir noch einmal zu 1933 zurück. Als „Mischling 1. Grades“, von den Nazis als ein Mensch einer Art niederen Kaste eingestuft, verlor Martin Drucker nach dem April 1933 das Notariat. Schon im März 1933 ist er in einer Kampagne gegen demokratische und jüdische Anwälte während einer Verhandlung in Zwickau vorübergehend verhaftet worden. Fortan war er Schikanen ausgesetzt. Sein jüngerer Bruder, der Naturwissenschaftler Carl Drucker, Schüler und Assistent von Wilhelm Ostwald, dessen Professur für physikalische Chemie er 1911 übernommen hatte, wurde von der Leipziger Universität entlassen. Es glückte ihm zu emigrieren und in Uppsala seine Arbeit fortzusetzen. Martin Druckers junger Mitarbeiter Fritz Grübel durfte, weil jüdischen Glaubens, seine Tätigkeit nicht fortsetzen, und dem Justizrat selbst – mit KZ bedroht – sollte durch ein sog. Ehrengerichtsverfahren die Advokatur genommen werden. Zu dem Verfahren vor der Anwaltskammer in Dresden holte man einen Vorgang von 1930 heraus, der längst beim Reichsgericht geklärt worden war. Als Präsident des Anwaltvereins war Martin Drucker damals von seinem Berliner Kollegen zu einer völkerrechtlichen Problematik konsultiert worden. Es ging um einen Fall von Werkspionage, wobei – 1930 – der Beschuldigte im Saarland von der deutschen Polizei entführt und auf diese Weise über die Reichsgrenze gebracht worden war. Was man Martin Drucker vorwarf, war – nach fünf Jahren – nichts weniger als Beihilfe zum Landesverrat. Wes Geistes Kind die Beschuldigung war, zeigt sich schon darin, daß der Urteilstext mit der „nicht-arischen Abstammung“ beginnt und Martin Druckers Position auf eine Stufe mit kommunistischen und marxisti-

22 U. Dähn, Der Weg der deutschen Justiz in das nationalsozialistische Herrschaftssystem, in: Staat und Recht 1989 S. 549. Zu den Anwälten dagegen vgl. St. König, Vom Dienst am Recht. Rechtsanwälte als Strafverteidiger im Nationalsozialismus, Berlin/New York 1987. Hier werden z. B. Max Alsberg und Hans Litten behandelt, über Drucker S. 22 u. 68.

23 ZStAP, Reichsjustizmin. 4165/1 Bl. 8, 10, 15, 21 ff.; 4410 Bl. 94, 337; 4411 Bl. 349 ff.; Jurist. Wochenschrift 1933 S. 1225; AnwBl 1933, 1225, 1234.

24 H. Göppinger, Die Verfolgung der Juristen jüdischer Abstammung durch den Nationalsozialismus, Villingen 1963 S. 140; ZStAP, Reichsjustizmin. 4163; Völk. Beobachter v. 21. 9. 1933.

25 ZStAP, Reichsger. (Oberreichsanw.) C 128, 17/1–5.

26 StAL, LG Leipzig 1387.

27 Ebd.





schen Auffassungen gestellt wurde. Der Justizrat war Zeit lebens ein liberaler Mann, er hatte vor 1933 der Deutschen Demokratischen Partei angehört. Aber ganz falsch war diese Aussage dennoch nicht, weil nach 1933 die Frage eigentlich nur lauten konnte: dafür oder dagegen. Getroffen werden sollte der prominente Anwalt, der frühere Präsident der demokratischen Anwaltsorganisation. Glücklicherweise ist unter den wenigen persönlichen Papieren der Einspruchstext erhalten geblieben. Es wäre reizvoll, daraus ausführlich zu zitieren, denn diese Verteidigungsschrift stellt ein Schlüsseldokument dar, wobei es Martin Drucker kaum um die eigene Sache, vielmehr um ein Plädoyer für das Ethos des Anwalts überhaupt ging. Er polemisiert gegen die „völlige Verken nung der hohen Berufspflichten des Verteidigers“. Betont wird der Schutz der Individualinteressen, auch gegenüber dem Staat; und zwar „mit allen gesetzlich nicht verbotenen Mitteln“. Und da fällt der kategorische Imperativ anwaltlicher Tätigkeit: „Suprema lex clientis jus“<sup>28</sup>. Martin Drucker kämpfte mit seinen Waffen – und die Nazis hatten Grund sie zu fürchten –, mit intellektuellen Mitteln, mit Scharfsinn und Mut. Schon war vermerkt: „Durch Urteil 1. Instanz aus der Anwaltschaft ausgeschlossen; das Urteil ist noch nicht rechtskräftig, Jude . . . Politische Zuverlässigkeit zweifelhaft“<sup>29</sup>. Aber die Anwaltskammer in Dresden konnte den Ausschluß nicht aufrechterhalten. Man reduzierte auf eine Geldbuße. Auch das war ein Stück Erfolg im Kampf gegen den Faschismus.

An dieser Stelle sei an die anderen Juristen unter den Leipziger Widerstandskämpfern erinnert. Hierher gehören Wolfgang Heinze, Justitiar und dann einer der Direktoren des Köllmann-Konzerns, zum Tode verurteilt und Anfang 1945 hingerichtet wegen seiner Zugehörigkeit zu dem großen Leipziger Widerstandszentrum, das mit dem Namen von Georg Schumann verbunden ist<sup>30</sup>. Genannt sei Hermann Gottschalk jun., der kaum daß er das Studium abgeschlossen hatte, noch 1933 der Gestapo in die Hände fiel und – Jude und Sozialist – im KZ Dachau ermordet wurde. Genannt sei der Sozialdemokrat Hermann Reinmuth – seine Doktorarbeit galt dem Betriebsrätegesetz –, der nach langer Zuchthausstrafe in Waldheim schließlich im KZ Sachsenhausen umkam<sup>31</sup>. Zu nennen sind zwei Oberbürgermeister: Carl Goerdeler, hingerichtet mit anderen Männern des 20. Juli, und Erich Zeigner. Dieser war einst Justizminister Sachsens und 1923 sozialdemokratischer Ministerpräsident gewesen. Nach 1933 mehrmals verhaftet, stand er von 1945 bis zu seinem Tode 1949 an der Spitze der Stadt<sup>32</sup>. In dem nach dem Sturz der sächsischen Arbeiterregierung 1923 gegen ihn geführten Prozeß ist Martin Drucker sein Verteidiger gewesen. Und voller Hochachtung genannt sei Fritz Grübel, Verwaltungsdirektor der Israelitischen Religionsgemeinde Leipzig und in vorderster Reihe ihres Ringens um Selbstbehauptung, im Novemberpogrom 1938 verhaftet und in Buchenwald eingekerkert.

Im Jahre 1939 starb Martin Druckers Frau, Margarete geb. Mannsfeld. Sie ist die Schwester des Oberlandesgerichtspräsidenten und jenes sächsischen Justizministers gewesen, den die Nazis bei ihrer Machtergreifung abgelöst hatten. Beide Söhne – selbst Repressalien ausgesetzt –, aber dennoch zur Wehrmacht eingezogen, kamen im Krieg um. Und Martin Drucker mußte erleben, daß sein Freund Julius Magnus nach Theresienstadt deportiert und ermordet wurde. Er selbst vermochte sich im März 1945 des Zugriffs der Gestapo nur durch ein illegales Quartier in Jena zu entziehen.

Zurück in Leipzig, nahm er – im 76. Lebensjahr stehend – die Anwaltspraxis samt Notariat wieder auf. Während der amerikanischen Besetzung Leipzigs war er im Gespräch für

die Aufgabe des Oberbürgermeisters, lehnte aber mit Rücksicht auf sein Alter ab. Im Sommer 1945 wurde er zu einem Mitbegründer der Liberaldemokratischen Partei. Im März 1946 beging Martin Drucker das goldene Doktorjubiläum. Unter den Gratulanten war auch Alfred Neu, einst Justizminister der Zeigner-Regierung und nun Präsident des Landgerichts Leipzig. Ihm erwiderte der Justizrat u. a.: „Nebeneinander stehen wir nunmehr vor der hohen Aufgabe, in einem neuen Staatswesen, das nach Geistesfreiheit streben soll, den beiden Berufsgruppen der praktischen Juristen die ihnen gebührende Stellung wieder zu gewinnen, die in zwölf Jahren der Herrschaft des Ungeistes und der Rechtsverachtung erschüttert worden ist“<sup>33</sup>.

Vom Herbst 1946 ist das Manuskript einer Rede erhalten geblieben, die er in Dresden vor den sächsischen Anwälten gehalten hat. Er zieht darin einen Bogen von jener Rechtsvorschrift aus dem Jahre 1878, die den deutschen Rechtsanwalt sozusagen geschaffen hat, bis in die Gegenwart des Jahres 1946. Es ist eine Abrechnung mit dem Faschismus, der „den totalen Krieg führte gegen alles, was Freiheit und Menschenwürde bedeutete“ und auch das Berufsethos des Anwalts zu sterilisieren versuchte. Er legt darin das Bekenntnis ab zur Säuberung der Anwaltschaft von allen nazistischen Elementen. „Rechtsanwalt in Sachsen ist, darf nur sein, wer nazistische Irrlehren niemals geduldet . . . hat“. Aber er verweist auch darauf – und es war ein altes Spannungsfeld –, „daß an vielen Stellen die Anwaltstätigkeit gering geschätzt wird“. Er lehnt sich an einen seiner akademischen Lehrer, an Friedländer an, wenn er sagt: „Der Kampf ums Recht . . . erfordert eine Persönlichkeit, welche bei der Erfüllung ihrer Pflichten vor keiner anderen Autorität als vor dem Rechte selbst halt macht“. Und Martin Drucker fügt hinzu, was für sein Denken und Tun ganz wesentlich war: Er verweist auf die Ideen der französischen Aufklärung: „Das ist das Gedankengut, das Montesquieu der europäischen Zivilisation vererbt hat . . .“<sup>34</sup>. Diese Rede, gehalten nicht lange vor seinem Tode im Februar 1947, darf als sein Vermächtnis gelten.

### Vortrag zur Gedächtnisfeier für Dr. Martin Drucker am 22. Oktober 1989

#### Revidierter Text der Einleitung zur Festschrift zu Ehren des 65. Geburtstages von Dr. M. Drucker (6. Oktober 1934)

Dr. Fred Grubel, New York

Der Herr Justizrat würde gewiß befriedigt lächelnd diese schöne Feierstunde genossen haben:

Vor einigen Tagen hätte er das sagenhafte biblische Alter von 120 erreicht.

Er hatte die Präsidentschaft des Deutschen Anwaltvereins niedergelegt, weil der Anwaltstag beschlossen hatte, den Sitz des DAV von Leipzig nach Berlin zu verlegen und nun kommen die Kollegen von Berlin nach Leipzig, um seiner zu gedenken.

28 Manuskript, in der Familie verwahrt.

29 StAL, LG Leipzig 1387.

30 W. Weiß, Vom Tagebuch bis zum Todesurteil, Berlin 1988.

31 StAL, Nachl. Reinmuth.

32 W. Bramke, Erich Zeigner, in: Berühmte Leipziger Studenten, Leipzig 1984 S. 157 ff.

33 StAL, LG Leipzig 1387.

34 Manuskript, in der Familie verwahrt.





Die deutschen Juristen aus Ost und West treffen sich ihm zu Ehren in seinem Leipzig, das er in den turbulenten Nachkriegsjahren nicht verlassen wollte, weil er die Anwaltschaft seiner Heimat nach den mörderischen Jahren der Rechtsverachtung und Rechtsvernichtung nach den Grundsätzen von Recht und Menschlichkeit wieder aufbauen wollte.

Die Feierlichkeit findet im Gebäude des früheren Reichsgerichts statt, das – obgleich oder vielleicht gerade weil stets konservativ – als gerechtes Gericht dem Tyrannen zum Trotz Gregori Dimitroff im Reichstagsbrandprozeß freigesprochen hat.

Es mag ihm wohl auch Genugtuung gegeben haben, daß einer seiner jüdischen vom Nazistaat verfolgten und verjagten Referendare die Ehre hat, dieser historisch bedeutungsvollen Versammlung etwas von ihm, dem Chef des großen Anwaltsbüros, dem menschlichen und klugen Juristen, dem väterlichen Freund zu erzählen.

Im schicksalsschweren August 1939 erhielt ich in London, wohin ich mich in letzter Minute mit Frau und Kind hatte retten können, einen Brief von Martin Drucker. Seine tiefe Resigniertheit spricht aus den Worten: „Von mir ist, wie gewöhnlich, nichts zu berichten. Dazu würde sich eigentlich nur Erfreuliches qualifizieren. Daran fehlt aber.“ Diese Resignation würde der heutige Tag gewiß in Zuversicht verwandeln.

Nun ist endlich wieder eine erfreuliche Stunde gekommen. Martin Druckers Kollegen einer neuen Generation aus allen deutschen Landen und von verschiedensten politischen und sozialen Anschauungen nehmen ihn wieder zum Vorbild, wie er es für ihre Vorgänger gewesen ist zu der Zeit, als zum ersten Male das feierliche Schwarz-Rot-Gold Symbol deutscher Republik gewesen ist.

Heute erinnere ich mich, als wäre es gestern gewesen, an eine schöne, ernste, aber doch menschlich frohe und warme Stunde in Martin Druckers Landhaus in Großbothen – fast genau vor 55 Jahren, zu Druckers 65. Geburtstag. Der greise Geheimrat Adolf Heilberg, der von den NS-Häuptlingen unter Todesdrohung aus Breslau verjagte frühere Präsident der Schlesischen Anwaltskammer und der Breslauer Stadtverordneten, Vizepräsident des Deutschen Anwaltvereins, übergab dem Jubilar eine Festschrift mit den Worten:

„Mein lieber Drucker, 65 Jahre ist eigentlich kein Alter für eine Festschrift. Aber die Umstände, in denen wir jetzt leben, erlauben uns nicht zu warten. Gott allein weiß, was in den nächsten fünf Jahren über uns hereinbrechen wird. Und deshalb nehmen Sie mit unseren heißesten und herzlichsten Wünschen die wohlverdiente 70-Jahr-Festschrift im voraus zum 65. Geburtstag!“

Unter der Leitung von Julius Magnus, Berlin, dem hervorragenden Herausgeber der Juristischen Wochenschrift, hatten sich führende deutsche Anwälte der versunkenen Weimarer Republik und des vergangenen glitzernden Kaiserreichs zusammengeschlossen, um Martin Drucker, Ehrenpräsidenten des Deutschen Anwaltvereins und persona non grata des Hitler-Regimes, Respekt, Ehre und Dank durch diese Festschrift zu bezeugen. Druckers Sohn Heinrich, Kriegsoffer des Zweiten Weltkriegs, und ich, während und über die Referendarzeit hinaus mit dem „Justizrat“ beruflich mehr und mehr persönlich verbunden, waren Magnus' Assistenten für Korrespondenz und technisches Detail. Die Leipziger Firma Brandstätter übernahm den Druck und die Ausstattung des schönen Lederbandes, in dem die Festschrift dem Jubilar übergeben wurde. Wir waren stolz darauf, daß jeder um wissenschaftlichen oder zumindest finanziellen Beitrag gebetene Anwalt (ohne Unterschied der Religion – um nicht das Haß-

wort von „Rasse“ zu gebrauchen) bereitwillig seine Beteiligung erklärt hatte. Besonders bewegt hat uns die große und schöne Geste der Witwe des bedeutenden Strafverteidigers, des Strafrechtlers Max Alsberg, der Vertreibung und Exil kurz vorher durch Selbstmord beendet hatte. Sie stellte uns den bis dahin unveröffentlichten Aufsatz „Das Plädoyer“ als posthumes Freundschaftsgeschenk für die Festschrift zur Verfügung. Wir alle, Martin Drucker und seine Familie, und die Gruppe von Freund-Kollegen unter der Führung Heilbergs als dem Senior, fühlten, daß der letzte Lichtschein von auf dem Prinzip absoluter Gerechtigkeit basierter Rechtspflege in Deutschland aus dieser Drucker-Festschrift herausleuchtete, während um uns herum die Nacht der Tyrannei und der nach dem Gutdünken der neuen Machthaber zurechtgebogenen Unrechtspflege über Deutschland hereinsank.

Ein Satz der leider nicht über die Zeit der Kindheit hinausgehenden Lebenserinnerungen Martin Druckers charakterisiert ihn aufs treffendste als Mensch, Rechts-Anwalt, Standesführer. Drucker schreibt im Mai 1945:

„Meine Unnachgiebigkeit gegenüber Vorhalten, wenn ich sie für unberechtigt hielt, hat mich durch mein ganzes Leben begleitet . . . eine Überzeugung darf nicht preisgegeben werden, wenn der Mensch sich nicht selbst verleugnen, sich untreu werden, sich selbst belügen und betrügen will.“

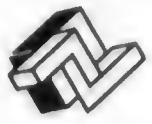
Der aufrechte Mann, der dieser Maxime auch in schwersten und schlimmsten Zeiten getreu geblieben ist, ist am 6. Oktober 1869 in Leipzig geboren. Am Anfang seiner Memoiren spricht er über seine Abstammung „nicht um widerlicher Rasseschnüffelei ein paar Brocken hinzuwerfen, sondern lediglich als Beitrag zur Familiengeschichte“.

Sein 1834 in Magdeburg geborener Vater, der spätere Leipziger Oberjustizrat Martin Drucker, war der Sohn eines jüdischen Ehepaars. Ein aus Holland eingewanderter Vorfahre war Hofjude der Kurfürsten von Hessen gewesen. Druckers Großvater übersiedelte später nach Leipzig und gründete eine Seidenhandlung von nicht nur lokaler, sondern internationaler Bedeutung. Er war ein führendes Mitglied der erst Anfang des 19. Jahrhunderts nach dem sehr späten sächsischen Judenemanzipationsrecht gegründeten Israelitischen Religionsgemeinde zu Leipzig. Seine Ehefrau war Amalie Fränkel aus Frankfurt/Oder. Als bereits Erwachsener ist Druckers Vater zur evangelisch-lutherischen Kirche übergetreten. Rechtsberater der Israelitischen Religionsgemeinde ist er jedoch geblieben, wie ich selbst aus den nunmehr verschwundenen alten Gemeindeakten ersehen habe.

Martin Druckers Mutter stammt aus protestantischen Familien. Sie ist die Tochter des in Altenburg geborenen Leipziger Stadtverordnetenvorstehers, des Advokaten und Notars Karl Klein und der Altenburgerin Konstanze Doelitzsch. Die Familie Klein kann nach Stettin zurückverfolgt werden. Die Doelitzsch sind seit Generationen Altenburger.

Der als Protestant geborene Martin Drucker betrachtete sich sein Leben lang als christlicher Religion angehörnd. Es ist jedoch bezeichnend, daß er in seinen Lebenserinnerungen nicht nur mit Liebe und Verehrung von seinem jüdischen Großvater berichtet, sondern auch wörtlich sagt: „Daß mein Vater von Juden abstammt, erhöhte in eigenartiger Weise meine Selbstachtung“. Ich selbst erinnere mich, von ihm gehört zu haben, daß er Anfang dieses Jahrhunderts als erfolgreicher, wohlsitruierter junger Anwalt es abgelehnt hat, sich in die Evangelisch-Lutherische Synode mit Aussicht auf spätere Präsidentschaft wählen zu lassen, „weil dies für den Sohn eines getauften Juden nicht passend war“.





Martin Drucker ist als ältester Sohn im Sechs-Kinder-Haushalt seiner seit 1865 verheirateten Eltern aufgewachsen. Seine Lebenserinnerungen spiegeln das uns heute märchenhaft erscheinende Leben der großbürgerlich-liberalen Gesellschaft des neuentstandenen aufblühenden Deutschen Reichs wieder, des Leipzig eines selbstbewußten handelsstolzen Bildungsbürgertums ohne Untertanengeducktheit. In größter Verehrung und Sohnesliebe beschreibt Drucker seines Vaters Leben, Erfolg und aufrechten Charakter ohne eine Spur von Ödipuskomplex.

Er absolvierte die Thomasschule, die als ältestes humanistisches Gymnasium der Stadt wohl auch heute noch (oder wieder) zu den besten Schulen des Landes zählt. Dann studierte Drucker die Rechte und promovierte 1896 zum Dr. jur. in Leipzig. Wetterleuchten in dieser sonnigen Zeit der 90er Jahre waren seines Vaters freiwilliger Verzicht auf die Alterherrenschaft in der Pauliner Sängerschaft-Verbindung wegen deren Einführung des „Arier-Paragraphen“ und ein Säbelduell, zu dem Drucker einen laut antisemitischen Kommilitonen herausgefordert hat. Der Duellgegner wurde später einer der frühesten Nationalsozialisten unter den Juristen und beging Selbstmord bald nach Hitlers Machtübernahme.

Druckers Auffassung vom Anwaltsberuf spiegelt sich bereits in einem Referendarerlebnis, von dem er gern und schmunzelnd berichtete. Als „bestellter Vertreter“ eines bereits als Rechtsanwalt etablierten Freundes verwies er „für immer“ einem Klienten das Betreten des Büros, weil er beim Herrn Rechtsanwalt juristische Rückendeckung für reichlich unsaubere Geschäfte gesucht hatte. Der aus den Ferien heimgekehrte Freund stellte fest, daß dieser „für immer“ verwiesene Geschäftsmann seiner jungen Anwaltspraxis bester Klient gewesen sei. Einige Zeit später, Drucker praktizierte bereits als junger Anwalt, erschien besagter Klient in Druckers Büro und gestand, daß Drucker ihm seinerzeit so imponiert hatte, daß er ihn von nun an zum ständigen Rechtsberater haben wolle. „Worauf ich den Mann zum zweiten Mal und nunmehr endgültig hinauswarf“, war das Ende der Geschichte. Die absolute Integrität, die aus dieser Episode spricht, ging soweit, daß Drucker – wie er mit, dem jungen „Kollegen“, versicherte – in dem Augenblick die Verbindung mit einem Klienten löste, da es sich ergab, daß mehr als ca. 20 % des Praxiseinkommens von diesem Klienten kam. Es war seine Überzeugung, daß der Anwalt nicht nur moralisch, sondern auch finanziell unabhängig bleiben muß.

Die Zulassung zur Anwaltschaft (Landgericht Leipzig) erhielt er 1896, wurde Partner seines Vaters und gründete zwei Jahre später seine eigene Familie. Er heiratete Margarethe Mannsfeld, Schwester des späteren sächsischen Oberlandesgerichtspräsidenten und Justizministers. Sie starb nach 40-jähriger Ehe kurz vor Ausbruch des Zweiten Weltkriegs. Zwei Söhne, obwohl in der Stallsprache der Nürnberger Gesetze „Mischlinge 2. Grades“, also genau wie ihr Vater „Menschen 2. Grades“ in den Augen der nationalsozialistischen Despotie, mußten im Heer dienen und beide, Heinrich und Peter Drucker, sind im Zweiten Weltkrieg gefallen. Die beiden Töchter, Sanitätsrätin Dr. Martina und Professor Dr. Renate Drucker, meine guten alten Freunde, geben uns heute die Freude und Ehre der Teilnahme an der Ehrung ihres Vaters.

Wie Martin Drucker seinen Kollegen erschienen ist, hat Heinrich Dittenberger, der als Erster Geschäftsleiter des Deutschen Anwaltvereins jahrelang in täglicher Zusammenarbeit mit Drucker gestanden hat, in dem Nachruf ausgedrückt (siehe Süddeutsche Juristenzeitung, Jahrgang 3, [1948], Nr. 7, Sp. 421/2), in dem er unter anderem ausführt:

„Drucker verkörperte das Ideal des Rechtsanwalts. Er verfügte über hervorragende Intelligenz und durchdringende Verstandesschärfe, über ein universales, immer bereites Wissen auf allen Rechtsgebieten, ein vorzügliches treffsicheres Judiz, über Menschenkenntnis und Verständnis für Menschliches, über Geistesgegenwart und Schlagfertigkeit und eine ausgezeichnete ungewöhnliche rednerische Begabung . . .“

Drucker war nicht „Fachanwalt“ im modernen Sinn. Er hat jedoch auf einigen Spezialgebieten große Bedeutung als Anwalt und als Rechtswissenschaftler gewonnen. Das vor ca. 100 Jahren neue Feld des „Immaterialgüterrechts“ war schon durch seinen Vater ein wichtiger Teil der Druckerschen Praxis geworden und wurde vom „Juniorpartner“ weiter gepflegt und entwickelt. Darüber hinaus wandte er sich ganz allgemein dem Handels- und Gesellschaftsrecht zu und wurde ein vielgesuchter Berater im immer komplizierter werdenden Recht der großen Geschäftswelt. Mit Klugheit, Takt und superber Sach- und Rechtskenntnis hat er schwierige Konfliktsituationen gelöst. Die Entwicklung der Aktienrechtsnovelle von 1931 und der damals neuen Institution des Wirtschaftsprüfers ist von ihm stark beeinflusst worden. „Die Qualität eines Rechtsanwalts zeigt sich nicht in der Anzahl der Prozesse, die er gewonnen, sondern in der Anzahl der Prozesse, die er vermieden hat“, gab er mir auf meinen juristischen Lebensweg als grundlegende Maxime mit.

In der Allgemeinheit hat aber wohl seine zum Teil Staunen und Aufsehen erregende Tätigkeit als Strafverteidiger, Kriminologe und Strafrechtswissenschaftler seinen weit über Leipzig hinausgehenden Ruf begründet. Diese Reputation etablierte er eklatant, als er in den ersten Jahren dieses Jahrhunderts als junger Anwalt im Strafprozeß nach dem international erschütternden Zusammenbruch der Leipziger Bank, einer der Großbanken jener Zeit auf Freispruch von der Anklage des betrügerischen Bankrotts plädierte. Druckers Stärke als Strafverteidiger war – ganz bewußt – nicht emotionelles Plädoyer, sondern scharfsinnige Analyse kompliziertester Sozial- und Wirtschaftsvorgänge und praktisch wenig erprobter Vorschriften der zu seiner Zeit noch sehr neuen weit- und tiefreichenden Gesetzgebung des jungen Deutschen Reichs. Bezeichnend ist seine Ansicht, daß ein Plädoyer für Gewährung mildernder Umstände den Verdacht . . . der Geistesfaulheit und juristischen Ignoranz des Verteidigers nahe legt.

Was der deutsche Rechtsanwaltsstand Martin Drucker verdankt, ist am besten von Dittenberger in dem schon zitierten Nachruf zum Ausdruck gebracht. Er schreibt über ihn:

„Vornehmlich ihm ist es zu verdanken, daß der Deutsche Anwaltverein im ersten Jahrzehnt des Jahrhunderts zu einer wahren Vertretung der Anwaltschaft ausgebaut wurde. Die Organisation des Vereins wurde deshalb von Grund auf umgestaltet. Das Organisationstalent Druckers bewährte sich hierbei bestens, so daß aus dem Umbau ein Instrument hervorging, das sich in mehr als zwanzigjähriger Arbeit voll bewährt hat. Das Instrument ist dann durch den Nationalsozialismus zerschlagen worden.“

Seine Arbeit im Deutschen Anwaltverein wurde durch Kriegsdienst im Ersten Weltkrieg unterbrochen. Als über 40-Jähriger wurde er eingezogen und hatte den Rang eines Vizefeldwebels. Als junger Mann nach Beendigung des Einjährigenjahres hatte er sich nämlich geweigert, das Formalgesuch um Offizierspatent Seiner Majestät zu unterbreiten. Laut und deutlich gegebene Erklärung dieses für seine Zeit und seine Gesellschaft unerhörten Affronts: „Ich wollte nicht zu Deutschlands arrogantester Kaste gehören!“ Erst nach einer rein zufälligen Begegnung zwischen dem Staatssekretär des Reichsjustizamts und dem uniformierten Vizefeldwebel





Drucker in den Couloirs des Reichsgerichts führte zu seiner Freistellung vom Heeresdienst.

Der 1917 zum Justizrat Ernante wurde 1924 Präsident des Deutschen Anwaltvereins. Im Herbst 1932 trat er von diesem Amt zurück, als gegen seinen energisch verfochtenen Widerstand die Verlegung des Sitzes des Deutschen Anwaltvereins von Leipzig nach Berlin beschlossen wurde. Drucker war überzeugt, daß die übermächtige Organisation der Berliner Anwaltschaft den Deutschen Anwaltverein als solchen erdrücken und zum Anhängsel Berlins machen würde. Die Ernennung zum Ehrenpräsidenten änderte nichts an seinem Entschluß, keine weitere Verantwortung für die von Berlin aus geführten Geschäfte zu übernehmen. Vielleicht hat ihm diese Haltung viel Unheil erspart; denn es ist kaum zweifelhaft, daß er der wenige Wochen nach der Sitzverlegung dekretierten nationalsozialistischen Gleichschaltung der Anwaltschaft sich weniger zahm gefügt hätte als seine Berliner Nachfolger.

Am schicksalsträchtigen 30. Januar 1933 war ich in Druckers Arbeitszimmer und berichtete ihm, daß soeben die Hakenkreuzfahne auf der Universität gehißt, aber nach kurzer Zeit wieder heruntergeholt worden sei. Wie so viele andere, war ich „weise“ genug zu erklären, daß doch nichts so heiß gegessen wie gekocht würde und daß der ganze Spuk wohl bald wieder verschwände. Drucker war ganz anderer Ansicht. Er nahm die Dinge so ernst wie nur möglich. Nur schwerste außenpolitische Komplikationen würden dem deutschen Volk die Augen öffnen, so daß es der zu erwartenden Gewaltherrschaft bewußt werden und sich der Staatsumwälzung erwehren würde. Freund und Berater von Karl Goerdeler, damals Oberbürgermeister von Leipzig, gehörte er zu den wenigen, die die Katastrophe voraussahen. Seine Anwaltsarbeit dauerte an. Mehr und mehr Verfolgte suchten Druckers Rat und Hilfe, und er scheute sich nicht, auch bei den neuen Machthabern gegen Willkür und Verfolgung zu protestieren. Sein jüdischer Sozius, Erich Cerf, verlor die Anwaltszulassung, und eine Leipziger NS-Zeitung, deren Name mir entfallen ist, warnte in einem Artikel „So geht das nicht, Herr Justizrat!“. Daß Drucker und sein anderer Partner Curt Eckstein die „Konsequenzen“ auf sich nehmen müßten, wenn die Juden Cerf und Grubel noch weiter Zutritt zu ihrem Büro hätten.

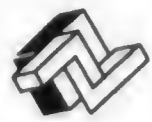
Nicht viel später wurde ein Ehrengerichtsverfahren gegen Drucker eingeleitet. Er war 1930 in seiner Eigenschaft als Präsident des Deutschen Anwaltvereins von dem Offizialverteidiger eines vom deutschen Geheimdienst illegal aus Frankreich nach Deutschland verschleppten Spions um Rat gefragt worden. Der Anwalt hatte, ohne Erfolg, bei der Reichsanwaltschaft die Niederschlagung des Verfahrens wegen der Illegalität der Festnahme beantragt. Als letzten Ausweg wollte er schriftlich die französische Regierung auf diese in keiner Weise geheime Sache aufmerksam machen. Drucker vertrat im Prinzip die Ansicht, daß ein Strafverteidiger rechtlich verpflichtet sei, alles zu unternehmen, was der Sache des Klienten günstig sein könnte, solange keine Gesetzesvorschrift dagegen steht. Von diesem Grundsatz aus hielt er den Plan des Verteidigers für legal und standesgeboten, riet jedoch, eine Druckschrift des Schreibens nach Paris offiziell zu den Akten des Reichsanwalts zu geben. Diesem Rat folgte der Verteidiger. Paris antwortete mit keinem Wort. Der Spion wurde verurteilt. Der Verteidiger wurde wegen des Pariser Kontakts vor dem Ehrengericht angeklagt, in erster Instanz freigesprochen, und auf Berufung erteilte ihm 1932 der Ehrengerichtshof beim Reichsgericht eine Warnung wegen fahr-

lässiger Verletzung der Standespflichten. Wegen dieser vier Jahre zurückliegenden Konsultation verfügte nun im Jahre 1934 das Ehrengericht der Sächsischen Anwaltskammer Druckers Ausschluß aus der Rechtsanwaltschaft. Auf Druckers Berufung wurde das Urteil 1935 vom Ehrengerichtshof auf eine Geldstrafe von 1000 RM reduziert.

Drucker konnte also seine Anwaltspraxis fortsetzen und tat dies unter sich steigernden Anfeindungen und Anpöbelungen. Er scheute sich nicht, immer riskanter werdende Verteidigungen vor dem Sondergericht zu übernehmen. Die Verbindung mit Karl Goerdeler und seinen auf die Befreiung vom Nazijoch hoffenden und darauf hinarbeitenden Freunden hielt er aufrecht. Lediglich seine Schwiegertochter wußte von gelegentlichen Zusammenkünften, und einmal im Jahre 1942 bemerkte Drucker zu ihr, daß sie keinesfalls auch nur das geringste darüber verlauten lassen dürfte. Es handle sich um Überlegungen, wie nach Beendigung des Naziterrors Deutschland zu organisieren und zu regieren sei. Er sei gebeten worden, die Reorganisation der Justiz zu übernehmen. Es ist ein beinahe unglaublicher Glücksfall, daß diese Verbindung ganz offenkundig der Gestapo unbekannt geblieben ist und Drucker nach dem mißglückten Attentat vom 20. Juli 1944 unbehelligt blieb.

Am 4. Dezember 1943 wurde das Gebäude, in dem Drucker seit Jahrzehnten seine Anwaltspraxis hatte, das Opfer eines Bombeneinschlags. Er verlor seine und seines Vaters reiche und große Fachbibliothek. Das Büro übersiedelte in Druckers Privatwohnung, aber noch im Dezember erhielt er einen Bescheid vom Reichsjustizminister, daß er gemäß der Verordnung zur Änderung und Ergänzung der Rechtsanwaltsordnung vom 1. 3. 1943 mit Wirkung vom 1. 1. 1944 wegen Erreichung der Altersgrenze, und „da die Bedürfnisse der Rechtspflege sein Verbleiben im Beruf nicht erfordern“, ohne Ruhegehalt in den Ruhestand versetzt werde und unter Strafanandrohung sich jeder juristischen Tätigkeit zu enthalten hätte. Im Einverständnis mit seinem Sozius Eckstein war Drucker trotzdem auch weiterhin insgeheim juristisch tätig, bis im Februar 1945 auch das Wohnhaus, wohin das Büro verlegt worden war, ausgebombt wurde. Drucker verlangte für sich und seine kriegsverwitwete Schwiegertochter und beide kleine Enkel Zuweisung einer neuen Wohnung, nur um durch einen Gestapo-Angestellten zu erfahren, daß dies Verlangen des Halbjuden als „Unverschämtheit“ angesehen wurde. Jeden Augenblick mußte daher die ganze Familie mit Verhaftung rechnen. Flucht nach Jena war die Rettung. Freunde beherbergten ihn und die Seinen verbargen sie, bis die amerikanische Armee das Gebiet besetzte. Die Militärregierung ließ Drucker aufsuchen und bot ihm an, das Amt des Oberbürgermeisters von Leipzig zu übernehmen. Der Wirrwarr des Kriegsendes machte jedoch seine rechtzeitige Rück-siedlung von Jena nach Leipzig unmöglich. Erst Anfang Juni 1945 kehrte er nach Leipzig zurück, um die Anwaltspraxis neu aufzunehmen und bei der Rehabilitation des Anwaltsstandes im Heimatbezirk zu helfen. Als er bei der amerikanischen Militärbehörde vorsprach, um nach den Besatzungsvorschriften zu beschwören, daß er in keiner Weise mit dem NS-Regime verbunden gewesen war, stellte es sich heraus, daß der für diese Angelegenheiten zuständige amerikanische Offizier der Sohn eines alten Freundes und Klienten war, des von den Nationalsozialisten als Juden verfolgten und verjagten Inhabers des bedeutenden Leipziger Musikverlags „Edition Peters“, Geheimrat Henry Hinrichsen. Major Hinrichsen nahm es auf sich, Martin Drucker ohne weiteres wieder zur Anwaltschaft zuzulassen und zwar ohne Eidesleistung. Druckers Versicherung seiner freiheitlichen Gesinnung





unter Eid zu nehmen, wäre unter seiner Würde gewesen, eine Beleidigung, deren sich die amerikanischen Militärbehörden nicht schuldig machen wollten.

Möglichkeiten auszuwandern oder nach dem Westen zu übersiedeln, bevor die amerikanische Armee im Juli 1945 Sachsen und Thüringen räumte, wollte Drucker nicht ausnützen. Er fühlte, daß er es seiner engeren Heimat schuldig sei, von Leipzig aus am Wiederaufbau von Recht und Gerechtigkeit zu arbeiten. Er versuchte, in Sachsen die Anwaltschaft nach seinen Grundsätzen der Freiheit und Rechtlichkeit neu zu beleben. Er hatte noch die Genugtuung, von der Leipziger Universität 1946 zum Goldenen Doktorjubiläum gefeiert zu werden. Am 22. Februar 1947 schied er aus diesem Leben. Sein Werk an einer neuen Rechtsanwaltsordnung konnte er nicht mehr vollenden.

Er schrieb zwar in seinen Memoiren: „Die geistige und sittliche Persönlichkeit des Menschen wird durch seine Umwelt und seine Schicksale geformt, nicht durch die Ahnen“. Trotzdem liegt der Gedanke nahe, daß Martin Drucker, Anwalt des Rechts, geformt war nicht nur durch Erlebnis und Erfahrung, sondern auch durch das glückliche Zusammenwirken seiner jüdischen und christlich-deutschen Vorfahren, ein schlagender Beweis gegen den Irrsinn des Rassenwahns, der solch unsagbares Unheil über Deutschland und die ganze Welt gebracht hat.

Es ehrt Sie alle, die heute für Recht und Gerechtigkeit in den deutschen Republiken Verantwortung tragen, daß Sie sich Martin Druckers erinnern und sein Leben und Denken zum Vorbild nehmen. Der Rechtsstand der Deutschen verdient erneut die Achtung der Menschheit, wenn die großen Worte, die am Anfang von Justinians Pandekten stehen, wieder Grundlage deutschen Rechts sind, die Worte, denen Martin Drucker in den dunkelsten Zeiten der Unmenschlichkeit stets treu geblieben ist:

*Iuris praecepta sunt haec:  
honeste vivere,  
alterum non laedere,  
suum cuique tribuere.  
Ehrenhaft leben,  
dem Nächsten kein Leid antun,  
jedem gewähren, was er verdient.*

### Ansprache: Erhard Senninger, München

Martin Drucker hat uns hier in Leipzig zusammengeführt, 57 Jahre nachdem er vom Amt des Präsidenten des Deutschen Anwaltvereins zurückgetreten ist, 42 Jahre nach seinem Tod. Mein Dank gilt allen, die dies ermöglicht haben, vor allem dem Rat der Vorsitzenden der Rechtsanwaltskollegien der DDR und an seiner Spitze Ihnen, sehr verehrter Herr Kollege Dr. Gysi, dem Kollegium der Rechtsanwälte zu Leipzig, und den beiden Festrednern dieser Gedenkveranstaltung, Herrn Kollegen Dr. Fred Grubel und Herrn Professor Unger. Ich schließe in diesen Dank Herrn Kollegen Gerhard Jungfer ein, von dem die Anregung zu einer Gedenkveranstaltung für Martin Drucker stammt. Wir sind tief bewegt, sehr verehrte Frau Professor Drucker und sehr verehrte Frau Sanitätsrat

Drucker, daß wir diesen Tag gemeinsam mit Mitgliedern der Familie unseres ehemaligen Präsidenten Justizrat Dr. Martin Drucker begehen dürfen.

Von Julius Magnus stammt der Satz, daß die Geschichte der Rechtsanwaltschaft eine Geschichte der menschlichen Kultur sei. Max Alsberg zitiert ihn in seinem Beitrag „Das Plaidoyer“ in der Festschrift für Martin Drucker.

Von der Gerichtsrede im alten Griechenland ist da die Rede und von dem Urteil Theodor Mommsen's über Cicero, der nicht nur ein schlechter Staatsmann, sondern auch ein schlechter Advokat gewesen sei, weil es ihm „an der Sachlichkeit des Könnens und Wollens“ gefehlt habe.

Wentworth wird erwähnt, der die Freiheit der Rede „die einzige Salbe, die die Wunden des Gemeinwesens heilen könnte“ genannt hat, und Briand, von dem Alsberg schreibt, er sei mit seinen Aufgaben gewachsen und zu dem großen, einsam großen unerhört beredten Ankläger eines verwerflichen und Anwalt eines besseren Europas geworden, als welcher er starb.

Julius Magnus, Max Alsberg – wir wissen, in welcher schrecklicher Weise sich an ihrem persönlichen Schicksal bewahrheitet hat, daß die Geschichte der Rechtsanwaltschaft eine Geschichte der menschlichen Kultur ist. Und auch Martin Drucker, dessen Name mit Geschichte und Geschick des Rechtsanwaltsstandes wie kein zweiter verbunden ist, blieben Verfolgung und Verleumdung, im Dezember 1943 schließlich auch der Entzug der Anwaltszulassung nicht erspart.

Geschichte ist nicht nur Erinnerung und Bewußtwerden der Vergangenheit, sondern daraus folgt auch ein Auftrag zur Gestaltung der Gegenwart. Rechtsetzung, Rechtsentwicklung, Rechtsverwirklichung, Rechtssicherheit sind, wer möchte das bezweifeln, ganz entscheidende Gestaltungselemente und der Rechtsanwaltschaft fällt dabei eine besondere Verantwortung zu. Denn Recht ist – wie Sprache – in Wirklichkeit nichts Starres, keine tote, sondern eine höchst lebendige Materie. Der wahre Sinngehalt einer Vorschrift wird oft erst spät erkannt, Widersprüche zwischen einzelnen Vorschriften lösen sich auf oder entstehen neu. Sinngehalt und Bedeutung der Gesetze unterliegen dem Wandel der Zeit. In Goethes Faust ist nachzulesen: Es erbten sich Gesetz und Rechte wie eine ew'ge Krankheit fort. Der dies sagt, ist Mephisto. Es dazu nicht kommen zu lassen, ist unsere Aufgabe.

Sein ganzes Leben ist Martin Drucker für Freiheit und Unabhängigkeit der Advokatur eingetreten, nicht nur um den Rechtsanwälten zu nützen, sondern weil hierin die unentbehrliche Grundlage für den Dienst zu erblicken ist, den Rechtsanwälte der Gemeinschaft zu leisten haben. In dem Spannungsfeld zwischen den Interessen der Gemeinschaft und den Belangen des einzelnen, zwischen dem Ermessen staatlicher Verwaltung und den Ansprüchen der Bürger, auch dem Anspruch auf Gleichbehandlung, bedarf es der Tätigkeit des Anwalts. Wo Sprachlosigkeit herrscht, müssen Anwälte das rechte Wort finden, in Offenheit und Sachlichkeit, wie Max Alsberg gesagt hat. Vertrauen erwerben und Vertrauen verdienen, Wunden heilen, Konflikte lösen, zur Verwirklichung des Rechts beitragen – dazu benötigen wir anwaltliche Freiheit und anwaltliche Unabhängigkeit, überall in der Welt. Wir haben als Anwälte keinen politischen Auftrag. Wir sind – selbstverständlich – ein Teil der Gemeinschaft, in der wir leben. Dies impliziert, wie ich meine, im Jahre 1989 auch, daß wir „Anwälte eines besseren Europas“ sein wollen und sein können; denn Recht stiftet Frieden, Frieden in der Gemeinschaft der Bürger und Frieden in der Gemeinschaft der Staaten.





Wir gedenken heute eines großen Leipziger Bürgers, eines Mannes, dessen Gedanken, dessen Taten und dessen Persönlichkeit weit über seine Lebensspanne hinaus Gültigkeit haben, wie dieser Tag sinnfällig macht. Ich meine, dieses Zusammentreffen heute, am 22. Oktober 1989 in Leipzig ist in seinem Sinne, im Sinne von Martin Drucker.

## Geplante Aufhebung des § 539 ZPO

Richter am LG Dieter Bochmann, Hannover

Mit Drucksache 11/4155 vom 9. 3. 1989 hat der Bundesrat dem Deutschen Bundestag den am 16. 12. 1988 beschlossenen Entwurf eines Gesetzes zur Entlastung der Zivilgerichte zugeleitet. Der Bundestag hat ihn am 21. 6. 1989 an den Rechtsausschuß überwiesen. Zielsetzung ist der rationellere Einsatz der Kapazitäten und der Abbau vermeidbarer Verfahrensschwernisse. Dabei wird das wesentliche Gewicht auf die erneute Erhöhung der Berufungs- und Beschwerdesumme gelegt. An ziemlich unauffälliger Stelle heißt es dann unter Artikel 1 zur Änderung der Zivilprozeßordnung in Ziff. 11: „§ 539 wird aufgehoben“. Diese Vorschrift ist, ohne daß dies offenbar richtig bemerkt worden ist, von immenser Bedeutung für den Ablauf des Zivilprozesses im Rahmen des Instanzenzuges. Sie lautet:

„Leidet das Verfahren des ersten Rechtszuges an einem wesentlichen Mangel, so kann das Berufungsgericht unter Aufhebung des Urteils und des Verfahrens, soweit das letztere durch den Mangel betroffen wird, die Sache an das Gericht des ersten Rechtszuges zurückverweisen“.

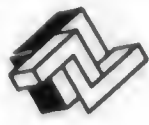
Hierzu bietet § 540 das Korrelat dahin, daß das Berufungsgericht von einer Zurückverweisung absehen und selbst entscheiden kann, wenn es dies für sachdienlich hält. In der Begründung wird dazu ausgeführt, eine solche Zurückverweisung bedeute stets, daß der Prozeß zum Nachteil der Parteien verzögert und verteuert werde. Auch möge eine Zurückverweisung von der ersten Instanz als „Schulmeisterei“ des Rechtsmittelgerichts empfunden werden, was deren Entscheidungsfreude – etwa im Rahmen der prozeßstraffenden Präklusionsvorschriften – hemmen könnte. Die durch § 539 ZPO ermöglichte Verteuierung und Verzögerung des Verfahrens seien so gravierende Nachteile, daß auf die Regelung verzichtet werden sollte. Ihr Fortfall würde zugleich das Ansehen der ersten Instanz stärken. Die Bundesregierung hat in ihrer Stellungnahme hingegen ausgeführt, die vorgeschlagene Regelung könne dazu führen, daß das Berufungsgericht die Grundlagen seiner Entscheidung selbst zu erarbeiten habe, sie wäre im Zivilprozeß systemfremd. Ihr sei nicht bekannt, daß die Anwendung der §§ 539, 540 ZPO in der Praxis zu Schwierigkeiten geführt hätte. Tatsächlich dürfte die Zurückverweisung der Ausnahmefall sein. Für 1986 hätten die Landgerichte in 2,2 %, die Oberlandesgerichte in 2,3 % der Fälle davon Gebrauch gemacht.

Aufgrund meiner Erfahrung aus einer zehnjährigen Tätigkeit in einer erstinstanzlichen Zivilkammer und der anschließenden vierzehnjährigen Arbeit in einer Berufungskammer des Landgerichts muß ich dem Standpunkt der Bundesregierung voll beitreten. Sicher führt die Zurückverweisung aufgrund der Eröffnung eines neuen Instanzenzuges zu einer Verteuierung und Verzögerung des Prozesses zum Nachteil der Parteien. Auch wird sie gelegentlich von der ersten Instanz durchaus als Belehrung empfunden werden. Dies stellt jedoch, wie unten zu erörtern, einen Effekt dar, der seinen guten Sinn hat. Soweit die Möglichkeit der Zurückverweisung die Entscheidungsfreude der ersten Instanz gerade im Rahmen der prozeßstraffenden Präklusionsvorschriften gegebenenfalls hemmt, führt dies im Ergebnis nur dazu, daß diese Bestimmungen entsprechend der Rechtsprechung des Bundesverfassungsgerichts und des Bundesgerichtshofes gleich von den Eingangsgerichten vorsichtig und zurückhaltend angewendet werden. Wieso eine Stärkung des Ansehens der ersten Instanz durch den Fortfall der Zurückverweisungsmöglichkeit eintreten soll, ist nicht ersichtlich. Die Parteien werden kaum Verständnis für eine auf Grund eines Verfahrensfehlers zustande gekommene Entscheidung des Richters am Amtsgericht oder der erstinstanzlichen Kammer aufbringen, wenn dann erst in der Berufungsinstanz die tatsächlich erforderliche umfangreiche, zeitraubende Sachaufklärung vorgenommen wird.

Damit ist auch schon die wesentliche Bedeutung dieser Vorschrift für den Ablauf des Verfahrens im Rahmen des Instanzenzuges angesprochen. Sie wird nämlich mit Rücksicht auf das Korrelat des § 540 ZPO in aller Regel nur in besonders schwerwiegenden und dazu geeigneten Fällen, namentlich dann, wenn das Berufungsgericht eine zeitraubende Sachaufklärung auf sich nehmen müßte, angewendet werden (vgl. Baumbach/Lauterbach, Komm. zur ZPO. 47. Aufl., 1 A zu § 539). Zwar wird der weit überwiegende Anteil der erstinstanzlichen Richter alles daransetzen, Verfahrensfehler zu vermeiden. In einer gewissen und leider doch ins Gewicht fallenden Zahl von Fällen ist der Richter des Eingangserichtes jedoch insbesondere in Folge der Arbeitsüberlastung geneigt, unter Hinnahme wesentlicher Verfahrensmängel kurzen Prozeß zu machen, anstatt sich einer sonst erforderlichen umfangreichen, arbeitsintensiven Aufklärung zu unterziehen. Hier bietet eine ab und zu erfolgte Zurückverweisung eine gute Möglichkeit, das erstinstanzliche Gericht zu genauerer, sachgerechterer Arbeit anzuhalten. Denn der Richter des Eingangserichtes wird sich nur ungern der Gefahr aussetzen, eine notwendige, erforderliche Sachaufklärung bei gleichzeitiger entsprechender Belehrung durch das Berufungsgericht nachholen zu müssen.

Ein ersatzloser Wegfall der Zurückverweisungsmöglichkeit wird darüber hinaus zum Auftreten entsprechender und hier noch gravierenderer Probleme in der zweiten Instanz führen. Denn auch ein Kollegium ist nicht dagegen gefeit, Verfahrensfehler zu begehen. Kann es nach der derzeitigen Rechtslage mit gleichem Arbeitsaufwand ein die Berufung zurückweisendes oder aber ein die Sache an das Gericht des ersten Rechtszuges zurückweisendes Urteil erlassen, so wird es eher geneigt sein, einem Verfahrensfehler das ihm zukommende Gewicht beizumessen. Scheidet die Möglichkeit der Zurückverweisung jedoch aus, so besteht die Gefahr, daß die zweite Instanz ebenfalls ein fehlerhaftes Verfahren wählt, um die ansonsten erforderliche umfangreiche Sachaufklärung zu vermeiden. Die Folge wäre jedenfalls bei Entscheidungen der Berufungskammern des Landgerichts ein weiteres Ansteigen der Verfassungsbeschwerden an das ohnehin stark





überlastete Bundesverfassungsgericht, soweit die Parteien nicht solche fehlerhaft ergangenen Entscheidungen resigniert hinnehmen. Insgesamt bietet § 539 ZPO ein ausgezeichnetes Instrument, einen sachgerechten Ausgleich zwischen dem Interesse der Parteien einerseits an einer raschen und andererseits an einer gründlichen Prozeßführung im Rahmen des Instanzenzuges zu erreichen. Ich halte es für sachlich falsch, diese Vorschrift ohne ausführliche Diskussion dieser Problematik einfach ersatzlos zu streichen.

Im übrigen ist der Bundesregierung darin beizupflichten, daß die Berufungskammern des Landgerichts tatsächlich nur in Ausnahmefällen von der Möglichkeit der Zurückverweisung Gebrauch machen. Nach eigener Kenntnis des Verfassers wird gerade beim Vorliegen von Verfahrensfehlern die Sache von der Berufungskammer regelmäßig abschließend erledigt, wenn eine Durchführung der fehlerhaft unterlassenen Sachaufklärung aufgrund prozeßleitender Maßnahmen im ersten Termin zur mündlichen Verhandlung möglich ist. Kommt dies nicht in Betracht, weil zu viele oder auswärtige Zeugen vernommen oder zeitraubende Sachverständigengutachten eingeholt werden müssen, so wird gleichwohl in jedem Fall lang und intensiv darüber beraten, ob dies ausnahmsweise ein Fall der Zurückverweisung nach § 539 ZPO ist oder ob die Kammer nicht doch von der Möglichkeit der eigenen abschließenden Entscheidung nach Durchführung der Beweisaufnahme in gesonderten Terminen gemäß § 540 ZPO Gebrauch macht. Dabei wird dem Gesichtspunkt, den Richter erster Instanz zu einer genaueren, sorgfältigeren Arbeitsweise anhalten zu können, eine um so größere Bedeutung zukommen, wenn bei Annahme des oben bezeichneten Gesetzesentwurfes durch den Bundestag in Zukunft Berufungen gegen Urteile des Amtsgerichts nur noch bei Erreichen einer Berufungssumme von mehr als 1 500,- DM möglich sind und der Beschwerdewert auf mehr als 200,- DM erhöht wird.

Für die Notwendigkeit der Erhaltung der Zurückverweisungsmöglichkeit des § 539 ZPO spricht auch die Tatsache, daß verschiedene Oberlandesgerichte (vgl. OLG Braunschweig, MDR 75, 671; OLG Hamm, MDR 77, 585; siehe auch Schneider, MDR 76, 52) entgegen dem BGH (vgl. BGH Z 50, 27) im Fall der unrichtigen Klagabweisung wegen Verjährung entsprechend § 538 I 2 ZPO von der Möglichkeit der Zurückverweisung Gebrauch machen. So hat die Kammer, der der Verfasser angehört, diesen Grundsatz auch auf Fälle einer unrichtigen Klagabweisung wegen der Versäumung von Ausschlußfristen im Rahmen des Reisevertragsrechtes nach § 651 g BGB angewendet (vgl. LG Hannover, NJW RR 87, 749; siehe auch LG Frankfurt NJW 87, 784). Auch in diesen Fällen tritt immer wieder die Situation ein, daß das Berufungsgericht bei anderer Beurteilung zu einer umfangreichen Sachaufklärung gezwungen werden kann. Es ist jedoch darauf hinzuweisen, daß die Berufungskammern auch bei diesen Verfahrenssituationen weithin von der Möglichkeit einer eigenen abschließenden Sachentscheidung nach § 540 ZPO Gebrauch machen.

## Gegen die Schwarzarbeit

– Sozialversicherungsausweis und weitere Meldepflichten \*) –

Rechtsanwalt Dr. Hermann Plagemann,  
Fachanwalt für Sozialrecht, Frankfurt a. M.

### I. Wichtige Fristen:

a) Ein-Wochen-Frist: Meldung des Beginns einer geringfügigen Beschäftigung innerhalb von einer Woche nach ihrem Beginn (§ 3 S. 2 DEVO). Ausnahme: Aushilfskräfte, die pro Monat nicht mehr als sechs Tage beschäftigt sind; hier reicht die Meldung bis zum 5. Werktag des Folgemonats, wenn dies die Krankenkasse „gestattet“ (§ 18 Abs. 1 a DEVO). Keine Meldepflicht: Beschäftigte im Haushalt, mitarbeitende Familienangehörige eines landwirtschaftlichen Unternehmers, geringfügig beschäftigte Schüler bis zum 16. Lebensjahr (§ 109 Abs. 1 Nr. 2 bis 5 SGB IV).

b) Ein-Wochen-Frist: Abmeldung eines geringfügig Beschäftigten innerhalb einer Woche nach dem Beschäftigungsende (§ 4 Abs. 1 DEVO).

c) Bis zum 31. März 1990: Anmeldung aller am 1. 1. 1990 geringfügig Beschäftigten bis zum 31. März 1990 (Art. II § 18 b SGB IV; § 22 Abs. 1 DEVO).

d) Zwei-Wochen-Frist: Anmeldung einer versicherungspflichtigen Beschäftigung innerhalb von zwei Wochen nach ihrem Beginn (wie bisher: § 3 S. 1 DEVO).

e) Sechs-Wochen-Frist: Abmeldung einer versicherungspflichtigen Beschäftigung innerhalb von sechs Wochen nach Beschäftigungsende (wie bisher: § 4 Abs. 1 DEVO).

f) Ab 1. Januar 1990: Sofortmeldung jedes Beschäftigten im Bau-, Schausteller- und Gebäudereinigungsgewerbe sowie solcher Personen, die beim Auf- und Abbau von Messen und Ausstellungen tätig sind (spätestens am Tage der Beschäftigungsaufnahme: §§ 103 SGB IV, 3 b DEVO).

g) Ab 1. Juli 1991: „Unverzügliche“ Kontrollmeldung solcher Arbeitnehmer, die nicht innerhalb von drei Tagen dem Arbeitgeber ihren Sozialversicherungsausweis vorgelegt haben (§ 102 SGB IV).

h) Zahlung des Gesamt-Sozialversicherungsbeitrages bis zum 15. des Folgemonats (§ 23 SGB IV i. V. m. der Satzung der jeweiligen Krankenkasse).

### II. „Schwarzarbeit“

Die Erfahrung lehrt, daß „Schwarzarbeit“<sup>1</sup> besonders häufig und nachhaltig in bestimmten Wirtschaftsbereichen (z. B. Bau-, Schausteller- und Gebäudereinigungsgewerbe) vorkommt, und zwar häufig nach dem gleichen Strickmuster: Löhne, die an sich die Beitragspflicht zur Sozialversicherung auslösen, werden auf mehrere Personen verteilt und als beitragsfreie (§ 8 SGB IV) Entgelte verbucht. Oder: der einzelne Arbeitnehmer hat mehrere geringfügige Beschäftigungen, ohne darüber seine Arbeitgeber informiert zu haben, so daß die sich aus der Mehrfachbeschäftigung ergebenden Beitragspflichten (§ 8 Abs. 2 SGB IV) nicht erfüllt werden<sup>2</sup>. Kranken-

\* Zum Gesetz zur Einführung eines Sozialversicherungsausweises vom 6. 10. 1989, BGBl. I, 1822. Die dazu ergangene 3. VO zur Änderung der 2. DatenerfassungsVO (DEVO) lag bei Abfassung des Manuskriptes i. d. F. der Bundesrats-Drucks. 584/89 vom 23. 10. 1989 vor. Zum Gesetz über den Sozialversicherungsausweis vgl. Schneider, BB 1989, 1974 und Finke, Die Angestelltenversicherung 1989, 401.

1 Im einzelnen streitet man darüber, was wirklich unter „Schwarzarbeit“ zu verstehen ist, vgl. Faupel, Soziale Sicherheit 1988, 18, 19; Verwaltungsprojekt Schwarzarbeit, Mitteilung der LVA Berlin 1988, 289, 291 f.

2 Vgl. dazu BSG, ZIP 1988, 539; ferner v. Einem, Die Sozialgerichtsbarkeit 1989, 364.



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IHR KONGRESS  
IN BONN  
AM RHEIN



Herrn Professor Dr. Ernst C. Stiefel  
Freiligrath Strasse 1  
4000 Düsseldorf 30

Sehr gelehrter Herr Professor!

Mit grösstem Interesse, sowohl vom sachlichen wie persönlichen Gesichtspunkt, las ich Ihren hervorragenden Beitrag zur Festschrift für Walter Oppenhoff über "Die deutsche juristische Emigration in den U.S.A.", auf den ich vor Kurzem aufmerksam gemacht wurde. Die Erinnerung an alte Zeiten wurde wachgerufen, und die Namen von guten, alten Freunden tauchten auf: Friedrich Kessler, dessen Anfänge in Yale ich miterlebte, als sein Ansehen in der Law School Fakultät und bei den Studenten von Jahr zu Jahr wuchs; Carl Fulda, mit dem ich gemeinsam in der Yale Law School "die Schulbank drückte" und der nun leider nicht mehr lebt. Aus Ihrem Bericht erfuhr ich über seine mannigfachen Arbeiten, von denen ich nichts wusste. Mir war nur noch bekannt, dass er in der ersten Zeit nach seinem Examen bei der Reform des New Yorker Rechts mitwirkte. Ich sah ihn das letzte Mal vor nunmehr fast 40 Jahren nach meiner Entlassung aus dem Militärdienst. Und dann Professor Rabel, der "Herr Geheimrat", der beim gemeinsamen Mittagessen der Mitglieder des Rabelschen und Bruns'schen Instituts im Berliner Schloss präsidierte - man durfte nicht zu spät kommen, um nicht auch noch den Zorn der wackeren Frau Fürst, die das Essen zur festgesetzten Zeit fertig haben musste, zu erwecken; Max Rheinstein, dessen



„Nachfolger“ ich 1946 in der Legal Division vom OMGUS in Berlin wurde. (Karl Löwenstein hatte mich nach Berlin gebracht.) Ich sah ihn später noch einmal in Chicago, als sein Augenlicht schon sehr schwach geworden war. Mit Gerhart Husert war ich eine Zeitlang beim OMGUS und HICOG zusammen. F. A. Mann war britisches Mitglied eines Kontrollratsausschusses in Berlin, der sich mit der „Reform des deutschen Rechts“ befassen sollte. Ich vertrat die U.S.A. in diesem Ausschuss. Sie erwähnen auch Martin Wolff, bei dem ich Sachenrecht, sein klassisches Fachgebiet, hörte und der mich im Referendarexamen am Kammergericht prüfte. Magdalene Schoch traf ich einige Male in Washington. Übrigens wird Kenler im Oktober während eines Alumni-Weekend in New Haven geehrt werden. Er erhält mit anderen (Mac Douglas, Rostow) eine Auszeichnung der Yale Law School.

Ich bin Ihnen dankbar, durch Ihren Aufsatz wieder von alten Freunden gehört zu haben. Und natürlich haben mich auch Ihre Ausführungen über die Emigration und das Schicksal deutscher Juristen in den U.S.A. aufs stärkste bewegt. Wie sehr kann ich nachempfinden, was Sie darüber geschrieben haben. Dass ich diese Jahre physisch und geistig überleben konnte - und dann noch fast 3 Jahre „beim Militär“ in vorgerücktem Alter - das erscheint mir jetzt fast wie ein Wunder.

Vielleicht würde ich einmal das Vergnügen haben, Sie persönlich kennenzulernen. Ich sehe aus Veröffentlichungen der Deutsch-Amerikanischen Juristen-Vereinigung, dass Sie gelegentlich an deren Veranstaltungen teilnehmen. Am 20. November findet das alljährliche Thanksgiving dinner hier in Bonn statt. Es wäre schön, wenn sich bei dieser Gelegenheit ein Zusammentreffen ermöglichen ließe.

Mit besten Wünschen und Grüßen.

Joachim von Elbe



V. File



# NEWSLETTER

Bonn

1/85

Januar 1985

## Die Vereinigten Staaten und der Wiederaufbau Deutschlands Ein Rückblick

Über dieses Thema sprach der 82jährige deutsch-amerikanische Jurist und ehemalige Rechtsberater der US-Militärregierung und US-Botschaft **Dr. Joachim von Elbe** bei der traditionellen **Thanksgiving-Feier** am 21. November 1984 im American Embassy Club in Bonn.

Das Interesse an dem Vortrag war so groß, daß die Veranstaltung mit über 200 Mitgliedern und Gästen den Rekord des Jahres aufstellte.

"Germany is wonderful" — dieser Slogan der amerikanischen Fremdenverkehrswerbung traf nicht auf jenes Deutschland zu, das Dr. von Elbe 1945 vorfand, als er als Mitglied der amerikanischen Streitkräfte nach 11jähriger Abwesenheit bei Aachen wieder deutschen Boden betrat. Wo immer er hinkam, sah er Trümmer und Schutt; Parkflächen, wie der Tiergarten in Berlin, waren in Ackerland umgewandelt und mit Kartoffeln und Kohl bepflanzt.

Diesem materiellen Trümmerhaufen entsprach der totale Zusammenbruch der deutschen Staats- und Rechtsordnung, der allerdings schon Jahre früher, mit der Machtübernahme durch die Nationalsozialisten, begonnen hatte. Dr. von Elbe illustrierte dies mit Beispielen aus Gesetzgebung und Praxis des "Dritten Reiches" und zeigte, wie die nationalsozialistische Führung bis zuletzt, über Hitlers Tod hinaus, in verblendeter Verkennung der Realität an ihren Zielen und Vorstellungen festgehalten hatte.

Nachdem jedoch die totale Besetzung deutschen Bodens durch die Truppen der Alliierten jeden militärischen Widerstand sinnlos gemacht und das Oberkommando der deutschen Wehrmacht die bedingungslose Kapitulation erklärt hatte, schlug am 9. Mai 1945 für Deutschland die "Stunde Null".

Würde es eine neue Zukunft für Deutschland geben oder würden Vergeltungsmaßnahmen der jetzigen Siegerstaaten, die von Deutschland mit diesem Krieg überzogen worden waren, die nun offen

zutage tretenden katastrophalen Zustände (Hungersnöte, Flüchtlinge, Kriegsgefangene, Zusammenbruch jeglichen Versorgungs- und Verwaltungssystems) weiter verschlimmern? Was war Amerikas Rolle in jener Situation? Was hatte es bewogen, in diesen Krieg einzutreten, einen europäischen Krieg um europäische Ziele? Welche Ziele verfolgte es selber und inwieweit beeinflussten sie seine Deutschlandpolitik? Mit diesen Fragen setzte sich Dr. von Elbe in seinen weiteren Ausführungen auseinander.



Dr. Joachim von Elbe

Hitler hatte den Vereinigten Staaten am 11. Dezember 1941 (4 Tage nach Pearl Harbour) den Krieg erklärt. Die Motive für diesen Schritt (nach Sebastian Haffner der "einsamste seiner einsamen Entschlüsse") sind unklar, sein Bündnis mit Japan hätte ihn nicht dazu verpflichtet. Die Vereinigten Staaten schätzten die "deutsche Gefahr" größer ein als die japanische, sie konzentrierten deshalb ihre Streitkräfte auf Europa ("Germany first") und beschlossen, den Krieg bis zur bedingungslosen Niederlage Deutschlands zu führen. Mit Großbritannien und der Sowjetunion bestand Einigkeit über das Kriegsziel: Deutschland sollte nie wieder die Fähigkeit besitzen, einen Krieg zu führen. Deshalb sollte es aufgeteilt werden. Dabei hatten die Alliierten unterschiedliche Teilungsvorstellungen (am weitesten gingen die der Amerikaner: Aufteilung von Deutschland in mehrere vollständig souveräne und entmilitarisierte Staaten, die lediglich durch ein Netz von Post-, Verkehrs-, Eisenbahn- und Zollabkommen miteinander verbunden sein

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BEILAGEN: Beitragsrechnung 1985, Tätigkeitsbericht des Vorstandes, Einladung zur Mitgliederversammlung 1985; Werbeprospekt Verlag C.H. Beck	



sollten). Dr. von Elbe stellte diese Pläne und ihr wechselhaftes Schicksal auf den Alliierten-Konferenzen der Jahre 1943/44 (Quebec, Teheran) vor, bis schließlich auf der Gipfelkonferenz in Yalta (Januar 1945) der Vorschlag der speziell zur Lösung dieses Problems eingesetzten Europäischen Sonderkommission gebilligt wurde: Aufteilung Deutschlands in eine britische Zone im Norden, eine amerikanische im Süden, eine russische im Osten, Angliederung des Saargebiets an Frankreich, Aufteilung Ostpreußens an die Sowjetunion und Polen.

In diesem Zusammenhang zeigte Dr. von Elbe, wie zeitweilig militärische Interessen und politische Wünsche im Widerstreit lagen: Das Operationsgebiet der Truppen sollte mit dem Besatzungsgebiet identisch sein, d.h. Nordwestdeutschland sollte britischer, Süddeutschland amerikanischer Kontrolle unterstehen. Zum Entsetzen der Militärs beider Länder führte Präsident Roosevelt plötzlich Gründe für eine umgekehrte Besatzungsregelung ins Feld, die ein "Überspringen" der jeweils anderen Truppen notwendig machen würde. Der Erwärmung Churchills für den von Roosevelt vorgelegten Morgenthau-Plan (insbesondere: Entindustrialisierung des Ruhrgebiets, Umwandlung Deutschlands in ein Agrar- und Weideland) war es schließlich zu verdanken, daß Präsident Roosevelt doch die südliche Besatzungszone annahm, da er nun die Erfüllung seines Kriegszieles — Verhinderung des Wiederaufbaus deutschen Kriegspotentials — auch durch die Briten gesichert sah.

Hatte die Gipfelkonferenz von Yalta zwar eine Einigung der "3 Großen" über die Aufteilung Deutschlands gebracht, so gab es doch keine Vereinbarung über ein gemeinsames Aktionsprogramm für die Zeit der Begrenzung, wenn Deutschland dem Regime von Militärregierungen unterstellt sein würde. Die Alliierten waren daher nur unzureichend vorbereitet, als der Sieg über Deutschland früher als erwartet eintrat. Angesichts der Probleme im total zerstörten Deutschland habe die Sieger — so Dr. von Elbe — eine Bewährungsprobe erwartet, wie sie in dieser Größe noch keiner Macht der Welt abverlangt worden sei. Ebenso sei es in der Geschichte ohne Beispiel, daß die Sieger in das mit der Auflösung der nationalsozialistischen Herrschaft entstandene Vacuum getreten seien, als sie mit Erklärung vom 5.6.1945 die oberste Regierungsgewalt in Deutschland übernommen hätten (ohne Deutschland zu annektieren).

Ausgeübt wurde die oberste Gewalt durch den Alliierten Kontrollrat (Mitglieder: Die Oberbefehlshaber der Streitkräfte der vier Besatzungsmächte, Sitz: Berlin) für alle Angelegenheiten, die Deutschland als Ganzes betrafen, und durch die jeweiligen Oberbefehlshaber der Streitkräfte der Besatzungsmächte, die innerhalb ihrer Besatzungszonen souverän waren.

Die Situation brachte auch Kuriositäten hervor. So kam z.B. der Ausschuß, der die Kontrollratsgesetzgebung zur Austilgung nazistischer Elemente im deutschen Recht vorbereiten sollte und in dem Dr. von Elbe amerikanisches Mitglied war, nur schlep-

pend voran, weil jede Bemerkung eines Ausschußmitglieds, die in einer der drei Verhandlungssprachen (Englisch-Französisch-Russisch) geäußert wurde, 2 x übersetzt werden mußte. Schließlich einigte man sich (inoffiziell) auf Deutsch als Verhandlungssprache, da es jeder verstand: Der Russe hatte in Deutschland deutsches Recht studiert, der Engländer war Rechtsanwalt in Berlin gewesen, der Franzose war Richter aus dem Elsaß, "und ich hatte mein Deutsch auch noch nicht vollständig vergessen".

Der Zwang, die Probleme vor Ort zu bewältigen, setzte seitens der USA eine Verlagerung von den Zielen der Kriegspolitik (Verhinderung der Fähigkeit, je wieder Krieg zu führen) zu einer Politik des Wiederaufbaus einer deutschen politischen Ordnung auf demokratischer Grundlage und späterer friedlicher Mitarbeit Deutschlands am internationalen Leben in Gang.

Bereits auf dem Gipfeltreffen der "3 Großen" in Potsdam (17.7. - 2.8.45) legte Präsident Truman als erster konkrete Vorschläge für einen politischen und wirtschaftlichen Wiederaufbau Deutschlands vor, der eine Erhaltung Deutschlands als einheitliches Staatswesen und wirtschaftliche Einheit vorsah. Obwohl die Sowjetunion seit Yalta den USA gegenüber mehr und mehr eine unnachgiebige Haltung eingenommen hatte, schien sie in den Potsdamer Beschlüssen diese "Wende" mitzutragen. Der Kontrollrat wurde angewiesen, die notwendigen Vorbereitungen zu treffen. Ein Rat der Außenminister der Hauptmächte wurde geschaffen, dessen Hauptaufgabe die Vorbereitung einer Friedensregelung war. Inzwischen sollte die Bevölkerung von ganz Deutschland nach einheitlichen Grundsätzen behandelt werden, alle Deutschen sollten das Recht der freien Meinungsäußerung, Pressefreiheit, Glaubens- und Gewissensfreiheit genießen.

Die Arbeit des Kontrollrates litt jedoch unter der zunehmenden Spannung zwischen der Sowjetunion und den Westmächten. Eine Beschlußfassung (Prinzip der Einstimmigkeit) wurde immer schwieriger, als Folge der häufigen Beschlußunfähigkeit verlagerte sich das Schwergewicht der Verwaltung in die Besatzungszonen. Mit Militärgouverneur General Lucius D. Clay besaß die amerikanische Besatzungszone einen Mann der Tat (Ingenieur von Herkunft), der "den Trümmerhaufen, den er vor sich sah, wegräumen und Neues schaffen wollte", den "die Vergangenheit nicht interessierte", der "nach vorn blickte".

Ihm gleichgesinnt war der amerikanische Außenminister James Byrnes, der als Reaktion auf die Rede des sowjetischen Außenministers Molotow auf der zweiten Tagung der Außenminister in Paris (10.7.46), in der dieser die amerikanische Besatzungspolitik als Fortsetzung des Morgenthau-Planes gescholten hatte, den anderen Besatzungsmächten den Vorschlag einer Zusammenlegung der Wirtschaftsverwaltung ihrer Zonen machte. Byrnes forderte außerdem die baldige Bildung einer provisorischen deutschen Regierung zur Leitung von zentralen deutschen Verwaltungsstellen



# NEWSLETTER

Bonn

2/85

April 1985

## 10 Jahre D A J V

### Bericht über den Jubiläums-Festabend im Amerikanischen Club, Bonn-Bad Godesberg, am 9. März 1985

Vor zehn Jahren — am 16. April 1975 — taten sich 13 junge Juristen, die an einer amerikanischen law school studiert hatten, zusammen und gründeten die Deutsch-Amerikanische Juristen-Vereinigung. Am Gründungsort, im **American Embassy Club** in Bonn-Bad Godesberg, beging die inzwischen "gereifte" Vereinigung am 9. März dieses Jahres ihr zehnjähriges Bestehen mit einem umfangreichen Festprogramm. Zuvor — am 8. März — hatte der Vorstand im Bonner Presseclub einen Empfang für Organisationen und Institutionen gegeben, mit denen der Verein zusammenarbeitet, insbesondere für Vertreter der amerikanischen Botschaft, des Auswärtigen Amtes, des Bundesministeriums der Justiz, des DAAD, der Fulbright-Kommission, des German Marshall Fund, der Alexander-von-Humboldt-Stiftung, des Harvard-Club Rhein-Ruhr und von "Inter Naciones". Die Gäste wurden vom DAJV-Vorsitzenden **Rudolf du Mesnil** (Düsseldorf) und Beiratsmitglied Judge **Dr. Leo Goodman** (München) begrüßt und zu Gesprächen mit den anwesenden Vorstandsmitgliedern eingeladen.

Am Samstag, dem 9. März, fand vormittags zunächst die diesjährige ordentliche Mitgliederversammlung statt (siehe Bericht auf Seite 29), anschließend ein Halbtags-Seminar zum Thema "Zehn Jahre Rechtsentwicklung in den USA" (siehe Berichte auf Seite 28, 37 ff.). Am Abend folgte die Festveranstaltung mit Ansprachen, einem Buffet und Tanz. Hierzu waren mehr als 160 Mitglieder und Gäste aus allen Himmelsrichtungen, aus Wien und Luxemburg, aus Hamburg und München, aus Berlin und Brüssel in den Club gekommen.

Den Festabend eröffnete **Rudolf du Mesnil**, indem er die Gäste, darunter auch einige Mitglieder aus den USA, ferner die Beiratsmitglieder **Dr. Goodman**, (München) **Dr. Gottheiner** (Frankfurt), und **Dr. Parkuscher** (München) sowie das neue Ehrenmitglied **Dr. von Elbe** (siehe Seite 26) willkommen hieß und Glückwunschsadressen des ersten DAJV-Vorsitzenden **Dr. Günther Schulz** (Manila) sowie des ersten Vorsitzenden und Gründers der German American Law Association (GALA), **Professor Otto L. Walter** (New York), verlas. **Herr du Mesnil** betonte, der weitere Anstieg der Mitgliederzahl auf inzwischen mehr als 1.200 zeige, daß nach wie vor ein starkes Bedürfnis nach einer bilateralen Juristenorganisation im Verhältnis zu den USA bestehe. Schließlich dankte **Herr du Mesnil** allen denen, die in den vergangenen zehn Jahren innerhalb und außerhalb der Vereinigung an der Verwirklichung ihrer Ziele mitgearbeitet oder die Tätigkeit der DAJV mit Rat und Tat gefördert haben.

Namens der amerikanischen Botschaft überbrachte danach Deputy Public Affairs Counselor **Harold Radday** ein Grußwort. Er hob hervor, daß die DAJV nicht nur dazu beitrage, die Beziehungen zwischen deutschen und amerikanischen Juristen zu ver-

bessern, sondern darüberhinaus auch einen Beitrag zum besseren Verständnis zwischen Deutschland und Amerika leiste. Die Bundesrepublik Deutschland und die Vereinigten Staaten seien durch gemeinsame Ziele und Werte besonders eng verbunden, — durch Werte, die in den drei grundlegenden Verfassungsprinzipien beider Staaten zum Ausdruck kämen: dem demokratischen Regierungssystem ("democracy"), der Rechtsstaatlichkeit ("rule of law") und dem Schutz persönlicher Grundfreiheiten ("freedoms"). Bei allen Unterschieden in den Einzelheiten seien es diese Ziele und Werte, die das Fundament der Zusammenarbeit beider Staaten bildeten und die sie von totalitären und autoritären Regimen unterschieden.

Im Anschluß daran gab **Reimer von Borries**, Vorstandsmitglied seit 1975 und Vorsitzender von 1980 bis 82, einen "Überblick über 10 Jahre DAJV". Am Beginn habe das Erlebnis eines Studienjahres an einer amerikanischen law school gestanden. Dieses hatten die Gründer der DAJV nicht nur als "Rechtskulturchock", sondern als "geistigen Innovationsimpuls" empfunden, den man nicht einfach verpuffen lassen, sondern durch einen organisatorischen Rahmen verfestigen wollte. Dabei sei es nicht nur um die Pflege der Beziehungen zu den alten law schools gegangen, sondern um die Beobachtung der Rechtsentwicklung in den USA und die Begegnung mit amerikanischen Juristen. Diese Erwägungen hätten zur Gründung einer breit angelegten Organisation nach dem Vorbild anderer bilateraler Juristenvereinigungen geführt. Den 13 Gründern hätten sich sehr bald zahlreiche weitere law school-Alumni sowie andere am amerikanischen Recht interessierte Juristen aller Berufssparten aus der ganzen Bundesrepublik angeschlossen. Dann seien in steigendem Maße junge Wissenschaftler, Rechtsreferendare, Jurastudenten und -innen zur DAJV gestoßen, ferner auch viele amerikanische Juristen — von Anchorage bis New Orleans und von New York bis San Franzisko. Im Hinblick auf die erfreulich große Zahl junger Juristen und weiblicher Mitglieder sei die DAJV ein sehr "moderner" Verein.

Besonders wichtig sei ihr **gemeinnütziger Charakter**. So seien die Veranstaltungsthemen nicht eng berufs-, sondern sachbezogen gewesen und hätten das Ziel verfolgt, Einblick in die amerikanische Rechtsentwicklung auf den verschiedensten Sachgebieten zu geben, zu rechtsvergleichender Beschäftigung mit dem amerikanischen Recht anzuregen und Kontakte zu amerikanischen Juristen zu ermöglichen. Zwar sei die DAJV keine wissenschaftliche, sondern eine fachliche Vereinigung, doch habe man sich an der geistigen Tradition der großen deutsch-amerikanischen Rechtsvergleicher zu orientieren versucht, eines Max Rheinstein, Stefan Riesenfeld, Ernst Rabel, Rudolf Schlesinger, Karl Löwenstein und anderer. Die DAJV sei auch keine politische Vereinigung, aber man sei sich dessen bewußt gewesen, daß Recht und Politik nicht zu trennen seien. Deshalb habe im Mittelpunkt das Interesse an "Rechtspolitik" gestanden, das heißt an aktuellen Entwicklungen in Gesetzgebung und Rechtsprechung. Im Vordergrund habe dabei der Bereich des Wirtschaftsrechts — auf dem Hintergrund des Verfassungsrechts — gestanden. **Herr von Borries** gab sodann eine summarische Übersicht über die Themen aus den Bereichen des Wirtschaftsrechts, der allgemeinen Rechtspolitik, des Justizwesens und des Verfassungsrechts, die in den vergangenen zehn Jahren in Vortragsabenden, Seminaren, Round-Table-Diskussionen, Dinner-Speeches und in Publikationen behandelt worden waren. Die Gesamtschau dessen, was in diesen Veranstaltungen vorgetragen worden sei, gebe ein faszinierendes Bild der Entwicklung der Vereinigten Staaten in Recht und Politik, Wirtschaft und Gesellschaft seit 1975.

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BEILAGEN: Eine Einladung (regionale Veranstaltung)	



Die bisherige erfolgreiche Tätigkeit der Vereinigung — jährlich rund 30 Veranstaltungen in Deutschland, vierteljährliche Newsletter, andere Publikationen, Studienführer, Studien- und Referendarberatung, Erledigung vieler "Spezialwünsche" von Mitgliedern und Nichtmitgliedern usw. — sei nur durch das große persönliche Engagement einer Vielzahl ehrenamtlicher Mitarbeiter inner- und außerhalb des Vorstandes und dank der Förderung durch andere Institutionen und Organisationen (insbesondere Ministerien) sowie durch die amerikanische Botschaft und viele gute Freunde "hüben und drüben" möglich gewesen. Ganz besonderen Dank schulde die DAJV aber dem langjährigen Vorstandmitglied **Peter H. Pfund**, dem früheren Legal Advisor an der amerikanischen Botschaft und jetzigen Assistant Legal Advisor for Private International Law im State Department in Washington D.C., dessen Beitrag zum Gelingen der Arbeit entscheidend gewesen sei. Der Erfolg sei auch durch verschiedene äußere Faktoren begünstigt worden, z.B. durch den guten Kontakt zu der alten, aus Europa stammenden Emigranten-Generation, ferner durch die große Zahl deutscher law school-Alumni der sechziger und siebziger Jahre mit ihrem ausgeprägten Interesse an einer dauerhaften Beschäftigung mit dem amerikanischen Recht und schließlich durch die dynamische Entwicklung der deutsch-amerikanischen Beziehungen im allgemeinen, insbesondere auf wirtschaftlichem, politischem und rechtlichem Gebiet. Diese Entwicklung habe schließlich auch zur Gründung einer amerikanischen Schwesternvereinigung — der **German American Law Association, Inc.** — in New York durch Professor **Otto L. Walter** geführt, die inzwischen über 100 Mitglieder habe.

Abschließend wies **Herr von Borries** darauf hin, daß in diesem Jahr das 200-jährige Bestehen des preußisch-amerikanischen Freundschafts- und Handelsvertrages von 1785 begangen werde, der als Markstein in der Geschichte des Völkerrechts und der politischen Beziehungen gelte und direkter Vorläufer des geltenden deutsch-amerikanischen Vertrages von 1954 sei. Die DAJV schätze sich glücklich, sich bei ihrer Tätigkeit in den Rahmen einer solchen guten Tradition der Beziehungen zwischen Deutschland und den USA einfügen zu können.

Zum Abschluß sprach der Koordinator für die deutsch-amerikanische Zusammenarbeit im Auswärtigen Amt, Staatssekretär a.D. **Berndt von Staden**, langjähriger Botschafter der Bundesrepublik in den USA. Er hob ebenfalls die Gemeinsamkeit der Werte hervor, die die Regierungssysteme der Bundesrepublik Deutschland und der Vereinigten Staaten prägten. Unter allen Werten und Verfassungsgrundsätzen erscheine ihm am Wichtigsten die "Herrschaft des Rechts", der moderne Rechtsstaat als die bisher größte zivilisatorische Errungenschaft der Menschheit. Die weitgehende Identität der Wertvorstellungen in beiden Staaten verleihe der Zielsetzung der DAJV besonderen Rang. Sie beruhe auf einer gemeinsamen Wurzel — dem Geist der Aufklärung des 18. Jahrhunderts — und sie bestehe fort, obwohl sich auf dieser Grundlage in den beiden Staaten zwei außerordentlich verschiedene Rechtssysteme entwickelt hätten. Viele Anzeichen deuteten darauf hin, daß sich die beiden Rechtssysteme in Zukunft nicht zu-, sondern auseinander entwickeln würden. Um so wichtiger sei die enge Zusammenarbeit zwischen Deutschland und den USA in allen Bereichen des Rechts. Der Erfolg der DAJV zeige, daß sie diesem Bedürfnis entspreche und daß es ein großes Potential für diese Zusammenarbeit gebe. Für die nächsten zehn Jahre "und darüberhinaus" wünschte **Herr von Staden** der DAJV viel Schwung und Erfolg.

**Herr du Mesnil** schloß diesen Teil des Abends mit herzlichem Dank an **Frau Ursula Dietzel**, der Organisatorin des Festprogramms. Großer Beifall! Danach wandte sich die Versammlung dem sehr reichhaltigen Buffet aus der Küche des Amerikanischen Clubs zu. Der Abend schloß mit einer Square-Dance-Vorführung und Tanz zu den flotten Klängen der Club-Kapelle.

**Reimer von Borries, LL.M.** (Meckenheim/Luxemburg)

### **Dr. Joachim von Elbe — neues Ehrenmitglied der DAJV**

Die diesjährige ordentliche Mitgliederversammlung hat auf Vorschlag des Vorstandes beschlossen, Herrn **Dr. Joachim von Elbe** die Ehrenmitgliedschaft in der Vereinigung anzutragen; **Herr von Elbe** hat sie sogleich angenommen. Die DAJV ehrt damit einen Juristen deutscher Herkunft und amerikanischer Staatsbürgerschaft, dessen Lebensschicksal auf's Engste mit der Entwicklung der deutsch-amerikanischen Beziehungen verbun-

den ist und der nach dem 2. Weltkrieg Wesentliches für den Wiederaufbau des Rechtswesens in Deutschland, zur Gestaltung der rechtlichen Beziehungen zwischen Deutschland und den USA sowie zur Verständigung zwischen beiden Staaten beigetragen hat — nicht als Politiker oder Wissenschaftler, sondern als juristischer Experte der amerikanischen Regierung.

**Herr von Elbe** wurde 1902 in Hamm geboren, wuchs in Potsdam und Neuwied auf, wo sein Vater als preußischer Landrat amtierte, studierte von 1920 bis 1924 in Hamburg, Kiel und Berlin (u.a. bei Walter Jellinek, Josef Partsch und Martin Wolff) Rechtswissenschaften und absolvierte den juristischen Vorbereitungsdienst in Charlottenburg, Gumbinnen und Königsberg. Nach dem 2. Staatsexamen wurde er — nach kurzer Tätigkeit als Regierungsassessor an einem Landratsamt — für einige Jahre als wissenschaftlicher Mitarbeiter in das Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht in Berlin berufen, das damals von **Viktor Bruns** geleitet wurde. 1930/31 war er Rechtsberater des Senats der Freien Stadt Danzig. Nach anschließender kurzer Tätigkeit bei der Bezirksregierung in Potsdam mußte er wegen teilweise "nichtarischer Abstammung" im Sinne der NS-Rassenideologie — seine Großmutter mütterlicherseits entstammte der Familie **Mendelssohn-Bartholdy** — aus dem Staatsdienst ausscheiden.

Nach dieser schockierenden Erfahrung und den Ereignissen des Sommers 1934 ("Röhm-Affäre"), die den terroristischen Charakter des NS-Regimes mit letzter Deutlichkeit enthüllten, verließ Herr von Elbe Deutschland und ging in die Vereinigten Staaten, um dort ein neues Leben aufzubauen. Mit nunmehr 32 Jahren begann er ein Studium des amerikanischen Rechts an der Yale Law School, wo er nach dem LL.B. (1938) zunächst "instructor" wurde. Nachdem er 1941 amerikanischer Bürger geworden war, wurde er zum Militärdienst einberufen und dem Oberkommando der Alliierten Überseestreitkräfte in London bzw. Paris zugewiesen. Nach Kriegsende wurde er Mitglied der Rechtsabteilung der amerikanischen Militärregierung in Berlin sowie amerikanischer Vertreter im Kontrollratsausschuß zur Reform des deutschen Rechts, dann Mitarbeiter der Abteilung "Ländergesetzgebung" der amerikanischen Militärregierung in der US-Zone, dann im Rechtsamt des Bizonen-Kontrollamtes und ab 1949 in der Rechtsabteilung des Amtes des Amerikanischen Hohen Kommissars in Bonn; zugleich war er amerikanischer Vertreter im Rechtsausschuß der Alliierten Hohen Kommission, die die Regierungsgewalt in Westdeutschland vor der Gründung der Bundesrepublik ausübte. 1955 wurde dieses Amt in die amerikanische Botschaft umgewandelt im Zuge der Wiedererlangung der Souveränität der Bundesrepublik mit dem Inkrafttreten des Deutschlandvertrages. An dessen Ausarbeitung wie auch an der Konzipierung des Londoner Schuldenabkommens von 1952 und der Pariser Verträge von 1954 war **Herr von Elbe** maßgeblich beteiligt — so maßgeblich, daß **Botschafter Arthur Burns** ihm später bescheinigte, "daß mancher Staatsmann Sie um den gestaltenden Einfluß beneidet, den Sie auf viele internationale Abmachungen auszuüben vermochten, an denen Sie von 1946 bis 1960 mitgewirkt haben."

Von 1955 bis 1969 war **Herr von Elbe** Rechtsberater der amerikanischen Botschaft und (zeitweilig) an der U.S. Mission in Berlin. 1969 erhielt er das Große Verdienstkreuz des Verdienstordens der Bundesrepublik Deutschland in Anerkennung seiner Verdienste beim friedlichen Wiederaufbau Deutschlands und um die Stärkung guter Beziehungen zwischen dem deutschen und dem amerikanischen Volk. **Herr von Elbe** hat seinen Lebensweg — verbunden mit zeitgeschichtlichen Betrachtungen — in dem 1983 erschienen Buch "Unter Preußenadler und Sternenbanner — Ein Leben für Deutschland und Amerika" ausführlich dargestellt. Allen DAJV-Mitgliedern sei dieses lesenswerte Werk empfohlen. Daneben ist **Herr von Elbe** aber auch als Autor auf einem ganz anderen Gebiet hervorgetreten, nämlich als Verfasser eines Standardwerkes über "Die Römer in Deutschland" (1977, amerikanische Ausgabe: "Roman Germany", 1975). Viele DAJV-Mitglieder werden sich der Thanksgiving-Speech von **Joachim von Elbe** vom November 1984 erinnern (vgl. Newsletter 1/85). Durch diesen Vortrag wie auch durch seine Teilnahme am Jubiläumsabend — bei dem der 82-jährige einer der eifrigsten Tänzer war — hat **Herr von Elbe** sein lebhaftes Interesse an den Zielen der DAJV bekundet und die spontane Sympathie aller derer für sich gewonnen, die ihn dabei näher kennenlernten. Wir hoffen, ihn möglichst oft in unserem Kreise begrüßen zu können, und wünschen ihm weiter Gesundheit und Lebensfreude in seinem hohen Alter.

**Reimer von Borries** (Meckenheim/Luxemburg)



INSTITUT FÜR AUSLÄNDISCHES UND  
INTERNATIONALES PRIVAT- UND WIRTSCHAFTSRECHT  
DER UNIVERSITÄT HEIDELBERG

## E I N L A D U N G

Anlässlich des 10. Todestages von  
ALBERT A. EHRENZWEIG  
laden die Direktoren des Instituts  
ein zu einem

**SYMPOSIUM**

**über**

**Albert A. Ehrenzweig  
und das Internationale Privatrecht**

17. Juli 1984



**Tagungsort:**

Vortragssaal der Heidelberger Akademie der Wissenschaften, Karlstraße 4, 6900 Heidelberg 1.

(Parkgelegenheit: Tiefgarage Karlsplatz)

U.A.w.g. (bei Teilnahme) an das Institut für ausländisches und internationales Privat- und Wirtschaftsrecht, Augustinergasse 9, Postfach 10 5760, 6900 Heidelberg 1, Telefon (06221) 54 22 00.

Prof. Dr. Rolf Serick

Prof. Dr. Erik Jayme

Prof. Dr. Hubert Niederländer

**Programm des Symposiums**

15 Uhr c.t.

Einführung in Leben und Werk  
Albert A. Ehrenzweigs.

*Zur Unterscheidung zwischen internationalem und interlokalem Privatrecht*

(Prof. Dr. Erik Jayme, Heidelberg)

*Die lex-fori-Lehre heute*

(Privatdozent Dr. Kurt Siehr, Hamburg/Zürich)

17 Uhr c.t.

Berichte über Dissertationen zu den Lehren  
Ehrenzweigs

*1. Datum-Theorie und Zweistufigkeit des IPR*

(Hans-Joachim Heßler, München)

*2. Rezeption der Lehren A. Ehrenzweigs  
in Europa*

(Gabriele Hessel, Münster)

17.45 Uhr

D i s k u s s i o n

18.30 Uhr

E m p f a n g



a totalitarian society, de Buen confuses short term policy concerns such as the balance of payments with the fundamental direction of legal development. That direction is intensified public administration of the private economy as the mass production of goods and the commodification of services increases the popular demand for regulation.

#### PRIVATE INTERNATIONAL LAW

ALBERT A. EHRENZWEIG UND DAS INTERNATIONALE PRIVATRECHT. Ed. by Rolf Serick, Hubert Niederländer & Erik Jayme. Heidelberg: Carl Winter, 1986. Pp. 188.

*Reviewed by Gerhard Kegel\**

Albert A. Ehrenzweig was born in Austria on 1 April 1906 and died, aged 68, in Berkeley on 4 June 1974. For his 70th birthday he was to have received a *festschrift* from his European friends; unfortunately it had to appear as a memorial.<sup>1</sup> Shortly after the tenth anniversary of his death a symposium in his honor was conducted, which has now, as indicated above, appeared as a book.

The book is principally devoted to the scholar's influence in Europe and turns on three questions close to his heart: Jayme writes about the distinction between interstate and international conflicts of law (pp. 19-34), Siehr about the current state of the *lex fori* theory (pp. 35-136) and Hessler (pp. 137-41) about Ehrenzweig's invented local and moral data, which he employed for his two-stage theory of international private law (stage one: conflicts rule; stage two: taking account of foreign data in the domestic law identified by the conflicts rule). A brief lecture by Gabriele Hessel summarizes the influence of Ehrenzweig's teaching in Europe (pp. 143-48). Following are extracts of a lively discussion (pp. 152-65), from which personal recollections by Hoyer (Vienna) and Müller-Freienfels (Freiburg) stand out. Concluding are several documents by Ehrenzweig and his family (pp. 171-74) and three smallish works by the deceased (pp. 177-84).

The central piece is Kurt Siehr's contribution. Already in 1977 Siehr had published an essay on "Ehrenzweig's *lex fori* theory and its significance for American and German conflicts law".<sup>2</sup> Now he explores the functions of the *lex fori* (pp. 35-48), Ehrenzweig's teaching (e.g., its distinction from "superlaw", the residuary rule of the *forum* and the *lex propria in foro proprio* (49-59) and, compara-

tively and with ample documentation, their effect in the U.S.A. (pp. 59-79) and influence in Europe (pp. 79-133). In a doctrine somewhat neglectful of the traditional connecting factors like domicile, place of tort, *situs rei*, the connection with the *forum* is exhaustively presented.

Erik Jayme speaks briefly but profoundly about Ehrenzweig's life and work (pp. 19-24). He explains his distinction between interstate and international conflicts law (pp. 24-26), which—as "A Plea for Segregation"—goes back to an article in 1957.<sup>3</sup> In the following he examines the consequence of that distinction in the law of the United States, especially in the proof of foreign law, in *forum non conveniens* and under the influence of political interests (pp. 27-34).

It is a merit of the book that it not only keeps alive the memory of a notable scholar by looking back at his teachings, but explores the extent of his most important thoughts in the current law of America and Europe. Besides we hear personal items about Albert and his admirable wife Erika. A welcome photograph, shows him as he was: an aggressive intellectual force, provocative, ironic, but with charm.

Perhaps he cared too much for quick success or his spirit was too fast to "bore in hard wood". Hence his often exaggerated theses, the many newly coined words, among them successful ones like "non-rule", the "land taboo", the "*lex stabuli*". Hence his unending writing which was no burden for him but proceeded with *elan*. Hence his insouciance of tradition, perhaps because he had to abandon his European past under painful circumstances and felt himself more a "citizen of the world". Perhaps also because one takes up novelty more lightly in America. Also present was a little intellectual arrogance, as if the world started with him and he knew everything, others nothing. (Admittedly, that is nothing special; of German professors it is said, their self esteem borders on hero worship!) Taken together, this could not ensure a great and lasting influence. Even among the American "conflicts revolutionaries", Ehrenzweig is a loner with few followers.

All the same, he remains unforgettable for all who had the privilege of encountering him, who enjoyed his and his wife's hospitality and knew to appreciate a brilliant conversationalist. On this rests also this fine symposium which reveals the scholar in his strength and weakness.

3. 41 *Minn. L. Rev.* 717-729 (1957).

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1. *Gedächtnisschrift für Albert A. Ehrenzweig*. (Jayme & Kegel, eds. 1976).

2. 34 *RabelsZ* 585-635 (1970).



Albert A. Ehrenzweig

Leben und Werk - Zum Unterschied zwischen  
internationalem und interlokalem Privatrecht

*Professor Dr. iur.*

von Erik Jayme, Heidelberg

I. Leben und Werk

Im Sommer 1974 unterrichtete ich an der Universität Münster, als mich die Todesnachricht aus Berkeley erreichte. Albert A. Ehrenzweig war am 4. Juni 1974 gestorben.<sup>1)</sup> Ich schrieb an Erika Ehrenzweig und erhielt von ihr - unter dem 23. Juni - folgende Antwort. Erika schrieb:

Hab keine düsteren Gedanken über die letzten vier Wochen hier in dem kleinen Haus nach dem Aufenthalt im Spital. Albert war müde, aber meist schmerzfrei, hat ein bißchen gearbeitet, Briefe diktiert, hie und da einen Besuch empfangen und in einem Streckessel liegend den Garten und das Vogelgezwitscher genossen wie nie vorher. Wir haben vom Tod gesprochen, manchmal in einer Dämmerstunde, aber daneben waren gleich die Pläne für ein herbstliches Seminar daheim und ein vielleicht möglicher Aufenthalt in Carmel im September.

Und am 4. Juni hat Albert noch gearbeitet bis wenige Minuten vor dem Letzten, das schmerzlos und augenblicklich gekommen ist, ohne Abschiednehmen, so wie er es sich immer gewünscht hatte ... Und nun sind die Töchter nah, alle beide, und die Gedanken vieler wirklicher Freunde. Fritz Kessler schickt Blumen für die verlassene kleine Studierstube, und noch immer legt ein getreuer Student einen Strauß Wiesenblumen vor die Türe, still ohne anzuläuten.



Diese Worte atmen nicht nur die Herzlichkeit und Liebe, die die Person Ehrenzweigs umgaben; in ihnen klingt auch jene österreichische Sprachmelodie, die die Ehrenzweigs auch nach mehr als 30 Jahren der Emigration nicht abgelegt hatten und die sie mit der versunkenen, aber zugleich lebendigen Welt Hofmannsthals und Schnitzlers verband.<sup>2)</sup> Erika war die Tochter der Anna Kallina, die von 1888 - 1933 Schauspielerin am Burgtheater war.<sup>3)</sup> Albert A. Ehrenzweig übertrug in der Emigration Gedichte von Anton Wildgans - dem Dichter und zeitweiligen Direktor des Burgtheaters - ins Englische und veröffentlichte eine zweisprachige Ausgabe 1965.<sup>4)</sup> Es ging ihm gut in Kalifornien. Seine Heimat war und blieb Europa. Jede Rückkehr ergriff beide neu, wie ein Brief vom 5. Juni 1970 aus Gravetye Manor in Sussex zeigt:

England ist herrlich: Heimatlich, friedlich, blühend ...  
uns geht es gut, und wir sind daheim - seltsam, obwohl  
alles doch fremd.

Albert A. Ehrenzweig wurde am 1. April 1906 in Herzogenburg in eine große Juristenfamilie hineingeboren. Sein Onkel war Armin Ehrenzweig, dessen Standardwerk zum System des österreichischen allgemeinen Privatrechts die Autorität des Namens Ehrenzweig begründet hatte. Sein Großvater Adolf Ehrenzweig war Herausgeber des "Assecuransjahrbuchs". Auch der Vater Albert widmete sich vor allem dem Versicherungsrecht. Die Spannung zwischen dem klassischen Zivilrecht und der Realität des Versicherungsgedankens war Ehrenzweig in die Wiege gelegt. Seine noch in Österreich veröffentlichten ersten Schriften,<sup>5)</sup> aber auch sein berühmten Buch "Negligence Without Fault" zeigen dies deutlich; auch das Internationale Privatrecht war betroffen. Mit seinem Vorschlag, die Haftung für Verkehrsunfälle dem "law of the garage", d.h. dem Recht des Ortes,



wo das Fahrzeugversichert war, zu unterstellen, versuchte er, den Versicherungsgedanken auf das IPR einwirken zu lassen. Nicht die zufällige lex loci delicti, sondern - entsprechend der Bedeutung der Versicherung für die Haftung aus Kfz-Unfällen - das "law of the garage", d.h. das Recht des Ortes, an dem versicherbare Risiken kalkuliert werden, schien Ehrenzweig eine vernünftige Basis für eine Kollisionsregel abzugeben. Er liebte solche provokatorischen Wortschöpfungen, die er aber dann - nicht ohne Ironie - umzusetzen verstand in die Fachsprache des internationalen Privatrechts. Aus dem "law of the garage" wurde die "lex loci stabuli".<sup>6)</sup> Eine Erinnerung an den Sommer 1968 taucht auf, als ich Ehrenzweig - dessen Gesundheit durch zwei Herzinfarkte erschüttert war - bei den Vorlesungen an der Haager Akademie für Internationales Recht assistierte: "Lex insurabilis" stand in internationalprivatrechtlichem Neulatein als Überschrift auf den Papieren, die mir Ehrenzweig am Abend im Kurhotel in Scheveningen für den Kurs des nächsten Tages mitgab.

Ehrenzweig hatte in Wien studiert;<sup>7)</sup> zu seinen Studienorten gehörten aber auch Paris und Heidelberg, wo er das Sommersemester 1927 verbrachte.<sup>8)</sup> Seine berufliche Laufbahn begann er als Richter und habilitierte sich 1937 an der Universität Wien für das Fach "Bürgerliches Recht". Er gehörte dann zu der letzten Emigrantenvelle, die Europa noch kurz vor dem Krieg verließ.<sup>9)</sup> Das bedeutete, daß er in den USA ganz von vorne beginnen mußte. Mit einem schmalen Stipendium studierte er 1939 - 1941 in Chicago. Im Jahre 1942 erwarb er den Magister-Titel an der Columbia University in New York. Das Bar Examination bestand Ehrenzweig 1943 in New York; er war dann 1944 - 1948 für eine bekannte New Yorker Anwaltsfirma tätig, ehe er 1948 an die Universität von Kalifornien nach Berkeley berufen wurde. Er lehrte dort 26 Jahre lang



"Conflicts, Comparative Jurisprudence, Insurance Law". In seiner Person vereinigten sich so die Erfahrungen von Praxis und Wissenschaft zweier Rechtskreise.

Das erst machte die einzigartige Zusammenschau beider Rechtswelten möglich. Den Europäern gab er den unverstellten Blick auf die Dinge zurück, die durch abgestandenes Theorienwerk überkrustet waren; die neue Welt aber zog er in seinen Bann durch die profunde Kenntnis der abendländischen Ideengeschichte. Er legte die Sonde des amerikanischen Realismus an die europäische Bücherwelt; den Amerikanern aber vermittelte er eine Theorie, indem er die Rechtssprüche ernst nahm und zu sogenannten "inchoate rules" verdichtete, d.h. Rechtsregeln, die als unfertige noch im Werden begriffen waren. Hauptaufgabe der Wissenschaft war für ihn, solchen Regeln eine "rationale", d.h. einen Sinn, zu geben. So entstanden seine Grundgedanken für das IPR, z.B. die Unterscheidung zwischen "admonitory torts" und "compensatory torts", d.h. vorsätzlichen unerlaubten Handlungen, bei denen der Präventivgedanke zur lex fori führt, und Fahrlässigkeitsdelikten, bei denen der Schadensausgleich versicherungsgemäße Anknüpfungen nahelegt.<sup>10)</sup> Seine Grundauffassung ging dahin, daß die Wirklichkeit zu akzeptieren sei; hier liegt auch der Grund für seinen lebenslangen Kampf gegen das Restatement Second of Conflict Laws.<sup>11)</sup> Es war eigentlich immer wieder derselbe Vorwurf, daß nämlich das sogenannte Restatement die Gerichtsentscheidungen nicht richtig wiedergebe, sie zu einer Theorie verforme. Über die Wirklichkeit aber könne man - wie im American Law Institute üblich - nicht abstimmen.

Dabei ging es ihm zum einen um die praktischen Ergebnisse der Entscheidungen.<sup>12)</sup> So entstand bei Ehrenzweig die "rule of validation",<sup>13)</sup> d.h. die Rechtsregel, daß das Vertragsstatut im Hinblick auf die Wirksamkeit des Vertrags bestimmt wird.



Er beschrieb - wie er meinte - nur das, was er in den Entscheidungen der Gerichte fand, und gab doch den durch vielerlei Begründungslärm übertönten Regeln seinen Namen, der dann seinerseits die Praxis zu beeinflussen begann.<sup>14)</sup> Zum anderen ging es ihm um psychische Wahrheiten. Seiner Theorie von der Maßgeblichkeit der lex fori für "moral data", d.h. für Billigkeits- und Wertvorstellungen, liegt der Gedanke zugrunde, daß ein Richter nicht fremde Moralvorstellungen seiner Entscheidung zugrunde legen könne.<sup>15)</sup>

In den letzten Jahren seines Lebens beherrschte ihn sein Interesse für die Psychoanalyse völlig. Es entstand sein Buch über "Psychoanalytische Rechtswissenschaft".<sup>16)</sup> Er lernte fast wie ein Kind von den anderen Wissenschaften.

Ein Brief aus Salzburg vom 16.7.1970 (ich hatte ein Buch von Mitscherlich gesandt):

Herzlichsten Dank für Dein so wertvolles Geschenk. Es kam gerade zur rechten Zeit, um das Hauptthema eines Fakultätsseminars zu werden, das Marcic mit 4 ordentlichen Ordinarien und 10 unordentlichen Privatdozenten arrangierte. Der Mitscherlich interessiert mich. Ich glaub, ich werd ihm schreiben. Meine ähnliche Anbiederung an Konrad Lorenz, dessen entzückende Briefe ich Dir zeigen werde, war ein voller Erfolg. Drei Assistenten führten uns zu ihm nach Seewiesen. 1 und eine halbe Stunde privatissimum über die Beziehungen zwischen Psa. und Ethologie. Wichtigstens: Ein großer Mann.

So spekulativ manche seiner Überlegungen zum Verhältnis von Psychoanalyse und Rechtswissenschaft waren, als Lehrer dagegen vermittelte er vor allem das Handwerkszeug des Juristen;<sup>17)</sup> er duldet keine Ungenauigkeit, kein blind schäumendes Theore-



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tisieren. Über 100 Leitentscheidungen mußte man im Kopf haben, um den multiple-choice-test im Kollisionsrecht zu bestehen. In der "comparative jurisprudence" lautete eine der Examensfragen (1966) "State Hohfeld's power-concept in Kelsen's terminology".

Unvergleichlich war in jener Zeit die Präsenz der großen Emigranten in Kalifornien. Kelsen fuhr mit seinem alten Wagen zu Ehrenzweigs Vorlesungen, wenn seine Theorie besprochen wurde. Michael Mann hielt Vorlesungen über "Doktor Faustus", Kerenski, der letzte Ministerpräsident des Zaren, lebte in Stanford und sprach in Berkeley über russische Geschichte; in San Francisco dirigierte Strawinsky seine Psalmensymphonie.

Die Semesterferien verbrachten die Ehrenzweigs in Carmel in Südkalifornien, also den Januar und die Sommermonate. Dort entstanden vor allem seine späten Bücher, der 2. und 3. Band unseres "Private International Law", die neuen Auflagen der "Nußschalen" (Conflicts in a Nutshell, Jurisdiction in a Nutshell), die um Zusammenfassungen mit dem Titel "The Nutshell in a Nutshell" bereichert wurden, schließlich seine "Psychoanalyse der Rechtswissenschaft".

Vom Haus führten wenige Treppenstufen zum Strand, und man schaute auf das gleißende Weiß der Schaumkronen des Pazifik, über welche die dunklen Surfer glitten. Am späten Nachmittag der Gang zur Carmel Mission, einem Kloster aus mexikanischer Zeit, in dessen offenen Kreuzgang abends die Kolibris einflogen und schillernd vor den Kelchen der Kalla-Lilien schwebten.<sup>18)</sup> In den nachgelassenen Papieren fand sich folgendes Gedicht:<sup>19)</sup>

Carmel Jänner '72

Welle, kommst Du aus der blauen Ferne  
oder stehts Du still im Windgebot?  
Sag mirs doch, ich wüßt sie gerne,  
Deine Lebensfahrt und Deinen Tod.



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## II. Internationales und interlokales Privatrecht

### 1. Die Lehren Ehrenzweigs

Aus der Fülle des Ehrenzweigschen Lebenswerks beschäftigt uns heute das Internationale Privatrecht. Dabei möchte ich auf den Unterschied zwischen internationalem und interlokalem Privatrecht eingehen, der zu den Grundlagen der Ehrenzweigschen Lehren gehört.<sup>20)</sup> Er liegt der vergleichenden Darstellung des internationalen Privatrechts zugrunde, die Ehrenzweig vor dem Hintergrund des amerikanischen Rechts unternahm.<sup>21)</sup> Es ist ein altes und zugleich ein dauerndes Problem des Kollisionsrechts, ob - wie es v. Bar 1889 formulierte - "das Verhältnis verschiedener in denselben Staatsgrenzen geltender territorialer Gesetzgebungen ... eine andere Lösung erheischt in diesem Falle, als in demjenigen, daß bei einem Rechtsverhältnisse die Gesetze verschiedener selbständiger Staaten in Betracht kommen."<sup>22)</sup> Während v. Bar sich gegen eine prinzipielle Differenz aussprach, meint der BGH in seiner Entscheidung vom 22.9.1982 zum Statut des nahehelichen Unterhalts im innerdeutschen Kollisionsrecht:<sup>23)</sup>

"Wenn innerdeutsche Rechtskonflikte mit der entsprechenden Anwendung der Normen des internationalen Privatrechts nicht sachgerecht gelöst werden können, müssen hierfür eigenständige Regeln gefunden werden, die den Besonderheiten des Verhältnisses zwischen beiden deutschen Staaten und der Lage der Bevölkerung im geteilten Deutschland angemessen Rechnung tragen."

Ehrenzweig hatte 1957 einen Aufsatz in der Minnesota Law Review veröffentlicht, der den Titel trug:

Interstate und International Conflicts Law:  
A Plea for Segregation<sup>24)</sup>,



Die Ausgangslage im amerikanischen Recht für eine solche Unterscheidung war nicht günstig. Es gibt zwar Bundesgesetze, deren Auslegung durch die Federal Courts zu amerikanischem Kollisionsrecht führt; hinzu kommt der ganze Bereich der "admiralty", d.h. des Seehandels- und Schiffahrtsrechts;<sup>25)</sup> aber das Kollisionsrecht gehört zur Kompetenz der Einzelstaaten. Die Bundesgerichte sind nach der Erie-doctrine gehalten, die Regeln des Staates anzuwenden, in dem sie ihren Sitz haben.<sup>26)</sup> Dies gilt nach der Klaxon-Entscheidung des US Supreme Court von 1941 auch für das Kollisionsrecht.<sup>27)</sup> Die Tatsache nun, daß jeder amerikanische Gliedstaat sein eigenes Kollisionsrecht entwickelt hat, erschwert eine Unterscheidung zwischen internationalem und interlokalem Privatrecht. Auf der anderen Seite setzte Ehrenzweig bei den "interstate conflicts" an. Hier ist es die amerikanische Bundesverfassung, die diesen Rechtsbereich beeinflußt. Die "Full Faith and Credit Clause" sichert die Anerkennung von Urteilen innerhalb der USA und die "Due Process Clause" die Einhaltung eines fairen Verfahrens. Ausländische Urteile werden dagegen nur im Wege der "comity" anerkannt; es fehlt hier das verfassungsrechtliche Gebot.<sup>28)</sup> Ehrenzweig schreibt:

"Policies developing such controls are obviously fundamentally different from those which continue to determine international conflicts."<sup>29)</sup>

Mit den "policies" wird nun ein Zentralbegriff der Ehrenzweigschen Lehren angesprochen. Sie bezeichnen die Rechtszwecke, die den Sachnormen zugrunde liegen.<sup>30)</sup>

Sein erster Aufsatz war dabei vor allem auch eine Kritik amerikanischer Entscheidungen, die ohne weiteres die eigenen Maßstäbe internationalen Fällen zugrunde gelegt hatten. So hatte ein Gericht in Ohio ein Urteil aus Quebec nicht anerkannt, weil



zwar die Zustellungsvorschriften von Quebec, aber nicht die für eine solche Gesetzgebung von der amerikanischen Verfassung aufgestellten Regeln beachtet worden waren.<sup>31)</sup> Das Gericht bezog sich auf einen früheren deutsch-amerikanischen Fall des New York Court of Appeals, der meinte, daß es "unreasonable" sei,

"that we should give greater respect to judgments recovered in a foreign country than to a judgment recovered in one of our sister states."<sup>32)</sup>

Recht  
Dagegen wendet sich Ehrenzweig, weil die wirkliche Frage sei, ob man die Maßstäbe der eigenen Verfassung an das ausländische legen dürfe, womit er ein gerade in Europa später heißdiskutiertes Thema ansprach.<sup>33)</sup> Der Beginn der Studien Ehrenzweigs in diesem Bereich war also eine kritische Sensibilisierung für die allgemeinen Unterschiede zwischen beiden Rechtsbereichen. Schon in dieser ersten Studie trat er aber auch für bilaterale Unterscheidungen ein, die er in zwei Büchern näher verfolgte, nämlich einem mit Fragistas und Yiannopoulos verfaßten amerikanisch-griechischen internationalen Privatrecht (1957) und dem Buch über "American-Japanese Private International Law" (1964, mit Ikehara und Jensen). Im Jahre 1966 erschien dann der erste Band seines "Private International Law", in dem sich die Fülle der Einzelstudien zu einem System des internationalen Privatrechts verdichtete. Um es auf einen kurzen Nenner zu bringen: Andere Quellen - hier Verfassung, dort Staatsverträge -, andere policies, andere Sachnormen sind die Vorbedingungen, die eine Trennung beider Rechtsgebiete nahelegen.



## 2. Die Feststellung des ausländischen Rechts im Prozeß

Der Unterschied zwischen interlokalem und internationalem Privatrecht zeigt sich deutlich bei der Feststellung fremden Rechts im Prozeß. Nach dem Uniform Judicial Notice of Foreign Law Act, der von 28 Gliedstaaten der USA - wenngleich mit Modifikationen - angenommen wurde, wird zwischen dem Recht der amerikanischen Gliedstaaten und dem Recht ausländischer Staaten unterschieden.<sup>35)</sup> Das erstere ist Gegenstand einer "judicial notice", d.h. einer Feststellung von Amts wegen, das letztere nicht.<sup>36)</sup>

Für das Verfahren vor den Bundesgerichten gilt dagegen seit 1966 die rule 44.1 der "Federal Rules of Civil Procedure"; das Gericht kann sich hier aller Hilfsmittel bedienen, um den Inhalt des ausländischen Rechts festzustellen.<sup>37)</sup> Es handelt sich dabei um eine Rechtsfrage. Die alte common-law-Regel, daß ausländisches Recht wie eine Tatsache zu beweisen sei, wurde für das Verfahren vor den Bundesgerichten 1966 aufgegeben.<sup>38)</sup> Es gibt nun neuere Gerichtsentscheidungen, welche unter Berufung auf die rule 44.1 ausländisches Recht von Amts wegen feststellen;<sup>39)</sup> auch das Prozeßrecht einzelner amerikanischer Gliedstaaten kennt solche Regeln.<sup>40)</sup> Allgemein durchgesetzt hat sich aber diese Regel nicht. Der Unterschied zum Recht der meisten amerikanischen Gliedstaaten bleibt. Die Regel geht dahin: Ausländisches Recht kann, Gliedstaatenrecht muß von Amts wegen festgestellt werden.

Ähnliche Unterschiede bestehen bei der Frage, ob die Parteien, welche ihren Anspruch auf ausländisches Recht stützen, dies im Verfahren kundtun müssen.<sup>41)</sup> Bei ausländischen Rechten ergeben sich gesonderte Hinweispflichten, die bei den Rechten der anderen amerikanischen Gliedstaaten entfallen.



3. Forum non conveniens

Betrachten wir nun andere Fragen anhand der Gerichtspraxis und beginnen wir mit der "doctrine of forum non conveniens".<sup>42)</sup> Sie besagt, daß ein an sich zuständiges Gericht im Einzelfall eine Klage abweisen oder das Verfahren ruhen lassen kann, wenn ein ausländisches Forum als geeigneter für die Durchführung des Prozesses erscheint.<sup>43)</sup> Für die Frage, ob ein fremdes Forum eher für das Verfahren in Betracht kommt, spielt neben der Verfügbarkeit von Zeugen auch die Anwendbarkeit ausländischen Rechts eine besondere Rolle.<sup>44)</sup> Hier nun zeigen sich Unterschiede in der Handhabung der Regel durch die Gerichte: Bei internationalen Fällen führt die Anwendbarkeit ausländischen Rechts eher zu Schwierigkeiten, die für eine Abweisung der Klage sprechen, als bei Sachverhalten, für die das Recht eines anderen amerikanischen Gliedstaates maßgebend ist.<sup>45)</sup>

Nehmen wir als Beispiel den Fall Danser v. Firestone Tire & Rubber Co, 1980 entschieden vom United States District Court für den Southern District von New York.<sup>46)</sup> Es ging um die Klage niederländischer Staatsangehöriger auf Schadensersatz aus einem Unfall in der Nähe von Köln. Beklagter war eine amerikanische Firma, die Herstellerin der Reifen, von denen einer auf der Fahrt durch Deutschland geplatzt war, was den Unfall verursacht hatte. Obwohl die Klage am Sitz des amerikanischen Beklagten erhoben worden war, wies sie das Gericht unter Berufung auf die "doctrine of forum non conveniens" ab. Hierfür war außer dem Problem der Beweismittel, Zeugen und Augenschein, auch die Frage des anwendbaren Rechts maßgebend:

"Given the paucity of New York contacts with the case at bar, it is very unlikely that New York law will be applied in this diversity action. Rather, logic dictates that either the law of West Germany or the Netherlands will be controlling. Certainly these jurisdictions are in a better position to apply their own law than is a federal court sitting in New York."<sup>47)</sup>



Anders als in nationalen Fällen spielte hier auch die Staatsangehörigkeit der Beteiligten eine Rolle.<sup>48)</sup> Das gleiche Gericht wies im Fall Allianz Versicherungs-Aktiengesellschaft v. Eskisehir die Klage einer deutschen Versicherung gegen einen türkischen Frachtführer mit einer Niederlassung in New York ab. Es ging um den Ersatz von Feuerschäden, die bei der Löschung einer Ladung in Istanbul entstanden waren:

"This action ... is ... one between foreign nationals. It involves an occurrence totally unconnected with this country."<sup>49)</sup>

Γρ

Im Danser-Fall kam hinzu, daß es sich um eine Klage gegen amerikanische Hersteller handelte. Daß in solchen Fällen eine mehr oder minder deutlich ausgesprochene Neigung der Gerichte besteht, Klagen abzuweisen und ausländische Gerichte für geeigneter zur Durchführung des Verfahrens anzusehen, läßt sich vielfach beobachten.<sup>50)</sup> Die Unterschiede der Herstellerhaftung spielen dabei eine Rolle: Der US Supreme Court hat sich in der Entscheidung Piper Aircraft Co v. Reyno (1981)<sup>51)</sup> offen dafür ausgesprochen, "in Produkthaftpflichtfällen die Attraktivität eines amerikanischen Gerichtsstandes durch Behelfe wie das forum non conveniens abzubauen."<sup>52)</sup> Schnyder bezeichnet das als "Schönheitsfehler".<sup>53)</sup> Was aber deutlich wird, ist, daß in internationalen Fällen "American policies" bestimmend werden, während bei interlokalen Sachverhalten diese Gesichtspunkte nicht auftauchen können.<sup>54)</sup>

4. Politische Interessen der Vereinigten Staaten

Hier ergibt sich dann - gestützt auf American policies - auch der gelegentliche Aufstand der Bundesgerichte gegen die Klaxon-doctrine von der Maßgeblichkeit des Kollisionsrechts der Einzelstaaten. Ein berühmter Fall ist hier Challoner v. Day and Zimmermann, Inc., der folgenden Sachverhalt hatte:<sup>55)</sup>



Eine Granate, die die beklagte Firma hergestellt hatte, explodierte verfrüht in den eigenen Reihen auf dem Kriegsschauplatz in Kambodscha. Nach dem Recht von Texas, wo das Bundesgericht seinen Sitz hatte, hätte als lex loci delicti möglicherweise das Recht von Kambodscha angewendet werden müssen, nicht amerikanisches Recht zur Herstellerhaftung.

Das Bundesgericht meinte:<sup>56)</sup>

"We are a Court of the United States, an instrumentality created to effectuate the laws and policies of the United States. We conclude that in this case we have no warrant, legal or moral, to frustrate well established American policies by an application of the local policies of a foreign government."

Der US Supreme Court hob die Entscheidung auf;<sup>57)</sup> maßgebend sei nicht amerikanisches Kollisionsrecht, sondern das Recht von Texas. Allerdings kam es später zu einem Vergleich,<sup>58)</sup> nachdem in Texas ein Gesetz erlassen wurde, das den Anwendungsbereich des Wrongful Death Act auf Todesfälle im Ausland erweiterte.<sup>59)</sup>

Umgekehrt können politische Interessen für die Anwendung ausländischen Rechts sprechen, während im interlokalen Privatrecht solche Interessen keine Rolle spielen. Aufsehen erregte vor allem der Fall Tramontana v. S.A. Empresa de Viação Aerea Rio Grandense.<sup>60)</sup> Es ging um einen Zusammenstoß eines Flugzeugs der amerikanischen Luftwaffe mit einem brasilianischen Flugzeug über Brasilien; ein Amerikaner, der sein domicile in Maryland hatte, wurde getötet. Klägerin war seine Witwe. Das Bundesgericht wandte die Haftungshöchstgrenze des brasilianischen Rechts von 100.000 Cruzeiros, d.h. 173 \$, an. Das Gericht sah den Sinn dieser Regel darin, die noch im Aufbau befindliche brasilianische Luftfahrtindustrie nicht durch zu hohe Schadensersatzansprüche zu gefährden, und meinte, daß diese Interessen sich auch im Kollisionsrecht durchsetzen sollten.



Solche, die Einzelstaaten übergreifenden politischen Interessen der Nationen, können ein besonderes Gewicht für die Lösung eines internationalen Kollisionsfalles erhalten. Sie spielen eine besondere Rolle, wenn amerikanische Gesetze zu Pflichtenkollisionen mit ausländischen Rechtsregeln führen. So haben neuerdings kalifornische Gerichte sogenannte Discovery-Verfahren, d.h. Anträge auf Beweiserhebung bei am Prozeß nicht beteiligten ausländischen Firmen abgelehnt, wenn anderenfalls diese Firmen Geheimhaltungspflichten ihren nationalen Rechts hätten verletzen müssen.<sup>61)</sup> Die Leitentscheidung ist Volkswagenwerk v. Superior Court, Alameda County,<sup>62)</sup> die vom California Court of Appeal, 1982 entschieden wurde.<sup>63)</sup> Das Gericht führte aus:<sup>64)</sup>

Rulings based in this concept of international comity are dictated not by technical principles of jurisdiction of the parties to or subject-matter of particular lawsuits, but rather by exercise of judicial self-restraint in furtherance of policy considerations which transcend individual lawsuits.

Solche übergreifenden internationalen Gesichtspunkte fehlen im interlokalen Bereich oder aber sie haben einen anderen Inhalt.

Kommen wir zum internationalen Handel. Zwei internationale Fälle - die der US Supreme Court zu entscheiden hatte - verhalfen der Parteiautonomie zum Durchbruch.

Im Fall M/S Bremen v. Zapata Off-Shore Company ging es um Schadensersatzansprüche einer amerikanischen Firma gegen die deutsche Unterweser Reederei, die eine Bohranlage von Louisiana nach Italien schleppen sollte.<sup>65)</sup> Die Bohranlage wurde bei einem Sturm im Golf von Mexiko beschädigt. Der



Vertrag sah folgende Klausel vor:

"Any dispute arising must be treated before the London Court of Justice."

Das Gericht sah diese Klausel als wirksam an und brach so mit der traditionellen Ansicht, daß Vereinbarungen, die im voraus die Zuständigkeit amerikanischer Gerichte ausschließen, gegen die "public policy" verstoßen und deshalb unwirksam sind. Der US Supreme Court führte aus:

"The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on the parochial concept that all disputes must be solved under our laws and in our courts ..."<sup>66)</sup>

Das Gericht fuhr fort:

"There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence and overwhelming bargaining power ... should be given full effect."<sup>67)</sup>

Die Internationalität des Falles rechtfertigte ein "distinguishing" gegenüber früheren Entscheidungen:

"It is clear, however, that whatever the proper scope of the policy expressed in Bisso, it does not reach the case. Bisso rested on considerations with respect to the towage business strictly in American waters, and those considerations are not controlling in an international commercial agreement."<sup>68)</sup>



In ähnlicher Weise sprach sich der US Supreme Court in einem weiteren deutsch-amerikanischen Fall für die Wirksamkeit einer Schiedsklausel im internationalen Rechtsverkehr aus. In diesem Fall, Scherk v. Alberto-Culver Company (1974), ging es um die Auslegung des Federal Arbitration Act, insbesondere um die Schiedsfähigkeit von Streitigkeiten, die an und für sich den Schutzbestimmungen des Securities Exchange Act unterlagen.<sup>69)</sup> Das entscheidende Argument für die Wirksamkeit der Schiedsvereinbarung sah das Gericht darin, daß es sich um ein

"truly international agreement"

handelt.<sup>70)</sup>

##### 5. Der internationale Handel

Diese liberale Rechtsprechung hatte umgekehrt auch gewisse Auswirkungen nach innen. Auf der anderen Seite geschah die Erneuerung des internationalen Vertragsrechts mit Hilfe von Überlegungen zum internationalen Handel. Hierzu noch der Fall Becker Autoradio USA v. Becker Autoradiowerk GmbH:<sup>71)</sup>

Es ging um die Erneuerung eines Vertriebshändlervertrages zwischen der deutschen Firma "Becker Autoradiowerke GmbH" und der "Pennsylvania corporation Becker Autoradio USA". Die ursprüngliche Vereinbarung enthielt eine Schiedsklausel, wonach für Streitigkeiten aus dem Vertrag ein Schiedsgericht in Karlsruhe zuständig sein sollte. Die deutsche Seite hatte ein Wahlrecht, entweder das Schiedsgericht oder auch ein staatliches Gericht in den USA anzurufen. Für diesen Fall sollte US-Recht gelten. Das Schiedsgericht sollte sich an die Regeln der Internationalen Handelskammer in Paris halten. Der Vertrag selbst wurde dem deutschen Recht unterstellt.



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Die amerikanische Partei klagte in den USA, weil der Vertrag nicht - wie vorgesehen - erneuert worden war. Die deutsche Beklagte stützte sich mit Erfolg auf die Schiedsklausel. Das Gericht war der Auffassung, daß die Streitigkeit unter die Klausel fiel:

"There is, of course, a strong policy in the federal courts favoring arbitration, especially in the context of international agreements ... Arbitration clauses are to be liberally construed ..."<sup>72)</sup>

Aufschlußreich ist auch, daß das Gericht keinen Grund für die Unwirksamkeit der Klausel darin sah, daß die deutsche Partei ein Wahlrecht hatte, welches dem amerikanischen Vertragspartner nicht zustand.

#### 6. Ausblick

Die Unterscheidung "international - interlokal" ist ein Grundpfeiler Ehrenzweigscher Lehren. Dabei werden Analogien nicht geleugnet, aber es liegt darin die Aufforderung, stets auch zu prüfen, ob die interlokale Regel auch für internationale Sachverhalte paßt. Das wird häufig übersehen, wenn es um die Rezeption amerikanischer Lehren in Europa geht. Es war die aufmerksame Lektüre der amerikanischen Gerichtsentscheidungen, welche seinen Überlegungen zugrunde lag.

Die Unterscheidung ermöglichte zugleich im Bereich der Wissenschaft, ein vergleichendes internationales Privatrecht zu entwickeln. In seinen Haager Vorlesungen klingt der utopische Gedanke transnationaler Regeln durch, die sich durch parallele nationale Entwicklungen ergeben, und welche mit Hilfe der Wissenschaft ins Bewußtsein gehoben werden können. Diese Lehre bildet das Gegengewicht zur Präponderanz der lex fori, mit der Ehrenzweig immer wieder identifiziert wird.



- 1) Vgl. den Nachruf von Friedrich Kessler, in: Gedächtnisschrift für Albert A. Ehrenzweig, Karlsruhe, Heidelberg 1976, XIII-XIV; Hinweise auf weitere Nachrufe a.gl.O., VII.
- 2) Vgl. unten, S. □, den Brief von Erika Ehrenzweig an den Verfasser.
- 3) Angaben nach Therese Nickl/Heinrich Schnitzler (Herausg., Hugo Hofmannsthal-Arthur Schnitzler, Briefwechsel, S. Fischer Verlag 1964, S. 340.
- 4) Und hätten der Liebe nicht.. Ein Zyklus neuer Gedichte von Anton Wildgans.- ...And Have Not Charity - A Cycle of New Poems by Anton Wildgans translated by Albert A. Ehrenzweig, Europäischer Verlag Wien 1965.
- 5) Ehrenzweig, Die Schuldhafte im Schadensersatzrecht, Wien 1936, S. 213 ff.; Ehrenzweig, Zur Erneuerung des Schadensersatzrechts - Bemerkungen zum tschechoslowakischen Entwurf eines BGB (Regierungsvorlage 1937) samt Gegenentwurf, Wien 1937, S. 41.
- 6) Zum "law of the garage" vgl. Ehrenzweig, Conflicts in a Nutshell, 2. Aufl., 1970, S. 254; zur Genese des Begriffs "lex loci stabuli" vgl. Ehrenzweig, The Not So "Proper" Law of Tort - Pandora's Box, I.C.L.Q. 17 (1968), 1 ff., 10 N. 57.
- 7) Vgl. den von Ehrenzweig selbst verfaßten Lebenslauf, unten S. 141.
- 8) Vgl. Serick, oben S. L .
- 9) Zwischenstation war 1938-1939 Bristol gewesen.
- 10) Vgl. Ehrenzweig, Der Tatort im amerikanischen Kollisionsrecht der außervertraglichen Schadensersatzansprüche, in: Festschrift Rabel, Bd. I, 1954, S. 655 ff.
- 11) Vgl. Ehrenzweig, The Restatement as a Source of Conflicts Law in Arizona, Arizona Law Review 2 (1960), 177 ff.; Ehrenzweig, The Second Conflicts Restatement: A Last Appeal for its Withdrawal, University of Pennsylvania Law Review 113 (1965), 1230 ff.; Ehrenzweig, Das Desperanto des Zweiten "Restatement of Conflict of Laws", Festschrift Rheinstejn, Bd. I, 1969, S. 343 ff.



- 12) Ehrenzweig in einem Brief an den Verfasser vom 11.11. 1971 (unten S. 101): "Worauf es mir ankommt, ist also nur die absolute Richtigkeit tatsächlicher Behauptungen." Vgl. auch Ehrenzweig, Wirklichkeiten einer "Lex-Fori Theorie", in: Festschrift Wengler, Bd. II, 1973, S. 251 ff., 266: "Nur habe ich mich wieder bemüht, Tausenden entschiedener Rechtsfälle tatsächliche Tendenzen der Gerichte in typischen Situationen zu entnehmen, deren Kenntnis der Praxis helfen soll, Interessenausgleiche zu fördern, und der Rechtswissenschaft, lebensnahe Rechtsregeln zu formulieren."
- 13) Ehrenzweig, Contract in the Conflict of Laws - Part One: Validity, Columbia Law Review 59(1959), 973 ff.; Ehrenzweig, A Treatise on the Conflict of Laws, 1962, S. 464 ff.; die "rule of validation" fand Kritik (vgl. Currie, Ehrenzweig and the Statute of Frauds: An Inquiry Into the "Rule of Validation", Oklahoma Law Review 18(1965), 243 ff.) und wurde später zur "presumption of validity" (Ehrenzweig/Jayme, Private International Law, Bd. 3, 1977, S. 16-17).
- 14) Die "rule of validation" wurde von Ehrenzweig zugleich durch die Parteierwartungen gerechtfertigt und ging damit über eine bloße Beschreibung des Istzustandes hinaus. "Professor Ehrenzweig's stress on the interests of the parties" (Kiehn v. Elkem-Spigerverket A/S Kemi-Metal, 585 F.Supp. 413, 416 N.3, M.D.Pa.1984) spielt auch in anderen Zusammenhängen eine Rolle.
- 15) Ehrenzweig, The Lex Aequitatis Fori: The Moral Datum, Gedächtnisschrift Vallindas (Sonderdruck 1966), S. 135 ff.; vgl. z.B. Vaugh v. American Basketball Association, 419 F. Supp. 1274, 1278-1279 (S.D.N.Y.1976), und hierzu Jayme, Forum non conveniens und anwendbares Recht, IPRax 1984, 303-304 N.8; vgl. auch OLG München, 10.12.1982, VersR 1984, 745 (Höhe des Schmerzensgeldes nach der lex fori zu bestimmen) und hierzu Mansel, VersR 1984, 746 ff., 748; Heller, Realität und Interesse im amerikanischen internationalen Privatrecht, Wien 1983, S. 93 - 96.



- 16) Psychoanalytic Jurisprudence, 1971; deutsche Ausgabe "Psychoanalytische Rechtswissenschaft", Berlin 1973; vgl. auch Ehrenzweig, A Psychoanalysis of Negligence, Northwestern University Law Review 47(1953), 855 ff.; Ehrenzweig, Civil Liability - A Neglected Area of Pschoanalytical Research, The American Imago 10(1953), 15 ff.; Ehrenzweig, Psychoanalytical Jurisprudence: A Common Language for Babylon, Columbia Law Review 65(1965), 1331 ff.; schließlich Ehrenzweig, Law - A Personal View, Leiden 1977.
- 17) Vgl. auch Ehrenzweig, Zum Handwerkszeug des amerikanischen internationalen Privatrechts, Öst. Zeitschrift für Öffentliches Recht 1956, 521 ff.
- 18) Aus einem Brief von Erika Ehrenzweig an den Verfasser vom 4.3.1974: "Ja, die Kolibris hab ich von Dir gegrüßt in der von Dir geliebten Mission in Carmel, und ich werd es im Juni wieder tun."
- 19) Freundlicherweise überlassen von Frau Joan von Kaschnitz.
- 20) Vgl. hierzu Scoles, Interstate and International Distinctions in Conflict of Laws in the United States, California Law Review 54(1966), 1599 ff.; Hay, International Versus Interstate Conflicts Law in the United States, RabelsZ 35(1971), 429 ff.; Kleinschmidt, Zur Anwendbarkeit zwingenden Rechts im internationalen Vertragsrecht unter besonderer Berücksichtigung von Absatzmittlungsverträgen, Diss. München 1985, S. 147 ff., 156 ff.
- 21) Private International Law, Bd. 1(1967), Bd. 2(1973, mit Jayne), Bd. 3(1977 mit Jayne).
- 22) L.v. Bar, Theorie und Praxis des internationalen Privatrechts, 2. Aufl., Bd. I, 1889, S. 119.
- 23) IPRax 1983, 184 ff., 186.
- 24) Minnesota Law Review 41(1957), 717-729.



- 25) Vgl. hierzu Ehrenzweig, Private International Law, Bd. 1 (1967), S. 196 ff.
- 26) Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).
- 27) Klaxon Co. v. Stentor Electric Mfg., Co., Inc., 313 U.S. 487 (1941).
- 28) Zu dieser Unterscheidung vgl. Somportex Limited v. Philadelphia Chewing Gum Corporation, 453 F.2d 435, 440 (3 Cir. 1971) (Vollstreckung eines englischen Versäumnisurteils in Pennsylvania); vgl. auch Sangiovanni Hernandez v. Dominicana de Aviacion, 556 F.2d 611, 614-615 (1st Cir. 1977). Zur "comity" gegenüber ausländischen Konkursentscheidungen vgl. Matter of Colorado Corporation, 531 F.2d 463, 468-469 (10th Cir. 1976) (Luxemburg. Niederländische Antillen).
- 29) Ehrenzweig, oben Note 24, 720. Anders Koster v. Automark Industries, 640 F.2d 77, 79 (7th Cir. 1981): "Whether it be Wisconsin or the Netherlands, the standard of minimum contacts is the same".
- 30) Vgl. Ehrenzweig, Wirklichkeiten, oben Note 12, S. 258-259.
- 31) Boivin v. Talcott, 102 F.Supp. 979 (N.D. Ohio 1951); ähnlich Koster v. Automark Industries, 640 F.2d 77, 81 N.3 (7th Cir. 1981) (niederländisches Versäumnisurteil); überzeugend dagegen Lugot v. Harris, 499 F.2d 1118, 1120-1121 (D. Nevada 1980) (Nichtanerkennung eines mexikanischen Scheidungsurteils, fehlendes "domicil" und bloße "notice published one day in the Mexican newspaper").
- 32) Grubel v. Nassauer, 103 N.E. 1113, 1114 (N.Y. 1913). Es ging in diesem Fall um die Nichtanerkennung eines Urteils aus Bayern, das auf Grund einer öffentlichen Zustellung ergangen war.
- 33) Vgl. Müller-Freienfels, "Spanierheiraten" Geschiedener im Meinungsstreit, in: Festschrift Kegel, 1977, S. 55 ff.; Schwind, Verfassung und internationales Privatrecht - Unzeitgemäße Betrachtungen zu einem zeitgemäßen Thema, in: Gedächtnisschrift Ehrenzweig, 1976, S. 121 ff.; Ballarino, Costituzione e diritto internazionale privato, Padova 1974; Moura Ramos, Direito internacional privado e constituição, Coimbra 1979.



34) Zur "internationalen" Auslegung des UN-Übereinkommens über die Anerkennung und Vollstreckung ausländischer Schiedssprüche ("internationally recognized defense") vgl. Rhone Mediterranee Compagnia v. Lauro, 712 F.2d 50, 53 (3d Cir. 1983) und hierzu die Anmerkung von Love, in: Journal of Maritime Law and Commerce 15 (1984), 455; vgl. auch Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982). Zur Anwendung der autonomen Anerkennungsregeln für ausländische Urteile, die Schiedssprüche für vollstreckbar erklären, vgl. aber Island Territory of Curaçao v. Solitron Devices, Inc., 489 F.2d 1313, 1319 (2d Cir. 1973).

35) Vgl. hierzu Scoles/Weintraub, Conflict of Laws, 2. Aufl., 1972, S. 904 ff.

36) § 5 des Gesetzes lautet: "Foreign Country - The law of a jurisdiction other than those referred to in Section 1 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice." Vgl. z.B. In Re Estate and Guardianship of Sowerwine, 413 P.2d 48, 51 (Wyo. 1966): "... we do not take judicial notice of the law of Nicaragua". Zum neuen Uniform Interstate and International, der aber bisher kaum angenommen wurde, vgl. Scoles/Weintraub, oben Note 35, S. 905; Shava, Proof of Foreign Law in

Procedure Act

Israel, New York University Journal of International Law and Politics 16 (1984) 11 ff., 221 N.73.

37) Vgl. aber auch Pollack, Proof of Foreign Law, A.J.C.L. 28 (1978), 470 ff.

38) Vgl. hierzu Zajtay, The Application of Foreign Law, in: Int. Enc. Comp. L. III Ch. 14 (1970), S. 22 ff.; Baade, Proving Foreign and International Law in Domestic Tribunals, Virginia Journal of International Law 18 (1978), 619 ff., 624.

39) Berufen sich die Parteien nicht auf ausländisches Recht, so ist das Gericht nicht verpflichtet, von Amtswegen Ermittlungen anzustellen: Corporacion Venezolana de Fomento v. Vintero Sales, 452 F.Supp. 1108, 1112 N.3 (S.D.N.Y. 1978) (Venezuela); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 860 (2d Cir. 1981) (Vietnam).



- 40) Vgl. z.B. California Evidence Code §§ 452 c)f), 454, und und hierzu Volkswagenwerk Aktiengesellschaft v. Superior Court, Alameda County, 176 Cal. Rptr. 874, 881 (Ct.App. 1982). Zu der 1957 eingeführten, ähnlichen Bestimmung der sec. 1875 des California Code of Civil Procedure vgl. In re Gogabashvele's Estate, 16 Cal. Rptr. 77, 80 (App.Ct. 1961) (sowjetrussisches Recht); Gallegos v. Union-Tribune Publishing Co., 16 Cal. Rptr. 185, 189 (Ct.App. 1961) (mexikanisches Recht); In re Estate of Chichernea, 57 Cal. Rptr. 135, 137 (Cal. 1967) (rumänisches Recht).
- 41) Vgl. hierzu die Anmerkung "Raising and Determining Issue of Foreign Law Under Rule 44.1 of Federal Rules of Civil Procedure", 62 A.L.R.Fed. 521 (1983); Anmerkung "Pleading and Proof of Law of Foreign Country", 75 A.L.R.3d 177 (1977). Erfolgt der Hinweis nicht, so kann das Gericht selbst das ausländische Recht ermitteln, ist aber hierzu nicht verpflichtet. Der mangelnde Hinweis führt nicht selten zur Anwendbarkeit der Sachnormen der lex fori; vgl. z.B. Clarkson Company Limited v. Shaheen, 660 F.2d 506, 512 N.4 (2d Cir. 1981).
- 42) Zum "forum non conveniens" in der kontinentaleuropäischen Diskussion vgl. Art. 429 c Abs. 2 des niederländischen Wetboek van Burgerlijke Rechtsvordering:  
"Aan de rechter komt geen rechtsmacht toe, indien het verzoek onvoldoende aanknooping met de rechtsfeer van Nederland heeft."  
Vgl. hierzu Sumampouw, Die Rücknahme der Vorbehalte des Haager Minderjährigenschutzabkommens; einige Konsequenzen für das niederländische IPR, IPRax 1984, 170 ff., 172 (in Fußnote 17 weitere Nachweise); vgl. auch Blum, Forum non conveniens - Eine Darstellung der angloamerikanischen Doktrin und die Anwendungsmöglichkeiten im kontinentalen Recht am Beispiel der Zürcher Zivilprozeßordnung, Zürich 1979. Gegen die Übernahme der amerikanischen Regeln in das deutsche Recht Schlosser, "Forum non conveniens" wegen Inaktivität der Prozeßbeteiligten?, IPRax 1983, 285 ff.



- 43) Zum amerikanischen Recht vgl. neuestens Schack, Jurisdictional Minimum Contacts Scrutinized, Heidelberg 1983, S. 30.
- 44) Ehrenzweig/Jayme, Private International Law, Bd. 3, 1977, S. 38-40; Berger, Zuständigkeit und forum non conveniens im amerikanischen Zivilprozeß, RabelsZ 41(1977), 39 ff., 61-63; Jayme, Forum non conveniens und anwendbares Recht, IPRax 1984, 303 f.; vgl. auch Piper Aircraft Co. v. Reyno, 102 S.Ct. 252, 263(1981): "The doctrine of foreign non conveniens... is designed in part to help courts avoid conducting complex exercises in comparative law." Vgl. ferner Schertenleib v. Traum, 589 F.2d 1156, 1165(2d Cir. 1978); vgl. aber Saraceno v. S.C. Johnson & Son, Inc., 492 F.Supp. 979, 987-988(S.D.N.Y.1980).
- 45) Dies gilt insbesondere dann, wenn ausländische Geschäftsgründe eine Rolle spielen; vgl. Calavo Growers of California v. Belgium, 632 F.2d 963, 967 (2d Cir. 1980).
- 46) 86 F.R.D. 120(S.D.N.Y.1980).
- 47) Vorige Note, 123.
- 48) Vorige Note; vgl. auch Pain v. United States Technologies Corp., 637 F.2d 775, 795-796(D.D.C.1980), und allgemein Jayme, Zur Krise des "Governmental Interest Approach", in: Festschrift Kegel 1977, S. 359 ff., 364.
- 49) 334 F.Supp. 1225, 1226(S.D.N.Y.1971); vgl. auch Bolanos v. Gulf Oil Corporation, 502 F.Supp. 689, 692(W.D.Pa. 1980)(Guatemala).
- 50) Vgl. z.B. Dahl v. United Technologies Corp., 632 F.2d 1027(3.Cir. 1980).
- 51) Piper Aircraft Company v. Reyno, 102 S.Ct. 252, 264 (1981).
- 52) Schnyder, Gerichtliche Zuständigkeit in den USA bei Sachverhalten mit Auslandsberührung, in: Schweizerisches Jahrbuch für internationales Recht 38(1982), S. 47 ff., 64.



- 53) Vorige Note. Vgl. dagegen Dennard, Forum non conveniens in international maritime collision litigation in the Federal Courts: A Suggested Approach, Cornell International Law Journal 16(1983), 121 ff., 141, der sich offen für die Durchsetzung von "American shipping interests" ausspricht.
- 54) Zum "national interest factor" vgl. Dahl v. United States Corporation, 632 F.2d 1027, 1032-1033(3d Cir. 1980).
- 55) 512 F.2d 77(5th Cir. 1975).
- 56) Vorige Note, 82.
- 57) 423 U.S. 3(1975).
- 58) Vgl. Baade, oben Note 38, 643-644.
- 59) Vgl. Challoner v. Day and Zimmermann, 546 F.2d 27 (5th Cir. 1977). Die "lex-loci delicti" wurde bald von den Gerichten in Texas aufgegeben und durch den "most significant relationship test" ersetzt, vgl. Brown v. Cities Service Oil Co., 733 F.2d 1156, 1159 mit Nachweisen(5th Cir. 1984).
- 60) 350 F.2d 468(D.C.Cir. 1965).
- 61) Vgl. hierzu Bosch, Das Bankgeheimnis im Konflikt zwischen US-Verfahrensrecht und deutschem Recht, IPRax 1984, 127 ff., mit Nachweisen; Schack, Internationale Zuständigkeit als Strafe für die Nichtbefolgung von discovery-Befehlen, IPRax 1984, 168 ff.
- 62) Volkswagenwerk Aktiengesellschaft v. Superior Court, Alameda County, 176 Cal. Rptr. 874(App.Ct. 1982).
- 63) Vgl. hierzu Lowenfeld, Discovery-Verfahren und internationale Rechtshilfe, IPRax 1984, 51 ff.
- 64) Vorige Note. Vgl. auch Pierburg GmbH & Co. KG v. Superior Court of Los Angeles County, 186 Cal. Rptr. 876(Ct.App. 1982). Vgl. dagegen Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 363(D.Vt. 1984); Graco Inc. v. Kremlin, Incorporated and SKM, 101 F.R.D. 503, 518-519(N.D.Ill. 1984).



65) 407 U.S. 1 (1972).

66) Vorige Note, 9.

67) Oben Note 65, 12-13. Vgl. auch Coastal Steel v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202 (3d Cir. 1983).

68) Oben Note 65, 15-16. Die Unterscheidung betraf den Fall Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

69) 417 U.S. 512 (1974); vgl. hierzu Dietrich, Internationale Schiedsvereinbarungen vor amerikanischen Gerichten, RabelsZ 40 (1976), 1 ff.

70) Vorige Note, 515.

71) 585 F.2d 39 (3d Cir. 1978).

72) Vorige Note, 44.

73) Vgl. z.B. Karl Lipert, Historischer Statutismus und Neostatutismus der USA: Albert A. Ehrenzweig, Brainerd Currie; Robert Lefflar; von Mehren/Trautman; David F. Cavers, Diss. Zürich 1979, S. 71 ff.; differenzierend dagegen Heller, oben Note 15, S. 76 ff., und hierzu die Rezension von Beitzke, ZfRV 1984, 155 ff.



Vorg: Bertelmann 1983

# Joachim von Elbe Unter Preußenadler und Sternenbanner

## Ein Leben für Deutschland und Amerika

Joachim von Elbe, 1902 in Hamm in Westfalen geboren, Jurist in Ostpreußen, Danzig und Berlin, emigrierte 1934 in die Vereinigten Staaten, kehrte 1945 in das zerstörte Deutschland zurück und war bis 1969 als Mitglied der US-Botschaft maßgeblich an der Ausarbeitung des »Deutschland-Vertrages«, des »Londoner Schuldenabkommens« und der »Pariser Verträge« beteiligt. Zu seinem 80. Geburtstag schrieb ihm Arthur Burns: »Ich könnte mir denken, daß mancher Staatsmann Sie um den gestaltenden Einfluß beneidet, den Sie auf viele internationale Abmachungen auszuüben vermochten, an denen Sie von 1946 bis 1960 mitgewirkt haben.«

Von Elbe, Joachim.—b. Hamm, Germany, June 4, 1902; naturalized 1941; U. of Hamburg, Kiel, and Berlin, LL.B. 1924; U. of Kiel, J.D. 1925; Yale U., LL.B. 1938; with Govt. of Prussia 1924–28; with Inst. for For. Public Law and Int. Law at Berlin 1928–33; research asst., Yale U. Law Sch. 1935–36, 1938–42; atty., OMGUS, 1946–48; legislative counsel, Bipartite Control Office, 1948–49; app. For. Ser. Staff officer of class two and assigned as legal officer, Legislation Div., Office of Gen. Counsel, at Frankfort on the Main Oct. 16, 1949.—HICOG.



Joachim von Elbe, 1902 in Hamm in Westfalen als Sohn eines preußischen Landrats geboren, in Potsdam und Neuwied aufgewachsen, erlebte noch Glanz und Gloria des wilhelminischen Deutschlands, dessen Faszination sich der Knabe ebenso wenig entziehen kann wie den Erschütterungen, die der Zusammenbruch von 1918 auslöst. Von 1920–24 studiert er in Hamburg, Kiel und Berlin Jura, anschließend ist er Regierungsreferendar in Ostpreußen, wird an das Institut für ausländisches Recht in Berlin berufen und ist 1930/31 Rechtsberater des Senats der Freien Stadt Danzig.

1933 ist der politisch eher konservativ orientierte Jurist – der väterlicherseits von der Familie derer von Richthofen und mütterlicherseits von der Familie Mendelssohn-Bartholdy abstammt – als »Misch-

ling zweiten Grades« im Dritten Reich als Beamter »nicht mehr tragbar«.

Er verläßt Deutschland, studiert erneut an der Yale University Rechtswissenschaft, wird zu den amerikanischen Streitkräften einberufen und arbeitet nach dem Zusammenbruch der Naziherrschaft als Mitglied der Rechtsabteilung der Militärregierung und später der US-Botschaft an der Ausarbeitung des »Deutschland-Vertrages«, des »Londoner Schuldenabkommens« und der »Pariser Verträge« mit.

Der Autor hat fast drei Generationen überlebt, ein Kaiserreich, drei Demokratien und eine Diktatur überstanden und den Vereinigten Staaten nicht weniger loyal gedient als der Weimarer Republik.

Er erzählt von einer behüteten Kindheit, berichtet voller Nostalgie von Ostpreußen und Danzig, vom eskalierenden Faschismus am Anfang der dreißiger Jahre in Berlin, den Erfahrungen in den USA und der Nachkriegsgeschichte der Bundesrepublik, an der der exzellente Völkerrechtler regen Anteil nimmt.

Zu seinem 80. Geburtstag schrieb Arthur Burns: »Ich könnte mir denken, daß mancher Staatsmann Sie um den gestaltenden Einfluß beneidet, den Sie auf viele internationale Abmachungen auszuüben vermochten, an denen Sie von 1946 bis 1960 mitgewirkt haben.«

Veranschaul. Wilfried Becker  
Bildarchiv Preußischer Kulturbesitz



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26. September 1985

Herrn Dr. Joachim von Elbe  
Plittersdorfer Strasse 224  
5300 Bonn 2

Lieber, sehr geehrter Herr Dr. von Elbe:

Es war mir eine ganz besondere Freude auf der Rueck-  
reise von Europa im Duesseldorfer Buero Ihre Zeilen vom 11.9.  
vorzufinden. Ihr Werk und Wirken unter dem Preussenadler und  
Sternenbanner hat mich (Elmauer wie Sie) seit Jahren fasziniert  
und ist in verschiedenen (nicht veroeffentlichten) Vortraegen  
diskutiert worden, zuletzt in Wildbad vor dem Praesidenten und  
Mitgliedern des Bundesgerichts und Bundesverfassungsgerichts  
und dem Aspen Institute in New York. Es wird eingehend zitiert  
werden in den nun anlaufenden Arbeiten meines Ko-Autors  
Dr. Mecklenburg, fuer das die deutsche Forschungsgemeinschaft  
ein zweijaehriges Stipendium soeben bewilligt hat, dank der  
Unterstuetzung des Freundes, Professor Dr. Markus Lutter und  
der Gutachten Lutter und Mommsen.

Ich lege einige Materialien zum vorgesagten bei und  
hoffe Sie bald persoendlich zu begruessen, hieben und drueben.

Mit bestem Gruss bin ich

Ihr

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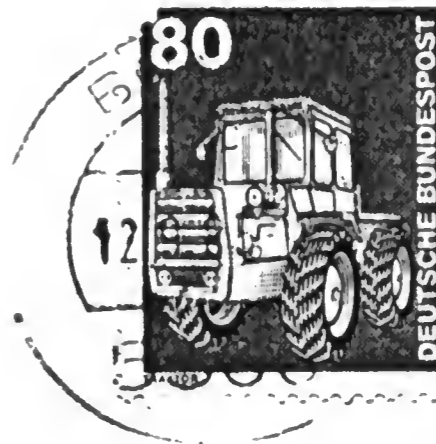
P.S. Wer war Ihr Vorgesetzter, zitiert auf S.250 Ihres  
Buches als "aelterer Rechtsanwalt aus New York"?

Kopie an: Prof. Dr. Markus Lutter (z.Zt.Japan)  
Dr. Mecklenburg



Joachim von Elbe  
Plittersdorfer Strasse 224  
5300 Bonn 2

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kongress  
IHR KONGRESS  
IN BONN  
AM RHEIN



Herrn Professor Dr. Ernst C. Stiefel  
Freiligrath Strasse 1  
4000 Düsseldorf 30



den 8. Oktober 1985

Lieber, sehr geehrter Herr Professor Stiefel!

Sie können sich denken, eine wie grosse Freude Ihr Brief vom 26. September für mich war. Ihr Urteil ist mir natürlich ganz besonders wertvoll, und wenn durch Ihre freundliche Vermittlung das Buch auch anderen bekannt wurde und Interesse gefunden hat, so bin ich Ihnen dafür sehr herzlich dankbar. Aus den Ihrem Brief beigelegten Materialien lässt sich ersehen, welchen weiten Umfang die geplanten weiteren Arbeiten haben werden, die man mit Spannung erwarten darf, und wenn ich die Briefe des Beifalls und der Zustimmung zu Ihren Vorhaben lese, so kann ich nur sagen: es freut mich, dass ich mich mit dem, was ich selbst dazu empfunden habe, in so hervorragender Gesellschaft befinde.

Der "ältere Anwalt aus New York", der 1946/47 in Berlin mein Vorgesetzter war, war Samuel Kramer. Er ist schon vor einigen Jahren gestorben. Die "N.Y. Times" widmete ihm seinerzeit einen



längeren Nachruf, den ich leider nicht zur Hand habe. Er war ein "Yale graduate" und war, wie ich hörte, ein häufiger Gast im Yale Club in New York.

Ich hoffe sehr, dass sich bald einmal eine Gelegenheit zu einer persönlichen Begegnung ergeben wird, und bin mit besten Grüssen

Ihr  
Joachim von Elbe



0228 - 356744

den 11. September  
1985

Sehr gelehrter Herr Professor!

Mit größtem Interesse, sowohl vom sachlichen wie persönlichen Gesichtspunkt, las ich Ihren hervorragenden Beitrag zur Festschrift für Walter Oppenhoff über "Die deutsche juristische Emigration in den U.S.A.", auf den ich vor Kurzem aufmerksam gemacht wurde. Die Erinnerung an alte Zeiten wurde wachgerufen, sind die Namen von guten, alten Freunden tauchten auf: Friedrich Kessler, dessen Anfänge in Yale ich miterlebte, als sein Ansehen in der Law School Fakultät und bei den Studenten von Jahr zu Jahr wuchs; Carl Fulda, mit dem ich gemeinsam in der Yale Law School "die Schulbank drückte" und der nun leider nicht mehr lebt. Aus Ihrem Bericht erfuhr ich über seine mannigfachen Arbeiten, von denen ich nichts wusste. Mir war nur noch bekannt, dass er in der ersten Zeit nach seiner Examina bei der Reform des New Yorker Rechts mitwirkte. Ich sah ihn das letzte Mal vor nunmehr fast 40 Jahren nach meiner Entlassung aus dem Militärdienst. Und dann Professor Rabel, der "Herr Geheimrat", der beim gemeinsamen Mittagessen der Mitglieder des Rabelschen und Bruns'schen Instituts im Berliner Schloss präsiidierte - man durfte nicht zu spät kommen, um nicht auch noch den Zorn der wackeren Frau Fürst, die das Essen zur festgesetzten Zeit fertig haben musste, zu erwecken; Max Rheinstein, dessen



„Nachfolger“ ich 1946 in der Legal Division von OMGUS in Berlin wurde. (Karl Löffelstein hatte mich nach Berlin gebracht.) Ich sah ihn später noch einmal in Chicago, als sein Augenlicht schon sehr schwach geworden war. Mit Gerhart Husserl war ich eine Zeitlang beim OMGUS und HCOG zusammen. F.A. Mann war britisches Mitglied eines Kontrollratsausschusses in Berlin, der sich mit der „Reform des deutschen Rechts“ befassen sollte. Ich vertrat die U.S.A. in diesem Ausschuss. Sie erwähnen auch Martin Wolff, bei dem ich Sachenrecht, sein klassisches Fachgebiet, hörte und der mich im Referendarexamen am Kammergericht prüfte. Magdalene Schoch traf ich einige Male in Washington. Überhaupt wird Kemler im Oktober während eines Alumni-Wochenend in New Haven gelehrt werden. Er erhält mit anderen (Mac Douglas, Rostow) eine Auszeichnung der Yale Law School.

Ich bin Ihnen dankbar, durch Ihren Aufsatz wieder von alten Freunden gehört zu haben. Und natürlich haben mich auch Ihre Ausführungen über die Emigration und das Schicksal deutscher Juristen in den U.S.A. aufs stärkste bewegt. Wie sehr kann ich nachempfinden, was Sie darüber geschrieben haben. Dass ich diese Jahre physisch und geistig überleben konnte - und dann noch fast 3 Jahre „beim Militär“ im vorgerückten Alter - das erscheint mir jetzt fast wie ein Wunder.

Vielleicht werde ich einmal das Vergnügen haben, Sie persönlich kennenzulernen. Ich sehe aus Veröffentlichungen der Deutsch-Amerikanischen Juristen-Vereinigung, dass Sie gelegentlich an deren Veranstaltungen teilnehmen. Am 20. November findet das alljährliche Thanksgiving Dinner hier in Bonn statt. Es wäre schön, wenn sich bei dieser Gelegenheit ein Zusammentreffen ermöglichen ließe.

Mit besten Wünschen und Grüßen.

Joachim von Elbe



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Ich lege einige Materialien zum vorgesagten bei und hoffe Sie bald persoenlich zu begruessen, hieben und drueben.

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Kopie an: Prof. Dr. Markus Lutter (z.Zt.Japan)  
Dr. Mecklenburg



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**JOBST-HINRICH VON BÜLOW**  
**DR. JUR., LL. M.**

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Ernst Fraenkel

Reformismus und Pluralismus

1973



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Fraenkel

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# I. Einleitung



Grundgedanken  
der amerikanischen Verfassung  
und ihre Verwirklichung

von

Karl Carstens

Dr. jur., Master of Laws (Yale)  
Privatdozent an der Universität zu Köln

LL17 1049

*Habilitationsschrift*



DUNCKER & HUMBLLOT / BERLIN



## Vorwort

Die Grundzüge der Verfassung der Vereinigten Staaten von Amerika sind in Deutschland weitgehend bekannt. Weniger bekannt ist dagegen die nähere rechtliche Ausgestaltung der Verfassungsgrundsätze und ihre Verwirklichung in der Staats- und Gerichtspraxis des Landes. Hiervon handelt die vorliegende Arbeit. Sie will keinen umfassenden Überblick über das amerikanische Verfassungsrecht geben, sondern sie beschränkt sich auf die Behandlung einiger weniger tragender Grundgedanken.

Die Schwierigkeiten, die sich einem solchen Unternehmen entgegenstellen, beruhen vor allem darauf, daß es unmöglich ist, die Fülle der Erscheinungsformen des amerikanischen Verfassungsrechts auch nur annähernd erschöpfend zu erfassen. Zum anderen ist die Deutung politischer und sozialer Vorgänge, die sich in einem fremden Land abspielen, für den Außenstehenden immer mit der Gefahr des Mißverständnisses, der Fehldiagnose belastet. Die vorliegende Arbeit möchte daher vor allem die Aufmerksamkeit auf einige Phänomene lenken, zu ihnen Stellung nehmen und zu einer weiteren Betrachtung dieser außergewöhnlich fesselnden Materie anregen.

Es ist mir ein Bedürfnis, an dieser Stelle meinen verehrten Lehrern an der Universität Yale: Harold L. Lasswell, Myres S. McDougal und George F. Braden für die Einblicke zu danken, die sie mir in das Wesen der amerikanischen Verfassung und in ihre Zusammenhänge mit den politischen, sozialen und wirtschaftlichen Strömungen des Landes gegeben haben. Herrn Professor Jahrreiss von der Universität Köln und Herrn Professor Fraenkel von der Deutschen Hochschule für Politik in Berlin bin ich zu besonderem Dank für wertvolle Anregungen und kritische Hinweise verbunden.

Bonn, im November 1953.

Karl Carstens



aus: Klassenjustiz und Pluralismus  
Festschrift für Ernst Fraenkel  
zum 75. Geburtstag  
Hamburg, 1973

## Vorwort

Anlässlich seines 75. Geburtstages wird diese Festschrift Ernst Fraenkel, dem unbeugsamen Streiter für die unverbrüchliche Geltungskraft des Rechts, freiheitlicher Demokratie und sozialer Gerechtigkeit von seinen Freunden, Kollegen und Schülern verbunden mit den herzlichsten Wünschen gewidmet. Sie verehren in ihm zugleich den Senior der Politischen Wissenschaft in der Bundesrepublik Deutschland.

Dem Jubilar wurde bereits zu seinem 65. Geburtstag eine Festgabe zum Thema »*Faktoren der politischen Entscheidung*« dargebracht. Der für diese Festschrift gewählte Titel

### KLASSENJUSTIZ UND PLURALISMUS

will auf die Entwicklung und Spannweite der wissenschaftlichen Tätigkeit Ernst Fraenkels verweisen.

Ernst Fraenkel wurde am 26. Dezember 1898 in Köln geboren. Er erhielt seine Gymnasialbildung in Köln und Frankfurt am Main und wurde als siebzehnjähriger Primaner 1916 zum Heeresdienst eingezogen. Nach Kriegsende studierte er in Frankfurt und Heidelberg Jurisprudenz sowie Geschichte und erhielt die für seine wissenschaftliche und berufliche Entwicklung entscheidenden Anregungen von seinem Lehrer, dem »Vater des Arbeitsrechts«, Hugo Sinzheimer, als dessen Assistent er während der frühen 20er Jahre tätig war. Von Sinzheimer angeregt, verfasste er eine Dissertation zum Thema »*Der nichtige Arbeitsvertrag*« und betätigte sich anschließend in Arbeiterbildungskursen, die von den Gewerkschaften und der SPD veranstaltet wurden, deren Mitglied er bereits im Jahre 1921 geworden war. Als der Deutsche Metallarbeiterverband 1926 in Bad Dürrenberg eine eigene Gewerkschaftsschule errichtete, wurde Ernst Fraenkel, der inzwischen das juristische Assessorexamen abgelegt hatte, Dozent an dieser Schule. Hauptberuflich wirkte er als Syndikus des Metallarbeiterverbandes sowie – gemeinsam mit Franz Neumann – als Prozeßvertreter des Parteivorstandes der SPD. Wegen der Zuspitzung der sozial-politischen Spannungen trat die Lehrtätigkeit,



die ihm zeit seines Lebens besonders am Herzen lag, allerdings bald mehr und mehr zurück, und er richtete in den kritischen Jahren vor 1933 sein Hauptaugenmerk auf die Führung arbeitsrechtlicher Prozesse. Auch diese Anwaltstätigkeit übte er gemeinsam mit seinem Studienfreund Franz Neumann aus. Daneben betätigte er sich literarisch auf seinen Hauptinteressengebieten: dem Arbeitsrecht, dem Verfassungsrecht und der Politikwissenschaft. Seine im Jahre 1927 entstandene Abhandlung »Zur Soziologie der KLASSENJUSTIZ« wurde vor einigen Jahren neu aufgelegt; sie erregte bereits damals namentlich in jungsozialistischen Kreisen nicht unbeträchtliches Aufsehen. Gegen Ende der Weimarer Zeit erschienen zugleich in der »Gesellschaft« eine Reihe grundlegender Artikel zur Verfassungskrise der Jahre 1931/32, in denen er sich mit Problemen des Weimarer Regierungssystems und ihrer theoretischen Interpretation befaßte. In diesen Schriften entwickelte er u. a. seine Theorie von der dialektischen Demokratie. Sein Interesse galt auch institutionellen Fragen. So schlug er bereits damals eine Verfassungsänderung vor, die später unter der Bezeichnung »konstruktives Mißtrauensvotum« im Grundgesetz einen Niederschlag gefunden hat.

Nach Hitlers Machtübernahme blieb Fraenkel, dem mit Rücksicht auf seine Kriegsteilnahme die Anwaltschaft nicht sofort entzogen worden war, noch fünf Jahre in Berlin. Während dieser Zeit stand er als Verteidiger und Berater politisch und rassistisch Verfolgter in engster Verbindung zur Widerstandsbewegung. Seine Erfahrungen, die er vor allem bei seinen zahlreichen Kontaktnahmen mit den Gerichten und Verwaltungsbehörden des Nazi-Regimes sammeln konnte und mußte, hat er theoretisch in dem noch in Deutschland verfaßten Buch »Der DOPPELSTAAT« verarbeitet – ein Werk, das in englischer Übersetzung im Jahre 1941 in New York erschienen ist. »The Dual State«, eine der ersten gewichtigen politologischen Analysen des nationalsozialistischen Totalitarismus, gilt als eines der bedeutendsten Standardwerke der antifaschistischen Literatur der Kriegszeit.

Nachdem Ernst Fraenkel im Spätherbst 1938 nach den USA ausgewandert war, studierte er zunächst an der Universität Chicago amerikanisches Recht und erwarb hier im Jahre 1941 den amerikanischen Juris Doctor (J. D.). Als die amerikanische Öffentlichkeit sich zunehmend mit der Frage der künftigen militärischen Besetzung Deutschlands beschäftigte, beauftragte die Carnegie Endowment ihn mit der Aufgabe, das Besatzungsregime im Rheinland nach dem ersten Weltkrieg zu untersuchen. Die Studie ist unter dem Titel »Military Occupation and the Rule of Law« im Jahre 1944 erschienen. Sie setzte sich das Ziel, anhand der Erfahrungen der Jahre 1918–1923 ein Besatzungsregime zu planen, das

Fraenkel

zur Wiederherstellung demokratisch-rechtsstaatlicher Verhältnisse geeignet schien. Aufgrund dieser Studie wurde Fraenkel eine Stellung in einer amerikanischen Kriegsbehörde angeboten. Gemeinsam mit der Amerikanerin Dr. Miriam Oatman hat er den ersten Entwurf einer Rekonstruktion des deutschen Gerichtswesens ausgearbeitet.

Als ihm nach dem Zusammenbruch des Dritten Reiches das Angebot gemacht wurde, eine Stellung bei den amerikanischen Besatzungsbehörden anzunehmen, lehnte er dies mit der Begründung ab, die Besatzungspraxis der Alliierten entspreche nicht den Prinzipien, die er in »Military Occupation and the Rule of Law« aufgestellt habe. Hingegen zögerte er nicht, die Position eines Rechtsberaters der amerikanischen Besatzungsbehörden in Korea zu übernehmen. Fraenkel ist bis zum Beginn des koreanischen Krieges in Korea geblieben, von dessen Ausbruch er in Seoul überrascht wurde. Aus Seoul wurde er nach Japan evakuiert. In Korea gehörte Fraenkel der amerikanischen Delegation der russisch-amerikanischen Kommission an, der es oblag, die Wiedervereinigung Koreas zu bewerkstelligen. Als offenkundig wurde, daß diese Aufgabe nicht gelöst werden konnte, schalteten die Amerikaner die UN ein, um freie Wahlen in beiden Teilen Koreas zu überwachen. Fraenkel gehörte dem Stab der amerikanischen Delegation an. Er hat den Entwurf eines Wahlgesetzes und eines Gesetzes zur Überwachung dieser Wahlen mitverfaßt und an deren Ausführung mitgearbeitet. Nach Durchführung der Wahlen und nach Etablierung der koreanischen Nationalversammlung erhielt Fraenkel den Auftrag, dem Verfassungsausschuß dieser Versammlung beratend zur Seite zu stehen. Nach Erlaß der Verfassung arbeitete er in der Marshall Kommission Korea und erlangte dergestalt auf Grund unmittelbarer eigener Erfahrung Kenntnisse der sozialen und wirtschaftlichen Probleme eines Entwicklungslandes sowie der Methoden der Wirtschaftshilfe.

Nach Ausbruch des Koreakrieges in die USA zurückgekehrt, traf er dort mit Otto Suhr zusammen, der ihm aus den Tagen gemeinsamer Arbeit in der Gewerkschaftsbewegung und der Untergrundarbeit besonders nahestand. Einer Einladung seines engsten Freundes Otto Suhr folgend, kehrte er – zunächst für ein Semester – nach Berlin zurück, um über koreanische Probleme zu unterrichten, die wegen ihrer Aktualität und prinzipiellen Ähnlichkeit mit den Grundfragen der Deutschlandpolitik ungewöhnliches Interesse erweckten. Seine Antrittsvorlesung an der von Otto Suhr geleiteten Deutschen Hochschule für Politik hat er unter dem Titel »Korea, ein Wendepunkt im Völkerrecht?« veröffentlicht.

Bereits im Jahre 1951 wurde ihm ein Lehrstuhl an der Deutschen Hochschule für Politik und ein Lehrauftrag an der Freien Universität ange-



boten. Zwei Jahre später wurde er zum Ordinarius der Vergleichenden Herrschaftslehre von der Philosophischen Fakultät dieser Universität berufen. Fortan galt sein besonderes Interesse dem INTERGESELLSCHAFTLICHEN VERGLEICH UND DER INTERNATIONALEN POLITIK. Er hat diesen Lehrstuhl bis zu seiner im Jahre 1967 erfolgten Emeritierung innegehabt. Er las – stets auf vergleichender Grundlage – über die verschiedenen parlamentarischen Regierungssysteme der westlichen Welt und über englische Verfassungsgeschichte. Die aus dieser Lehrtätigkeit entstandenen umfangreichen Studien auf dem Gebiet des »Comparative Government« hat er teilweise in seiner Aufsatzsammlung »Deutschland und die westlichen Demokratien« publiziert. Sein vornehmliches Lehr- und Forschungsinteresse galt jedoch dem amerikanischen Regierungssystem, dem er zwei grundlegende Werke widmete, »Amerika im Spiegel des deutschen politischen Denkens« (1959) und »Das amerikanische Regierungssystem« (1960). Das Bemühen um eine Intensivierung amerikakundlicher Forschung in Deutschland krönte Fraenkel schließlich im Jahre 1964 mit der ohne ihn nicht denkbaren Gründung des John-F.-Kennedy-Instituts für Amerikastudien in Berlin, dessen erster Direktor er wurde.

Vor allem hat sich Ernst Fraenkel einen Namen als Begründer und führender Theoretiker des Neo-Pluralismus gemacht. Die wichtigsten seiner Studien zur pluralistischen Demokratietheorie, der »Staatstheorie des Reformismus«, wie sie Fraenkel einmal charakterisierte, sind in dem bereits zitierten Aufsatzband »Deutschland und die westlichen Demokratien« vereinigt. Mit diesen Abhandlungen zum PLURALISMUS wurde eine der bedeutendsten Diskussionen zum Selbstverständnis, den Normvorstellungen und der Verfassungswirklichkeit der Bundesrepublik angeregt und zentral mitbestimmt. Ernst Fraenkel hat an dieser Diskussion mit großem Engagement teilgenommen und hierbei, wie in allen seinen Analysen, Stellungnahmen und Auseinandersetzungen, seinem Leitmotiv entsprochen: »Politologie ist kein Geschäft für Leisetreter und Opportunisten«.

Ernst Fraenkel hat seine Berliner Lehrtätigkeit wiederholt unterbrochen und der Einladung verschiedener amerikanischer Universitäten Folge geleistet, jeweils für ein Semester als Gastprofessor dort tätig zu sein – eine Übung, die seinen vergleichenden Studien zugute gekommen ist.

Vor allem haben diese wiederholten Aufenthalte in den USA seine Kenntnisse der amerikanischen Verfassungsrealität vertieft und ihm ermöglicht, den Fortschritten der amerikanischen »Political Science« verbunden zu bleiben.

Nach seiner Emeritierung wurde Fraenkel zum Honorarprofessor der Universitäten Freiburg und Salzburg ernannt; die Philosophische Fakultät der Universität Bern hat ihm im Jahre 1971 den Doctor honoris causa verliehen.

Mit dem Wunsche, auch nach dem 75. Lebensjahr Engagement und Schaffenskraft Ernst Fraenkels der deutschen Politikwissenschaft erhalten zu wissen, verbinden die Mitarbeiter und Herausgeber die Hoffnung, daß Spannweite und wissenschaftliche Aktualität seines Werkes erkannt, umfassend gewürdigt und seine Werke wie bisher diskutiert werden mögen.

Berlin / Hamburg  
Im Oktober 1973

Die Herausgeber



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FREIE UNIVERSITÄT BERLIN

PHILOSOPHISCHE FAKULTÄT

Prof. Dr. Ernst Fraenkel

BERLIN - DAHLEM

Boltzmannstr. 3 Telefon 76 52 61

13. 12. 1961

Herrn  
Landgerichtsrat Dr. Göppinger  
Stuttgart-Vaihingen  
Möhringer Landstr. 81

Sehr geehrter Herr Landgerichtsrat,

verbindlichen Dank für Ihr freundliches Schreiben vom  
9. 12. 1961.

Es ist richtig, daß ich der Chronist der "Justiz" gewesen bin. Die letzte von mir verfaßte Chronik ist einen Tag vor dem Reichstagsbrand geschrieben und nach dem Reichstagsbrand veröffentlicht worden. Wie Sie sich vorstellen können, hat diese "Chronik" mir in den damaligen Wochen etwas unliebsam im Magen gelegen. Mit der Abfassung dieser Chronik war meine Tätigkeit an der "Justiz" abgeschlossen, und ich habe nie mehr von der Zeitschrift etwas gesehen oder gehört.

An den Republikanischen Richterbund habe ich nur noch dunkle Erinnerungen. Schließlich liegen die Vorgänge ja fast 30 Jahre zurück. Die Chronik in der "Justiz" wurde ursprünglich von meinem Lehrer, Prof. Dr. Sinzheimer, geschrieben, und ich habe diese Aufgabe etwa im Jahre 1929 übernommen. Ich habe sehr eng mit Herrn Oberverwaltungsgerichtsrat Kroner und mit Professor Radbruch zusammengearbeitet; beide sind verstorben. Ich wüßte eigentlich niemand aus diesem Kreise, der noch am Leben ist. Bei dem Republikanischen Richterbund hat es sich um einen relativ kleinen Kreis gehandelt. Wenn ich mich an die Vereinsabende recht erinnere, waren nicht mehr als maximal 100 Leute bei den Veranstaltungen zugegen. Im Vorstand bin ich nicht gewesen, so daß ich Ihnen nähere Auskünfte zu geben nicht in der Lage bin.

Was nun Ihre letzte Frage anlangt, halte ich es für das Richtigste, wenn Sie sich an den Schwiegersohn und



Jan 23.7.

Anwaltspartner von Herrn Sinzheimer, Herrn Dr. Richard  
M a i n z e r in New York wenden. Es ist vermutlich das  
einfachste, daß Sie sich hierbei auf mich beziehen. Die  
Adresse von Herrn Dr. Mainzer lautet: 521, Fifth Avenue,  
New York 17, New York.

Mit verbindlichen Empfehlungen

*Fraenkel*

(Prof. Dr. Ernst Fraenkel)

*Sinzheimer*  
*im April 1933*  
*beurteilt;*

*Fraenkel, FZ 1958, 457;*

*Radbruch, SZ 1949, 732*

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*Theorie der Gesetzgebung*  
*Valkhoff.*

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Man dürfte dann schon nicht gemerkt haben, daß das, was man zu sich nimmt, statt Kaffee Tabak ist. Aber wer so fahrlässig mit seinem Geschmack umgeht, handelt schon fast wieder vorsätzlich. Auch damit ist's also schwerlich etwas. Bleibt noch die Möglichkeit, daß man Mund und Nase von anderen Organen oder Öffnungen nicht unterscheiden kann. Das erscheint durchaus denkbar. Doch dürfte ein solcher Grad von Trunkenheit wiederum das Verschulden ausschließen.

Man kann also verstehen, daß das Justizministerium der Ahndung fahrlässigen Schnupfens oder Tabakkauens in einer Konditorei nichts mehr abgewinnen kann. Es ist nicht, daß man die Lust daran verloren hätte. Denn die Fälle, in denen man ein solches Verhalten von Amts wegen geahndet hat, müssen ohnehin selten gewesen sein. Nein, es sind einfach die Schwierigkeiten, die sich vor dem Versuch aufzuräumen, einen derartigen Tatbestand zu verwirklichen. Man soll dem Bürger das Leben nicht schwerer machen, als es sowieso schon ist.

Freilich will das Ministerium auch die anderen Mumien, die es bei seinen Vorarbeiten zur Rechtsbereinigung ausgegraben hat, aus dem Wege schaffen. Das ist leichter gesagt als getan. Denn gibt es nicht umgekehrt Verhaltensweisen, die bisher nicht geahndet werden konnten, weil die entsprechenden Vorschriften fehlten? Wie sieht es denn beispielsweise aus, wenn jemand einen anderen fahrlässig als „Mumie“ bezeichnet? Oder dann, wenn jemand fahrlässig einen Kurort konserviert?

Vielleicht wird das Justizministerium sein Vorgehen nochmals überdenken. Nachher fehlen nicht nur die Vorschriften, die man abgeschafft hat, sondern es gibt überhaupt Lücken. Wenn etwas Hand und Fuß haben soll, braucht man eine Handhabe, um seinen Fuß dazwischenstellen zu können. Das Ministerium wird also noch schwer daran zu kauen haben. Es dürfte kaum Tabak in einer Konditorei sein.

Professor Dr. Heinz Müller-Dietz, Saarbrücken

## Glückwunsch

### Erich Fechner 80 Jahre

Dr. phil. Dr. jur. *Erich Fechner*, emeritierter ordentlicher Professor für Handels-, Wirtschafts-, Arbeitsrecht und Rechtsphilosophie an der Universität Tübingen, vollendet am 23. Dezember 1983 sein 80. Lebensjahr. Kollegen, Freunde und Schüler übermitteln ihm zu diesem Festtag die herzlichsten Glückwünsche, verbunden mit dem Dank für eine Fülle geistiger Anregungen und Denkanstöße, die von diesem umfassend gebildeten Gelehrten ausgingen.

Breite und Tiefe des Studiums von *Erich Fechner* waren wohl auch schon zu seiner Studienzeit und erst recht heute ungewöhnlich. Er hat zunächst Philosophie, Soziologie und Deutsche Literaturgeschichte studiert, im Anschluß daran Volkswirtschaftslehre und Rechtswissenschaft. Nach der Promotion in Philosophie und dem volkswirtschaftlichen Diplom war er Jahre in der Praxis als Syndikus bei der Vereinigung der Arbeitgeberverbände des Regierungsbezirks Aachen tätig. Das Verbot der Arbeitgeberverbände im Jahre 1934 setzte dieser Tätigkeit in der Praxis, die er für die spätere Arbeit in Lehre und Forschung stets als fruchtbar empfunden hat, ein Ende. Er nutzte die folgenden Jahre zu einem Zweitstudium, wobei er sich neben Germanistik, Anglistik und Philosophie vorwiegend der Rechtswissenschaft widmete, die er mit dem Staatsexamen und der Promotion abschloß. Nach seiner Habilitation in Bonn im Jahre 1941 und seiner im gleichen Jahr erfolgten Berufung an die Universität Tübingen konnten Studentengenerationen in Vorlesungen und Seminaren von dem umfassenden Wissen *Erich Fechners*, den zudem noch eine hervorragende Rhetorik auszeichnet, profitieren. Unvergessen werden allen Teilnehmern Seminare bleiben, die auf der Terrasse seines Hauses oder im „tiefen Keller“ stattfanden. Nach heißen Diskussionen, etwa über die Reine Rechtslehre, saß man noch lange in froher Runde beisammen und erlebte einen *Erich Fechner*, der als Gastgeber nicht zu überbieten war.

Das galt auch für eine Fülle anderer Veranstaltungen, die im Hause *Fechner* stattfanden und – wie der räumlich seit Jahren entferntere Unterzeichnete von Tübinger Kollegen erfahren hat – weiterhin stattfinden. *Erich Fechner* brachte interessante Diskussionsrunden mit Teilnehmern aus den verschiedensten Wissenschaftszweigen zusammen. Er lud, unterstützt von seiner kunstverständigen Gemahlin, zu

Musikabenden ein und – last not least – waren die Tanzveranstaltungen im Hause *Fechner* berühmt.

Es gab und gibt freilich nicht nur den lebensfrohen *Erich Fechner*, sondern auch jenen, der eine einmal bezogene sachliche Position hart und kompromißlos verteidigt und sich auch nicht scheut, sich dabei persönliche Feinde zu machen. So hat sich *Erich Fechner* bereits vor Jahrzehnten vehement für die Erhaltung der Natur und gegen die Verpestung der Luft und die Verseuchung der Flüsse eingesetzt. Er hat für natürliche Lebensmittel plädiert und ist ob dieser Aktivitäten damals belächelt und teilweise sogar angefeindet worden. In den letzten Jahren kreisen seine Gedanken immer wieder um die Bedrohungen und Gefährdungen unseres sozialen Rechtsstaats. *Erich Fechner* gehörte zu den ersten, die bereits in den 50er Jahren das Sozialstaatsprinzip vom Anspruchsdenken lösten und den Pflichtengehalt betonten. In seiner letzten Veröffentlichung „Zur Herkunft und zur Gegenwartslage des sozialen Rechtsstaats“ (Rechtstheorie, 9. Band, Seite 466ff., 480) vertieft er noch einmal diese Gedanken und resümiert: „Der Bürger, der sich der rechts- und sozialstaatlichen Wohltaten erfreut, ist zugleich gehalten, alles notwendige zu tun, um die ihn schützende Institution, den Staat, vor Schaden zu bewahren und zu fördern und alles zu unterlassen, was die Institution schwächt und gefährdet . . .“

Angehörige des Staates, die die rechts- und sozialstaatlichen Gewährungen mißbrauchen und dessen Regeln grundsätzlich zuwiderhandeln in der Absicht, diesen Staat demonstrativ zu verneinen und ihn letztlich zu zerstören, schließen sich aus dem Kreis der Begünstigten selber aus . . .

Gegnern des sozialen Rechtsstaats Zugang zu öffentlichen Ämtern zu gewähren, bedeutet daher eine schwere Verletzung der obersten Pflicht des Staates, sich im Interesse der ihm anvertrauten Menschen und kulturellen Güter selbst zu erhalten.“ Es liegt auf der Hand, daß *Erich Fechner* für diese Feststellungen nicht den Beifall aller finden wird. Wahrscheinlich kritisieren ihn heute viele, die sich bei früheren Anlässen auf ihn beriefen. Auf der anderen Seite kann sich *Erich Fechner* heute der Zustimmung vieler früherer Kritiker gewiß sein. Das ist aber ein sicheres Zeichen dafür, daß *Erich Fechner* früher als andere sich anbahnende Mißstände und Fehlentwicklungen erspürt und ohne Rücksicht auf die *communis opinio* anprangert.

*Erich Fechner* hat sich diesen kämpferischen Elan bewahrt. Dafür legen eine Reihe nach seiner Emeritierung verfaßter rechtsphilosophischer Untersuchungen und der bereits genannte Aufsatz zum sozialen Rechtsstaat Zeugnis ab. Mit dem gleichen Problemkreis hat sich *Erich Fechner* beim Australian World Congress „Law and the Future of Society“ vom 14. bis 21. August 1977 in Sydney und Canberra befaßt (vgl. *Future Prospects of the Sozialer Rechtsstaat*, ARSP, Beiheft N. F. Nr. 11 Seite 145ff.). Alle diese Aktivitäten sind *Erich Fechner* nur möglich, weil ihm die körperliche und geistige Frische erhalten geblieben ist. Das Alter hat ihn noch nicht eingeholt. An seinem 80. Geburtstag sei der Wunsch gestattet, daß dies noch lange so bleiben möge.

Wolfgang Gitter, Bayreuth

## Nachruf

### Imre Zajtay †

Vor erst einem Jahr hat *Imre Zajtay* in Paris im Kreise von Kollegen, Freunden und Schülern seinen 70. Geburtstag gefeiert. Dieses Ereignis war Anlaß zur Überreichung einer Festschrift, in der Autoren aus vielen Ländern ihre Verbundenheit mit einem Gelehrten zum Ausdruck brachten, dessen Lebenswerk der Rechtsvergleichung gewidmet war. *Imre Zajtay* hatte kurz vor Vollendung seines 70. Geburtstages eine hartnäckige Krankheit scheinbar überwunden, und er und die bei seiner Geburtstagsfeier Anwesenden konnten hoffen, daß der Jubilar einen ruhigen, aber immer noch von Arbeit ausgefüllten Lebensabend vor sich haben werde. Sein Tod am 23. September 1983 kam nach kurzem Kranksein, kurz nach seinem Geburtstag am 3. August, dann doch unerwartet für seine Kollegen und Freunde. Ein Trost mag es sein, daß ihm Siechtum und Abhängigkeit erspart geblieben sind.

*Imre Zajtay* teilte sein Lebensschicksal mit den vielen Emigranten unseres Jahrhunderts. Von derselben Generation wie viele der deutschen Emigranten der Nazi-Zeit (geboren im Jahre 1912) hat er seine Heimat Budapest nach dem zweiten Weltkrieg (im Jahre 1948) verlas-



sen, um einem früh von ihm durchschauten und abgelehnten Regime zu entgehen. Sein Entschluß, das neue Leben in Frankreich zu beginnen, war eher ungewöhnlich. Grund für diesen Entschluß waren einmal die Verbindungen, die *Zajtay* zu Frankreich schon hatte. Er hatte in den Jahren 1936–1938 als Stipendiat der ungarischen Regierung in Paris studiert und diesen Aufenthalt mit dem „Diplôme d'Etudes Juridiques Comparatives de l'Institut de Droit Comparé de l'Université de Paris“ abgeschlossen. Es mag nicht nur diese äußere, freilich sehr hilfreiche Anknüpfung gewesen sein, die *Zajtay* bewogen hat, gerade nach Frankreich zu gehen. Aufgrund seiner Sprachkenntnisse (er sprach, nach einer großbürgerlichen Erziehung im Ungarn der Zwischenkriegszeit, gleich gut, und das heißt perfekt, Englisch, Französisch und Deutsch) hätte es ebenso nahegelegen, nach den Vereinigten Staaten (wo er dann allerdings später 1959 als Gastprofessor an der University of Pennsylvania Law School in Philadelphia tätig war) oder Großbritannien zu gehen. *Ronald Graveson* hat in seinem Vorwort zur *Zajtay*-Festschrift festgestellt, daß auch die Aufteilung der Emigranten aus Mitteleuropa – wer die Assimilation sucht, geht nach Amerika, wer die Kultur sucht, nach Frankreich, und wer die Freiheit sucht nach Großbritannien, – so nicht auf *Imre Zajtay* gepaßt hat: er hat in Paris sowohl Assimilation, als auch Kultur und Freiheit gefunden. Es war wohl einfach so, daß *Imre Zajtay* zur französischen Kultur eine besondere Zuneigung und Affinität hatte. So ist er ohne Vorbehalte Franzose geworden und hat alle Ehren empfangen, die sein neues Vaterland verleihen kann: er wurde zuerst wissenschaftlicher Mitarbeiter im Institut de Droit Comparé der Universität, promovierte dann 1952 mit einer preisgekrönten Arbeit zum Doctor iuris der Universität Paris, wurde 1957 Maître, 1970 Directeur de recherche im Centre National de la Recherche Scientifique. 1963 wurde er zum Chevalier, 1972 zum Offizier de l'Ordre des Palmes Académiques ernannt. Diese ehrenvolle Karriere in Frankreich hat sich an eine ebenfalls sehr erfolgreiche Laufbahn im Heimatland Ungarn angeschlossen: zwei Doktorgrade (rer. pol und iuris) mit höchsten Auszeichnungen, Tätigkeiten erst als wissenschaftlicher Assistent an der Universität Budapest und dann bis zur Emigration im ungarischen Justizministerium.

Damit nicht genug, hat *Imre Zajtay* in Deutschland die Mühen einer dritten akademischen Karriere auf sich genommen und dadurch die enge Verbundenheit zu unserem Land bewiesen. Er hat sich 1958 an der Fakultät für Rechts- und Wirtschaftswissenschaften der Universität Mainz mit einer Arbeit über die Stellung des ausländischen Rechts im französischen internationalen Privatrecht habilitiert (1963 auf deutsch erschienen). Nach regelmäßigen Vorlesungen über französisches Privatrecht und rechtsvergleichenden Seminaren wurde er

schon 1961 in Mainz zum außerplanmäßigen Professor ernannt. Die Universität Hamburg ehrte ihn für seine Lehrtätigkeit in Hamburg mit dem Titel eines Honorarprofessors (im Jahre 1971).

Es ist hier nicht der Ort und die Zeit, das umfangreiche wissenschaftliche Werk *Imre Zajtays* erneut zu würdigen; dies ist erst kürzlich aus Anlaß seines 70. Geburtstages geschehen (*Kreuzer, Imre Zajtay, Leben und Werk, Festschrift für Zajtay, 1982, S. XI ff.*; dort auch Verzeichnis der Schriften, S. 581 ff.). Eine ganz besondere und außergewöhnliche Leistung verdient aber hervorgehoben zu werden: sein Verdienst als Vermittler zwischen deutschem und französischem Recht und deutscher und französischer Rechtswissenschaft. Dafür durch seine Sprachkenntnisse und seine profunde Kenntnis der Kultur beider Länder prädestiniert, hat er dieses Ziel, mitzuwirken an dem wissenschaftlichen Austausch zwischen beiden Ländern, unermüdlich verfolgt. Er hat seine große Fähigkeit, Freund zu sein und Freunde zu gewinnen, in den Dienst dieser Idee gestellt. Durch seine rechtsvergleichenden Seminare und Vorlesungen in Mainz und Hamburg und die Betreuung deutscher Studenten in Paris hat er vielen Studenten die Rechtskultur des Nachbarlandes vermittelt. Manche dieser Beziehungen haben sich zu lebenslangen Freundschaften entwickelt. Ganz besonders wirksam war er in diesem Sinne auch in seiner Eigenschaft als Redacteur en Chef adjoint de Revue internationale de droit comparé. Seit 1956 hat er durch die Vermittlung von Rezensionen deutsche Publikationen durch französische und von französischen Publikationen durch deutsche Kollegen wesentlich zum wissenschaftlichen Austausch zwischen beiden Ländern beigetragen. Hinzu kommen noch seine eigenen zahlreichen Rezensionen deutscher Publikationen in französischen Fachzeitschriften. Einen Höhepunkt hat diese Vermittlungstätigkeit in den fünfziger und sechziger Jahren erreicht, als sowohl in Deutschland als auch in Frankreich die Reform des Ehegüterrechts anstand. *Zajtay* hat einen bedeutenden Beitrag zu dieser Reform geleistet, indem er in beiden Ländern die Überlegungen und den Standpunkt des jeweils anderen Landes bekannt gemacht hat.

Auch der internationalen Zusammenarbeit im Bereich der Rechtswissenschaften hat *Imre Zajtay* seine Arbeitskraft gewidmet. Er war von 1957 für insgesamt sechs Jahre als Generalsekretär der von der UNESCO getragenen Internationalen Vereinigung der Rechtswissenschaften tätig, ein Amt, das er kommissarisch noch bis 1964 weiterführte. Diese Jahre waren eine Zeit enger Zusammenarbeit mit *R. H. Graveson, F. H. Lawson, A. Tunc* und *K. Zweigert*.

Mit dem Tode *Imre Zajtays* hat die Rechtswissenschaft einen engagierten Gelehrten, die deutsche Rechtswissenschaft einen Freund verloren. Seinen persönlichen Freunden wird er unvergessen bleiben.

Peter Arens, Freiburg i. Br.

## Literatur

**Stoll, Hans:** Grundriß des Sachenrechts, C. F. Müller, Heidelberg, 1983, 212 S., DM 18.80.

Der Grundriß beginnt mit „Bereich und Grundstruktur des Sachenrechts“. Im ersten Abschnitt dieses Kapitels („System des Sachenrechts“) ist bemerkenswert der gedrängte Hinweis auf die Überlagerung des Sachenrechts durch das öffentliche Recht; zu erwähnen ist auch der Hinweis auf den interessanten Begriff des öffentlichen Eigentums, einer hoheitlich gestalteten Sachherrschaft, die bei uns freilich im Gegensatz zum französischen Recht keine große Rolle spielt. Im zweiten Abschnitt „Schuldrecht und Sachenrecht“ wird der Unterschied zwischen schuldrechtlichem und dinglichem Rechtsgeschäft und vor allem der Unterschied zwischen schuldrechtlichen und dinglichen Rechten in Konkurs und Zwangsvollstreckung dargestellt; wie schon *Jaeger* sagte, der Konkurs, und das gleiche gilt für die Einzelvollstreckung, ist der Prüfstein des dinglichen Rechts. Vertretbar ist es, daß *Verf.* schon hier auf die Treuhandverhältnisse näher eingeht, obwohl man bei der Stoffanordnung des *Verf.* notwendigerweise unmittelbar zuvor Gesagtes sofort widerrufen muß; aber der scharfe Kontrast, den *Verf.* herausstellt, kann pädagogisch durchaus von Nutzen sein, zumal der mündliche Vortrag den Idealtyp der Treuhand, den englischen trust, näher charakterisieren kann; der trust ist das Ergebnis des Dualismus von common law and equity, und dieser Dualismus war wiederum nur möglich bei zwei konkurrierenden, voneinander unabhängigen Gerichtsorganisationen; daher versprechen alle Versuche, den Zwitter „Treuhandverhältnis“ mit Anlei-

hen aus dem trust-Recht zu veredeln, wenig Erfolg; und so gesehen hat das Unmittelbarkeitsprinzip der Rechtsprechung mit seiner einschränkenden Wirkung durchaus Plausibilität.

Im zweiten Kapitel werden die „Dinglichen Rechte und ihre Verwirklichung“ behandelt. Auf den Überblick über die Arten der dinglichen Rechte folgen die sachenrechtlichen Grundsätze wie die der Spezialität und der Einheitlichkeit (wesentliche Bestandteile können nicht Gegenstand besonderer Rechte sein), das Prioritätsprinzip, das Prinzip der beweglichen Rangordnung; den Abschluß bildet die Verwirklichung der dinglichen Rechte durch die dinglichen Ansprüche.

Im dritten Kapitel werden „Besitz und Eigentum als allgemeine Institute des Sachenrechts“, im Abschnitt über das Eigentum u. a. auch das ziemlich unübersichtliche und komplizierte Nachbarrecht in relativer Kürze und doch mit erstaunlicher Klarheit erörtert. In diesem Kapitel wird auch das vom Studenten gefürchtete Eigentümer-Besitzer-Verhältnis dargestellt. Diese für das Buch relativ umfangreiche, aber beim Umfang der Materie trotzdem knappe Darstellung bringt nicht bloß einen einführenden Überblick, sondern geht bis in wichtige Detailfragen, z. B. bei den vertraglichen Drittbeziehungen des Fremdbesitzers; *Verf.* bringt das Beispiel, daß der Vorbehaltskäufer die unter Eigentumsvorbehalt gekaufte Sache zur Reparatur gibt und der Eigentümer und Vorbehaltsverkäufer, der vom Kaufvertrag wegen Zahlungsunfähigkeit des Vorbehaltskäufers zurückgetreten ist, die Sache von der Reparaturwerkstatt zurückverlangt. Die Frage ist



had a profound impact on many aspects of American and international law. He was instrumental in the development of American participation in The Hague Conference on Private International Law. His scholarship and intense concern for all questions he touched were an inspiration to countless colleagues here and abroad."

In 1972, a volume containing a selection of Dr. Nadelmann's essays was published by Martinus Nijhoff (The Hague), with a foreword and introductory essays by Professors David Cavers, Arthur von Mehren, and Donald Trautman of the Harvard Law School. Professor Nadelmann continued in his scholarly work during the past four years in a nursing home and was at work on a bankruptcy article at the time of his death.

ANDREW FREEMAN  
(1916-1983)

Andrew Freeman, immediate past president of the American Foreign Law Association and prominent member of the New York City bar, died suddenly at his home on 1 December 1983 in his 67th year. At his funeral a childhood schoolmate from Budapest, his law firm partners, his rabbi, his son and friends characterized him as a man of perfect integrity, of dignity and of excellence, devoting himself without stint to every concern of his clients, large and small.

To a larger public he was known for his scholarship. As an adult he came to the United States from chaos in war-torn Hungary, mastered the common law system, comparing it in his speeches and writings with the fundamental principles of Roman and civil law learned as a student and imbibed from a father and grandfather who had been prominent lawyers in Budapest. His lectures in New York and elsewhere focused on complicated legal matters requiring knowledge of the common law and Romanist systems of Europe. His erudition and effective communication gained him the respect of bench and bar. He became not only an interpreter of the Continental legal systems to Americans but of the common law systems to scholars in Hungary, to which he returned on various occasions.

Law was not all that filled his life: he was an accomplished historian, relating current events to their historical origins to create meaningful perspective. Additionally, he was a connoisseur of music from classical to modern. His language proficiency was startling, for he was capable of moving without hesitation from Hungarian to English, German, French and Italian with hardly a flaw.

His colleagues in the American Foreign Law Association cannot forget his presidency. He spoke frequently at meetings, exhibiting an impressive speaking style, going quickly to the point while coloring his remarks with literary, philosophical and musical references



appropriate to his topic. He fitted truly into the definition of the Renaissance man.

His first law degree was obtained in 1938 from the University of Budapest. After reaching New York following World War II, he won a second law degree from St. John's University in 1951. Until 1978 he practiced law in New York with the firm of Regosin, Edwards and Freeman. Afterwards his firm became Wachtell, Manheim and Grouf with whom he remained active until the very day of his death.

In addition to his presidency of the American Foreign Law Association, he served as president of the Consular Law Society from 1979 to 1980, as a member of the Executive Committee of the American Branch of the International Law Association, and as a member of the Foreign and Comparative Law Committee of the Association of the Bar of the City of New York. His law review articles published in the United States concerned primarily matters of trusts and estates in a foreign context.

He is survived by his wife, Vera, a paper import manager, and his son George, an attorney with the New York Times.

JOHN N. HAZARD  
GEORGE FREEMAN



Mitgl. Stadtschulrat für Wien. 1934 nach den Februarkämpfen Zwangspensionierung. ZusArb. mit illeg. RSÖ, Mitarb. *Der Kampf* Brünn, Ps. Franz Morhofer. 1941 unmittelbar vor drohender Verhaftung Flucht nach Kuba, anschl. USA. Mitarb. *Voice of America* im Abhördienst fremdsprachiger Rundfunksendungen. Ab 1943 Mitgl. eines Ausschusses der österr. Sozialisten in New York zur Planung des künftigen Ausbildungswesens in Österr. - 1946 Rückkehr nach Wien, Mitgl. SPÖ; 1946-49 Amtsltr. u. ökon.-administrat. Ref. im Stadtschulrat für Wien. 1949 Pensionierung, weiterhin ehrenamtl. Mitarb. Stadtschulrat für Wien. Mitgl. Österreichische UNESCO-Kommission. - *Ausz.*: 1922 Hofrat.

*W*: u.a. Sieben Jahre Schulreform in Österreich. 1926; Wesen und Werden der Schulreform in Österreich. 1929; Schulreform, Demokratie und Österreich 1918-1950. 1950; Warum allgemeine Mittelschule? 1952. *L*: DBMOI; Maimann, Politik. *D*: VfGdA. *Qu*: Arch. Hand. Publ. Z. - IfZ.

**Fisher** (bis 1944 Fischer), **Paul**, Dr. jur., Wirtschaftsexperte; geb. 9. Juli 1908 Wien; jüd.; *V*: Ernst F. (geb. 1878 Olmütz, gest. 1940 Wien), jüd., Geschäftsm.; *M*: Irma, geb. Loebel (geb. 1882 Prag, gest. 1956 Washington/D.C.), jüd., Emigr. GB, Haushaltshilfe, Fabrikarb., Schneiderin, später USA, Stud. Univ. Minn., Bibliothekarin; *StA*: österr., 1944 USA. *Weg*: 1938 USA.

1925-27 Stud. Paris u. Alte Wiener Handelsakademie, 1930 Prom. Univ. Wien, 1930-38 RA-Konzipient u. 1934-38 wiss. Assist. Univ. Wien für ArbRecht u. Sozialversicherung bei Arthur Lenhoff, 1935-38 Strafverteidiger. Mitgl. Jugendgruppe *B'nai B'rith, Blau-Weiß*. Nach dem Anschluß Österreichs Berufsverbot, zeitw. in Haft. Aug. 1938 Emigr. USA, Fremdsprachenkorr. u. Vertr. bei Import-Exportfirma; 1941 Stipendiat Oberlaender-Stiftung; 1943-46 Assist. Prof. Clark Univ. Worcester/Mass., 1946-50 Dartmouth Coll./N.H., 1950 Stipendiat des US-Außenmin. u. des Soc. Science Research Council zum Stud. der Betriebsratsgesetzgebung in Deutschland u. Frankr.; 1951-60 wirtschaftswiss. Sachverständiger für ArbRecht Office of Labor Affairs der FAO, Mutual Security Admin. u. Econ. Coop. Admin.; 1961 Wirtschaftsexperte Planungsgruppe Nord-Ost-Brasilien der USAID; 1962 US-Deleg. im UN-Ausschuß für Wirtschaftspolitik in Bangkok. 1962-63 stellv. Ltr. der Abt. Planungsunterstützung, Program Coordinating Staff, AID. Ab 1963 Mitarb. Inst. für angewandte Sozialforschung, Columbia Univ., ab 1964 Ltr. internat. Abt. der Soc. Security Admin., Washington/D.C., 1966 Berater US-Deleg. u. Vors. Sozialversicherungsausschuß der 8. Am. States Conference der ILO in Ottawa/Kanada. 1968-69 Wirtschaftsexperte ILO Genf. 1973-74 u. 1977 Entwicklungsberater der Harvard Univ. für Probleme der Sozialversicherung in Korea. Doz. an versch. US-Univ. u. am Industrial Coll. of the Armed Forces, beim Econ. Development Inst. der Internat. Bank for Reconstruction and Development u. im Foreign Service Inst. des US-Außenmin.; Mitgl. *Am. Econ. Assn.*, *Industrial Relations Research Assn.*, *Am. Arbitration Assn.*, *Internat. Assn. for Labor and Soc. Legislation*. Lebte 1977 in Washington/D.C.

*Qu*: Fb. Hand. - RFJI.

**Fladung, Hans** (Johann), Parteifunktionär, Publizist; geb. 12. Febr. 1898 Frankfurt/M.; Diss.; *V*: Georg F., Bildhauer; *M*: Auguste, geb. Ahlers; ∞ I. 1922, II. 1960 Klara Krösche; *K*: 2. *Weg*: 1938 CH, GB; 1946 Deutschland (BBZ).

Kunstschmiedelehre; ab 1913 Mitgl. Arbeiterjugend. 1917 Kriegsteiln., nach dem Krieg USPD, 1920 Deleg. Vereinigungs-PT u. Mitgl. KPD. 1924 hauptamtl. Funktionär u. Gew-Sekr. BezLtg. Pommern. Dez. 1924-1933 MdL Preußen. 1925 Funktionär KPD-Bez. Niederrhein. 1927 Agitprop-Sekr., ab 1931 OrgLtr., 1928-33 StadtVO. Düsseldorf. 1933 illeg. Tätigkeit (Deckn. Diesing), 9. Nov. 1933 Verhaftung, im Columbia-Haus Berlin von Gestapo schwer mißhandelt, vorüberg. KL Oranienburg, VGH-Urteil 2 1/2 J. Zuchth. (1. Ehefrau 1 1/2 J. Gef.). 1938 Emigr. über die Schweiz nach GB. Führende Funktionen in KPD, Mitgr. FDKB, später dessen Vors.; 1943 Mitgr. FDB, Mitgl. Arbeitsausschuß. 1946 Gr. Progreß-Verlag Düssel-

dorf, Hg. *Zs. Heute und Morgen*. 1948 FDKB-Sekr. Düsseldorf, 1951-58 Bundessek. Wegen des Versuchs, den FDKB nach KPD-Verbot weiterzuführen, vor dem LG Düsseldorf Anklage wegen „Staatsgefährdung“. Der Prozeß, der in GB Aufsehen erregte u. gegen den Bertrand Russel protestierte, wurde Jan. 1964 wegen Verhandlungsunfähigkeit des Angeklagten abgesetzt. Lebte 1976 in Gunderhausen b. Darmstadt. - *Ausz.*: 1964 Dr. h.c. Univ. Jena.

*L*: Baukloh, F., Der Fall Hans Fladung. In: Frankfurter Hefte, H. 4, Apr. 1964; Röder, Großbritannien. *D*: IfZ. *Qu*: Arch. Hand. Publ. Z. - IfZ.

**Flatow, Georg**, Dr. jur., Ministerialbeamter; geb. 2. Nov. 1889 Berlin, umgek. Okt. 1944 KL Auschwitz; jüd.; *V*: Robert F., Kaufm.; *M*: Minna, geb. Goldberg; ∞ Hedwig Wiener (gest. 1944); *K*: Ilse; *StA*: deutsch. *Weg*: 1939 NL; Deutschland.

Ab 1908 Stud. Rechtswiss. Berlin, München, 1915 Prom. Heidelberg. 1920 RegRat ReichsarbMin., 1923-33 im Preuß. Min. für Handel u. Gewerbe, ab 1927 MinRat, Experte für Arbeitsrecht, Berufung als ao. Prof. an die Univ. Berlin durch natsoz. Machtübernahme vereitelt. 1938 KL Sachsenhausen, 1939 Emigr. nach Amsterdam, Tätigkeit in Flüchtlingshilfe. Nach dt. Besetzung deportiert.

*W*: u.a. Die sozial-politischen Errungenschaften der Revolution. 1919; Kommentar zum Betriebsrätegesetz (zus. mit Otto Kahn-Freund). 1920, 3. Aufl. 1931; Betriebsvereinbarung und Arbeitsordnung. 1923; Kommentar zum Arbeitsgerichtsgesetz (zus. mit Richard Joachim). 1928; Entscheidungen des Reichsarbeitsgerichts und der Landesarbeitsgerichte (Hg.). 1928/29. EGL. Hand. - IfZ.

**Flegenheimer, Albert**, Fabrikant; geb. 4. Juli 1890 Schwäbisch-Hall, gest. 16. Dez. 1972 New York; jüd.; *V*: Samuel F.; *M*: Lissette, geb. Rothschild; ∞ 1920 Helen Stern; *K*: Ruth Herzog; → Ernest Flegenheimer; *StA*: 1943 USA. *Weg*: 1937 I; 1939 CDN; 1941 USA.

1905-07 Lehre in Karlsruhe, bis 1937 versch. Stellungen in der Zuckerindustrie in Deutschland, Italien, Rumänien, Bulgarien, VorstMitgl. Süddeutsche Zucker AG Mannheim, 1937 Rücktritt u. Übertragung seines Aktienanteils an Süddeutsche Zucker AG. 1937 Emigr. Italien, 1939 Kanada, Aufbau einer Rübenzuckerfabrik in Manitoba, 1941 in die USA, 1941-48 Präs. Waverly Sugar Co. in Waverly/Iowa, 1952-57 Menominee Sugar Co. Green Bay/Wisc., 1961-63 Dir. u. 1963-72 Vors. Michigan Sugar Co. Saginaw/Mich.

*Qu*: Hand. HGR. Pers. Publ. - RFJI.

**Flegenheimer, Ernest**, Fabrikant; geb. 30. Jan. 1927 Zürich; jüd., später ev.; *V*: → Albert Flegenheimer; ∞ 1952 Marjorie McGinn, ev.; *K*: Ellen, Lauren, Eric John, Mark Steven; *StA*: 1943 USA. *Weg*: 1937 I; 1939 CDN; 1942 USA.

1946-48 Stud. New York Univ., 1948-49 Middlebury Coll. Vermont, 1949-50 Univ. Grenoble/Frankr.; 1950-51 bei Import-Exportgeschäft Domestic Concentrates Inc. New York, 1954-62 bei Menominee Sugar Co. Green Bay/Wisc., 1962-63 Zuckergroßhandlung Bend Southhall McBratnic Co. Green Bay/Wisc., ab 1963 Präs., VorstMitgl. u. Dir. Michigan Sugar Co. Saginaw/Mich., zugl. Dir. Second Nat. Bank of Saginaw, AR-Mitgl. International Sugar Research Foundation, AR-Vors. *Farmers and Manufacturers Beet Sugar Assn.*, Treuhänder *US Beet Sugar Assn.* Lebte 1977 in Saginaw/Mich.

*Qu*: Hand. HGR. Pers. Publ. - RFJI.

**Fleischer, Anton**, Parteifunktionär; geb. 4. Aug. 1909 Langengrün b. Luditz/Böhmen; *StA*: österr., 1919 CSR, N (?). *Weg*: 1938 (?) N.

Sekr. *Verband der Kleinbauern und Häusler* u. DSAP-Funktionär. Emigr. nach Norwegen, TG-Mitgl. Lebte 1977 in Bekkestua b. Oslo.

*Qu*: Pers. - IfZ.



## Juso erinnerten an Reichskristallnacht

Mit einer Mahnwache gedachten die Jungsozialisten (Juso) der Reichskristallnacht vom 8. November 1937. Damals hatten Nazihorden jüdische Geschäfte geplündert, Juden mißhandelt und unter anderem die Synagoge in der Halderstraße angezündet. Erst im letzten Jahr wurde die Kultstätte der Israelitischen Kultusgemeinde wieder hergerichtet. Wie in den vergangenen Jahren standen Mitglieder der Jugendorganisation der SPD Mahnwache vor der Synagoge und beim Kaufhaus Zentral, das bis zur Nazizeit jüdische Besitzer hatte. Auf Plakaten kritisierten die Juso unter anderem die Asylpolitik der Bundesregierung und die „Ausländer-raus“-Haltung vieler Menschen. (kpk)

## Aus der IKG Fürth Vorsitzender: Severin Pasternak

### Gebetszeiten

Gebetszeiten in der Synagoge, Hallemannstraße 2:  
Freitags: 17.30 Uhr; samstags 10.00 Uhr

### Geburtstage

Folgende Gemeindeglieder feiern ihren Geburtstag:

- 6. 12. Schlomo Halpert
- 15. 12. Suzanne Gundelfinger
- 24. 12. Alex Melnik
- 24. 12. Eva Zentner
- 26. 12. Hersz Schor
- 29. 12. Gil Leder
- 31. 12. Cilli Reitler
- 1. 1. Hermann Grubner
- 3. 1. Ilse Flescher
- 3. 1. Moses Perekalski
- 9. 1. Ferenc Herzog
- 17. 1. Fela Perekalski
- 24. 1. Saul Neuberg

Ihnen allen wünscht die Gemeinde Fürth ein herzliches „Mazal tov!“

### Kranzniederlegung

Am 16. November, 9.30 Uhr, fand auf dem Friedhof, Erlanger Straße 99, in Fürth, eine Kranzniederlegung durch Herrn Oberbürgermeister Uwe Lichtenberg statt. Anwesend waren viele Herren des Stadtrates und unserer Gemeinde sowie der Bürgermeister Weidemann, Altbürgermeister Scherzer.

### Chanukka-Feier

Am 28. Dezember, 15.30 Uhr, wird in unserem Gemeindesaal, in der Blumenstraße 31, wieder eine Chanukka-Feier stattfinden, zu der noch besonders eingeladen wird.

## Aus der IKG München Präsident: Charlotte Knobloch

### „Es gibt keine Versöhnung ohne Erinnerung“

#### Israelitische Kultusgemeinde München, ZJD und BDKJ gedachten der Reichskristallnacht

Anlässlich des 48. Jahrestages der sogenannten „Reichskristallnacht“ fand am 8. November am Gedenkstein der einst schon im Sommer 1938 auf Befehl Hitlers abgerissenen Münchner Hauptsynagoge an der Herzog-Max-Straße eine Gedenkfeier der Israelitischen Kultusgemeinde statt. Anwesend waren dieses Mal gerade sehr viele junge Leute. Denn neben der Zionistischen Jugend (ZJD) beteiligten sich konfessionelle und gewerkschaftliche Jugendgruppen. Mit „historischen Texten zur Erinnerung“ stimmten Stadtjugendpfarrer Hans Lindenberg und zwei Mitglieder vom Bund der Deutschen Katholischen Jugend (BDKJ) die zahlreichen Zuhörer ein. Dr. Thomas Münz, Vizepräsident der IKG München, richtete an alle den Appell, die „zahllosen Opfer niemals zu vergessen“. „Uns ist immer noch nicht in ausreichendem Maße bewußt geworden, daß der NS-Terror der Vergangenheit jederzeit wiederholbar ist und von gewissen Gruppen heute schon wieder angestrebt wird. Jeder Mensch muß sich im klaren sein, daß die Kriterien, also die Auswahl der Opfer austauschbar sind und kein Mensch ist vor dem totalitären System sicher“. In diesem Zusammenhang stellte Münz mit Bestürzung fest: „Leider sind die Vorurteile nicht an der Wurzel in unserem Lande angepackt worden, sie sind nur oberflächlich behandelt worden oder gar verdrängt“. Als jüngstes Beispiel führte er die endgültige Einstellung aller Verfahren gegen die Nazi-Juristen vom „Volksgerichtshof“ an. „Die deutsche Justiz konnte oder wollte (diese Sühne) nicht zustande bringen.“

Johannes Schiessl vom BDKJ räumte ein, daß man in zunehmendem Maße eine Gleichgültigkeit, ein Vergessenwollen dieser Greuel spüre: „Gegen diese Gleichgültigkeit gilt es anzukämpfen“. Als „Vertreter eines Jugendverbandes“ meinte er: „Wir sind Nachgeborene, aber das soll und darf für uns keine Entschuldigung sein, wie man das wieder öfter hört. Uns trifft keine persönliche Schuld, aber wir haben ein schweres Erbe angetreten. Es ist an uns, die Vergangenheit als unsere anzunehmen!“ und „Es gibt keine Versöhnung ohne Erinnerung“. Diesen Gedanken unterstrich auch die Zionistische Jugend mit der Rezitation aus einem Grußwort des SPD-Vorsitzenden Willy Brandt für das Jüdische Neujahrsfest 1985: „Die neue Generation muß sich gegen das Vergessen wehren, nichts ist trügerischer als die Illusion, Zeit könne immer Wunden heilen“. Gemeindevorstand Pinchas Biberfeld, ein gebürtiger Berliner, berichtete von seinen ganz persönlichen, schrecklichen Erinnerungen an die Reichskristallnacht. Und weil damals jeder alles gewußt habe, rief er die Jugend eindringlich auf,

gegen das Wiederaufleben des Neonazismus anzukämpfen.

Mit einer Schweigeminute schloß die Gedenkfeier, an der als Vertreter der Stadt München die Stadträte Dr. Dietmar Keese (SPD) und Rudolf Hierl (CSU) teilnahmen. Im Anschluß daran wurde in St. Bonifaz die Ausstellung „Briefe an junge Deutsche“ eröffnet, die bis zum 15. November unter der Ägide des BDKJ und vom 16.-19. November von der Zionistischen Jugend im Jugend- und Kulturzentrum der IKG München präsentiert wurde.

Ellen Presser

### Öffnungszeiten der Gemeindebibliothek

Die Bestände der Bibliothek wurden durch Ankäufe neuer Bücher aktualisiert und erweitert. Interessierten Lesern stehen Bücher in deutscher, englischer, hebräischer, jiddischer und polnischer Sprache zur Auswahl. Von Montag bis Donnerstag zwischen 15.00 und 17.00 Uhr ist die Bibliothek für das Publikum geöffnet.

### Gebetszeiten

Freitag, 19. Dezember: Lichtzünden 16.03 Uhr, Mincha 16.15 Uhr.

Schabbat, 20. Dezember, Wajischlach: Mincha 16.15 Uhr, Ausgang 17.21 Uhr.

Wochentags, 21.-25. Dezember: Mincha-Ma'ariv 16.15 Uhr.

Freitag, 26. Dezember, Erew Chanukka: Lichtzünden 16.06 Uhr.

Die Chanukka-Lichter werden vor den Schabbat-Lichtern angezündet.

Schabbat, 27. Dezember, Wajeschew, Schabbat Chanukka 1, Mewarchin Hachodesch: Mincha 16.25 Uhr, Ausgang 17.25 Uhr.

Wochentags, 28.-31. Dezember: Mincha-Ma'ariv 16.20 Uhr.

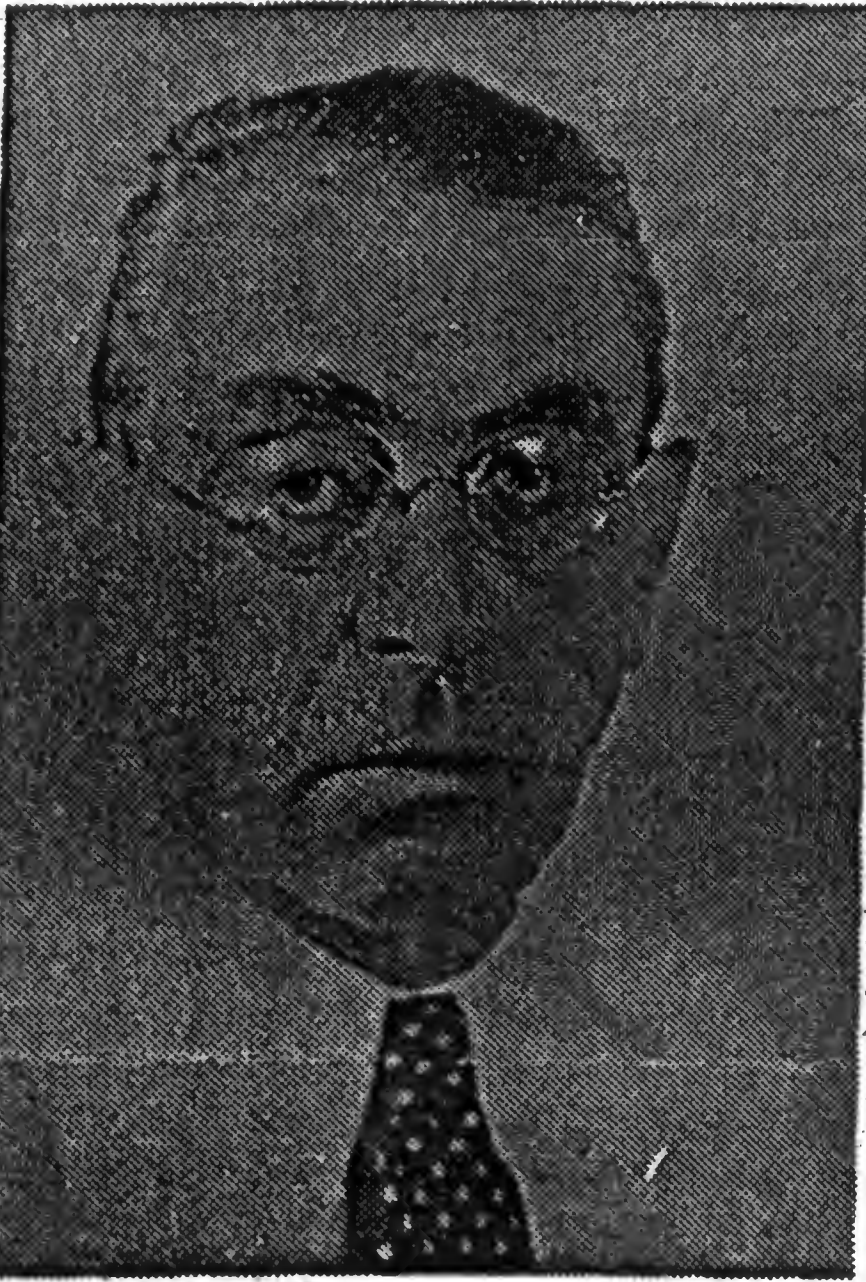
### Erinnerung an Dr. Sigbert Feuchtwanger

Zum 100. Geburtstag am 2. Dezember 1896

Dr. Feuchtwanger wurde am 2. Dezember 1896 in München geboren und entstammte der bekannten Familie, aus der neben begabten Bankiers auch der Schriftsteller Lion Feuchtwanger und der Polyhistor Dr. Ludwig Feuchtwanger hervorgegangen sind. Sein Interesse galt von je wissenschaftlichen Fragen. Dafür zeugen neben vielen Aufsätzen die Werke „Staatliche Submissionspolitik in Bayern“ (1910), „Die Judenfrage als wissenschaftliches und politisches Problem“ (1916), „Die freien Berufe, im besonderen die Anwaltschaft. Versuch einer Kulturwirtschaftslehre“ (1922). In seiner stillen Art gehörte er zu den angesehensten Anwälten Münchens, den gerade rechtsstehende Kreise als ihren Vertreter in die Anwaltskammer wählten, ihn, den Juden und Zionisten. Zeichen einer deutsch-jüdischen Symbiose, die aus schmerzlicher Erbitterung heute oft geleugnet wird und dennoch Wirklichkeit war. Ein Zionist hatte es zuzeiten



schwerer, Verständnis bei seinen jüdischen Brüdern zu finden, als bei rechtschaffenen Deutschen, die es doch auch gab. Er hat als 2. Vorsitzender der Gemeinde die schweren Tage des Niedergangs der deutschen Juden mitgemacht und seinen Standpunkt mit Würde und Ritterlichkeit vertreten. Spät kam er nach Israel. Dem dort schnell neu aufblühenden Bankinstitut seiner Familie (J.L. Feuchtwanger, gegründet München 1857) gehörte er als Syndikus an. Für jede nur praktische Aufgabe nicht recht begabt, hat er unter manch geistigem Verzicht die Forderung des neuen und so sehr veränderten Tages erfüllt und damit Wertvolles im Sinne der Privatbank geleistet. Sigbert Feuchtwanger hat die Tradition seines streng



**Dr. Sigbert Feuchtwanger**

konservativen Vaterhauses immer bewahrt, ohne für sich den Anspruch zu erheben, ein religiöser Jude zu sein. Er litt unter dieser Spannung und wollte nicht einsehen, wie zukunftsweisend er als ein Mann war, der zwischen denen stand, die glaubten, Religion sei ein fester Besitz und denen, die meinten, auf Religion verzichten zu dürfen. Was ihm Unruhe und Unbehagen bereitete, ist schließlich der einzige Weg, die Chance für eine religiöse Erneuerung des jüdischen Glaubensvolkes. Der im Westen und seiner Kultur Beheimatete empfand natürlich stark, daß der in Israel neu wurzelnde Jude unter einem Lebensgesetz stand, das nicht mehr ganz das seine werden konnte.

In eine Weise, die tief bewegte, mühte er sich um Gerechtigkeit gegenüber Gedanken, die ihm fremd waren, um Objektivierung in einer Epoche sehr subjektiver Impulse und nationaler Wallungen. Bei aller Schau und Zurückhaltung seines Wesens verspürte man dabei stark seine Verletzlichkeit und Melancholie. Doch gab er dem nicht nach, hielt seine Person für völlig unwichtig und bewährte sich damit in einem letzten Sinn eben als religiöser Mensch. Ein plötzlicher Tod überraschte den beinahe Siebzighrigen, führte ihn leicht und schmerzlos aus einer Welt, die ihm schwer und schmerzreich erschien – und die er dennoch geliebt und bejaht hatte.

## Flohmarkt für die Sinai-Schule

Einen Flohmarkt und Winterbasar hatte der Elternbeirat der Sinai-Schule im Jugendzentrum organisiert. Im großen Kellerraum boten die Kinder die Sachen feil, für die man selbst keine Verwendung mehr hatte, andere aber noch gebrauchen konnten. Gedacht war diese Veranstaltung für die Kinder, die Krimskrams tauschen oder verkaufen konnten. Daneben waren auch ganze Winterausrüstungen günstig zu haben. Es war nicht nur ein Treffen für die Kinder, sondern auch für die Erwachsenen, die normalerweise in der Möhlstraße aneinander „vorbeischießen“ – mangels Zeit. Hier konnten sie nun bei Kaffee und Kuchen, gestiftet vom Elternbeirat, dem die Familien Wasserstein, Kalmanowicz, Guttman und Alfandari angehören, an einem Sonntag vormittag bei einem Schwätzchen zusammensitzen. Der Inhalt der Spendenkasse ging an die Sinai-Schule zur Finanzierung schulischer Veranstaltungen. Herr Levy, der neue Schulleiter der Sinai-Schule, konnte mit seinem Elternbeirat zufrieden sein. (S.F.)

## Treffen der europäischen Magbit-Vorsitzenden

Am 15./16. November fand in Genf das Europäische Magbit-Vorsitzendentreffen statt. Ca. 30 Magbitvorsitzende aus ganz Europa haben an diesem Treffen teilgenommen. Aus München waren der Vorsitzende des Magbit München, Herr Abrascha Frydman und der Vorsitzende der Young Leadership München, Herr Buma Sandler, angereist.

Der Gastgeber der Konferenz Nissim Gaon hatte als Ehrengast den Verteidigungsminister des Staates Israel, Herrn Izchak Rabin, eingeladen. Minister Rabin hatte in seiner hervorragenden Rede die politische und ökonomische Lage des Staates Israel erläutert und hat besonders auf die drei großen Ereignisse, die in den kommenden Jahren in Israel stattfinden werden hingewiesen:

1986: 100-jähriger Geburtstag von David Ben-Gurion;

1987: 20 Jahre wiedervereinigtes Jerusalem;

1988: Der Staat Israel wird 40 Jahre alt.

Am Sonntag, 16. November 1986, haben die Delegierten eine Arbeitstagung abgehalten, die sich über den ganzen Tag zog, wobei der Keren Hayessod-Arbeitsplan für die Jahre 1987/88 durchdiskutiert wurde. Die drei großen Ereignisse, die das jüdische Volk mit dem Staat Israel miterleben wird, sollen dabei berücksichtigt werden.

## Europäisches YL-Magbittreffen

Am 14. November hat in Zürich das jährliche Europäische Magbit-YL-Treffen stattgefunden. Teilgenommen haben ca. 100 Delegierte aus allen westeuropäischen Ländern, unter anderem auch die Delegierten aus München, der Vorsitzende der YL, Buma Sandler mit Frau und Dr. Steinberg mit Frau, sowie Rommi Ryba. Während dieses Treffens, das drei Tage

gedauert hat, wurden folgende Themen gesprochen und anschließend diskutiert:

- Zionismus und Judaismus;
- Die innere Sicherheit der Juden in der Gemeinde;
- Das Jewish Agency Budget;
- Das Problem der Juden in der Sowjetunion;
- Planung der Keren Hayessod Arbeit kommenden Jahr.

Der Höhepunkt dieses Treffens war ein Telefongespräch mit einer Jüdin in Moskau, der Mann als Regimegegner im Gefängnis ist, und anschließend noch ein Telefongespräch mit Anatoli Schtaransky in Israel.

In der Vorsitzenden-Besprechung, die nach der Konferenz stattfand, wurde einstimmig beschlossen, daß das nächste Treffen 1987 in München abgehalten werden soll. Dies ist für die YL-Magbitfreunde in München eine große Ehre, da noch nie ein derartiges Treffen in der Bundesrepublik stattgefunden hat. Das nächste Treffen 1987 findet im Monat November statt.

## Vom pathologisch guten Gewissen

### Henryk M. Broder zu Gast im Münchner Jugend- und Kulturzentrum

In der letzten Novemberwoche sicherte der Intendant des Frankfurter Schauspiels Günter Rühle in einem gerichtlichen Vergleich zu, daß die Aufführung des Fassbinder-Stück „Der Müll, die Stadt und der Tod“ „wegen der mit ihr verbundenen besonderen psychischen Belastung jüdischer Mitbürger“ in Frankfurt auch in Zukunft unterbleiben solle. Der Streit um die Rühle zugeschriebene und in einer mündlichen Schnellverhandlung per einstweiliger Verfügung von ihm zunächst erfolgreich abgewiesene Urhebererschaft des Ausdrucks „Das Ende der Schonzeit“ ist noch nicht beendet. Henryk M. Broder, Autor des Buches „Der Ewige Antisemit. Über Sinn und Funktion eines beständigen Gefühls“ und der mit betroffene Fischer-Verlag, legten Berufung ein, da die strittige Passage bis auf weiteres in allen Verkaufsexemplaren geschwärzt werden muß. Bei der Berufungsverhandlung am 11. Dezember vor dem Frankfurter Landgericht geht es nicht allein um die rein faktische Argumentation, was Zeugen gehört bzw. nicht gehört haben. Ob sich „das Ende der Schonzeit“ schon über den „jüdischen Mitbürgern“ zusammenbraut, hängt schließlich nicht von der Kreation eines antisemitischen Slogans ab, sondern vom Umfeld der Begriffe, die in die Kontroverse um das Fassbinder-Stück und die so lästige Sensibilität der Juden eingeführt wurden. Und da drängen offensichtlich viele, bislang vom „Auschwitz-Tabu“ unterdrückte Ausläufer jenes „antisemitischen Potentials“ – von Broder oft beschrieben – ans Licht der öffentlichen Meinung.

Einen Erfahrungsbericht über die Reaktionen auf sein Buch und darüber, wie man hierzulande auf den Antisemitismusvorwurf reagiert, stellte der Publizist Henryk M. Broder dieser Tage anlässlich eines Vortrages im Jugend- und Kulturzentrum der IKG München vor. Dieses jüngste Kapitel einer Fortsetzungsgeschichte, der es an Material leider wohl nie



# Mitteilungen

## der Rechtsanwaltskammer für den Oberlandesgerichtsbezirk München

Nummer 3

München, im Dezember 1986

Jahrgang 1986

**ZUM WEIHNACHTSFEST UND ZUM NEUEN JAHR**  
*wünscht der Vorstand der Rechtsanwaltskammer allen Kolleginnen und Kollegen*  
*Glück, Gesundheit und Erfolg!*

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**Aktuelle Rechtsprobleme  
des Ost-West-Wirtschaftsverkehrs**  
am Donnerstag / Freitag, den 26. / 27. Februar 1987  
in München  
(Näheres unter „Veranstaltungen“)

#### In memoriam Dr. Sigbert Feuchtwanger

Am 2. Dezember 1986 wäre Dr. Sigbert Feuchtwanger 100 Jahre alt geworden. Der vielfältig im bayerischen und Münchener Kultur- und Wirtschaftsleben hervorgetretenen Familie Feuchtwanger entstammend, wurde er 1913 zur Rechtsanwaltschaft zugelassen. Von 1927 bis 1933 gehörte Dr. Feuchtwanger dem Vorstand der Rechtsanwaltskammer München an. Er gab 1937 seine Zulassung auf, emigrierte und verstarb 1956 in Israel.

Feuchtwangers Interesse galt seit je wissenschaftlichen Fragen. Schon als Rechtspraktikant veröffentlichte er Werke wie „Staatliche Submissionspolitik in Bayern“ (1910), später „Die Judenfrage als wissenschaftliches und politisches Problem“ (1916), um 1922 in seinem grundlegenden Werk „Die freien Berufe, im besonderen: Die Anwaltschaft“ den „Versuch einer allgemeinen Kulturwissenschaftslehre“ zu geben (Verlag Duncker & Humblot; Besprechung von Kneer in JW 1924, 385). Auch später befaßte er sich mit Fragen des Anwaltsrechts, der Anwaltssoziologie und -philosophie wiederholt, so in „Krisis und Jubiläum“ (JW 1929, 3129), „Idee und Wirklichkeit in der deutschen Anwaltspolitik“ (JW 1932, 1091), „Der Staat und die freien Berufe. Staatsamt oder Sozialamt?“ (1930, besprochen von Wolff, JW 1931, 2348), „Über Wesen und Wandlung des Standesrechts, im besonderen: Die Pflicht zur Wahrung des guten Scheins“ (in der Festschrift für Albert Pinner, 1932).

Neben Friedländer, dem klassischen Kommentator der Rechtsanwaltsordnung von 1878, gehörte Feuchtwanger zu den grundlegenden Erforschern des Anwaltsrechts. Die Lücke, die er in der Grundlagenforschung über die Anwaltschaft hinterlassen hat, beginnt sich erst in allerneuester Zeit allmählich zu schließen.

Wir gedenken des angesehenen Münchener Rechtsanwalts und stillen Aristokraten in Verehrung.

#### I. Mitteilungen des Vorstands

##### 1. Kammerversammlung 1987 (Anträge zur Tagesordnung)

Die ordentliche Kammerversammlung 1987 findet am Freitag, den 27. März 1987, 14.00 Uhr in München (Kolpinghaus, Kolpingstraße 1) statt. Einladungen mit Tagesordnung werden gemäß § 5 Abs. 2 der Geschäftsordnung nach Ablauf der Frist für die Einreichung von Anträgen zur Tagesordnung brieflich ergehen.



## Hans Kelsen-Institut

Am 30. 10. 1972 hat die von der Republik Österreich aus Anlaß des 90. Geburtstages von Hans Kelsen gegründete Stiftung, die den Namen Hans Kelsen-Institut trägt, mit der Konstituierung ihrer Organe ihre Tätigkeit aufgenommen.

Angesichts der überragenden Verdienste des Gelehrten ist der Bundeskanzler der Republik Österreich, Dr. Bruno Kreisky, Präsident des Hans Kelsen-Instituts. Zum Vizepräsidenten wurde der zweite Präsident des Nationalrats, Dr. Alfred Maleta bestellt. Dem Kuratorium des Instituts gehören ferner die Bundesminister Dr. Christian Broda und Dr. Hertha Firnberg, der Abgeordnete Dr. Tassilo Brosigke, Sektionschef Dr. Edwin Loebenstein und die Universitätsprofessoren Dr. Erwin Melichar (Wien), Dr. Gustav E. Kafka (Graz), Dr. Hans R. Klecatsky (Innsbruck), DDr. Friedrich Kojas (Salzburg), Dr. Anton Lager (Wien), Dr. Norbert Leser (Salzburg) und Dr. Herbert Schambeck (Linz) an.

Als Geschäftsführer fungieren die Universitätsprofessoren Dr. Kurt Ringhofer (Salzburg) und DDr. Robert Walter (Wien).

Dem Institut ist die Aufgabe gestellt, die Reine Rechtslehre und ihren wissenschaftlichen Widerhall im In- und Ausland zu dokumentieren, darüber zu informieren und die weitere Durchdringung, Fortführung und Entwicklung zu fördern. Es ist eine vollständige Dokumentation der Werke Hans Kelsens und der Aufbau einer diese Werke umfassenden Bibliothek geplant; aber auch eine möglichst weitgehende Dokumentation der Werke, die sich mit der Reinen Rechtslehre beschäftigen oder sich auf diese beziehen, und der Aufbau einer die wichtigsten dieser Werke umfassenden Bibliothek.

Über die Arbeit des Instituts sollen die Interessenten regelmäßig informiert werden.

AöR 98, 1973

## Wolfgang Gaston Friedmann †

On September 20, 1972, a few steps away from the Columbia Law School, Wolfgang Gaston Friedmann was robbed and murdered. The senselessness of the crime was heightened by the character of the victim. For Wolfgang Friedmann, a scholar of unparalleled breadth of interests and achievements, was a gentle and warm person who, in his life, had courageously spoken out against brutality and violence, and had worked constantly and energetically to improve the conditions of the poor. It is most tragic that he should fall victim to a crime of violence and poverty.

Wolfgang Friedmann was born in Berlin, Germany, in 1907. Instructed in the law at the University of Berlin by such great scholars as Arthur Nussbaum and Ernst Rabel, whose American colleague he became in later life, he published in 1930 *Die Bereicherungshaftung*, his doctoral thesis and the first of his many books. Shortly thereafter, he joined the staff of the *Juristische Wochenschrift*, to which he contributed regularly, and became a practicing lawyer.

His career as a practicing lawyer was of short duration. After a brief clerkship in an English solicitor's office, he joined the *freiwillige Arbeitsdienst* and, in 1933, became a *Gerichts-assessor* in the *Arbeitsgericht*. This career was also short-lived. Known for his opposition to the terroristic tactics of the Nazis, he and his friend Otto Kahn-Freund were almost simultaneously dismissed from office. Both, sensing the things to come, managed to make their way to England.

In England, working as a farmer and school teacher during the day and studying law at night, he received his LL.M. degree in 1936. The excellence of his work having caught the eyes of his instructors, he shortly thereafter became a Lecturer in Law at the College of Law of the University of London.

As a teacher, Wolfgang Friedmann began to display the breadth that has continued to amaze his colleagues. While teaching courses in conflict of laws, torts, contracts, international law and jurisprudence, he produced a steady flow of books. One of the most famous of these, *Legal Theory*, was first published in 1944, is now in its fifth edition, and has been published in French and Dutch translations.

In 1945, he was sent to Germany and attached to SHAEFF, the Allied High Command. Eventually, he became the Head of the Office for Economic Reconstruction in the British sector of Germany, the precursor of the present Ministry of Economic Affairs. Convinced that rehabilitation was indispensable to a return to normal conditions, he opposed the official policy of non-fraternization and the program of massive denazification. In 1947, he published *The Allied Military Government of Germany*, in which he spelled out his ideas. Because it was critical of official policies, this book did not meet with favor in allied circles. But it accurately discerned the proper course, and the correctness of his ideas was confirmed by the subsequent relinquishment of the policies he had criticized.



In 1947, shortly after his return to England as Reader at the University of London College of Law, he was appointed to a chair at the University of Melbourne. While teaching administrative and international law, he wrote *Principles of Australian Administrative Law*. This book, from being the first, quickly became the leading work on the subject and has since gone through several editions. While working in Australia, he kept in close touch with developments in England. From this sprang a book, *Law and Social Change in Contemporary Britain* (1951), which proved to be the forerunner of what later became one of Friedmann's most famous works, *Law in a Changing Society*.

Even though he then lived and worked in a remote corner of the world, Friedmann's prodigious scholarship did not remain unnoticed elsewhere. Invitations to deliver lectures elsewhere came his way in abundance and, while on a lecture tour in the United States and Canada, he received an offer from the newly created Faculty of Law of Toronto University to head its program in comparative law. Ever ready to rise to a new challenge, Friedmann accepted, and in short order produced three important symposia: *The Public Corporation* (1954), *Matrimonial Property* (1955), and *Antitrust Laws* (1956).

His intellectual peregrinations ended and found their culmination in his appointment as Director of the International Legal Studies Program and Professor of Law at Columbia University. Having nurtured such international legal giants as *John Bassett Moore*, *James Hyde*, and, more recently, *Philip Jessup*, Columbia had grown accustomed to having international legal scholars of great stature in its midst. The prominence of its traditions proved a worthy challenge to Wolfgang Friedmann.

This time, the legal problems faced by and in underdeveloped countries became the focus of his interest, an interest that was stimulated by his work as a consultant to the United Nations. A whole series of works were the result: *Legal Aspects of Foreign Investment* (with Pugh, 1959), *Joint International Business Ventures* (with Kalmanoff, 1961), *International Financial Aid* (with Kalmanoff and Meagher, 1956), *The Role of the State and The Rule of Law in the Mixed Economy* (Tagore Lectures, 1971), *Joint International Business Ventures in Developing Countries* (with Béguin, 1971).

At the same time, he taught Jurisprudence and International Law at the Columbia Law School. He so inspired his students in International Law that they formed the first International Law Society of any law school in the United States, and shortly thereafter commenced publication of the first student journal on international law, the *Columbia Journal of Transnational Law*. In 1971, in a fitting tribute to his inspirational guidance, the issue of this Journal celebrating its tenth year of existence was dedicated in its entirety to Wolfgang Friedmann.

While concentrating on problems of an international nature, he did not forsake his abiding interest in jurisprudence. In 1959, *Law in a Changing Society* was published, by many regarded as the clearest and most authoritative treatment of the subject. This book was so successful that it was published in a Penguin edition, a rare distinction for a work of jurisprudence.

New trends and developments in international law and the challenges posed to it by our rapidly changing world were treated with authority and insight in *The Changing Structure of International Law* (1964), which was quickly also published in a Spanish translation. A new, and now most widely used, casebook on international

law, *Cases and Materials on International Law*, was the product of his collaboration with two of his Columbia colleagues, Professors *Lissitzyn* and *Pugh*. And another burning problem of the internationalists of today was the subject of his most recent book, *The Future of the Oceans* (1971).

Excellence so consistently demonstrated brought Wolfgang Friedmann many distinctions. Those he remembered most fondly himself were the Tagore Lectures in Calcutta, India, his general course on international law at the International Academy at The Hague, and his visiting professorship at the Sorbonne in Paris.

Although his honors and distinctions set him apart from less famous scholars, Wolfgang Friedmann never acquired the arrogance and pomposity that so often are their collateral

consequences. He was a kind and friendly man, ever ready to help when his aid was invoked and ever ready to lend a respectful ear to points of view that differed from his. He was also a man, who was willing to take a public stand in support of his ideas. His opposition to the Vietnam war was publicly proclaimed at an early time, when his views were unlikely to bring him public acclaim. And he equally resolutely condemned the violent interference with the freedom of expression and study practiced by some of the student revolutionaries. It was a rare privilege, indeed, to have Wolfgang Friedmann both as a colleague and a friend. A kind and courageous man, he will be sorely missed.

Hans Smit



Ernst Fraenkel

Zur Soziologie der Klassenjustiz und Aufsätze zur

Verfassungskrise, 1931 - 32

1968

Reformismus und Pluralismus

1973

Klassenjustiz und Pluralismus

Festschrift für Ernst Fraenkel zum 75. Geburtstag

1973

wegen den weiteren Werken Fraenkels vergleiche Anhang

zu FS Fraenkel (Photokopie)



Die Rechtsordnung des Nationalsozialismus, S. 9 ff.

in: Der Unrechts-Staat, Hrsg. Redaktion Kritische Justiz, 1979  
(identischer Titel, aber Anknüpfung an Aufsatz in KJ 1971)

Franz Neumann

Behemoth, Struktur und Praxis des Nationalsozialismus  
1933-1944, 1977

Fate of small business in Nazi Germany, 1979

Die Herrschaft des Gesetzes, 1980



23. März 1975 Ernst Fraenkel  
Beisetzung 8. April 1975 - 11.20 Uhr Waldriedhof Bahlem

Otto Fahn-Freund

Wir sind hier zusammen gekommen, um Abschied zu nehmen von einem bedeutenden Manne, der vielen unter uns ein naher Freund war. Für mich ist es schwierig, hier das Wort zu ergreifen. Wir waren enge Freunde seit unserer Studentenzeit, seit mehr als einem halben Jahrhundert, und es gibt niemanden, der auf meine <sup>eigene</sup> Entwicklung einen stärkeren Einfluss hatte als Ernst Fraenkel. Wenn man sich so nahe stand wie wir es taten, wird jedes Wort zu einer Verfälschung der Gefühle.

Ich habe gesagt, dass er ein bedeutender Mann war: Er hatte die undefinierbare aber für jeden klar erkennbare Gabe der Inspiration, jenen "Funken", den man in sich trägt und nicht erwerben kann, der aus der Natur kommt und nicht aus der Erfahrung. Poeta nascitur non fit. Ernst Fraenkel war kein Dichter, ihm fehlte die visuelle Phantasie, die zu dem schaffenden Künstler gehört, aber er hatte die Gabe der plötzlichen, beinahe explosiven Einsicht in ideale Zusammenhänge, - und, vor allem in jüngeren Jahren, - eine unvergleichliche Fähigkeit der Umsetzung von Gedanken in Worte. Er war ein Meister des "richtigen Wortes", des "mot juste". Er war der Sprache verhaftet, der deutschen Sprache verhaftet, - sie war ihm mehr als ein Werkzeug, sie war der Gegenstand seiner ewigen Liebe.

Diese Verklammerung an das Wort war Ernesto's grosse Stärke und grosse Schwäche, - und er wusste es. Sie war seine Schwäche, denn eine so starke Persönlichkeit mit einer so unbedingbaren Hingebung an die deutsche Sprache konnte sich einer fremdsprachigen Umwelt anpassen. Ernst Fraenkel hatte sich in Amerika und für Amerika in Korea einen wichtigen Wirkungskreis geschaffen, - ~~aber~~ <sup>er</sup> war Amerika in liebender Dankbarkeit verbunden - aber Fuss fassen konnte er in Amerika nicht, - es wäre gegen das Gesetz gewesen nach dem er angetreten, wenn er es getan hätte. Er blieb ein Deutscher, - und das hervorragende Buch, das er später über das amerikanische Regierungssystem schrieb, war keineswegs das Buch eines Amerikaners. Es war das Buch eines deutschen Beobachters amerikanischen politischen Lebens - und es gehört in den Zusammenhang der grossen europäischen Werke über Amerika, in den Zusammenhang von James Bryce und von Alexis de Tocqueville.



Aber jene Verklammerung an das Wort war vor allem auch seine Stärke, seine Stärke zumal als der unvergleichliche Lehrer der er war. Der spontane Ausdruck durch das gesprochene Wort lag seinem Wesen am nächsten. Er war das wahre Medium seiner Kunst, noch mehr als der reflektierte schriftliche Stil. Noch leben Hunderte die das Glück hatten, seine Hörer und Schüler zu sein, Hörer und Schüler aus der Arbeiterbewegung der Weimarer Republik und aus der Studentenschaft, der er seit seiner Rückkehr nach Deutschland seine ganze Kraft widmete. Aber dem grossen Lehrer wie dem Mimen flieht die Schwelt keine Kränze: ein zuendender Meister der Lehrkunst wie Fraenkel wirkt durch das was seine Schüler ihren eigenen Schülern weitergeben. Niemand ist so der Tradition verbunden wie der Lehrer, der Tradition, d.h. mit Weitergabe von Sprach- und Gedankenut von Generation zu Generation. <sup>Vielleicht muss man das - oder hätte es - gesagt hat es es nie</sup> Vielleicht war es deshalb, dass der Tradition- und Kulturbruch, den er gegen Ende seiner Tage erleben musste, ihn, den Lehrer, so tödlich traf.

Ernst Fraenkel war und blieb sein ganzes Leben lang ein Deutscher. Er gehörte zu der Generation, deren Zugehörigkeit zur jüdischen Gemeinschaft von ihrem Deutschtum nicht zu trennen war. Ernesto hatte keine lebendige Beziehung zu der jüdischen Religion. Er war niemals auch nur im Entferntesten ein Zionist. Und doch war er sich sehr bewusst, ein Jude zu sein, zu einer historischen Gemeinschaft, einer Schicksalsgemeinschaft zu gehören, aber einer Gemeinschaft die, - so glubten wir alle, - in ihre deutsche Umwelt eingebettet war. Sein fast fanatischer Sinn für Gerechtigkeit, vor allem aber für die Freiheit und für die Würde des Menschen, wurzelten in der jüdischen Tradition. Sie führten ihn zu der sozialistischen Arbeiterbewegung. Sie vor allem waren der Antrieb zu dem unsagbar mutigen und aktiven Widerstand gegen die Barbarei, durch den er unter grossster Gefahr zwischen 1933 und 1938 als Anwalt zahllosen Opfern des Nazi-Regimes zu helfen vermochte. Und diese unverbrüchliche Bindung an die Sache der Freiheit und der Würde des Menschen war es auch, die ihn in den letzten Jahren seines Lebens an den deutschen Universitäten verzweifeln liess. Als 1951 Otto Suhr ihn an die Hochschule für Politik berief und so für immer nach Deutschland zurückbrachte, begann für Fraenkel die wissenschaftlich fruchtbarste Zeit seines Lebens. Schon in den Jahren der Weimarer Republik hatte er durch seine kritischen Aufsätze, namentlich durch seine Schrift über die Soziologie



der Klassenjustiz, einen bleibenden Beitrag zur Analyse der Politik geleistet. Später - in der Illegalität und in grosser Gefahr - schrieb er jenes grundlegende Buch über den Doppelstaat, das für Generationen ein massgebendes Lehrbuch über den Doppelstaat, das für Generationen ein massgebendes Lehrbuch der Anatomie und Physiologie von Diktaturen sein wird. Aber erst nach 1951 begann die systematische Beschäftigung mit den Formen der Herrschaft, durch die er der Begründer - oder vielleicht der Wiederbegründer - der politischen Wissenschaft in Deutschland wurde.

Seine Haltung als Politologe ist - obgleich er es oft bestritt - nur zu verstehen aus seiner juristischen Vergangenheit. Ich habe ihm oft gesagt - er wollte es nicht wahr haben - "Deine Politologie ist aufgeklärtes Staatsrecht." Sein Interesse galt der institutionellen Seite der Politik. Trotz des unermesslichen Einflusses von Max Weber auf ihn hatte er kein Soziologe, und die psychologische Analyse politischer Vorgänge lag <sup>gänzlich</sup> ausserhalb seines Bereichs. Ihn interessierten die Formen der Herrschaft und hier hat er wirklich Grosses geleistet. Es ist charakteristisch, dass z.B. der Aufsatz über die plebiszitären und repräsentativen Komponenten der Demokratie - vielleicht das Beste was er je geschrieben hat - die Revolution in den Medien der Massenkommunikation und Information nur am Rande berücksichtigt.

Das Corpus dieser - glücklicherweise noch von ihm selbst in mehreren Bänden veröffentlichten - politologischen Aufsätze ist eine wissenschaftliche Leistung von grosser Bedeutung. Sie wird ein Bestandteil des europäischen Gedankengutes bleiben. Aber seine Liebe galt dem, was er hier in Berlin als lebendige Einrichtungen des Lehrens und Forschens zu schaffen trachtete, vor allem dem Otto-Suhr-Institut und dem Kennedy-Institut. Hierin lag sein Stolz, hier sah er seine Sendung, und hier, in dem was er als die Zerstörung seiner Werke sah, lag sein Kummer und seine Verzweiflung.

Und doch - welch ein erfülltes Leben, welche Entfaltung einer schöpferischen Kraft, trotz aller und vielleicht durch alle Wechsel und Schläge des Schicksals. Welche Stetigkeit bei allem Wandel. Und diese Stetigkeit war verbürgt durch eine häusliche Umwelt, die ihm die Ruhe zum Wirken gab und die der grosse Segen seines Lebens war. Nur seine engsten Freunde ermassen das, was Hanna ihm Ernesto getan hat und gewesen ist. In dieser Stunde des bittersten Verlustes und den



tiefsten Schmerzes sollst Du, Hanna, auch den Stolz darüber fühlen dass Du ihm dieses Leben ermöglicht hast. Wir drücken Dir die Hand und im Geiste grüßen wir Ernesto ferner Schwester Marta die Hand, die in Gedanken bei uns ist. Ja, wir nehmen hier Abschied von unserem Freunde, aber doch nur von dem an ihm was vergänglich war. Und was vergänglich war ist nur ein Gleichnis dessen was bleibt, das lebendige Bild einer kraftvollen Persönlichkeit, eines gütigen Menschen, eines treuen Freundes. Dies bleibt uns so wird er uns nicht verlassen.



In Trauer und Ehrfurcht geben wir Nachricht vom Tod unseres verehrten Seniors

# Louis H. Farnborough

Dr. jur. Dipl.-Volkswirt

Rechtsanwalt am Oberlandesgericht Düsseldorf

26. Februar 1905 — 14. Juli 1983

Klaus Dittmann

Dr. Christian G. Scholz

Manning Stahl

4.7.83 B  
4. Juli 1983 B

## Zum Tode von Dr. Ludwig H. Farnborough

Der kürzlich verstorbene Dr. Ludwig H. Farnborough war der Senior einer angesehenen Anwaltssozietät in Düsseldorf. Ausserdem stand er lange Zeit an sichtbarer Stelle im jüdischen Leben, so als Vorsitzender des Vorstands der Synagogengemeinde Düsseldorf und des Landesverbands der jüdischen Gemeinden von Nordrhein sowie vor allem als Präsident des KKL (Jüdischen Nationalfonds) für Deutschland. Nach dem Krieg (den er als Soldat in den britischen Streitkräften mitgemacht hatte) war er bis 1951 in der Rechtsabteilung der britischen Militärregierung (Control Commission for Germany) in leitender Position tätig. Dann arbeitete er vorübergehend in einer Anwaltsfirma in England, wonach er (vor etwa 30 Jahren) eine eigene Praxis in der Rheinmetropole einrichtete, die sich u.a. auch mit Wiedergutmachungsangelegenheiten befasste. Ludwig H. Farnborough (als Farnbacher 1902 in der Pfalz geboren) war, nach Universitätsstudien in Deutschland und im Ausland, bis 1933 Rechtsanwalt in Neustadt/Weinstrasse und, bis zu seiner Auswanderung Oktober 1938, im Wirtschaftsleben in Berlin tätig.

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# Lesen, schreiben

Von Hans St...

Komm

Dr. Henning Stahl  
Dr. Volker B. Triebel  
Dr. Kurt Weil  
Dr. Peter Kraatz  
Dr. Thomas Försterling  
Dr. Paul Gotzen  
Dr. Siegfried H. Elsing

Die Beerdigung findet am 19. Juli 1983 um 14.15 Uhr auf dem Jüdischen Friedhof, Düsseldorf, Ulmenstraße, statt.

Es wird höflichst gebeten, von Kranzspenden abzusehen.

Königsallee 98 a—100  
4000 Düsseldorf 1

unseres verehrten Seniors

rough

Düsseldorf

1983

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# Carl J. Friedrich Dies at 83; Influential Harvard Professor

Dr. Carl J. Friedrich, a professor of government at Harvard University for nearly 50 years and the influential author of books on political thought, died Wednesday in a nursing home in Lexington, Mass., after a long illness. He was 83 years old.

In the period after World War II, the German-born professor was regarded as one of this country's important thinkers on political ideology. His analyses of totalitarianism and Communism were regarded as ground-breaking.

A prolific scholar, he wrote a dozen books ranging from a study of the Baroque Age to one on the philosophy of law to a treatise on Immanuel Kant. Dr. Friedrich's writings and lectures influenced the study of political theory in many universities.

Having lived in an era which saw the rise of Nazism and the spread of Communism, Dr. Friedrich sometimes took a dour view of the human inclination for freedom.

## Erroneous Notion About Freedom

In his 1967 book "An Introduction to Political Theory," he wrote that while the liberal tradition believed people wanted freedom maximized, "experience in the last hundred years has shown this to be quite in error." He added, "Actually I think it is much more nearly true to say that people want a minimum of freedom, rather than a maximum. Most people are very glad to leave a lot of things to other people."

Zbigniew Brzezinski, President Carter's national security adviser, who was once a student and a co-author of Dr. Friedrich's, described the professor as "a wonderfully inspiring teacher with a unique gift for stimulating and challenging his students; a major political thinker whose work on totalitarianism has withstood the test of time; an engaging human being who sometimes enraged but always captivated those working with him."

Dr. Friedrich's government experi-

ence was not all academic. From 1946 to 1949, he left Harvard to serve as an adviser to the American military governor in Germany, Gen. Lucius D. Clay. In the early 1950's, he was a constitutional adviser to Puerto Rico and to the European Constituent Assembly.

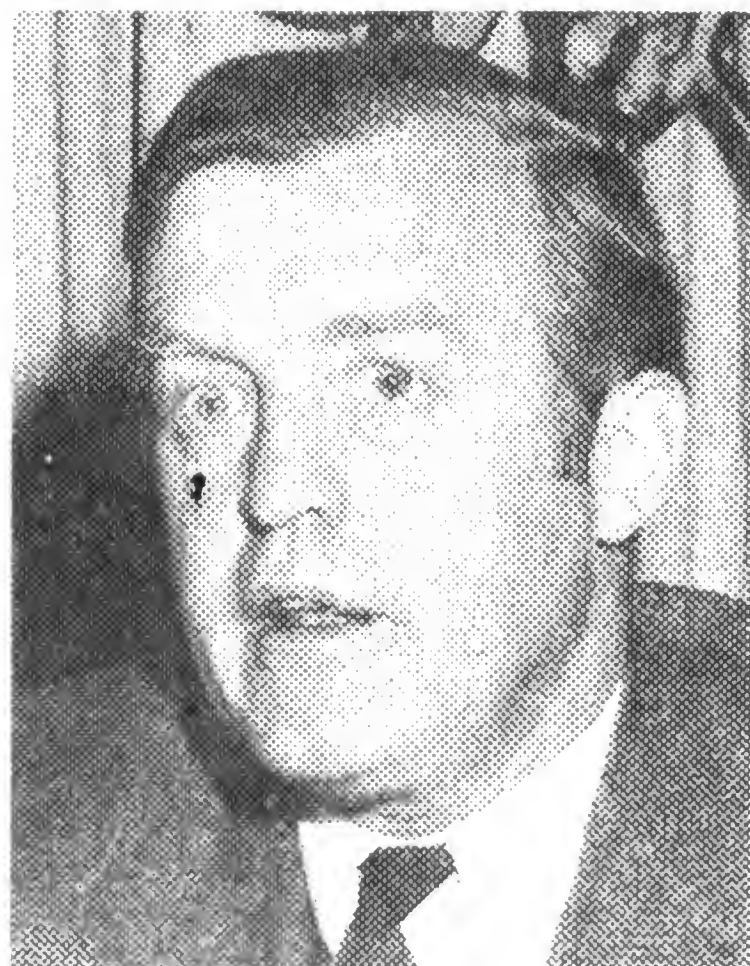
Carl Joachim Friedrich was born June 5, 1901, in Leipzig, Germany, and studied at the Universities of Marburg, Frankfurt and Vienna. He visited the United States as an exchange scholar in 1923, and a few years later, after receiving his doctorate from University of Heidelberg, he came to stay.

He began teaching at Harvard in 1926, and he held several professorships until his retirement in 1971.

For several years beginning in 1956, Dr. Friedrich held a professorship in political science on the law faculty at Heidelberg, where he founded the Institut für Politische Wissenschaft. After retirement from Harvard, he served as a visiting professor at Colby College, Duke University and the University of Manchester, England.

He was a member of the American Political Science Association, and in 1962 served as its president. He was a man who grappled with the issues of his time and regularly aired his views at public forums and in letters to newspapers.

Dr. Friedrich's scholarship ranged over much of Western political thought and culture. His books included "The New Belief in the Common Man" (1942); "Inevitable Peace" (1948); "Totalitarian Dictatorship and Autocracy," authored with Mr. Brzezinski (1956); "The Philosophy of Law in Historical Perspective" (1957); "The Pa-



U.S. Army, 1948

Dr. Carl J. Friedrich

thology of Politics" (1972), and "Tradition and Authority" (1972).

Dr. Friedrich's survivors include his wife, the former Lenore Pelham of Cambridge, whom he married in 1924; a brother, Wolfgang Günter Friedrich of Berlin; two sons, Paul W. of Chicago and Otto of New York; two daughters, Matilda de Boor of Madison, Wis., and Dorothea Gombrich of Oxford, England; 15 grandchildren and one great-grandchild.

Funeral services will be private. A memorial service at Memorial Church in Harvard is scheduled for Oct. 21.

## Coroner Rules Gaynor Death Was Result of '82 Accident

RIVERSIDE, Calif., Sept. 21 (UPI) — The death of the actress Janet Gaynor has been officially ruled a direct result of a 1982 traffic accident in San Francisco, the Riverside County Coroner's office said today.

"The death was the direct result of complications which occurred from her injuries during the traffic accident," said Carl Smith, chief deputy coroner.

Miss Gaynor, who won the first Academy Award for best actress, died Sept.

## JUSTIN J. McCARTHY

Special to The New York Times

ALBANY, Sept. 21 — Justin J. McCarthy, a lawyer who had served as chairman of the Legislative Bill Draft-

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Karl Rahner an diesem Montag um 1  
Uhr als der bedeutendste katholische  
Theologe unserer Zeit gefeiert. Zu  
Recht. (hjf)

### Ossip Flechtheim 75

Der Lebenslauf enthält die Vorgabe, daß Ossip Flechtheim nicht leicht einzuordnen ist. Diese Eigenschaft war Flechtheim, der an diesem Montag 75 wird, mitgegeben, und er hat sie gepflegt: er neigte zum Unkonventionellen, suchte die originelle Position, fand, bei aller persönlichen Liebenswürdigkeit, gern die Bestätigung im Widerspruch. Geboren wurde Flechtheim in Rußland (in Nikolajew), aber viel kann das nicht bedeutet haben, denn schon in zartem Alter kam Flechtheim mit seinen Eltern nach Deutschland. Er studierte von 1927 an Rechts- und Staatswissenschaften an verschiedenen deutschen Universitäten, konnte noch — 1934 — zum Dr. jur. promovieren, wurde aber von den Nationalsozialisten aus den verschiedensten damals geltenden Gründen aus dem Referendardienst entlassen. Flechtheim emigrierte nach Genf, setzte dort, seine Gebiete über das Juristische hinaus erweiternd, die Studien fort, siedelte über nach Amerika. Als Mitarbeiter im Büro des amerikanischen Anklägers beim Internationalen Militärtribunal der vier Alliierten von 1946 kam Flechtheim nach Deutschland zurück, promovierte später in Heidelberg zum Dr. phil und lehrte schließlich, der Weg dahin nahm einige Wendungen, als Professor an der Freien Universität in Berlin Politikwissenschaft. Flechtheim kann vielleicht, so sehr sich seine Eigenart der Einordnung entzieht, als ein überwiegend unorthodoxer Linker bezeichnet werden. Bei der Kulturrevolution Ende der sechziger Jahre nahm er Partei für die Forderungen der Studenten, wenn auch mit Vorbehalten, wo die Funktion der Hochschulen als Ausbildungsstätten — da hatte Flechtheim seine ihm aus der amerikanischen Leistungsgesellschaft überkommenen Maßstäbe — in Frage gestellt würde. Flechtheim hat viel geschrieben, auch Dokumenten-Sammlungen herausgegeben, zuletzt hat er sich der Zukunftsforschung zugewandt. Vor 1933 war er bei der KPD, nach dem zweiten Weltkrieg bei der SPD, aus welcher Partei er austrat. Zuletzt hat er sich über die Grünen den Alternativen zugewandt und — vergeblich — zur Wahl in das Berliner Abgeordnetenhaus kandidiert. Republikanischer Klub, „Kritische Universität“, „Sozialistischer Bund“, Humanistische Union — die Aktivitäten Flechtheims in diesen Einrichtungen zeigen seine, bis in seine hohen Jahre, unermüdliche Suche nach dem festen Platz, den er wohl eigentlich nicht will. (F.A.Z.)

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**Dr. WERNER GOLDSCHMIDT**

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TEL. 38 - 5371

(1088) BUENOS AIRES

26. Februar 1987

Professoren Reinhold Geimer und Rolf A. Schütze,  
Verfasser der Internationalen Urteils-  
anerkennung.

Sehr verehrte Kollegen:

In Ihrem monumentalen Werk "Internationale Urteilsanerkennung" werden im 2. Halbband des ersten Bandes auf S. 49 drei Werke von Goldschmidt angeführt. Ich wollte Sie ergebenst darauf aufmerksam machen, dass die ersten beiden von mir: Werner Goldschmidt, das dritte hingegen von meinem berühmten Vater: James (1874-1940) verfasst sind. Vielleicht könnte anlässlich der nächsten Auflage diese Sachlage geklärt werden. Ich benutze die Gelegenheit Sie beide aufrichtig zu dem grossartigen Werke zu beglückwünschen.

Ihr Ihnen sehr ergebener

*Werner Goldschmidt*

Werner Goldschmidt



ENGLISH LAW FROM THE  
FOREIGN STANDPOINT

BY

HANS W. GOLDSCHMIDT

DR. JUR., DR. SC.POL.

FORMERLY PROFESSOR IN THE UNIVERSITY OF COLOGNE



LONDON  
SIR ISAAC PITMAN & SONS, LTD.

1937



## PREFACE

THE particular aims which are pursued in this book are set out in the first chapter under the heading of "General Remarks," and need not therefore be further discussed in this Preface. In every case the object is to bridge the gulf which for centuries has divided English law from other legal systems, so as to promote a better understanding between English and foreign lawyers.

Since I began the study of English law over fifteen years ago, it has been my desire to contribute to the solution of this problem. Such a book had to be written in English, for two reasons. In the first place, this will obviously facilitate the use of the book by English readers; and, secondly, it can be assumed that most foreigners interested in English law are equipped with a sufficient knowledge of the English language to enable them to understand an English book, whereas a book written in another language would be available only to a limited number of foreign students of English law.

It remains for me to acknowledge the valuable assistance given to my work in its different stages. Professor A. L. Goodhart was the first to look through my manuscript when it was only partly finished, and to discuss its plan and several details with me. Dr. W. Ivor Jennings, Dr. William A. Robson, Mr. H. G. Hanbury, Mr. D. Seaborne Davies, and Mr. Llewellyn Davies read through parts of my manuscript and made many useful suggestions. Dr. Keeton has read through the book in proof and offered much helpful criticism. It is my pleasant duty to express my thanks to them all.

I am also indebted to Mrs. Alice Whitehead (Cologne) and Mr. J. P. Ross (London) for linguistic advice, as well as to Mr. Reginald Saw (Cologne), who assisted me in correcting the proofs.

HANS W. GOLDSCHMIDT.

*June, 1937*



devoted himself to the study of their law. Such a mirror may be of some interest particularly at the present time, when English law is on the threshold of a new era, as will be pointed out repeatedly in this book.

Finally it is hoped that this book may be a contribution to the literature of comparative law.

Among the factors which have influenced the law in England for centuries past, are the abhorrence of extreme solutions and the sense for practical issues. Both originate in the English national character. They have led to the seeking after compromise which is so often met in descriptions of English public life. On the legal side these tendencies have been responsible for moulding English law not "into a very scientific shape,"<sup>1</sup> but rather in accordance with the practical needs of the day. This feature is the keynote of English law, and may be emphasised at the very outset of this book, the more so as foreign lawyers often approach English law from a more theoretical point of view. English legal conceptions therefore grow up together with the respective institutions and are not the product of logical speculation. There is little room for a logical analysis of such conceptions nor, above all, for a critical attitude towards them. They have to be accepted as they have developed in the course of centuries. It is, moreover, rarely possible to give exhaustive definitions of English legal conceptions; they have to be explained by pointing out their most important characteristics. Professor C. K. Allen, in *Bureaucracy Triumphant* (1931, pp. 46-7) writes: "It is a cruel sport, and one to which lawyers are somewhat prone, to try to make the supple body of the law lie easy on a Procrustean bed of definition." In general, English legal definitions are not definitively framed, but narrowed and expanded as may seem necessary.

In contrast to the well-known work of Lévy-Ullmann, *The English Legal Tradition: Its Sources and History*, 1935, this book contains but little legal history, and is chiefly concerned with modern law. As the law cannot be fully understood apart from its sociological background, it is necessary to trace here the social situation in modern England. A steady progress of economic organisation is to be seen all over the world. There are many forms of economic organisation, some already existing, others imaginable. Whether one of these forms is likely to supersede the others or whether several forms will

<sup>1</sup> Cf. Lindley, L.J., in *Colonial Bank v. Whinney* (1885), 30 Ch.D., p. 284.



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## James Goldschmidt zum Gedächtnis

Am 28. Juni dieses Jahres sind 10 Jahre vergangen, seit James Goldschmidt, der bedeutende und hochverdiente Rechtsgelehrte der alten Berliner Friedrich-Wilhelms-Universität, auf einer Vortragsreise in Montevideo (Argentinien) verschieden ist. Seitdem die politischen Verhältnisse Deutschlands, wie sie sich nach 1933 entwickelten, James Goldschmidt zur Emigration gezwungen hatten, ist sein Name im rechtswissenschaftlichen deutschen Schrifttum zwar nicht ganz verschwunden, aber doch nur selten noch genannt worden. So ist diesem deutschen Gelehrten der Lebensabend durch das bittere Gefühl getrübt worden, daß sein Lebenswerk in seiner deutschen Heimat verkannt und vergessen worden ist. Aber dem ist doch nicht so. Seine wissenschaftlichen Arbeiten leben fort und wirken gerade in der Gegenwart in Wissenschaft und Gesetzgebung sehr stark nach. Goldschmidt ist gebürtiger Berliner gewesen. Seine wissenschaftliche Laufbahn hat sich von seiner Habilitation an (1901) an der Berliner Universität vollzogen. Hier wurde er 1908 außerordentlicher, 1919 ordentlicher Professor. Die Dogmatik des Strafrechts und des Prozeßrechts ist Gegenstand seiner wissenschaftlichen Forschung gewesen, die sich durch einen ungewöhnlichen Scharfsinn, durch Originalität der Gedanken, durch eine seltene Fähigkeit, in die tiefsten Tiefen zu bohren, auszeichnet und dank dem unermüdlichen Fleiße Goldschmidts neben größter Intensität auch eine erstaunliche Extensität aufweist. Wo immer er die wissenschaftliche Sonde ansetzte, geschah es in souveräner Beherrschung des Stoffes, in gründlichster Verarbeitung des Schrifttums und der Rechtsprechung. Seine großen bahnbrechenden Leistungen betreffen die Theorie des Verwaltungsstrafrechts, die strafrechtliche Schuldlehre und die Theorie beider Prozesse. Die geistige Grundlage seiner Arbeiten ist unausgesprochen die Idee des Rechtsstaates, ein Liberalismus, der die unbedingte Notwendigkeit der rechtsichernden Schrankenziehung zwischen Staat und Individuum, Justiz und Verwaltung begreift und bejaht, ohne zu manchesterlicher Übertreibung zu gelangen und die drängenden sozialen Erfordernisse des 20. Jahrhunderts zu verkennen. „Soziales Strafrecht — liberaler Strafprozeß“ — das ist die Losung gewesen, die die politische Tendenz des Goldschmidtschen Lebenswerkes erfüllt hat, ganz im Sinne Franz von Liszts, der auch sein Lehrer gewesen ist und der ihn zur Mitarbeit an seinem Gegenentwurf (1911) herangezogen hat.

Mit seinem historisch fundierten, dogmatisch scharfsinnigen großen Werk über das Verwaltungsstrafrecht (1902) hat Goldschmidt sich die *venia legendi* erworben. Das Werk hat lange Zeit nicht die verdiente Würdigung erfahren. Erschien es doch zu einer Zeit, wo der verwaltende Staat noch nicht die Gesamtheit aller Lebensbeziehungen ergriffen hatte und die staatsfreie Sphäre des einzelnen noch groß genug war, so daß die gewaltige rechtspolitische Bedeutung einer sauberen Trennung von Kriminalstrafrecht und Verwaltungsstrafrecht nur von wenigen erkannt wurde. Aber wie sehr die spätere Entwicklung die fundamentale Richtigkeit dieses Goldschmidtschen Jugendwerks für rechtsstaatliches Denken erwiesen hat, das ist uns Heutigen völlig klar geworden. Als im Jahre 1947 an eine rechtsstaatliche Neugestaltung des machtstaatlich völlig verseuchten Wirtschaftsstrafrechts herangegangen wurde, war es Goldschmidts verwaltungsstrafrechtliche Theorie, die für die Lösung der gesetzgeberischen Probleme den Schlüssel bot. Ohne die großartige Vorarbeit, die Goldschmidts Werk von 1902 bedeutet hat, wäre es nicht möglich gewesen, im Wirtschaftsstrafgesetz vom 26. 7. 1949 den rechtsstaatlichen Ausgleich zwischen Justiz und Verwaltung zu finden, die Hypertrophie staatlichen Strafens ebenso zu überwinden wie die Tendenz der Verwaltung zu Übergriffen in das Gebiet der Rechtspflege. Es ist zu hoffen, ja zu fordern, daß mit Hilfe der Goldschmidtschen Theorie vom Verwaltungsstrafrecht eine weitergehende Bereinigung der strafrechtlichen „Nebengesetzgebung“ nach dem Muster des Wirtschaftsstrafgesetzes erfolgen wird. So dürfte die Auswirkung dieses Werkes von 1902 erst begonnen haben und noch reiche Früchte erwarten lassen. Im Bereiche der strafrechtlichen Dogmatik ist es dann vor allem die Schuldlehre, die Goldschmidt aufs stärkste gefördert hat. Goldschmidt hat klar erkannt, was eine „normative“ Schuldlehre bedeutet und leistet. Nicht das „Wollen des Pflichtwidrigen“, sondern „pflichtwidriges Wollen“ macht das Wesen einer aus dem Banne des Psychologismus befreiten Schuld aus. Auf Franks Vorarbeit fußend, hat Goldschmidt in seiner bahnbrechenden Arbeit „Der Notstand, ein Schuldpro-

blem“ (1913) die moderne normative Schuldlehre sicher fundiert und zugleich die Eigenart des Notstandsproblems klar erfaßt. Mochte seine Lehre von der „Pflichtnorm“ (als einer neben der Rechtsnorm selbständig stehenden Norm) sich als entbehrlich erweisen; jedenfalls hat Goldschmidt mit dieser Lehre den Kern der Schuldproblematik aufs schärfste erfaßt. Das Notstandsproblem konnte nun im Sinne der Differenzierungstheorie wirklich gelöst werden. An der Notwendigkeit und Praktikabilität dieser Lösung dürfte nicht zu zweifeln sein. Sie hat stark auf die reichsgerichtliche Rechtsprechung gewirkt, die sich mit der Standard-Entscheidung vom 11. 3. 1927 (RGSt 61, 242 [249 ff.]) in Goldschmidts gedanklichen Bahnen bewegt.

Daß Goldschmidt das gesamte Zivilrecht mit der gleichen souveränen Sicherheit beherrscht hat wie das Strafrecht, ist insbesondere seinen prozeßtheoretischen Arbeiten zugute gekommen. Sie setzen schon 1905 ein mit der Arbeit über das „materielle Justizrecht“ und haben ihre Krönung gefunden in dem Werke, das wohl überhaupt als die Summe des Goldschmidtschen Lebenswerkes anzusprechen ist, nämlich in dem 1925 erschienenen, inhaltsschweren Buch „Der Prozeß als Rechtslage“. Die Stärke und die Bedeutung der prozeßrechtlichen Arbeiten Goldschmidts bestehen darin, daß Goldschmidt stets Strafprozeßrecht und Zivilprozeßrecht zusammen ins Auge faßt. Das hindert ihn nie, die tiefgreifenden Unterschiede herauszuarbeiten, die sich aus der Inquisitionsmaxime einerseits, der Verhandlungsmaxime andererseits, aus den ganz verschiedenen Staatsaufgaben im einen und im anderen prozessualen Bereiche ergeben müssen. Aber wie sich das prozessuale Denken ganz allgemein und überhaupt vom materiellrechtlichen Denken unterscheidet, wie infolgedessen im gesamten Bereiche des Prozeßrechts die Vermengung mit materiellrechtlichen Betrachtungsweisen vermieden werden muß, wie eine selbständige Lehre der prozessualen Handlungen und der auf sie bezüglichen Wertkategorien entwickelt werden muß, sollen die prozessualen Probleme wirklich prozeßrechtlich erfaßt und gelöst werden, das hat Goldschmidt in unwiderleglicher Weise gezeigt. Sein Buch von 1925 verdient mit vollem Recht den Untertitel: „Eine Kritik des prozessualen Denkens“. Es hat zunächst im Bereiche der zivilprozeßrechtlichen Wissenschaft mehr gewirkt als in der strafprozeßrechtlichen, sehr zum Schaden der letzteren. Aber es kann schon heute gesagt werden, daß nunmehr auch das Strafprozeßrecht in den Bann dieses Werkes gerät. Gerade in ihm wird Goldschmidt weiter wirken.

Als in den Jahren 1919/20 der Gedanke einer Reform des Strafprozeßrechts auftauchte, wurde Goldschmidt seitens des Reichsjustizministeriums zur Mitarbeit herangezogen. Aus seiner Feder entstammte 1920 der „Entwurf eines Gesetzes über den Rechtsgang in Strafsachen“. So sehr dieser Entwurf inhaltlich umstritten gewesen ist, das eine konnte niemand leugnen, daß in diesem Entwurf in vorzüglichen Formulierungen nach einheitlichen großen Gesichtspunkten eine Liberalisierung des Strafprozesses versucht worden ist, die doch in erster Linie dem Gedanken des Rechtsstaates hat zugute kommen sollen. Vielleicht wird dieser Entwurf noch einmal eine Auferstehung feiern, wenn erneut eine an die Grundlagen heranführende Reform des Strafprozesses unternommen wird. —

Dieser kurze Rückblick auf das Lebenswerk James Goldschmidts darf nicht schließen, ohne daß des *Rechtslehrers* Goldschmidt gedacht wird. Seine Vorlesungen waren bis ins letzte durchgefeilt. Was sie — ebenso wie seine strafrechtlichen und prozeßrechtlichen Übungen — so wirkungsvoll machte, das war die phrasenlose, unerbittliche gedankliche Präzision, die keinerlei Vernebelung der Problematik und kein Hinwegreden über gedankliche Tiefen und Unterscheidungsnotwendigkeiten duldete und in ihrer Strenge und Sachlichkeit außerordentlich erzieherisch wirkte. Goldschmidt verkörperte die geistige Diszipliniertheit und Zucht, ohne die es echtes Juristentum nicht geben kann und die immerdar die Überlegenheit und Stärke dieses Juristentums ausmachen wird. Wer diese juristische Schulung an sich selbst erlebt hat, kann nur in Dankbarkeit des Lehrers gedenken, der sie ihm vermittelte. Die deutsche Rechtswissenschaft steht tief in Goldschmidts Schuld. Wir können sie nur abtragen, indem wir das reiche Lebenswerk dieses überragenden Gelehrten in unserem eigenen Schaffen in Ehrerbietung und Dankbarkeit Früchte tragen lassen in ständiger geistiger Auseinandersetzung mit dem Gedankenreichtum, den seine Arbeiten uns bieten.

Eberhard Schmidt, Heidelberg



X

## Geschichtliche und rationale Elemente im englischen Strafrecht

Von Professor Dr. M. Grünhut, M. A.  
Reader in Kriminologie an der Universität Oxford

Vortrag gehalten vor Dozenten und Studenten der Universität Freiburg i. Br.  
am 3. Juli 1959

Zu den rechtsvergleichenden Studien im Strafrecht, die in Freiburg eine so wirkungsvolle Stätte gefunden haben, sollen die hier folgenden Ausführungen einen Beitrag liefern, der in voller Absicht auf eine bestimmte Fragestellung beschränkt ist. Dabei waren drei grundsätzliche Überlegungen für die Wahl und Begrenzung des Gegenstandes dieser Darstellung maßgebend. Einmal ist es nicht die Aufgabe der Rechtsvergleichung, wahllos Vergleiche einzelner Rechtsinstitute in möglichst zahlreichen und verschiedenen Rechtssystemen vorzunehmen. Vielmehr gilt ein Wort von Martin Wolff, der zu sagen pflegte: «Es ist die erste Aufgabe der Rechtsvergleichung, das Recht des einen Landes den Juristen des anderen Landes verständlich zu machen.» Zweitens handelt es sich nicht darum, einzelne Rechtsfiguren oder Einrichtungen des einen Systems herauszugreifen und nach ihrem Vorhandensein oder Fehlen in anderen Systemen zu fragen. Vielmehr muß man einen Schritt zurückgehen auf allgemeine soziale und rechtspolitische Probleme und die Antwort suchen, die jeweils in dem betreffenden Rechtssystem gegeben wird. Dann wird sich erweisen, daß die Rechtsvergleichung eine begrenzte Anzahl von Lösungen verwandter Probleme aufzuzeigen vermag. Schließlich dient die Rechtsvergleichung in erster Linie der Erkenntnis und nicht, oder jedenfalls nicht zu früh, der Wertung. Sie führt zu einem mehrdimensionalen Bild, in dem man das eigene Rechtssystem als eine neben anderen Möglichkeiten zu verstehen beginnt. Vielleicht ist der Gewinn, den rechtsvergleichende Arbeit verspricht, am besten ausgedrückt in einem kleinen Vers von Goethe. Er lautet:

Willst du dich selber erkennen,  
So sieh wie die andern es treiben;  
Willst du die andern verstehn,  
Blick in dein eigenes Herz!

(Votivtafeln)



...die für die richtige dienstliche Verwendung und  
...Soldaten von Bedeutung sind. Mit Recht stellt  
...Senat fest, daß „der behandelte Soldat diese Offenbarungs-  
...pflicht des Truppenarztes auf Grund seiner Dienstpflicht  
...Eingriff in seinen Persönlichkeitsbereich hinnehmen muß“.  
...Verhältnis des Truppenarztes zum Soldaten nicht aus-  
...truppendienstlich sieht, daß er es vielmehr auch hier  
...„notwendig“ erachtet, daß zwischen Truppenarzt und Sol-  
...„ein persönlicher, durch das ärztliche Berufsgeheimnis  
...geschützter Vertrauensbereich“ zu bilden vermag. Der Sol-  
...soll sich auch dem Truppenarzt gegenüber „freimütig“  
...dürfen. Was der Truppenarzt hierbei erfährt, wird  
...notwendig in den durch das Thema „Dienstfähigkeit“  
...Rahmen fallen, kann also der rein persönlichen  
...des Soldaten zugehören. Durch Entgegennahme solcher  
...vertraulichen Mitteilungen läßt der Truppenarzt von  
...aus ein Vertrauensverhältnis entstehen, mit dem der Sol-  
...Gedanken an ärztliche Verschwiegenheit verbinden darf.  
...aber genießen die Mitteilungen des Soldaten den  
...Schutz des § 300 StGB.

Die Grenze zu bestimmen zwischen dem, was der Offen-  
...pflicht des Truppenarztes unterfällt, und dem, worauf  
...seine Schweigepflicht bezieht, wird oft nicht einfach sein.  
...ist es nur sehr bedeutsam, daß der Senat die Bestim-  
...dieser Grenze im Einzelfall ganz der Entscheidung des  
...Gewissens anheimstellt: „Entsteht im Einzelfall ein  
...Konflikt zwischen der Geheimhaltungspflicht und der Offen-  
...pflicht des Truppenarztes, so muß der Arzt seine Ent-  
...scheidung zwischen diesen Pflichten nach eigenem Wissen und  
...Gewissen abwägen.“ Das kann nur dahin verstanden werden,  
...daß die juristische Bewertung einer Offenbarung wie auch  
...des Verschweigens ärztlichen Wissens von einer ärztlichen  
...ethischen) Gewissensentscheidung abhängig ist. Der  
...Senat vertritt damit den gleichen Standpunkt, den kürzlich das  
...LSG gerade hinsichtlich der Schweige- bzw. Offenbarungs-  
...pflicht eines gerichtlich bestellten fachärztlichen Gutachters

vertreten hat<sup>5</sup>. Nach meiner Auffassung<sup>6</sup> verdient dieser Stand-  
punkt volle Billigung.

Der vom WehrDS behandelte Fall hat nun seine spezifische  
Bedeutung dadurch erhalten, daß sich der Truppenarzt durch  
den Befehl, die „Arztakte“ zusammen mit einer truppenärzt-  
lichen Meldung vorzulegen, in seiner Entscheidungsfreiheit  
zwischen Offenbaren und Schweigen beeinträchtigt gefühlt hat.  
In dieser Hinsicht legt der Senat nun völlig zutreffend dar,  
daß der Truppenarzt, indem er sich von der Bedeutung des  
Begriffs „Arztakte“ ein falsches Bild gemacht hat, den (ganz  
allgemein gehaltenen) Befehl mißverstanden hat. Was der  
Truppenarzt bei der Behandlung eines Soldaten in die „Arzt-  
akte“ einträgt, unterliegt genau dem gleichen pflichtmäßigen  
Ermessen, das er bei der erörterten Gewissensentscheidung wal-  
ten zu lassen hat. Er wird also das, was nicht zum Thema  
„Dienstfähigkeit des behandelten Soldaten“ gehört, ihm viel-  
mehr vom Soldaten „persönlich anvertraut“ worden ist, in der  
Arztakte gar nicht vermerken. Ist aber etwas Derartiges in die  
Arztakte hineingeraten, so wird es aus dieser entfernt, bevor  
die Akte mit der dienstlichen Meldung vorgelegt wird. Auch  
insofern überläßt der WehrDS in juristisch durchaus zutreffen-  
der Weise alle Entscheidung dem pflichtgemäßen Ermessen des  
Truppenarztes. Der Entscheidung des WehrDS ist auch darin  
beizupflichten, daß sich die Grenze zwischen Offenbarungs-  
pflicht und Schweigepflicht gerade für die Konfliktsfälle nicht  
eindeutig ziehen läßt, und zwar weder in einem Gesetz (das  
hat schon § 13 III der ReichsärzteO von 1935 gezeigt) noch in  
einem dienstlichen Befehl. Solange aber dienstliche Befehle  
die vom WehrDS herausgearbeitete Entscheidungsbefugnis nach  
ärztlichem Wissen und Gewissen nicht beeinträchtigen, besteht  
für einen Truppenarzt kein Anlaß, sich durch einen solchen  
Befehl in seinen ärztlichen Rechten und Pflichten verletzt zu  
fühlen.

Alles in allem ist die Entscheidung des WehrDS vom juri-  
stischen Standpunkt aus als Klärung einer nicht einfachen Pro-  
blematik sehr zu begrüßen.

Prof. Dr. Dr. h. c. Eberhard SCHMIDT, Heidelberg

<sup>5</sup> Vgl. dazu NJW 62, 1780.

<sup>6</sup> Vgl. NJW 62, 1745.

## GLÜCKWUNSCH

### Max Grünhut zum 70. Geburtstag

Am 7. Juli 1963 feiert Max Grünhut in Oxford in voller körper-  
licher und geistiger Frische und Rüstigkeit den 70. Geburtstag. Sohn  
eines Chemikers, der als Verfasser eines Buches über „Das Trink-  
wasser“ im Fachschrifttum heute noch Rang und Namen hat, besuchte  
Grünhut die Universitäten Heidelberg, München und Kiel und ging  
dann nach Ende des ersten Weltkrieges mit seinem Lehrer Moritz  
Lepmann nach Hamburg, wo er sich 1922 für Strafrecht und Straf-  
prozeßrecht habilitierte. Ganz im Sinne seines Lehrers war er alle-  
zeit lebensfremder doktrinäer Einseitigkeit abhold. Statt dessen  
sah von Anfang an den sozialen Aufgaben von Rechtslehre und  
Rechtspflege sein besonderes Interesse.

Grünhuts Habilitationsschrift trägt den Titel: „Anselm von Feuer-  
bach und das Problem der strafrechtlichen Zurechnung“ (1922).  
Dieser Beitrag zur Dogmengeschichte der deutschen Strafrechts-  
wissenschaft wollte nach den Worten des Verfassers „an einem  
zentralen kriminalistischen Problem die grundlegenden Gedanken  
Anselm von Feuerbachs lebendig werden lassen, sie aus den wissen-  
schaftlichen und rechtsgeschichtlichen Strömungen der Zeit ver-  
leben und zugleich in ihrer Bedeutung für die strafrechtlichen  
Fragen der Gegenwart kennzeichnen“. Dieses Feuerbach-Buch ist  
bis zum heutigen Tage das einschlägige Standardwerk geblieben.

Seine akademische Laufbahn führte Grünhut 1923 an die Uni-  
versität Jena und 1928 an die Universität Bonn, an die Seite des  
von ihm sehr verehrten Alexander Graf zu Dohna, mit dem ihn  
bald Freundschaft verband.

Die Jenaer Zeit war einigen dogmatischen Untersuchungen ge-  
widmet, vor allem aber Fragen der Reform des Strafvollzugs. Frucht  
der Bemühungen auf letztgenanntem Gebiet war das Sammelwerk

von Frede-Grünhut „Reform des Strafvollzugs“ (1927).

Hand in Hand damit ging eine intensive Lehrtätigkeit, die in  
Jena und Bonn eine große Zahl interessierter und ergebener Schü-  
ler um Max Grünhut scharte, die — von ihm zu gründlichster wis-  
senschaftlicher Arbeit erzogen — sich heute ihres Lehrers in ganz  
besonderer Anhänglichkeit erinnern werden.

Das Jahr 1933 setzte diesem weit ausgreifenden und erfolgrei-  
chen Wirken an deutscher Wissenschaft und deutscher Jugend ein  
jähres Ende. Bis Anfang 1939 blieb Grünhut noch in Bonn. Die  
Stätte und das Land, in denen er so verwurzelt war und die er  
so sehr liebte, verließ er buchstäblich erst im allerletzten Augen-  
blick, von dem Warden von All Souls College in Oxford eingeladen  
und aufgenommen. Er erhielt am College ein Forschungsstipen-  
dium, das bis 1947 immer wieder verlängert wurde. 1947 wurde  
er zum Lecturer und 1951 zum Reader an der Universität Oxford  
ernannt. Zur Rückkehr auf seinen deutschen Lehrstuhl konnte er  
sich nicht entschließen.

Durch seine Veröffentlichungen in englischer Sprache erwarb sich  
Grünhut binnen kurzem einen sehr geachteten Namen auch im eng-  
lischen Schrifttum. 1948 veröffentlichte er ein Buch über „Penal  
Reform“, das seit längerer Zeit vergriffen ist. 1956 folgte ein Buch  
über „Juvenile Offenders before the Courts“. 1954 und 1959 er-  
schienen zwei für die UN erstattete Gutachten über praktische  
Erfahrungen mit der Probation. In zahlreichen Einzelabhandlungen  
setzte er sich mit Fragen der Jugendkriminalität, dem Problem der  
Todesstrafe, der gesetzgeberischen Behandlung der Sittlichkeits-  
delikte usw. auseinander.

Seit Beginn der 50er Jahre nahm auch das Home Office seinen  
Rat in Anspruch und berief ihn zum Mitglied des dem Home Office



eingegliederten *Probation Advisory and Training Board*. Das gleiche Ministerium unterstützte daneben kriminologische Arbeiten, die in Oxford unter seiner Leitung angefertigt wurden. Neujahr 1961 erhielt er aus der Hand der Königin-Mutter den Orden des Britischen Empire (O.B.E.).

Einen großen Teil seiner Zeit und Kraft widmete Grünhut in den Nachkriegsjahren der deutschsprachigen evangelischen Kirche in England. Er wirkte entscheidend mit an dem allmählichen Zusammenwachsen der Mehrzahl der im Lande verstreuten Gemeinden zu einer kirchlichen Gesamtkörperschaft. Er war und ist juristischer Berater in dieser Körperschaft, war viele Jahre Vorsitzender

ihres Geistlichen Rates und hat ihre kirchliche Ordnung mitgestaltet.

Die vornehme Gesinnung, die Max Grünhut besaß, hat sich zum Ausdruck, daß er, ungeachtet aller schweren Erlebnisse, die der ersten war, die nach 1945 die Fühlung zu den Freunden und Bekannten in der Heimat wiederaufnahmen und ihnen in besonderer Weise die Hand entgegenstreckte. Er darf sicher sein, daß er an seinen Ehrentage in beiden Ländern viele seiner in Verehrung und Anerkennung als eines echten Mannes der Wissenschaft und eines edlen und noblen Charakters gedenken werden.

Erich SCHWINGE, Marburg

## BERICHTE

### „Presse und Justiz“

Nachdem die Staatsaktion gegen den „Spiegel“ eine unerhofft breite Kreise erfassende Diskussion der einschlägigen politischen, verfassungs- und presserechtlichen Probleme ausgelöst hatte, drängte sich für die am 5./6. April 1963 in Düsseldorf unter dem Vorsitz von RA Dr. Löffler abgehaltene 13. Arbeitstagung des Studienkreises für Presserecht und Pressefreiheit das oben genannte Thema, dessen Fassung allerdings darauf verzichtet, den unmittelbar-politischen Werkzeugcharakter von Strafverfolgungsbehörden zu akzentuieren, geradezu unabweislich auf. Zu der ursprünglich vorgesehenen Fortsetzung der Verhandlungen der 12. Arbeitstagung (in Konstanz am 28./29. September 1962) über die Bestreikung von Presseunternehmen wird es voraussichtlich auf der 14. Arbeitstagung kommen.\*

Der im allgemeinen bemerkenswert dichten und sich kaum auf Nebenwege verlierenden Aussprache gingen drei einleitende Kurzreferate (RA Dr. Löffler, Stuttgart; Bundesanwalt Dr. Kohlhaas, Karlsruhe; Jean-Louis Hébarre, Paris) voraus. Nach dem Vorschlag des Erstreferenten wurden, jeweils unter Zugrundelegung des Sachverhalts der Spiegel-Aktion, jedoch stets mit einer Erweiterung der Fragestellung auf die allgemeine Problematik hin, vier Problemkreise untersucht: a) das grundgesetzliche Zensurverbot, b) die Tragweite des rechtsstaatlichen und von der Werteordnung der freiheitlichen Demokratie bedingten Übermaßverbots für ein behördliches Vorgehen gegen Presseunternehmen, c) die politische Bedeutung und die rechtsmethodischen Möglichkeiten einer Unterscheidung von gemeinem und „publizistischem“ Landesverrat, d) die involvierten Fragen des Berufsgeheimnisses der Presse, insbesondere des Zeugnisverweigerungsrechts.

a) Hinsichtlich des Zensurverbots — übereinstimmend mit der geschichtlichen Entwicklung und der h. L. wurde es von allen Diskussionssteilnehmern als Verbot der Vor-Zensur aufgefaßt (a. M. Löffler, Presserecht, 1955, Rd.-Nr. 53 zu § 1 RPG, S. 75) — lehnte Dr. Löffler den vor einigen Jahren von Johanne Noltenius (Die freiwillige Selbstkontrolle der Filmwirtschaft und das Zensurverbot des Grundgesetzes, Göttingen 1958)<sup>1</sup> entwickelten materiellen Zensurbegriff ab, der die mit der Zensur verfolgten Ziele (z. B. die Förderung regimetreuer „Gesinnungstüchtigkeit“) in den Begriff hineinnimmt, und definierte als Zensurmaßnahme jedes behördliche Verlangen auf Vorlage einer Druckschrift vor deren Veröffentlichung zwecks inhaltlicher Überprüfung, wobei die endgültige Veröffentlichung von der Genehmigung durch die Behörde abhängt. Mit diesem bloß „formellen“ Zensur-Begriff werden auch Einzelmaßnahmen, an die bei der gegen die festen Zensurinstitutionen des restaurativen Biedermeier gerichteten Aufnahme des Zensurverbots in die Verfassungen des 19. Jh. nicht gedacht werden konnte, wie die der Beamten der Bundesanwaltschaft bezüglich der Fahnen der im Druck befindlichen Nr. 44/62 des „Spiegels“ dem grundgesetzlichen Zensurverbot unterworfen (jedenfalls, wenn man mit dem regierungsamtlichen, von der entsprechenden Darstellung des Bundesinnenministers vor dem Deutschen Bundestag — es habe sich lediglich um eine Überwachung gegen ein etwaiges Verbringen von Beweismaterial aus dem Verlagsgebäude gehandelt — abweichenden „Spiegel“-Bericht davon ausgeht, daß eine inhaltliche Überprüfung auf „Beziehungspunkte“ zum Foertsch-Artikel der Nr. 41/62 stattfand und dem Verlag „gestattet“ wurde, die neue Ausgabe fertigzustellen; Bulletin des Presse- und Informationsamtes der Bundesregierung, Nr. 23 v. 5. 2. 1963, S. 203). Einige Diskussionssteilnehmer (Prof. Dr. Doofat, Berlin; Prof. Dr. G. Küchenhoff,

Würzburg) stellten hingegen auf den „materiellen“ Zensurbegriff ab und bestritten dementsprechend die Zensur-„Tendenz“ der kriminalisierten Vorlageanordnung. Prof. Dr. Ridder (Bonn) trat vor allem in eingehender Auseinandersetzung mit Prof. Dr. Löffler (Tübingen), die These, daß das Zensurverbot nach Art. 5 I S. 3 GG absolut gelte und auch von den nach Art. 5 II der Meinungs- und Pressefreiheit durch die „allgemeinen Gesetze“ gezogenen Schranken in keinem Fall berührt werden könne. An sich sei nach der geschichtlichen Entwicklung, wie etwa durch § 143 II der Preussischen Reichsverfassung zu belegen ist, das Zensurverbot durch zahlreiche anderen Elementen (wie Verbot des Konzessionszwangs, des Postverbots usw.) in der institutionellen Pressefreiheit zu einer Einheit verschmolzen und überall, wo „Pressefreiheit“ gewährleistet wird, stets bereits mitnormiert. Der Parlamentarische Rat habe die mehr oder minder beiläufig als Traditionsgut des Liberalismus im Grundgesetz übernommen. Dort werde es indes, ohne dem Gebot der Pressefreiheit inhaltlich noch etwas hinzufügen zu können, der rechtsstaatlichen und politischen Weisheit des Grundgesetzes gleichwohl zu einer neuen Funktion gebracht. Art. 5 Abs. II GG wolle zwar alle Einzelrechte des Abs. I („diese Rechte“) dem allgemeinen Gesetzsschranken unterwerfen. Das könne sich aber gegenüber einem verselbständigten Zensurverbot nicht auswirken, sondern eine „Beschränkung“ des Zensurverbots nicht denkbar sei. Eine „Beschränkung“ des Zensurverbots sei ja bereits seine (partielle oder totale) Aufhebung. Nur insofern könne Art. 5 I S. 3 GG überhaupt einen normativen Sinn haben; andernfalls sei die Bestimmung heute ein juristisch inhaltsleeres Museumsstück.

b) Die Diskussion zum Übermaßverbot, das in der Praxis nur zu den letzten Mitteln gehören muß, litt naturgemäß etwas an der probleminhärenten Unmöglichkeit, zu abstrakten und generalisierenden Ergebnissen zu gelangen. Hier mußte also sehr viel auf die Vorgänge der Spiegel-Aktion eingegangen werden, wobei der derzeitige Sprecher des Deutschen Presserats Dr. Cron (Stuttgart) und Chefredakteur Frhr. v. Mauchenheim (Bad Godesberg) wertvolle Informationen beisteuerten. Das Eingreifen zur Nachforschung wurde für den vorliegenden Fall nahezu einhellig als exzessiv erachtet. Ein eindrucksvoll kontrastierendes Bild zeichnete Hébarre in seinem Bericht über die einschlägigen Rechtsvorschriften für den französischen Strafprozeß und die zugehörige Praxis, wobei unter den gegenwärtigen politischen Bedingungen gibt es Daueruntersuchungen von Presseunternehmen — nie bei Nacht, sondern während der Dauer ein Tag — nur in Gegenwart des Beschuldigten und seines Rechtsbeistands, äußerstenfalls unter Zuziehung von zwei unparteilichen Zeugen, die das sehr detaillierte Untersuchungsprotokoll zu unterschreiben haben und bei jeder Erweiterung des Untersuchungsbereichs mit rechtlichen Mitteln intervenieren können. Prof. Dr. Schüle gab zu bedenken, daß jeder Exzeß schon gemäß der strafprozessualen Untersuchungsinstitutionen innewohnenden Finalität rechtswidrig ist. Bundesanwalt Dr. Kohlhaas plädierte für eine präzise Umgrenzung des „Beschlagnahme“- bzw. „Durchsuchungsobjektes“ und lehnte mit Schärfe die Eignung beiläufig „gefundenen“ Objekte als Beweismittel im Strafverfahren ab. Die durch § 103 StPO gebotenen Sicherungen wurden als völlig unzureichend angesehen.

c) Was die rechtspolitische Forderung nach künftiger Differenzierung zwischen gemeinem oder „klassischem“ Landesverrat und publizistischer Geheimnisverletzung (etwaige Modelle nach dem britischen „Official Secrets Act“ oder nach dem französischen Vorwurf des „Angriffs gegen die Staatssicherheit“) angeht, konnte die Diskussion sich bereits auf recht umfangreiche Äußerungen in der Eröffnung stützen und glaubte, als gesichert annehmen zu dürfen, daß die maßgeblichen parlamentarischen und Regierungsstellen den auf einer

\* In der JZ wird ein zusammenfassender Bericht über diese beiden Tagungen erscheinen. — D. Red.

<sup>1</sup> Von mir in JZ 60, 420 f. rezensiert.



1979

## WERNER GOLDSCHMIDT ZUM 70. GEBURTSTAG

Am 9. Februar 1980 vollendet Werner Goldschmidt sein 70. Lebensjahr. Er ist der Sohn des Berliner Strafrechtlers und Rechtsphilosophen James Goldschmidt, der in den zwanziger Jahren und anfangs der dreißiger Jahre in der damals glanzvollen Berliner Fakultät wegen seines Witzes und seiner außerordentlichen Lehrbegabung einer der beliebtesten akademischen Lehrer war<sup>1</sup>.

Die Vita von Werner Goldschmidt ist exemplarisch für das Schicksal eines jungen Gelehrten, dem damals alle Türen offenzustehen schienen. Nach Absolvierung der ersten juristischen Staatsprüfung und der Promotion über ein strafrechtliches Thema wirkte Goldschmidt noch einige Zeit als Fakultätsassistent in Kiel unter *Husserl* und *Schoenborn* und vollendete dort seine Habilitationsschrift über „Die Schuld im Straf- und Zivilrecht“. Am 3. Juli 1933 verließ er Deutschland, um dem Nazismus zu entrinnen, und ging nach Zürich.

Seine Fachrichtung umfaßte schon damals vornehmlich die Rechtsphilosophie und das Internationale Privatrecht. Auf seiner ersten Reisestation in Zürich verfaßte er eine rechtsphilosophische Schrift (*Der Linguismus und die Erkenntnistheorie der Verweisungen*, 1936). Da diese größere Arbeit ihm indessen ein ständiges Wirken in Zürich nicht gestattete, zog Goldschmidt weiter nach Madrid. Hier wirkte er bis März 1949 – verheiratet mit einer Spanierin – wissenschaftlich und als Anwalt. Seine wissenschaftliche Arbeit war hier vor allem dem Internationalen Privatrecht gewidmet (*La consecuencia jurídica de la norma del Derecho Internacional Privado*, 1935; *Sistema y filosofía del Derecho Internacional Privado*, 1949).

Im Jahre 1948 erreichte ihn ein Ruf als Professor für Internationales Privatrecht an die argentinische Universität Tucumán, dem er im Frühjahr 1949 folgte. Seinen ursprünglichen Fächern blieb er als hochgeschätzter Forscher und akademischer Lehrer treu und lehrte sie an fast allen argentinischen Fakultäten. Vor allem faßte er in Buenos Aires Fuß, wo er noch heute die beiden Lehrstühle für IPR und für Rechtsphilosophie innehat und auch das Institut für IPR als ordentlicher Professor leitet.

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<sup>1</sup> Eine kleine Erinnerung: *James Goldschmidt* leitete im Berliner Audimax eine vollbesuchte Besprechung einer Klausur und rief den Studenten Mayer auf. Auf das tiefe Schweigen meinte James Goldschmidt: „Es muß doch im überfüllten Berliner Audimax *einen* Studenten namens Mayer geben.“

Weitere Publikationen von Goldschmidt betreffen das lateinamerikanische und das argentinische IPR, die „Ciencia de la Justicia (Dikelogía)“ und sein in deutscher Sprache erschienenes Buch den „Aufbau der juristischen Welt“ (1963).

Vorlesungen im Haag im Jahre 1972 über das Thema „Transactions between States and Public Firms and Foreign Private Firms“ (1972) runden das Bild ab.

Trotz der durch den Nazismus gesetzten Anfangsschwierigkeiten kann Goldschmidt auf ein reiches und in aller Welt anerkanntes Gelehrtenleben zurückblicken. Rabels Zeitschrift ist stolz darauf, daß sie Goldschmidt auch zu ihren Autoren zählen darf (vgl. etwa die tiefgehende Rezension von Ehrenzweigs „Psychoanalytic Jurisprudence“, RabelsZ 40 [1976] 312–323).

Wir wünschen dem Jubilar weiterhin Gesundheit, Lebensfreude und Schaffenskraft.

KONRAD ZWEIGERT



ohne verfassungsgerichtliche Entscheidung wurde festgestellt, daß Polizeimaßnahmen zum Schutze der öffentlichen Ordnung von dieser Bestimmung nicht berührt werden. Der OrgA einigte sich in der 6. Sitzung auf folgende Fassung dieses Absatzes:

Parteien, die sich nach Art ihrer Tätigkeit die Beseitigung der freiheitlichen und demokratischen Grundordnung zum Ziel gesetzt haben, sind verfassungswidrig. Die Feststellung der Verfassungswidrigkeit erfolgt durch das Bundesverfassungsgericht auf Antrag der Bundesregierung, der der Zustimmung des Bundesrats (Senats) bedarf. Das Gericht kann einstweilige Anordnungen gegen solche Parteien treffen. Ohne verfassungsgerichtliche Entscheidung kann keine Behörde gegen eine Partei wegen verfassungswidriger Betätigung einschreiten.

In der 11. Sitzung des OrgA (7. 10. 48) wurde angeregt, daß auch den politischen Parteien das Antragsrecht zu einem Verfahren vor dem BVG gemäß Abs. IV gegeben werden sollte. Diese Anregung fand jedoch nicht die Zustimmung des Ausschusses. Die Bestimmungen gegen antidemokratische Parteien wurden vom Allg. RedA als Abs. III des Art. 21 a<sup>17)</sup> neu gefaßt:

Parteien, die darauf ausgehen, die freiheitliche und demokratische Grundordnung zu beeinträchtigen oder zu beseitigen, sind verfassungswidrig. Über die Verfassungswidrigkeit entscheidet das Bundesverfassungsgericht. Das Antragsrecht und das Verfahren werden durch Gesetz geregelt.

Abgesehen von redaktionellen Änderungen wurde später als Maßstab der gegen die demokratische Grundordnung gerichteten Tätigkeit von Parteien eingefügt<sup>18)</sup>: „(...) die nach ihren Zielen oder nach dem Verhalten ihrer Anhänger (darauf ausgehen...)“. Schon in der 11. Sitzung am 7. 10. 48 des OrgA war darauf hingewiesen worden, daß gerade die Art der Tätigkeit einer Partei, nicht nur das Parteiprogramm, das eigentliche Indiz für das BVG in einem solchen Verfahren sei.

Die systematische Einordnung des Parteienartikels war nach einem Vorschlag des Allg. RedA<sup>19)</sup> gegenüber dem ChE geändert worden. Wegen seiner generellen Bedeutung erhält er seinen Platz in dem damaligen Abschnitt „Allgemeine Bestimmungen“ (entspricht den Art. 20—29 der Endfassung) im Anschluß an die Vorschrift über die Ausübung der Staatsgewalt (Art. 20 Endf.).

#### B. Art. 38 I S. 2 GG

Im OrgA<sup>20)</sup> wurde die Frage des Fraktionszwanges in Zusammenhang mit Art. 38 I S. 2 der Endfassung des GG erörtert: „Sie (die Abgeordneten) sind Vertreter des ganzen Volkes, an Aufträge und Weisungen nicht gebunden und nur ihrem Gewissen unterworfen.“ Im ChE war diese Bestimmung in einem selbständigen Artikel (46) enthalten:

„Die Abgeordneten sind Vertreter des ganzen Volkes. Sie sind nur ihrem Gewissen unterworfen und an Aufträge nicht gebunden.“

<sup>17)</sup> Fassg. v. 16. 11. 48, Drs. 279.

<sup>18)</sup> HauptA 27. Sitzg. v. 15. 12. 48.

<sup>19)</sup> Drs. 267 v. 10. 11. 48 zu Art. 46.

<sup>20)</sup> 2., 6. u. 20. Sitzg. v. 16. 9., 24. 9. u. 5. 11. 48.

### Zum zehnten Todestag von James Goldschmidt

Am 28. Juni 1940 ist Professor James Goldschmidt in Montevideo verstorben. Während in Südamerika das wissenschaftliche Lebenswerk des Verstorbenen an vielen Stellen eingehend gewürdigt wurde, erschien in Europa nur ein Nachruf von Ernst Heintz in der Rivista di Diritto Privato 1941. Es ist daher gerechtfertigt, sich anlässlich des zehnten Todestages dieses Gelehrten zu erinnern und insbesondere auch derjenigen wissenschaftlichen Leistungen zu gedenken, die er nach dem Jahre 1933 außerhalb Deutschlands vollbracht hat; denn diese Arbeiten sind bisher in seinem Heimatlande kaum bekannt geworden.

In Deutschland haben verschiedene der strafrechtlichen und der prozessualen Arbeiten Goldschmidts einen weitreichenden Einfluß ausgeübt. Von den strafrechtlichen Arbeiten sind vor allem diejenigen über das Verwaltungsstrafrecht zu nennen. In umfassender Weise hat sich G. mit dem Polizeidelikt in seiner Habilitationsschrift „Das Verwaltungsstrafrecht“ (1902) beschäftigt. Diese Lehre ist dann in verschiedenen Arbeiten weiter ausgebaut worden; hingewiesen sei hier z. B. auf seine Abhandlung über das

In den Fachausschußberatungen befürworteten gewichtige Stimmen aus verschiedenen Fraktionen die Streichung dieses Artikels oder wenigstens seines 2. Satzes. Der Artikel wurde dabei ausgelegt als Ausschließung 1. des Fraktionszwanges bei Abstimmungen im Parlament, 2. des imperativen Mandats, d. h. eines Auftrages, den eine außerparlamentarische Interessengruppe dem Kandidaten vor der Wahl etwa gibt. Diese letztere Gefahr wurde beim Mehrheitswahlrecht als besonders groß angesehen, während beim Verhältniswahlrecht dem Kandidaten ein Mandat der Partei zufalle: in diesem Falle würde sich die Bestimmung gegen den Parteiapparat richten.

Für die Streichung wurden drei Argumente ins Feld geführt: 1. ein auf Resignation gegenüber dem nun einmal üblich gewordenen Fraktionszwang beruhendes: die Bestimmung des Art. 46 müsse auf den historisch und verfassungsrechtlich nicht vorgebildeten Leser als eine Unwahrhaftigkeit wirken; 2. den Außenseitern und Einzelgängern dürfe bei Abstimmungen nicht eine Schutzbestimmung gegenüber ihrer Fraktion an die Hand gegeben werden; 3. Art. 46 ChE sei überflüssig, da auch bei Einführung des Fraktionszwanges die Partei kein verfassungsrechtlich zulässiges Mittel (etwa der Relegation) habe, um eine Abstimmung im Sinne des Fraktionsbeschlusses zu erzwingen.

Diese Argumente konnten sich nicht durchsetzen. Die Fiktivität des Art. 46 ChE wurde bestritten: auch gegenwärtig noch vertrete der Abgeordnete die Interessen des gesamten Volkes und sei nur an die Richtschnur seines Gewissens gebunden. Es wurde auf den Art. 61 der bay. Verfassung hingewiesen („Die Abgeordneten sind Vertreter des Volkes, nicht nur einer Partei.“). Man wollte auf den Schutz des einzelnen Abgeordneten oder der Gruppe, die eine von der Fraktion abweichende Meinung vertrete, nicht verzichten, um der politischen Entwicklung keine Hemmung zu bereiten. Ferner befürchtete man, daß die Streichung dieses altüberlieferten Verfassungsartikels als eine Billigung des Systems der ferngesteuerten Fraktionen ausgelegt werden könnte.

Die vom HauptA<sup>21)</sup> aus der badischen Verfassung (Art. 121 S. 3) herübergenommene — später zugunsten der „klassischen“ wieder fallen gelassene — Fassung: „Der Abgeordnete folgt bei Reden, Handlungen, Abstimmungen und Wahlen seiner Überzeugung und seinem Gewissen“ sollte die persönliche Gewissensentscheidung und auch die persönliche Freiheit des Abgeordneten dem Fraktionszwang gegenüber schärfer herausstellen.

Der Allg. RedA<sup>22)</sup> ging wieder auf die Fassung des Art. 21 WeimRV (mit geringer Abweichung) zurück, da durch die Formulierung nach der bad. Verfassung das Recht des Abgeordneten auf freie Entscheidung nicht ausreichend zum Ausdruck komme.

Inhaltlich wurde seitdem nichts mehr geändert, doch beschloß der HauptA<sup>23)</sup> auf Vorschlag des Allg. RedA die Einfügung dieser Bestimmung in den Art. 38 (Endfassung) über Wahl und Mandat der Abgeordneten.

Dr. WERNER MATZ, Bonn

<sup>21)</sup> 2. Sitzg. v. 11. 11. 48.

<sup>22)</sup> Fassg. v. 13. 12. 48.

<sup>23)</sup> 57. Sitzg. v. 5. 5. 49.

Verwaltungsstrafrecht im Verhältnis zur modernen Staats- und Rechtslehre (in der Festgabe für Koch, 1903) und auf die Arbeit „Materielles Justizrecht“ (1904). Die hier entwickelten Lehren von Goldschmidt haben auf das stärkste die neue deutsche Gesetzgebung beeinflusst; sie haben sich in den beiden wichtigsten Zweigen des Verwaltungsstrafrechts, dem Polizeistrafrecht und dem Wirtschaftsstrafrecht, durchgesetzt. Für das Polizeistrafrecht hat diese Lehre ihren Niederschlag in dem preußischen Polizeiverwaltungsgesetz von 1931 gefunden (vgl. hierzu J. Goldschmidt, Die Rechtsgültigkeit des Zwangsgeldes, ZStrW 52 S. 497). Auf den Erkenntnissen der Lehre vom Verwaltungsstrafrecht beruht auch das Wirtschaftsstrafgesetz vom 26. 7. 1949 (vgl. Eb. Schmidt, Das neue westdeutsche Wirtschaftsstrafrecht [1950] S. 14). Die ideengeschichtlichen und staatsphilosophischen Grundlagen der Goldschmidtschen Lehre vom Verwaltungsstrafrecht hat in geistvoller Weise Erik Wolf dargelegt und weiter ausgebaut (E. Wolf, Die Stellung der Verwaltungsdelikte im Strafrechtssystem, in: Festgabe für Frank Bd. II). — Von den sonstigen zahlreichen strafrechtlichen Arbeiten



G.s seien hier nur noch genannt: „Der Notstand, ein Schulproblem“ (Österr. Zschr. f. Strafrecht 1913) und „Normativer Schuldbegriff“ (Festgabe für Frank Bd. I).

Unter den prozessualen Arbeiten Goldschmidts ist an erster Stelle „Der Prozeß als Rechtslage“ (1925) zu nennen. Nach G. ist der Begriff der Rechtslage ein eigentümlicher Begriff des Prozeßrechts, und zwar dessen Grundbegriff. G. sieht in dem Recht einen Inbegriff von anzuwendenden Maßstäben für den Richter. Die Rechtssätze sind für die Rechtsunterworfenen Verheißungen oder Androhungen eines bestimmten richterlichen Verhaltens, letztlich eines richterlichen Urteils bestimmten Inhalts. Die hierdurch begründeten Rechtsbeziehungen der Parteien sind keine Rechtsverhältnisse, d. i. weder Pflichten noch Rechte im Sinne von Herrschaften über Imperative, sondern Rechtslagen, d. h. Spannungsverhältnisse zu dem zu erwartenden richterlichen Verhalten, letztlich zu dem zu erwartenden richterlichen Urteil, nämlich Aussichten, Möglichkeiten und Lasten. Auch für denjenigen, der dieser Grundauffassung nicht zu folgen vermag, ist das Werk über den Prozeß als Rechtslage eine unerschöpfliche Fundgrube. Wichtigste Fragen des Prozeßrechts werden in monographischer Form behandelt; z. B. sind die Lehren von den Prozeßhandlungen und von der Streitgenossenschaft durch dieses Werk erheblich gefördert worden. Mit Recht hat Eb. Schmidt kürzlich in seiner Besprechung der neueren zivilprozessualen Lehrbücher (SJZ 50, 377 f.) bemerkt, daß alle diese Werke zeigen, wie reiche Früchte Goldschmidts Kritik des prozessualen Denkens getragen hat. — Von den sonstigen

prozessualen Arbeiten G.s sei noch hingewiesen auf die Schrift „Zur Reform des Strafverfahrens“ (1919) und auf das Lehrbuch des Zivilprozeßrechts (1929 und 1932).

Im Jahre 1933 verlor Goldschmidt seinen Lehrstuhl in Berlin. Auf Einladung spanischer Universitäten übte er in den Jahren 1933 bis 1936 eine umfassende Lehr- und Vortragstätigkeit in Spanien aus; er hielt Vortragsreihen an den Universitäten Madrid, Barcelona, Valencia, Sevilla und Zaragoza. Der spanische Bürgerkrieg setzte dieser Tätigkeit ein Ende. Über England kam er nach Südamerika; die Juristische Fakultät der Universität Montevideo öffnete ihm die Hörsäle. Im Zusammenhang mit der Lehrtätigkeit in Spanien veröffentlichte G. drei Arbeiten: „Metodologia juridico — penal“ (1935), „Problemas juridicos y politicos del proceso penal“ (1935) und „Teoria general del proceso“ (1936). G. wandte sich in diesen Jahren immer mehr rechtsphilosophischen Problemen zu und veröffentlichte darüber eine ganze Reihe von Arbeiten. Die beiden Hauptwerke sind: „Problemas generales del derecho“ (Buenos Aires 1944) und „Estudios de filosofia juridica“ (Buenos Aires 1947). Es ist zu hoffen, daß diese Werke in Übersetzungen auch dem deutschen Leser zugänglich gemacht werden können. Alle diese Arbeiten legen in beredter Weise Zeugnis von dem ab, was Goldschmidt nach dem Jahre 1933 in Spanien und in Südamerika gewesen ist: ein „Botschafter und Propagandist der deutschen Kultur“ (so Alcalá-Zamora y Castillo).

Professor Dr. SCHÖNKE, Freiburg i. Br.

## Chronik der Rechtsentwicklung

### Rechtsentwicklung in der Bundesrepublik Deutschland

#### Bundesrecht<sup>1)</sup>

#### A. Bundesgesetze und Bundesverordnungen<sup>2)</sup>

##### II. Zivil- u. Strafrecht einschl. Verfahrensrecht.

G. üb. Bekanntmachungen v. 17. 5. 50 (BGBl. S. 183). — Vgl. DRZ 50, 204 B II 1. Amtl. Begründg.: BANz. 1950 Nr. 103.

##### III. Öffentliches u. privates Wirtschafts- u. Verkehrsrecht.

1. VO üb. d. Erstreckung von Recht auf dem Gebiet der Wertpapierbereinigung u. d. Kapitalverkehrs v. 12. 5. 50 (BGBl. S. 180). — Sie erstreckt das Wertpapierbereinigungsgesetz und das Kapitalverkehrsgesetz auf die franz. Zone.

2. VO üb. d. Erstreckung von Binnenschiffahrtsrecht v. 11. 5. 50 (BGBl. S. 179). — Sie erstreckt das G z. Aufhebung einiger VOen usw. v. 9. 8. 49 (WiGBl. S. 249) auf die franz. Zone.

3. Zweite VO üb. d. Erstreckung von Landwirtschaftsrecht v. 12. 5. 50 (BGBl. S. 180). — Sie erstreckt d. G. üb. d. übergebielichen Verkehr mit Erzeugnissen der Land- u. Forstwirtschaft u. d. neugefaßte G zum Schutz der landwirtschaftlichen Kulturpflanzen auf die franz. Zone.

4. VO üb. d. Erstreckung von Recht des Post- u. Fernmeldewesens v. 12. 5. 50 (BGBl. S. 181) erstreckt d. G. üb. d. Amateurfunk, die DVO dazu u. d. G. üb. d. Betrieb von Hochfrequenzgeräten auf die franz. Zone.

5. AO z. Durchf. des NotG für die deutsche Hochseefischerei [vgl. DRZ 50, 203 rechts III 1] v. 28. 4. 50 (BGBl. S. 181): über Kohleverbilligung.

##### IV. Sozial- und Arbeitsrecht.

VO üb. d. Erstreckung von Sozialversicherungsrecht v. 12. 5. 50 (BGBl. S. 179). — Die VO erstreckt das SozVersAnpassungsG mit NebenG u. DVO unter Berücksichtigung der landesrechtl. Sonderregelungen auf die franz. Zone.

##### V. Allgemeines Verwaltungsrecht.

Urt. d. DOGI S. 2 u. 3/48 sowie 48/49 v. 19. 4. 50 (BGBl. S. 182), wonach Verwaltungsangehörige der Hauptverwaltung des deutschen Seeverkehrs, die der Seewasserstraßenverwaltung bei ihrer Eingliederung in die Verw. für Verkehr angehört haben, die Rechte von Zonenbeamten i. S. des § 5 des G. üb. den Aufbau der Verwaltung für Verkehr v. 12. 9. 48 haben.

##### VII. Finanz- u. Steuerrecht.

1. Bek. betr. neue Lohnsteuertabellen v. 3. 5. 50 (BGBl. S. 123): Monats-, Wochen- u. Tagestabellen.

<sup>1)</sup> Im Anschluß an DRZ 50, 225. Stand v. 2. 6. 50.

<sup>2)</sup> Zu I u. VI: keine Verkündungen.

2. VO betr. Jahrestabellen für die Einkommensteuer u. Lohnsteuer v. 15. 5. 50 (BGBl. S. 147).

#### B. Gesetz- und Verordnungsentwürfe<sup>3)</sup>

##### I. Verfassungsrecht.

1. G. üb. öffentliche Versammlungen und Aufzüge (VersammlungsgG) (RegEntw. v. 13. 5. 50). — Das G bezweckt die Verhinderung von Mißbräuchen der Versammlungsfreiheit durch Festsetzung gewisser Grundsätze für das Verhalten von Versammlungsteilnehmern u. für die Handhabung der Versammlungsleitung bei öff. Versammlungen in geschlossenen Räumen u. unter freiem Himmel. Die Einhaltung dieser Formbestimmungen wird durch Strafvorschriften gesichert.

2. G. üb. d. Beitritt der BRD zum Europarat (RegEntw. v. 12. 5. 50). Hierzu Denkschrift der BReg. zur Frage des Beitritts zum Europarat.

3. G. üb. d. Rechtsstellung der in den BT gewählten Angehörigen des öff. Dienstes (veränderter RegEntw. i. d. Fass. v. 19. 5. 50). — Während für die Wahl zum 1. BT (WahlG v. 15. 6. 49, BGBl. S. 21) bestimmt war, daß Richter und Beamte von Bundeseinrichtungen vor der Annahme der Wahl in den BT ihre Versetzung in den Wartestand beantragen mußten, haben die BesMächte ihrerseits durch MRG Nr. 20 (US- u. brit. Z.) und VO Nr. 216 (franz. Z.) bestimmt, daß beamtete BT-Mitgl. mit Annahme der Wahl ohne weiteres aus dem öff. Dienst ausscheiden (vgl. DRZ 49, 324). Die hiermit verbundene Beendigung jedes öff. rechtl. Beschäftigungsverhältnisses geht nach Ansicht der BReg. über den erstrebten Zweck, die beamtenrechtl. Bindungen des Abgeordneten zu lösen, weit hinaus und hindert praktisch öff. Bedienstete, ein Abgeordnetenmandat anzunehmen. Der Entw. löst diesen Konflikt durch vollständige Freistellung der betr. Bediensteten von allen Rechten u. Pflichten aus dem öff. Dienst- u. Arbeitsverhältnis, ohne jedoch eine grundsätzl. Beendigung des Beschäftigungsverhältnisses eintreten zu lassen (Beamter ohne Amt). Die AHK hat diese Regelung gebilligt, jedoch gefordert, daß mit Beginn der Wahlkandidatur die Rechte u. Pflichten aus dem öff. Dienstverhältnis beendet sein müssen, da die Beteiligung eines aktiven Beamten am Wahlkampf sowohl dem Grundsatz der Gewaltentrennung als auch dem Verbot der aktiven politischen Betätigung der Beamten widerspreche.

##### II. Zivil- u. Strafrecht einschl. Verfahrensrecht.

1. G. üb. d. Anerkennung von Nottrauungen. Durch die allg. Verhältnisse des Zusammenbruchs ist es seit Beginn des Jahres 1945 zu Eheschließungen gekommen, die den gesetzlichen Bestimmungen deshalb nicht genügen, weil die Ehe nicht vor dem zuständigen Trauungsorgan geschlossen werden konnte (Dänemark-Deutsche, Eheschließung vor richterlichen Militärjustizbeamten nach der Kapitulation, Eheschließung vor Geistlichen in dem Gebiet östlich der Oder-Neiße-Linie). Da diese Ehen formell lediglich Scheinehen dar-

<sup>3)</sup> Zu IV: keine neuen Entwürfe.



*From the desk of . . .*

JAMES R. MAXEINER

6/5/90

To: Ernst --

I assume that Dr.  
Graupner is in your book.  
I first corresponded with  
him about ten years ago  
regarding a question of  
forfeiture of property  
used in crime.

Regards.

Jim

Jim

enc.: Anwaltsblatt  
article



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June 5, 1990

Dr. Rudolf Graupner  
Solicitor  
Pritchard Englefield & Tobin  
23, Great Castle Street  
London W1N 8NG  
England, United Kingdom

Dear Dr. Graupner:

I read in the latest issue of the Anwaltsblatt about the honor recently bestowed on you by the Deutscher Anwaltverein. Congratulations!

Dr. Rabe's article about you I found especially interesting. In our correspondence, we have never touched upon your many varied experiences in two legal systems. I, of course, suspected something of the sort, but only now learned a few of the details.

I am especially interested in your experiences in explaining the Civil Law to your common lawyer friends. I would be most appreciative to receive copies of your lectures at the University of Surrey, if available, or articles (or citations) treating this theme.

I take it that you must know Dr. Ernst Stiefel and Dr. Otto Walter here in New York, both of whom share many of your experiences. I know them quite well and have enjoyed hearing from them about the travails of Civil Law lawyers forced to adapt to the Common Law. Dr. Stiefel has and is writing about your group of accomplished lawyers.

I believe I mentioned before that my wife was working on a doctoral dissertation on the property rights of married women in medieval England. I am pleased to report that last month all was completed and The Catholic University of America awarded her the Ph.D. degree. What I don't believe I have ever mentioned to you about her is that her family, like yours, fled Germany in the 1930s. Her grandfather was an engineer and her

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Dr. Rudolf Graupner

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June 5, 1990

grandmother a physician who met at the University of Freiburg. Her grandfather's family came originally from Breslau, where he went to school. We have since visited Silesia together. In 1934, the family escaped to Persia and spent the war there. After a brief stop in Oxford in 1946, they finally settled in Berkeley, California.

I hope that our ten-year long correspondence relationship will finally lead to a face-to-face meeting. There is much that I would enjoy talking with you about. I hope to attend the Juristentag in Munich in September. Is there any chance that you will be there?

Once again, please accept my heartiest congratulations and my very best wishes for the future.

Very truly yours,

*James Maxeiner*  
Dr. James Maxeiner

JRM/ka

bcc: Dr. Ernst Stiefel ✓





Aus der Arbeit des DAV

Auf dem 22. Deutschen Verkehrsgerichtstag 1984 referierte er zum Thema „Der medizinisch-technische Nachweis des Unfallablaufes“. Auf dem 44. Deutschen Anwaltstag 1987 in Hamburg war er Referent der Offenen Ausschusssitzung des Verkehrsrechtsausschusses und des Geschäftsführenden Ausschusses der Arbeitsgemeinschaft Verkehrsrecht zum Thema „Reform der Verkehrsunfallflucht“.

Der Präsident bedankte sich bei dem ausscheidenden Vorsitzenden des Verkehrsrechtsausschusses, Herrn Rechtsanwalt und Notar Dr. Georg Greißinger, Hildesheim, daß er den Verkehrsrechtsausschuß lange Jahre geleitet habe und daß er sich auch weiterhin als Vizepräsident des DAV in erheblichem Maße um die Belange der Anwaltschaft einsetzen werde.

### Curt Freiherr von Stackelberg – 80 Jahre

Curt Freiherr von Stackelberg, Rechtsanwalt beim Bundesgerichtshof, wird am 24. Mai 1990 80 Jahre alt, verbunden mit einem weiteren Jubiläum, nämlich demjenigen, daß Stackelberg nunmehr seit 40 Jahren BGH-Anwalt ist.

Seit 1968 war er Präsident der Rechtsanwaltskammer beim Bundesgerichtshof (deren Vorstand er schon vorher angehört hatte) und wurde von seiner Rechtsanwaltskammer bei Niederlegung des Präsidentenamtes mit der Bezeichnung „Ehrenpräsident“ geehrt. Schon aus Anlaß seines 75. Geburtstages wurde seitens des damaligen Präsidenten des BGH, Professor Dr. Pfeiffer, hervorgehoben, daß Baron Stackelberg dem Rechtsleben wichtige Impulse gegeben hat und Arbeitsweise und Stil des BGH mitgeprägt habe. Stackelberg selbst äußerte sich in der Festschrift „25 Jahre Bundesgerichtshof“, S. 298/299 wie folgt:

„An uns Rechtsanwälten beim Bundesgerichtshof ist es, die Fülle des strömenden Lebens in die Gerichtssäle zu holen. Gerechtigkeit droht zur Ungerechtigkeit zu werden. Rechtssicherheit, die an der unendlichen Vielfalt des Lebens vorbeisieht, droht zu leeren Formeln herabzusinken. An uns wird es sein, das unruhige Gewissen des vorausschauenden Richters immer von Neuem anzurufen und so mitzuhelfen, daß nicht der lebendige Mensch im unbarmherzigen Räderwerk der überlasteten Justiz Schaden leidet“.

Getreu diesem Grundsatz verlief auch die weitere Tätigkeit des Jubilars, der alsbald nach Eröffnung des Bundesgerichtshofes im Jahre 1950 berufen wurde. Zuvor hatte er bei dem Landgericht Berlin, dann bei dem Landgericht Traunstein – Bad Reichenhall und auch als Verteidiger vor Internationalen Tribunalen in Nürnberg gewirkt.

So kam es, daß der in St. Petersburg geborene Sproß einer baltischen Adelsfamilie aus dem Gebiet der Rechtsanwaltskammer München (Traunstein) als erster BGH-Anwalt gewissermaßen den Freistaat Bayern beim BGH repräsentierte. Seine Persönlichkeit und seine berufliche Betätigung fanden sichtbaren Ausdruck und Anerkennung durch Ordensverleihungen: Baron Stackelberg ist Träger des Großen Bundesverdienstkreuzes mit Stern des Verdienstordens der Bundesrepublik Deutschland, wurde aber auch vom österreichischen Bundespräsidenten im Jahre 1978 mit dem „Großen Silbernen Ehrenzeichen für Verdienste um die Republik Österreich“ ausgezeichnet in einem Festakt in Wien; zeitweise bekleidete er das Amt des Präsidenten der „World Association of Lawyers“. Eine nicht zu übersehende Freude am Repräsentieren sowie die liebenswürdige, humorvolle Art des Jubilars kam

In der bereits zitierten Festschrift „25 Jahre Bundesgerichtshof“ weist der Jubilar mir Recht darauf hin, daß mit dankbarer Freude gesagt werden dürfe, daß das persönliche Verhältnis zwischen Richtern und Rechtsanwälten beim BGH besonders gut ist und von gegenseitigem Vertrauen und gegenseitiger Achtung getragen wird.

Das ist bis heute so geblieben, woran der Jubilar – geschätzt, teilweise beliebt bei seinen Kollegen, geliebt von seiner Familie – einen unübersehbaren Anteil hat.

Hans Correll

### Ehrenzeichen an Dr. Rudolf Graupner

Der Präsident des Deutschen Anwaltvereins hat das Ehrenzeichen der deutschen Anwaltschaft verliehen an Rechtsanwalt Dr. Rudolf Graupner, Solicitor in London. Ehrenzeichen und Urkunde wurden Herrn Dr. Graupner am 7. März 1990 durch den ehemaligen Präsidenten des Deutschen Anwaltvereins, Dr. Hans-Jürgen Rabe, in der deutschen Botschaft in London in Anwesenheit des Botschafters Dr. Hermann Freiherr von Richthofen übergeben. Dr. Rabe und Dr. von Richthofen würdigten die besonderen Verdienste Dr. Graupners um die deutsche Anwaltschaft. Dr. Graupner, der am 10. November 1938 Deutschland verlassen mußte, wurde bereits 1955 Vertrauensanwalt der deutschen Botschaft in London. Durch seine vieljährige Lehrtätigkeit an der University of Surrey brachte er englischen Studenten die Grundzüge des deutschen Privatrechts und darüber hinaus deutsche Rechtskultur näher. Seine große Erfahrung in beratender Tätigkeit, nicht zuletzt im Hinblick auf die oft hochinteressanten und wissenschaftlich „ergiebig“ Fälle, die er für die deutsche Botschaft übernahm, schlugen sich in zahlreichen wissenschaftlichen Veröffentlichungen nieder, insbesondere in der NJW und in RIW. Im Jahre 1988 verlieh die juristische Fakultät der Bayerischen Julius-Maximilians-Universität in Würzburg Herrn Dr. Graupner die Ehrendoktorwürde – die Promotion mit einer fertiggestellten Dissertation bei Professor Helfritz (Breslau) über die politischen Parteien im Staatsrecht der Weimarer Republik wurde ihm – nach 1933 – verweigert. Besonders verdient gemacht hat sich Dr. Graupner jedoch um die Ausbildung deutscher Referendare in London. Jetzt einer der Seniorpartner der Londoner Solicitor Firm Pritchard, Englefield & Tobin, hat Dr. Graupner über Jahrzehnte deutschen Referendaren sein besonderes Interesse, ja seine Fürsorge zugewandt und ihnen Kenntnisse und Erfahrungen aus seinem langen, erlebnisreichen Anwaltsleben vermittelt. Darauf mag ein besonderes Licht werfen, was eine Referendarin, die kürzlich zur Ausbildung bei Dr. Graupner war, zusammenfassend schrieb: „Die Ausbildung bei und durch Dr. Graupner ist ein absoluter Glücksfall, den man noch vielen Referendaren wünscht. Sein großes Wissen verbunden mit seiner Freundlichkeit, Toleranz und Jugendlichkeit macht diesen Abschnitt der Ausbildung zu einem unvergessenen Ereignis.“

Dr. Hans-Jürgen Rabe

### Rechtsanwaltskammer München

Das Präsidium der RAK München setzt sich nunmehr wie folgt zusammen:

Rechtsanwalt Dr. Jürgen Friedrich Ernst, Präsident  
Rechtsanwalt Hans-Gerhard Beck, 1. Vizepräsident



## Judge in Iran-Contra Trial: Forceful Wielder of the Law

By DAVID JOHNSTON

Special to The New York Times

WASHINGTON, March 2 — On a visit to the Holocaust Museum in Jerusalem, Federal District Judge Harold H. Greene stopped at a photograph of a man being paraded through a street wearing a placard that said, "This will teach me not to complain to the police."

For Judge Greene, who fled Hitler's Germany with his family as a youth, the image in the photograph struck at the core of his beliefs about the role of the courts in defending the powerless from the strong.

The idea conveyed by the photograph, he said in an interview today, is that "you really don't have protection from arbitrary conduct because the police and everybody else are in cahoots." And he added, "You need some outside force to make sure this doesn't prevail."

On Monday, Judge Greene, who is best known as the aggressive judge who presided over the breakup of the American Telephone & Telegraph Company, will apply his faith in the law once again when he presides over the opening of the Iran-contra trial of John M. Poindexter. The former national security adviser faces five criminal charges, including accusations that he made false statements and obstructed Congressional inquiries into the sale of arms to Iran and efforts to aid the Nicaraguan rebels at a time when direct assistance was banned.

The 67-year-old judge has already stamped an indelible imprint on the case in a manner that displayed his willingness to apply the law even to the most powerful citizens.

Last month, Judge Greene ordered former President Ronald Reagan to

provide a videotaped deposition in the Poindexter case, a ruling that produced eight hours of testimony in which Mr. Reagan described his role in the Iran-contra affair for the first time in a public forum.

In the interview in his chambers at the Federal courthouse here, Judge Greene discussed the impact of his experience as an immigrant American, his involvement with Robert F. Kennedy as a Justice Department civil rights lawyer in the 1960's and the evolution of his judicial philosophy.

Judge Greene joined the Justice Department in the 1950's after attending George Washington University at night and graduating with honors. In 1965, President Lyndon B. Johnson appointed him to a judgeship in the District of Columbia Superior Court. In 1978, President Jimmy Carter named him to a seat on the Federal bench.

Judge Greene describes himself as a disciple of Earl Warren, the Chief Justice of the United States in the 1950's and 60's. "The impression I have of Justice Warren," Judge Greene said, "is that he was looking for the just result in a case regardless of fixed dogma or principles, and I like to think that I'm in that mold."

In the 1960's, Judge Greene headed the Justice Department's appeals and research section in the civil rights division. It was a fledgling, low profile office when he joined it in 1957, but after Robert F. Kennedy became Attorney General, young lawyers like Judge Greene played a major role in writing landmark civil rights legislation, including the 1964 Civil Rights Act and 1965 Voting Rights Act.

### Role in Rights Legislation

Charles D. Ferris, a lawyer who was chief counsel to Mike Mansfield, who was the Senate Democratic majority leader in those days, remembered the bill-writing sessions before the introduction of the Voting Rights Act.

"It's a very historic piece of legislation and his role in it was essential and critical to the shape of the bill," Mr. Ferris said of Judge Greene. "His role was not to be the point advocate, but the one who could really put together the legislation that could cover what it was designed to cover."



The New York Times/Paul Heselros

Federal District Judge Harold H. Greene, who is presiding over the Iran-contra trial of John M. Poindexter.

Judge Greene, who met regularly with Mr. Kennedy on civil rights matters, praised the Senator as a "great man" for qualities that others sometimes admire in the judge himself. Judge Greene said, "I thought that partly because of what he wanted to do, and partly because he bypassed a lot of the slogans that other people were fond of, he came to the heart of the matter and had idealistic goals and very practical and pragmatic views."

On the bench, Judge Greene conveys alternately an impish charm and a penetrating intellect. In his private office, where he sat at his writing desk wearing a blue blazer and red tie, the judge spoke quietly, but often with fervor about the significance and strength of the judiciary in American society.

"I think it does work," Judge Greene said of the rule of law. "The fact that the law is there and injustices can be rectified, I think has a lot to do with the fact that the people in this country aren't as frustrated as they are in some of these places in Eastern Europe and don't resort to violent revolution."

Judge Greene's best known case by far was the 1982 settlement of the Justice Department's antitrust case against A.T.&T. Along with the breakup of the \$50 billion company, he imposed an arrangement that spun off local telephone companies and created a legal structure for monitoring the agreement that supporters described as a clearinghouse for telecommunications issues and critics dismissed as a one-person regulatory agency.

Peter B. Kenney Jr., a lawyer in private practice who worked on the case for the Justice Department's antitrust division, said, "I continue to be flabbergasted by the magnitude of the achievement, considering how complicated a field this is; not only the law, but the technology driving the competition."

Lawyers for A.T.&T. said Judge Greene went too far. "He was very cynical about big business and very untrustworthy of people who run big corporations," said George L. Saunders, the company's chief lawyer in the case. Discussing the settlement, Mr. Saunders said, "It was unnecessary, unpro-

ductive and it was destructive of a great corporation."

Even some of the judge's close friends thought he was wrong. "For a while, even in the house of good friends for dinner or for cocktails, they would really be upset," Judge Greene recalled. "They thought I had single-handedly destroyed the best phone service in the world."

In 1968, Judge Greene sentenced the Rev. Ralph David Abernathy, the civil rights leader, to 20 days in jail for violating Federal assembly laws after a march on Capitol Hill. In sentencing Mr. Abernathy, the judge said, "The enforcement of the law cannot depend on the justice of a cause or one man's conscience."

Today, Judge Greene said his opinion sounded a "little bit too simplistic." He added, "If I've learned anything since then, it has been that frequently you have a clash between the more sterile letter of the law and the justice that underlies it, and I think one of the things I've been trying more or less, where it was possible, is to go with the justice rather than the letter of the law."

### Surgeon General Confirmed

WASHINGTON, March 2 (AP) — Dr. Antonia Coello Novello was confirmed as Surgeon General by the Senate on Thursday. A 45-year-old pediatrician and expert on AIDS in children, she is the first female and the first Hispanic Surgeon General. She has been deputy director of the National Institute of Child Health and Human Development, one of the National Institutes of Health.



Feb 6 1986

Frankfurter Allgemeine Zeitung

## Für die deutsch-amerikanische Freundschaft

Ein Preis zur Erinnerung an Leo Goodman

wei. Mit der Gründung der „Leo M. Goodman-Gedächtnisstiftung“ will die Amerikanische Handelskammer in Deutschland das Bemühen ihres ehemaligen Sonderberaters um die deutsch-amerikanische Freundschaft institutionalisieren. Im kommenden Herbst plant die Stiftung, zum ersten Mal ihren jährlichen Preis in Höhe von zehntausend Mark zu vergeben. Ausgezeichnet werden soll der Einsatz für die Verständigung zwischen beiden Ländern. Die Statuten der Stiftung und die Richtlinien für die Verleihung des „Dr. Leo Goodman-Preises“ werden derzeit von einem Komitee ausgearbeitet, dem der Hauptgeschäftsführer der Amerikanischen Handelskammer, John D. Brennan, ihr Vizepräsident William H. King und Schatzmeister Kurt W. Düll, Generalbevollmächtigter der Hessischen Landesbank-Girozentrale, angehören.

Die Stiftung trägt den Namen des im Dezember letzten Jahres verstorbenen Sonderberaters der Kammer in Bayern, Leo Goodman, der sich in den fünfzehn Jahren seiner Tätigkeit in München nicht nur für die Intensivierung der Wirtschaftsbeziehungen, sondern auch um die Förderung der deutsch-ameri-

kanischen Freundschaft große Verdienste erworben hat. Bereits zu Lebzeiten sei er zu einem Symbol der Verständigung zwischen Deutschen und Amerikanern geworden, sagte Frederic Drake, Präsident der Amerikanischen Handelskammer.

Goodman, der am 17. Dezember 1985 im Alter von 76 Jahren starb, war 1947 von der amerikanischen Militärregierung zum Direktor der deutschen Justizverwaltung ernannt worden. Ein Jahr später wurde er Oberster Richter der Alliierten Kommission in Deutschland und Richter beim Obersten Berufungsgericht dieser Behörde. Er wurde 1962 zum amerikanischen Generalkonsul in Bremen bestellt und war als amerikanischer Richter am Internationalen Obersten Rückerstattungsgericht in Herford tätig. Für seine Verdienste um die Verbesserung der deutsch-amerikanischen Beziehungen wurde Goodman mit dem Großkreuz des Verdienstordens der Bundesrepublik Deutschland und mit dem Bayerischen Verdienstorden ausgezeichnet. Die Universität München benannte die internationale juristische Bibliothek nach ihm und verlieh Goodman ein Ehrendoktorat.



# Judge Allows Local Phone Units To Expand Into Other Businesses

By REGINALD STUART

Special to The New York Times

WASHINGTON, Dec. 14 — A Federal judge today approved requests by six of the seven regional telephone companies to enter a broad range of businesses beyond local telephone service.

Judge Harold H. Greene of the United States District Court for the District of Columbia gave the permission by modifying his 1982 order for the breakup of the Bell system. That breakup led to the establishment in January of the regional companies,

Domestically, the companies would be able to engage in computer sales, telephone equipment leasing and office products sales, among other businesses. Overseas, they could offer data processing, consulting, engineering and construction services.

## Departure From Breakup Order

Granting of the waivers represented a marked departure from the restraints embodied in the order breaking up the American Telephone and Telegraph Company, which limited the newly independent regional companies to local telephone service.

Judge Greene said that in authorizing the waivers, he was insisting on safeguards to make sure local telephone customers would not be forced to subsidize other lines of business and to protect the public from anticompetitive practices, such as an attempt to tie sales of office equipment to purchases of telephone services.

The new businesses must be conducted through separately managed and financed subsidiaries. They will be

Continued on Page 32, Column 4

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The New York Times

Judge Harold H. Greene

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## U.S. Inquiry on Hijacking

The United States has begun an investigation of the hijacking of a Kuwaiti airliner to Iran in which two Americans were killed. Page 3.

## Subway Link Approved

The Metropolitan Transportation Authority will hook up the 63d Street subway from Manhattan to existing local tracks in Queens. Page 25.

## Fifth Avenue's Future

The mix of modern and traditional architecture that gives Fifth Avenue its special character faces an uncertain future. An appraisal, page 25.

J.R. IT'S "THE REAL THING." MERRY CHRISTMAS. P.F.—ADVT.



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## Bilder, von denen man immer noch zehrt

„Lehrjahre im alten Europa“ – Die Lebenserinnerungen des Historikers Felix Gilbert

Im vergangenen Dezember fand im Deutschen Historischen Institut in Washington eine Tagung über die deutschen und österreichischen Historiker statt, die in der Zeit des Nationalsozialismus emigrieren mußten und in den Vereinigten Staaten eine neue Wirkungsstätte fanden. Erstmals wurde ihr bedeutender Einfluß auf die amerikanische Geschichtswissenschaft und nach dem Kriege auch auf die der Bundesrepublik umfassend sichtbar gemacht. Der dreiundachtzigjährige Felix Gilbert nahm an dieser Tagung teil, als wohl letzter Überlebender, und er scheint nun auch der einzige aus dieser Historikerguppe zu sein, der persönliche Erinnerungen verfaßt hat. So ungewöhnlich das Leben dieser Gelehrten war, sie sind nicht genügend zu solchen Aufzeichnungen ermuntert worden und wußten nicht, wem sie welchen Lebensabschnitt erzählen sollten.

Felix Gilberts Nachname deutet auf die englische Abkunft seines Vaters, den er aber wegen dessen frühem Tod nicht mehr kennenlernte. Sein Vorname stammt von seinem Urgroßvater, dem Komponisten Mendelssohn-Bartholdy, und im Kreise dieser wohlhabenden und kultivierten Familie mütterlicherseits wuchs er in Berlin auf. Wie die meisten emigrierten Historiker studierte er bei Friedrich Meinecke, wurde Spezialist für die italienische Renaissance und die deutsche Geschichte des 19. und 20. Jahrhunderts und trug entscheidend zur Verbreitung dieser Forschungsrichtungen in Amerika bei. Stärker als die anderen Emigranten beschäftigte er sich aber auch mit der Geschichte Amerikas.

Seine Memoiren handeln nur über seine europäische Vergangenheit. Sie reichen zwar bis 1945, bis zur vorübergehenden, kriegsbedingten Rückkehr nach Europa, aber sie sparen die ersten amerikanischen Jahre 1936–44 aus. Denn eigentlich hat er sie für seine amerikanischen Landsleute geschrieben, für deren Interesse an dem fremden, vergangenen Europa, in englischer Sprache. Diese 1988 erschienene Fassung ist nun von nicht genannter Hand ins Deutsche übersetzt und von

Gilbert nur wenig verändert worden. Mit Recht kann er vermuten, daß auch wir an seiner Beschreibung dieser fremd gewordenen Zeit zutiefst interessiert sind. Aber diese Beschreibung ist durch den Entstehungsprozeß distanziert, unterkühlt geworden. Gilbert hat das gewünscht, es ist seine Art, und nur so vermag er die Trauer über seine zerbrochene Vergangenheit einzudämmen.

Das erste Kapitel, „Kindheitssommer“, beschwört die Schönheiten dieser Vergangenheit. Wie ein neuer Proust fand er 1945 auf der Suche nach der zerstörten und auch persönlich verdrängten Geschichte in den Trümmern des verwüsteten Berlins das Muster der blauen und weißen Pflastersteine wieder, die ihm das Kinderspiel vor dem regelmäßigen Sommerumzug nach Charlottenburg ins Gedächtnis zurückriefen, dann die Ferienzeiten im Salzkammergut und im holländischen Noordwijk mit der überstürzten Rückreise wegen der Julikrise 1914. Gilbert gestaltet diese Erinnerungen als das, was sie seither für ihn sind: als Bilder, von denen er bis heute lebt. „Die Erinnerung an Augenblicke reiner Freude und ungeteilten Vergnügens war – und ist noch heute – eine Art Schutz gegen die düstere Wirklichkeit des Lebens.“

In den späteren Kapiteln tauchen solche Momente nur noch selten auf. Die persönliche Entwicklung tritt immer weiter zurück hinter den neuen Zeiterfahrungen von Krieg, Revolution und sozialer Spannung. Schon damals – nicht erst nach dem Zweiten Weltkrieg – gab es eine skeptische Generation, und Gilbert rechnet sich zu ihr: „Anders als die Generation davor und danach waren wir skeptisch gegenüber den Werten der Vergangenheit, aber ebenso skeptisch hinsichtlich der Möglichkeit gesicherter Verhältnisse in der Zukunft.“ Er war pazifistisch und wählte trotz seiner Herkunft sozialdemokratisch. Manche heutige Vorstellungen von der damaligen Zeit korrigiert er: das Leben in Deutschland sei während des Ersten Weltkrieges ziemlich normal weitergegangen; der Antisemitismus habe in der Weimarer Zeit nicht zugenommen.

Das mögen milieubedingte, subjektive Eindrücke sein, aber sie sind doch wertvoll. Mit Erinnerungen an berühmte Zeitgenossen sucht Gilbert ebensowenig zu prunken wie mit sich selber. Statt dessen widmet er einigen Freunden aus der Schul- und Studienzeit biographische Skizzen: Dietrich Bonhoeffer, Heinz Holldack, am eindrucksvollsten dem unglücklichen Historiker Theodor E. Mommsen, der auch emigrierte und sich 1958 vor der Rückkehr nach Deutschland das Leben nahm.

Den Aufstieg des Nationalsozialismus 1932/33 erlebte Gilbert aus der Distanz in Italien, also dokumentiert er ihn durch Briefe, in denen ihm Verwandte und Freunde die politischen Veränderungen schilderten. Auch hier ist Mommsen besonders aufschlußreich, der sich 1933 nicht in „starre Opposition“ stellen kann, „unter anderem deshalb, weil schließlich noch ziemlich ein ganzes Leben vor uns liegt“. Noch intensiver ist aber Gilberts eigene Aufzeichnung nach einem kurzen Deutschland-Besuch 1934. Er empfand die mentalitätsmäßige Auswirkung des Nationalsozialismus als „tödliche Krankheit, die das Leben erstarren läßt“.

In den Jahren 1933 bis 1935 war Gilbert in London. Sein Haupteindruck ist düster, geprägt von den persönlichen Mißerfolgen und von seiner Verweigerung, daß die Engländer nicht begreifen, was in Deutschland vor sich geht. Mit „ungeheurer Erleichterung“ verläßt er Europa. In der deutschen Ausgabe hat Gilbert hier leider ein paar Seiten weggelassen, in denen er darauf hinweist, wie verständlich ihm aus der Mentalität der früheren Einwanderer der amerikanische Isolationismus wurde; wie stark er aber auch auf das traditionelle messianische Moment der dortigen Außenpolitik hoffte. Mit anderen deutschen Emigranten war er seit 1943 im Office of Strategic Services tätig und kehrte in diesem Dienst 1944 in ein verändertes Europa zurück, zunächst wieder nach England, dann nach Frankreich und, wie viele Emigranten mit großer, verständlicher innerer Abneigung, nach Deutschland.



Felix Gilbert Foto Bundesbildstelle Bonn

Auch diese Abschnitte in ihrer knappen, mühsam distanzierten Sprache sind ergreifend. Gilbert hatte Anteil an der Wiedereröffnung der Universitäten, traf Jaspers und einen sehr anpassungswilligen Heidegger und beobachtete kritisch, wie schnell die deutschen Professoren zu ihren alten, fragwürdigen Traditionen vor 1933 zurückkehrten und bald jeglichen Einfluß der Studenten auf Lehrpläne und Berufungen wieder zurück drängten. Dann fuhr Felix Gilbert in seine zerstörte Heimatstadt Berlin, suchte nach dem Haus, in dem er groß geworden war, und der Kreis dieses reichen, kurzen Buches zur Bewahrung von seiner und unserer Erinnerung schließt sich.

Man wünscht sich eigentlich ein zweites Erinnerungsbuch von ihm: seine amerikanische Lebenshälfte, geschrieben mit direktem Blick auf deutsche Leser.

ERNST SCHULIN

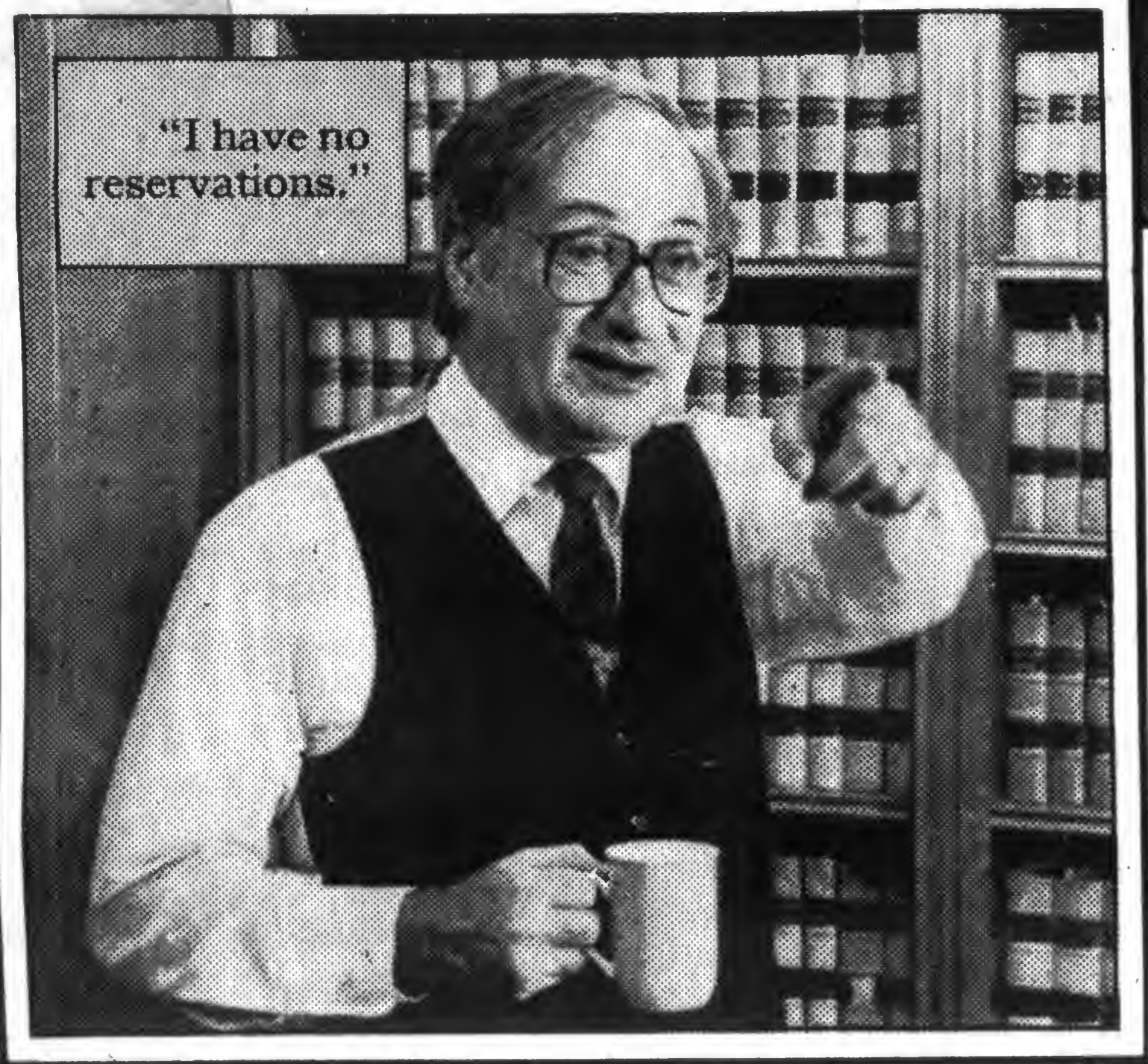
Felix Gilbert: „Lehrjahre im alten Europa“. Erinnerungen 1905–1945. Siedler Verlag, Berlin 1989. 234 S., geb., 36,- DM.

Henke ... Adel ohne Land

... über die Füll ... geschicht Ve



"I have no reservations."



The New York Times/George Tames

## The Supervising Judge: Advocate for the Public

Harold H. Greene

By ROBERT D. HERSHEY Jr.

Special to The New York Times

WASHINGTON, Dec. 29 — Judge Harold Herman Greene, who presided over the marathon trial leading to the dismemberment of the world's biggest company, admits to no doubts that the breakup of the American Telephone and Telegraph Company will, in fact, produce the broad public benefits envisioned by the historic settlement.

"I have no reservations," said the stocky, 60-year-old refugee from Nazi Germany who, in shirt-sleeves and vest, responded crisply today to questions about his role as the divestiture neared formal completion at mid-

night Saturday.

"Competition has served this country well in other areas, and I see no reason why competition shouldn't serve the public as well in telecommunications," he said. "There's no reason whatever why the quality should go down, and there's every reason to believe, based on past experience, that competition will drive the price down for the consumer."

Just two mementos in his tidy office indicate Judge Greene's four-year absorption in the landmark case: a foot-long hunk of black telephone cable, filled with a swarm of multicolored wires, that was a piece of evidence in the trial, and a sketch of his courtroom on Jan. 12, 1982, the day the judge insisted that he would personally review the out-of-court settle-

Continued on Page D3

Continued From First Business Page

ment that A.T. & T. had reached with the Justice Department. The settlement made the trial moot.

Sitting judges rarely give interviews, but Judge Greene has agreed to a few in recent weeks.

No, he says, he cannot think of anything he would have done differently in conducting the proceedings, which most analysts say he kept moving faster than was thought possible.

But yes, he was a bit sad when the surprise settlement with the Justice Department was announced — he first learned of the details by picking up a newspaper in Miami — because it deprived him of the chance to write an opinion that would be studied, probably, for centuries.

"I was disappointed from a professional point of view as a lawyer," Judge Greene said. "I felt it would have been kind of nice to write a major antitrust opinion."

But he dismisses this as of little consequence "in the grand scheme of things" and, looking back, finds that the job of analyzing and approving the settlement, in which he played an intense personal role, proved considerably more burdensome than expected.

'175 Other Cases'

"I wasn't looking for any outlet," he said of his supervisory role. "I've got other things to do — I've got 175 other cases." One of these, he says, now has him opposing the British courts, which have sought to limit filings in an antitrust case brought by the bankrupt Laker Airways.

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Harold Herman Greene was born in Frankfurt an der Oder, in what is now East Germany, on Feb. 6, 1923. He came to the United States in 1943 by way of Belgium, France and Spain. In 1952, after serving in military intelligence with the American Army in West Germany, he was graduated with honors from the George Washington University Law School.

He and his wife, Evelyn, have two children, Michael, 30, who is a doctor at the Pentagon, and Stephanie, 26, an elementary school teacher in Long Beach, Calif.

The judge, sometimes called an activist in the Earl Warren mold, will continue to have a role in the A.T. & T. case after the divestiture, but he is essentially limited to making sure that all parties live up to the conditions.

The 'Access Charges' Debate

Because he may be called upon, however, to make some decision about the hotly debated "access charges" that the Federal Communications Commission has ordered for residential and small-business customers, Judge Greene resists expressing his views on their desirability.

Nonetheless, he indirectly suggests his opposition by complaining of "ideologues" at the commission and the Justice Department who support the charges as essential to bringing costs and prices of telephone service into closer alignment. The charges, in effect, replace part of the subsidy from long-distance service that after the breakup will no longer be available to the local companies.

"I am not one of those who believe that we must march rigidly down ideological lines," he says, declaring that some people may have to give up their phones if the charges go into effect.

Judge Greene, who lives in northwest Washington, has purchased three personal telephones in recent weeks and has little patience with consumers who complain of the bother of now having to decide whether to buy or to continue leasing.

Financially, he said, one is better off buying and service should not be a big problem. "A phone doesn't break that often," he said, "and if it does, you buy a new one like a toaster" or get it repaired like a TV set. "People don't seem to be helpless when one of those things goes bad."

Judge Greene insists that the strong language he used in refusing A.T. & T.'s initial request to dismiss the Government's antitrust case did not mean that he had tentatively decided to rule against the company. Some analysts has said that the refusal of the request might have prompted A.T. & T. to settle the case with the Justice Department.

"People do not believe me, but I really do not know how I would have come out" if the trial had been allowed to run its course, he said.

As for allegations that he exceeded his authority in demanding changes in the settlement agreement to strengthen the local companies, Judge Greene remains adamant.

"Judges," he said pointedly, "are not supposed to be rubber stamps."



Guttman

GJa  
1988

### **Deutschstämmiger Jude wird Quayles Chefberater**

Der von Bush erkorene Vizepräsident Dan Quayle hat den aus München stammenden jüdischen Anwalt Robert Guttman zu seinem Stabschef ernannt. Der 60jährige Jurist, der mit seinen Eltern aus Deutschland floh, lebte während des Krieges mit seinem Vater in England und diente als Leutnant in der britischen Armee. Nach dem Krieg kam Guttman mit seiner Mutter in die USA — die Eltern waren geschieden — und liess sich in Los Angeles nieder. Guttman ist Absolvent der Harvard-Universität. In den Jahren 1985-86 war er Quayles juristischer Berater im Senat und ausserdem Berater der republikanischen Minderheit im Senatsausschuss für Arbeiterfragen.

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Am 17. Dezember 1985 verstarb in München

Dr. jur. Dr. h. c.

**Leo M. Goodman**

Träger des Großen Bundesverdienstkreuzes mit Stern  
und anderer Auszeichnungen

Er war bei unserem Gericht seit dem Jahre 1977 als Richter  
tätig. Mit unserer tiefen Trauer verbinden wir den Dank für  
sein Wirken im Dienste des Rechts und der Verständigung.

**Gunnar Lagergren**  
Präsident  
des Obersten Ruckerstattungsgerichts



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möglichst guten Beweismittels verweigert, könnte an einen Mißbrauch oder gar an Willkür mit der Folge eines Beweisverwertungsverbots gedacht werden. Bei der Beurteilung, ob die Haltung der Behörde als mißbräuchlich gekennzeichnet werden kann, wird hier nicht außer Betracht bleiben dürfen, daß der Zeuge M. noch mehr als sechs Monate nach Anklageerhebung in Strafhaft saß und für eine in dieser Zeit durchgeführte Hauptverhandlung zur Verfügung gestanden hätte.

Nach alledem durfte das LG nicht unter Berufung auf ein Beweisverwertungsverbot davon absehen, die verlesenen Vernehmungsniederschriften als Beweismittel zu wür-

digen. Auf dem Fehler beruht das Urteil. Es ist daher aufzuheben.

In der neuen Hauptverhandlung wird das LG sich im Sinne der obenstehenden Erwägungen um eine Vernehmung des Zeugen M. bemühen müssen. Der Senat weist darauf hin, daß die im Falle der Erfolglosigkeit solcher Bemühungen erneut zu prüfende Frage, ob die Voraussetzungen einer Verlesung der polizeilichen Niederschriften vorliegen, unter Berücksichtigung der gleichen Kriterien zu entscheiden sein wird, wie sie bei der Prüfung, ob ein Beweisverwertungsverbot aus dem Gesichtspunkt des fairen Verfahrens gegeben ist, zu beachten sind.

## Glückwunsch

Richard Honig 90 Jahre

Am 3. Januar 1980 ist *Richard Honig*, emeritierter Ordinarius für Strafrecht, Strafprozeßrecht und Zivilprozeßrecht, 90 Jahre geworden. Ein wechselvolles Geschick hat ein ungewöhnliches Gelehrtenleben geprägt. Nach der Schulzeit in seiner Heimatstadt Gnesen studierte er Rechtswissenschaft in München, Breslau und Erlangen. Im Jahre 1919 wurde er in Göttingen habilitiert. Hier wurde er 1925 zum außerordentlichen Professor ernannt, seit 1931 lehrte er als Ordinarius.

Mit der Machtergreifung der Nationalsozialisten verlor er 1933 seinen Lehrstuhl. Er fand eine neue Wirkungsstätte in der Türkei, wo er maßgeblich am Aufbau der juristischen Fakultät der Universität Istanbul beteiligt war. Bei Kriegsbeginn siedelte er in die USA über.

Nach dem Kriege kehrte er trotz des ihm angetanen Unrechts an seine Wirkungsstätte Göttingen zurück. Seit 1953 gehört er als Emeritus wieder seiner Göttinger Fakultät an. Schüler und Freunde aus der früheren Zeit haben ihm ihre Zuneigung und Verehrung bewahrt und wieder Kontakte hergestellt, neue Freunde hat er gewonnen. Zum 80. Geburtstag im Jahre 1970 hat ihn die juristische Fakultät mit einer Festschrift geehrt und ihre fortbestehende Verbundenheit zum Ausdruck gebracht.

Die Strafrechtswissenschaft verdankt *Richard Honig* wegweisende dogmatische Arbeiten. Seine Habilitationsschrift über die Einwilligung des Verletzten eröffnete neue Horizonte in der Rechtsgutslehre, indem sie den Begriff des Rechtsguts mit größter Schärfe und Konsequenz mit dem Normzweck in Ver-

bindung brachte. Auf dem Gebiet der Konkurrenzlehre ist neben seinen Studien zur juristischen und natürlichen Handlungseinheit vor allem die Schrift „Straflose Vor- und Nachtat“ zu nennen, die ein besonders verworrenes Kapitel in diesem Bereich mit bewundernswerter Klarheit einer Ordnung zuführt. Erst heute in seiner Bedeutung voll erfaßt ist sein Denkansatz, mit dem er im Jahre 1930 in der Abhandlung über Kausalität und objektive Zurechnung das damals herrschende Kausaldogma zu überwinden trachtet und die Zurechnung als normatives Urteil über empirische Daten herausstellt.

Das wissenschaftliche Werk *Richard Honigs* umfaßt daneben das Kirchenrecht, die Rechtsgeschichte, und - veranlaßt durch seine Zeit in den USA - die Strafrechtsvergleichung. Noch kürzlich hat er in seinem Beitrag zur Festschrift für Böckelmann aus übergreifender historisch-philosophischer Sicht das Thema „Schicksal und Gewissen“ aufgenommen und das Schuldproblem behandelt. Auch der Kunst ist er verbunden. Wer ihn besucht, dem fällt wohl ein besonders liebenswürdiges Portrait seines Sohnes im Kindesalter ins Auge, das von seiner Liebe zur Malerei zeugt. Bis vor einigen Jahren spielte er auch die Violine, die ihm ebenso wie Pinsel und Farbe ein Ausgleich für die Strenge der Jurisprudenz gewesen ist.

In ungebrochener geistiger Kraft hat er seinen 90. Geburtstag begangen. Unsere Glückwünsche gelten einem Gelehrten, der der deutschen Strafrechtswissenschaft vielfältige Impulse gegeben hat, einem gütigen Menschen, der sich der Freundschaft und Verehrung im Kollegen- und Schülerkreis sicher sein kann.

Manfred MAIWALD, Göttingen

## Bericht

### Tagung der Wissenschaftlichen Vereinigung für Internationales Verfahrensrecht, Verfahrensrechtsvergleichung und Schiedsgerichtswesen in Bad Brückenau

Die internationalen Aspekte des Verfahrensrechts gewinnen in Wissenschaft und Praxis zunehmend an Bedeutung. Ihren Niederschlag im institutionellen Bereich hat diese Entwicklung in der Gründung einer eigenen wissenschaftlichen Gesellschaft gefunden: mit dem Ziel, Theoretiker und Praktiker der betreffenden Rechtsgebiete sowie Vertreter der als Hilfswissenschaften erheblichen Disziplinen zu gemeinsamer wissenschaftlicher Arbeit in Arbeitsgruppen und wissenschaftlichen Tagungen zusammenzuführen sowie insbesondere die internationale Zusammenarbeit zu fördern, konstituierte sich im Vorjahr die Wissenschaftliche Vereinigung für Internationales Verfahrensrecht, Verfahrensrechtsvergleichung und Schiedsgerichtswesen (Vorstand: Vorsitzender: Prof. Dr. Dr. h. c. W. Habscheid, Würzburg/Genf, stellvertretender Vorsitzender: Prof. Dr. K.-H. Schwab, Erlangen, Schatzmeister: OLG-Vizepräsident a. D. Dr. H. Nagel, Bremen; Rat: Prof. Dr. K. Firsching, Regensburg, Prof. Dr. P. Gottwald, Bayreuth, Prof. Dr. F. Nickelisch, Heidelberg, Prof. Dr. G. Roth, Innsbruck, Prof. Dr. P. Schlosser, München).

Im fränkischen Bad Brückenau trafen sich Mitglieder und Gäste der jungen Vereinigung am 12./13. Oktober 1979 nunmehr zu einer ersten Vortragsveranstaltung.

Aus dem international-verfahrensrechtlichen Bereich referierte

Prof. Dr. *Günter H. Roth*, Innsbruck, über „Internationalrechtliche Probleme bei Prorogation und Derogation“, nämlich Zweifelsfragen hinsichtlich des Geltungsbereichs und des Regelungsinhalts von Art. 17 des EG-Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen (einschließlich der durch die Novelle 1978 aufgeworfenen Interpretationsprobleme) sowie Fragen der Zulässigkeit und Wirkung internationaler Zuständigkeitsvereinbarungen nach allgemeinem deutschem IZPR. Zu letzterem setzte der Referent insbesondere Akzente dahin, inwieweit Gesichtspunkte wie Annahmefähigkeit und Entscheidungsanerkennungsfähigkeit durch und im Zweitstaat einschlägig bedeutsam, ferner ob und inwieweit den Schranken des § 40 ZPO auch internationalrechtliche Geltung zukommt. Vom Ansatz, daß die Aspekte Annahmefähigkeit und Anerkennungsfähigkeit nicht kollisionsrechtlich auf das Prozeßrecht des Zweitstaates verweisen, vielmehr die sachrechtliche - nach der *lex causae* und der *lex fori* zu beurteilende - Frage der Rechtsschutzgewähr aufzuwerfen, plädierte *Roth* dabei für einen favor prorogationis derogationis: im Zweifel sei zunächst von der Annahmefähigkeit des Zweitstaats und der Anerkennungsfähigkeit im Zweitstaat auszugehen und subsidiärer Rechtsschutz durch die eigenen Gerichte erst dann zu gewähren, wenn im Zweitstaat die Annahme des Rechtsstreits bzw. die Urteilsanerkennung tatsächlich verweigert wird. Hinsichtlich der beiden Schranken des § 40 II ZPO sprach er sich für eine Geltungserstreckung auch auf internationale Vereinbarungen aus. Eine Ausnahme für die Derogation lasse sich nicht mit einer Parallele zum



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Aufgrund der Machtergreifung Hitlers entstand 1933 eine internationale Bewegung zur Unterstützung der durch den Faschismus verfolgten Intellektuellen. Die spanische Republik schloß sich dieser Bewegung an, wodurch der Aufenthalt Hellers in Madrid ermöglicht wurde. Auf die Initiative von Antonio de Luna -  
 5 Professor für Völkerrecht an der Universität Madrid - hin, sandte Fernando de los Ríos in seiner Eigenschaft als Kultus-Minister in der Azana Regierung eine  
 Einladung an Heller, als Lehrbeauftragter am Instituto de Estudios Internacionales y Económicos zu lehren.<sup>14</sup> Bei dieser Operation dürfte Salvador de Madariaga - damals spanischer Botschafter im Völkerbund - eine wichtige Rolle ge-  
 10 spielt haben.<sup>15</sup>

Heller muß im Frühjahr 1933 in Madrid angekommen sein - ein Brief von ihm an seine Frau vom 1. März 1933 stammt noch aus Oxford, Balliol College. Ein Foto von Heller mit Antonio de Luna in der Madrider Straße Carrera de San Jerónimo,  
 15 das zu jener Zeit von Carlos Ollero aufgenommen wurde, hängt noch heute in dessen Arbeitszimmer. Luis Tobío<sup>16</sup> spricht davon, daß Heller in dem Colegio Mayor Del Amo an der Universitätsstadt gewohnt habe. Die Version, die Niemeyer und Manfred Friedrich<sup>17</sup> von der Zerstörung der Villa Hellers im Bürgerkrieg geben, scheint Tobíos Angabe zu unterstützen. Allerdings behauptet Eustaquio  
 20 Galán<sup>18</sup>, daß Heller zu Fuß von seiner Wohnung in Claudio Coello zu seinen Vorlesungen im 'Pabellón Valdecillas' an der Straße San Bernardo gegangen sei und daß von dort auch der Begräbniszug zum städtischen Friedhof seinen Ausgang genommen habe.

25 Im Sommer 1933 hielt Heller an der Universidad Internacional von Santander einige Vorträge über 'Formalismo y Post-formalismo an la Teoría del Estado' - im Rahmen eines Kurses über den modernen Staat. Mit ihm zusammen nahmen auch Harold Laski und Luis Recasens Siches an diesem Kurs teil.<sup>19</sup>

30 Im Herbst 1933 begann Heller ein Seminar über Politische Wissenschaft an der Universität Madrid, an dem als Studenten Eustaquio Galán, Manuel García Pelayo, Manuel Tunón de Lara, Antonio Truyol, Maravall, Salvador de Lissarrague und Mariano Aguilar Navarro teilnahmen. Sie alle wurden Zeugen des Herzan-

<sup>14</sup>Vgl. Klaus Meyer, Hermann Heller. Eine biographische Skizze (1967), oben S. XXX ff.

<sup>15</sup>Diese Annahme kann ich allerdings nicht belegen.

<sup>16</sup>Persönliche Mitteilung.

<sup>17</sup>Vgl. Meyer, Klaus, aaO.

<sup>18</sup>Persönliche Mitteilung.

<sup>19</sup>Madariaga/Valbuena, La Universidad de Verano, aaO. (Anm. 7).



falls, den er während einer Vorlesung erlitt und an dessen Folgen er am 5. November starb.<sup>20</sup>

Francisco Ayala kann sich nicht mehr genau daran erinnern, ob er selbst es war, der Heller Zugang zur Jura-Fakultät der Universität Madrid verschafft hat. Möglich ist es, wenn man neben den persönlichen Beziehungen seit seiner Berliner Zeit die Tatsache berücksichtigt, daß er damals Fakultätssekretär und Assistent am Lehrstuhl für Staatsrecht und Politik von Adolfo Posada, den seit 1932 Pérez Serrano innehatte, war. Jedenfalls erhielt Heller einen Lehrauftrag.<sup>21</sup>

Pérez Serrano und Antonio de Luna sorgten auch für die Präsenz Hellers in wissenschaftlichen Zeitschriften, indem sie Arbeiten von ihm - den Artikel 'Political Science',<sup>22</sup> 'La justificación del Estado'<sup>23</sup> - in die Revistas für Privat-Recht und Cruz y Raya übernahmen. Die Trauerrede auf dem städtischen Friedhof hielt Pérez Serrano;<sup>24</sup> auch der Nachruf, der in der Revista de Derecho Publico erschien,<sup>25</sup> stammt von ihm.

Nach seinem Tod zog sich Gerhart Niemeyer, der Heller ins Exil begleitet hatte, nach Tossa de Mar - einem Fischerdorf an der Costa Brava - mit der Absicht

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<sup>20</sup>Vgl. Eustaquio Galán, La concepción estatal de Heller en referencia a la filosofía política de su época, in Revista General des Legislación y Jurisprudencia, 1945 (Sept.-Dic.).

<sup>21</sup>Ernennung als 'Profesor Encargado de Curso' in der Facultad de Derecho, 16. Mai 1933, Boletín Oficial del Ministerio de Instrucción Pública y Bellas Artes, 3. Juni 1933.

<sup>22</sup>Hermann Heller, Concepto, desarrollo y función de la Ciencia Política, übersetzt von Nicolás Pérez Serrano, Madrid 1933, Ed. Revista de Derecho Privado; englische Fassung in Encyclopaedia of the Social Sciences, 12 (1934), S. 207-224, jetzt in Heller, Gesammelte Schriften, Leiden/Tübingen 1971, Bd. 3, S. 45-75.

<sup>23</sup>Heller, Hermann, La Justificación del Estado, in: Revista Cruz y Raya, Madrid 1933 (Dez.). - Die ideologische Heterogenität der Heller-Vermittler wird nicht erst beim Ausbruch des Bürgerkrieges deutlich. Die Zeitschrift Cruz y Raya - eine katholische Avantgarde-Zeitschrift -, in deren Gründungs-Mannschaft sehr unterschiedliche Persönlichkeiten zusammentrafen - von dem katholischen Republikaner José Bergamín bis zu den Franquisten Alfonso García Valdecasas, Antonio Garrigues, Antonio de Luna und Juan Lladó - hat eine wichtige Rolle bei der Verbreitung der Hellerschen Gedanken gespielt. Derselbe García Valdecasas, der im Monat Oktober 1933 die Falange gründet, nimmt zwei Monate später einen Artikel von dem demo-liberalen Heller in Cruz y Raya auf. Gleichzeitig veröffentlicht er die Beurteilung von Carl Schmitt über Donoso Cortés in der rechts-extremistischen Zeitschrift 'Acción Española' - die Cruz y Raya im katholischen Ideenkreis entgegengesetzt ist -.

<sup>24</sup>Vgl. Galán, La concepción estatal de Heller, aaO. (Anm. 20).

<sup>25</sup>Pérez Serrano, Hermann Heller (Necrología), in: Revista de Derecho Publico, Año II, no. 23, 15. November 1933, S. 321.



López Pina

zurück, die Notizen Hellers zu ordnen und in Form der Staatslehre herauszugeben.<sup>26</sup>

In den Jahren 1933-34, resp. 1934-35 arbeiten Francisco Javier Conde und Enrique Gómez Arboleya in Berlin an ihrer Doktorarbeit. Bei Conde's Arbeit - 'El Pensamiento político de Bodino' - stellt Heller einen wichtigen bibliographischen Bezugspunkt dar, während Gómez Arboleya über das Thema 'Rasgos fundamentales del Pensamiento de Hermann Heller' schreibt. Beide sollten später zu den wichtigsten Vermittlern der Gedanken Hellers innerhalb der intellektuellen francoistischen Gemeinschaft werden.

Die Heller-Rezeption teilt das tragische Schicksal der spanischen Gesellschaft, die durch den Bürgerkrieg auseinander gerissen wurde: Ein Teil der intellektuellen Vermittler gehört zu den Schlüsselfiguren bei der Verteidigung der Republik, der andere unterstützt den Militärputsch, dessen Sieg zur Diktatur führte. Recasens Siches, der zunächst Ministerialrat für Lokalverwaltung und später Staatssekretär im Industrieministerium war, verließ Spanien mit dem Ziel Südamerika zwischen Juli und November 1936. Fernando de los Ríos wechselte in kurzer Zeit die Rolle eines Unterhändlers bei wichtigen Verhandlungen mit der französischen Regierung mit der des Rektors der Universität Madrid, um kurz darauf - am 20. September 1936 - zum Botschafter in Washington ernannt zu werden.<sup>27</sup>

Manuel M. Pedroso gehörte zu den Auserwählten der spanischen Intelligentsia, die als Mitglieder einer Staatsdelegation in Mexico an der 'Casa de España'<sup>28</sup> in Sicherheit gebracht wurden. Francisco Ayala blieb bis zum Ende des Bürgerkriegs in Spanien und ging dann an die Universität Buenos Aires<sup>29</sup>. Nur Recasens und Ayala gelang es, später nach Spanien zurückzukehren; in den anderen Fällen mußte die geistige und persönliche Erinnerung an Heller notwendigerweise jenseits des Atlantiks gepflegt werden.

Von den Persönlichkeiten, die ein engeres Verhältnis zu Heller hatten, blieben Antonio de Luna, Pérez Serrano und García Pelayo - letzterer bis 1950 - in Spanien. Ich habe bei Luna in schriftlicher Form keinen Nachweis für eine spätere intellektuelle Anerkennung Hellers finden können; trotzdem ist aber sein

<sup>26</sup> Persönliche Mitteilung von Luis Tobío und Francisco Ayala.

<sup>27</sup> Vgl. Libro de la Primera Reunión de Profesores Universitarios Españoles Emigrados, La Habana: Talleres Tipográficos 'La Mercantil', 1944.

<sup>28</sup> Vgl. Libro Conmemorativo del 45 Aniversario, Fondo de Cultura Económica, México: Fondo de Cultura Económica, 1980 ; bestätigende persönliche Mitteilung von Amaro del Rosal.

<sup>29</sup> Vgl. Ayala, Recuerdos, aaO. (Anm. 11).



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DILLON AND O'BRIEN  
1920-1980

COUNSEL  
HERBERT C. PENTZ  
GEORGE G. NEMETH P.C.

December 16, 1983

Ernst C. Stiefel, Esq.  
200 Park Avenue  
New York, N.Y. 10017

Dear Mr. Stiefel:

I enclose herewith copies of three Law Review Articles written by me. This will also confirm that I am a "Licencié en Droit" (Paris 1938), and "Diplomé de l'Ecole Libre des Sciences Politiques" (1938); I received my "LLB" from Columbia Law School in 1947. I have taught every year at New York University Law School. I have taught two courses: one in European Economic Community from 1962 to date, and another course entitled "Western European Comparative Commercial Law" from 1966 to 1981. I am an adjunct professor at that school.

1940  
1918.

I was born a French citizen in Biarritz, France, in

25 years

I remain with kind regards,

Yours sincerely

Maurice Hahn

MH:ja  
enclosures

P.S. If this is relevant, I served as an Officer in the U.S. Army and was awarded the Bronze Star Medal and the French War Cross, while serving with the U.S. 79th Infantry Division.



Rudi Schlesinger }  
Arthur Lerneroff } - N.Y. Law Commission for a Revision  
1977/77 } see Addendum  
Vol 18 N: L p 841

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ADOLF HOMBURGER

## Recognition and Enforcement of Foreign Judgments

A New Yorker Reflects on Uniform Acts

### INTRODUCTION

For many years the topic of recognition and enforcement of foreign judgments has been the scholar's delight. Students of conflict of laws, constitutional law, comparative law, international law, and civil procedure have explored its complexities and have proposed reforms.<sup>1</sup> Yet, these efforts have not significantly influenced American law. The United States has no treaty on recognition with any country. No federal statute governs the recognition of foreign country judgments or implements the full faith and credit clause of the Constitution on the enforcement of sister state judgments; and only a few states have adopted the Uniform Laws on the subject.<sup>2</sup>

ADOLF HOMBURGER is Professor of Law, State University of New York at Buffalo, Faculty of Law and Jurisprudence. The author is chairman of the Committee to Advise and Consult with the Judicial Conference of the State of New York on Civil Practice Law and Rules. The views expressed here are the author's and do not necessarily represent those of the Judicial Conference or its Advisory Committee. This article is an expansion of a lecture delivered by the author at the Association of the Bar of the City of New York in January 1969. The writer gratefully acknowledges research assistance from Robert M. Feinson and Gerald Morreale.

<sup>1</sup> E.g., Yntema, "The Enforcement of Foreign Judgments in Anglo-American Law," 33 *Mich. L. Rev.* 1129 (1935); Nussbaum, "Jurisdiction and Foreign Judgments," 41 *Colum. L. Rev.* 221 (1941); Reese, "The Status in This Country of Judgments Rendered Abroad," 50 *Colum. L. Rev.* 783 (1950); Nadelmann, "Non-Recognition of American Money Judgments Abroad and What To Do About It," 42 *Iowa L. Rev.* 236 (1957); Smit, "International Res Judicata and Collateral Estoppel in the United States," 9 *U.C.L.A. L. Rev.* 44 (1962); Graupner, "Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe," 12 *Int'l & Comp. L.Q.* 367 (1963); von Mehren and Trautman, "Recognition of Foreign Adjudications: A Survey and A Suggested Approach," 81 *Harv. L. Rev.* 1601 (1968); Kulzer, "Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgments Recognition Act," 18 *Buffalo L. Rev.* 1 (1969). For textbook treatments see, e.g., Ehrenzweig, *Conflict of Laws*, 160-234 (rev. ed. 1962); Goodrich, *Conflict of Laws*, 388-414 (1964). For an extensive casebook treatment see, von Mehren and Trautman, *The Law of Multistate Problems*, 831-994 (1965). For articles addressed primarily to problems of interstate recognition and enforcement see e.g., Cook, "The Powers of Congress Under the Full Faith and Credit Clause," 28 *Yale L. J.* 421 (1919); Leflar, "The New Uniform Foreign Judgments Act," 24 *N. Y. L. Q.* 336 (1949); Paulsen, "Enforcing Money Judgments of a Sister State," 42 *Iowa L. Rev.* 202 (1957); Kulzer, "Programs for Improving Foreign Judgment Enforcement in New York: The Uniform Enforcement of Foreign Judgments Act," 18 *Buffalo L. Rev.* 53 (1969).

<sup>2</sup> The Uniform Enforcement of Foreign Judgments Act (1948 Act), 9A *U.L.A.* 474 (1965), was approved by the National Conference of Commissioners on Uniform Laws and the American Bar Association in 1948. It was adopted by Arkansas, Illinois,



*Professor 4*

New York Times, Sept. 12, 1968

**WALTER HERZFELD,  
A LAWYER HERE, 60**

Walter Herzfeld, legal counsel for Volkswagenwerk A. G. in the United States since 1954 and a member of Volkswagen of America's board of directors, died of a heart attack yesterday while on a business trip in Germany. He was 60 years old and lived at 180 East End Avenue.

Mr. Herzfeld was senior partner in the law firm of Herzfeld & Ruben, 40 Wall Street. Born in Essen, Germany, he studied law at the universities of Munich, Heidelberg and Berlin from 1926 to 1933. He received a Master of Laws degree from the University of Paris in 1936 and practiced in Paris until 1939, when he entered the French Foreign Legion.

He came to the United States in 1941 and received his LL.B. degree from the New York University School of Law in 1944.

He was admitted to the bar in New York and became a naturalized American citizen in 1947. He was named a lecturer in comparative law at N.Y.U. in 1950 and, in 1964, an adjunct professor of law.

Mr. Herzfeld is survived by his widow, Karen.

MRS. HAROLD H. CORBIN

HERZFELD—Walter. Suddenly on September 11, 1968 in Wolfsburg, Germany. Beloved husband of Karen Herzfeld. Funeral, Germany, September 13, 1968.

HERZFELD—Walter. The partners of Herzfeld & Ruben record with deep sorrow the untimely passing of their senior partner and valued friend, Walter Herzfeld. We offer sincere condolences to his bereaved family and share with them the loss of his wisdom and leadership.

HERBERT RUBIN  
BERNARD J. WALD  
CECELIA H. GOLIZ

HERZFELD—Walter. The associates and staff of Herzfeld & Ruben sorrowfully note the loss of their mentor and guide, Walter Herzfeld. Our deepest sympathy is extended to his wife and family.  
HERZFELD & RUBIN

verlassen.

ler Volks-

rstarb am

ieren mit

chts und

nenarbeit

her Tod

WOLFGANGWERK ANTIENGESELLSCHAFT

Der Vorstand

Wolfsburg, den 12. September 1968



Ein treuer Freund und selbstloser Berater hat uns für immer verlassen.

## **Dr. Walter Herzfeld**

Professor of Law, Docteur en droit

Berater des Volkswagenkonzerns für die USA, Mitbegründer der Volkswagen of America, Inc. und Mitglied ihres Board of Directors, verstarb am 11. September 1968 an den Folgen eines Herzinfarkts. Wir verlieren mit ihm einen hervorragenden Kenner des internationalen Privatrechts und einen überzeugten Förderer der deutsch-amerikanischen Zusammenarbeit sowie der gegenseitigen Wirtschaftsbeziehungen. Sein allzu früher Tod hinterläßt eine tiefe Lücke in unserem Freundeskreis.

**VOLKSWAGENWERK AKTIENGESELLSCHAFT**

Der Vorstand

Wolfsburg, den 12. September 1968



Vorfänger  
Johann

Dr. Ludwig Heßdörfer  
Präsident des Bundesfinanzhofs i. R.

8 München 80  
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Tel. (0811) 98 27 46



Hochberg



(RECHT UND HUMANITÄT)

*Ausgewählte Aufsätze und Niederschriften*

1923-1962

*Von*

WALTER LEWALD

*Dr. jur., Rechtsanwalt und Notar  
in Frankfurt am Main*

*Original in the possession  
of The Leo Baeck Institute  
New York*



C. H. BECK'SCHE VERLAGSBUCHHANDLUNG

MÜNCHEN UND BERLIN 1962



körperung des inneren Menschen, welcher scheinbar Gegensätzliches harmonisch vereinigte: das Gespannt-Kämpferische und das Lässige, das Handfeste und Geschmeidige. Hier wirkte kein „metier“, sondern eine unverbildete natürliche Vollkraft, die sich auf der Grundlage äußerer Unabhängigkeit, des Geschenkes eines gütigen Schicksales, entfalten durfte und sich auswirkte in instinktsicherem Gefühl für alles Menschliche und völlig unprätentiöser Sicherheit des Urteils über Menschen und Dinge. Einen Grandseigneur hätte man ihn nennen können, hätte aber mit diesem zu kosmopolitischen Ausdruck den wichtigsten Teil seines – trotz fremdländischer Komponente – im besten Sinn deutschen Wesens noch nicht erfaßt. Einen Ritter ohne Furcht und Tadel mochte man ihn noch lieber nennen. Ohne Furcht: denn sein Wesen war Männlichkeit. Ohne Tadel: denn seine Noblesse entwaffnete jeden möglichen Feind. Der äußere Eindruck, den von der Persönlichkeit jeder empfing, war: souveräne Selbstsicherheit, ihr tiefster Wesensgrund aber war: Ritterlichkeit.

BERNHARD VON BÜLOW unterschied einst, an PASCAL anknüpfend, zwischen dem „*esprit géométrique*“ und dem „*esprit de finesse*“, indem er, den wir mit ein wenig Geringschätzung als den Typus des „Diplomaten“ betrachten, persönlich sich für das zweite entschied. Das vollkräftige Leben, welches der gedanklichen Distinktionen spottet, wirkte im Fall ROLAND KÖSTER die Synthese von beiden.

„Der Menschheit Würde ist in Eure Hand gegeben.“ Das Wort gilt nicht nur für den Künstler. Wer könnte leugnen, daß es eine Angelegenheit der Menschenwürde ist, die zwischenstaatlichen Beziehungen zu pflegen, und in wessen Hände könnte jene Pflege eher gelegt werden, als in die Hände derjenigen, die in ihrer Person die besten Werte ihres Landes verkörpern und die dadurch für ihr Land jene moralischen Eroberungen zu machen vermögen, auf deren Grundlage die Zusammenarbeit sich gegenseitig achtender Völker am besten gedeiht?

*Frankfurt a. M., im Januar 1936*

### MAX HACHENBURG ZUM 90. GEBURTSTAG!

*Es kommt doch am Ende darauf an, daß man aus-  
hält und die anderen überdauert.* Goethe

Am 1. Oktober 1950 vollendet MAX HACHENBURG sein 90. Lebensjahr. Der Einzigartigkeit des Ereignisses entspricht die Einzigartigkeit des Menschen: als eine harmonisch geschlossene Persönlichkeit großen Stils ragt die Figur HACHENBURGS in unsere aufgewühlte und zerrissene Gegenwart. In HACHENBURG verkörpert sich ein Stück deutscher Rechtsgeschichte: er zählt zu den bahnbrechenden Förderern einer aus der Enge der dogmatischen Rechtswissenschaft der ersten Hälfte des 19. Jahrhunderts hinausstrebenden wirklichkeitsnahen deutschen Rechtslehre, die sich an den Bedürfnissen des modernen Wirtschaftslebens orientieren und dessen im 20. Jahrhundert immer vielgestaltiger werdende Probleme mit elastischen Denkformen bewältigen will. Als Student der Rechtswissenschaft von zeitgenössischen Rechtslehrern wie WINDSCHEID, RUDOLF VON IHERING, RUDOLF SOHM, ERNST IMANUEL BEKKER, angeregt, erweist sich HACHENBURG bald als ein Zivilrechtsdogmatiker von hohen Graden. Zeugnis davon geben seine „Vorträge über das BGB“, die vor Inkrafttreten des BGB nach Abschluß der Kommissionsarbeiten vor Mannheimer Juristen gehalten und später veröffentlicht wurden – ein meisterliches Buch, das nach mehr als 50 Jahren heute noch lesenswert wäre, wäre es nicht längst schon vergriffen. Auf diese wichtigste seiner zivilistischen Arbeiten – HACHENBURG hat, wie er in seinen Lebenserinnerungen berichtet, noch andere verfaßt – folgt die wissenschaftliche Bearbeitung des gesamten Handelsrechts und des Rechts der GmbH – erstere in dem großen in Gemeinschaft mit dem ehemaligen Reichsgerichtsrat DÜRINGER herausgegebenen Kommentar zum HGB, der als „Düringer-Hachenburg“ berühmt geworden ist, letztere in der Neuherausgabe des Staub'schen Kommentars zum GmbH-Gesetz. Von dem Kommentar zum HGB sagt HACHENBURG in seinen Memoiren, daß die Erläuterung des Handels-



gesetzes auf der Grundlage des allgemeinen Zivilrechts erfolgen sollte. Damit ist der Charakter des Werkes gekennzeichnet: es enthält eine synoptische Darstellung des Zivil- und Handelsrechts und vereinigt damit die Qualitäten von Lehrbuch und Kommentar. Das Werk gehört zum eisernen Bestand der deutschen Rechtsliteratur.

So läge denn die Bedeutung HACHENBURGS für das deutsche Rechtsleben in seiner wissenschaftlichen Leistung, darin, daß er nicht „nur“ Praktiker ist? Man weiß, welches Vorurteil auch heute noch in Deutschland vielfach gegen den Nur-Praktiker herrscht und mit welchen – vielleicht manchmal unbewußten – Überlegenheitsgefühlen zumal in Professorenkreisen oft auf den Rechtsanwalt als die Inkarnation des Nur-Praktikers herabgesehen wird. In seinen Memoiren beklagt HACHENBURG, daß die deutsche Anwaltschaft oft nicht die ihr gebührende Achtung genieße. Er erzählt von sich selbst, daß er ursprünglich daran gedacht habe, die akademische Laufbahn zu wählen, daß er sich dann aber doch für die Anwaltschaft entschied und daß er mit Leib und Seele an diesem Beruf geangen habe. Jedenfalls zeigt sich an dem Beispiel HACHENBURGS die ganze Fragwürdigkeit der landläufigen, oft wertbetonten Unterscheidung zwischen Theoretiker und Praktiker. Noch eine andere Unterscheidung mag am Fall Hachenburg überprüft werden. Einen breiten Raum in der öffentlichen Wirksamkeit HACHENBURGS nimmt seine publizistische Betätigung ein. In seinen Lebenserinnerungen nennt er diese literarische Tätigkeit „juristische Journalistik“. Das heißt zu deutsch: Tagesschriftstellerei. Wenn HACHENBURG den für den Tag bestimmten juristischen Artikel von der gelehrten wissenschaftlichen Arbeit unterscheidet, so geschieht dies ohne jeden Beigeschmack des Inferioren. Wir kennen Goethes Wort von der „Forderung des Tages“: der Tag fordert von dem, der dazu berufen ist, die publizistische Äußerung. Der „Journalist“ HACHENBURG hat, wenn vieles, was er für den Tag geschrieben hat, vergessen ist, in der deutschen juristischen Publizistik einen gesicherten Platz.

Das „Mehr“, das HACHENBURG war und ist, mehr als Praktiker, mehr als Theoretiker, mehr als Journalist, ist er als deutscher Anwalt geworden. Lesen wir die Hachenburgschen Lebenserinnerungen, so wird uns fast auf jeder Zeile klar, zu welcher Rolle im öffentlichen

Leben der Anwalt befähigt und also berufen ist. Die Rechtsberatung ist nicht nur Sachbehandlung, sondern auch Menschenbehandlung und erfordert deshalb Seelenkunde und menschliche Teilnahme. Der ethischen Aufgabe des Anwalts gibt HACHENBURG stärkstmögliche Betonung, wenn er sagt, der Anwalt sei ein Faktor im sittlichen Leben. Im Mund HACHENBURGS, des Feindes der Phrase, ist dies keine schöne Redensart, sondern der Ausdruck eines inneren Erlebnisses. Die Noblesse seiner Gesinnung verlieh ihm in der anwaltlichen Sach- und Menschenbehandlung eine einzigartige moralische Autorität. Mit der Wundergabe der „Persönlichkeit“ begnadet ist er im mündlichen und schriftlichen consilium der Rechtsberater wirklich großen Stils geworden, im schriftlichen consilium durch seine *Gutachten*, in denen er eine Meisterschaft schöpferischer Gestaltung richtigen Fallrechts erreichte, die nicht übertroffen werden kann. So hat HACHENBURG ein Beispiel gegeben, zu welcher Höhe der Praktiker gerade als Anwalt emporsteigen kann.

Hachenburgs Wesen ist auf einen Dreiklang gestimmt: schöpferische Intuition, analytischen Verstand und unfehlbares Daimonion. Die harmonische Verbindung dieser Eigenschaften ermöglichte es ihm, die Höhe der Weisheit zu erreichen. Seine Weisheit hat die letzte Probe bestanden: die Probe des Unglücks. Auch HACHENBURG sah sich gezwungen, ins Exil zu gehen. In seiner engsten Familie hat ihn schweres persönliches Leid getroffen. Er hat sich gleichwohl von jedem persönlichen Ressentiment freigehalten und hat damit menschliche Größe bewiesen.

Nicht nur die deutsche Anwaltschaft, deren größter lebender Repräsentant Hachenburg ist, der ganze deutsche Juristenstand denkt seiner mit den innigsten Segenswünschen. Dem verehrten und verehrungswürdigen Manne ist schon bei seinen Lebzeiten eine Ehrentafel gewidmet, auf der unter dem Namen MAX HACHENBURG in goldenen Lettern geschrieben steht: „bene de jurisprudentia meritus“.

## IN MEMORIAM MAX HACHENBURG!

*„Geprägte Form, die lebend sich entwickelt“*

Am 23. November 1951 ist MAX HACHENBURG in Berkeley (Kalifornien) gestorben. Fern seiner badischen Heimat im kaum begonnenen 92. Lebensjahr. Fast hat es symbolische Bedeutung, daß HACHENBURG die Lebensbahn bis zum physischen Höchstmaß durchschritten hat, um alles dessen in Fülle teilhaftig zu werden, was an Gutem und Bösem den Sterblichen zugemessen werden kann. Jahrzehntlang hat HACHENBURG in den Brennpunkten des deutschen Rechtslebens gestanden. Seit etwa 1½ Jahrzehnten war er uns ferngerückt und ist uns doch, als Symbol und Vorbild, nahe geblieben. Seine einzigartige Persönlichkeit ist am 1. Oktober 1950, seinem 90. Geburtstag, in diesen Spalten gewürdigt worden. Heute beklagen wir seinen Tod als unersetzlichen Verlust.

Aber keine bittere Klage beim Abschluß eines so erfolgreichen, so erfüllten Lebens! Wir gedenken HACHENBURGS als eines in allem Leid Glücklichen. Weil er als Persönlichkeit das höchste Glück der Erdenkinder erfahren hat. Weil er das Göttergeschenk einer den Körper meisternden wunderbaren Vollkraft des Geistes bis zuletzt genossen hat. Charakteristischer Ausdruck ungebrochener Geisteskraft war seine weitausholende schwungvolle Handschrift, die sich in Jahrzehnten nicht geändert hat.

Sein letztes wissenschaftliches Bemühen galt der Materie des Rückerstattungsrechts, die, so viele technisch-juristische Einzelfragen sie aufgeben mag, im ganzen gesehen schlicht und recht eine moralische Angelegenheit ist. Wie alles Moralische, sollte sich auch die Rückerstattung von selbst verstehen. HACHENBURG hat wohl gefühlt, daß dies leider nicht der Fall ist. So hat er ein letztes an Umfang kleines, dem Inhalt nach gewichtiges Buch geschrieben, das am Tag der Vollendung seines 90. Lebensjahres der Öffentlichkeit übergeben wurde und das sich „Probleme der Rückerstattung“ nennt. Auch das hat symbolische Bedeutung. Schmerz und Freude standen an der

Wiege dieses Buches: Schmerz über das Schicksal des Judentums, Freude an der den sittlichen Geist des Rückerstattungsrechts beschwörenden literarischen Schöpfung. Auf Seite 15 des Buches lesen wir die einfachen, aber vielsagenden Worte: „es wird oft als eine glückliche Gabe bezeichnet, daß der Mensch ein Unglück vergessen kann, es gibt aber Dinge, die er nicht vergessen soll.“ Diese Worte HACHENBURGS, der sich um das deutsche Recht über zwei Menschenalter lang immer strebend bemüht hat, sollten uns ein aus der Trägheit des Gewissens aufrüttelnder moralischer Weckruf sein.

HACHENBURGS Name wird lange unter uns fortleben.



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zu unterrichten, so setzt nach den Worten *Amelunxens* die Verwirklichung dieses Grundrechts eine gesetzliche Begründung des Rechtes der Presse auf Informationen und der Pflicht der Behörden auf Erteilung von Auskünften voraus. Die Pflicht der Behörden müsse allerdings an der gesetzlich normierten Amtsverschwiegenheit und dem Schutz höherrangiger privater oder öffentlicher Interessen ihre Grenze finden. *Schmidt-Osten*, der die Kernfragen eines kommenden Presserechts skizzierte, wies im Anschluß an entsprechende Bemerkungen von *Bader* insbesondere auf die Probleme der Selbstverwaltung der Presse und eines Ehrengerichtsverfahrens hin, damit die Unabhängigkeit der Presse ihr notwendiges Korrektiv in der Form einer staatsfreien Selbstverwaltung finde. Die Haltung des verantwortungsvollen Journalisten zur Justiz kennzeichnete *Schmidt-Osten* treffend in dem Wort: „Die Presse hat sich nicht die geistige Freiheit und Unabhängigkeit erstritten, um sie anderen streitig zu machen.“

Der vierte Referent, MinDirektor *Bleibtreu* (Düsseldorf), gab eine lebhaft diskutierte Darstellung des Strafrechtsänderungsgesetzes und seiner Bedeutung für die Presse.

Alle Referenten und Diskussionsredner ließen erkennen, daß gesetzliche und organisatorische Maßnahmen (Justizpressestelle!) allein keine fruchtbaren Beziehungen zwischen Justiz und Presse schaffen können. Bei Juristen und Journalisten werden „die geistige Haltung und das Fingerspitzengefühl die wichtigsten Faktoren sein“ (*Amelunxen*). Verliert nicht das mit mannigfachen juristischen, politischen und organisatorischen Fragen beladene Verhältnis von Justiz und Presse seinen problematischen Charakter, wenn man es in menschliche Beziehungen zwischen dem einzelnen aufgeschlossenen Richter, Staatsanwalt und Journalisten auflöst, wenn der Jurist sich die Einsicht vor Augen hält, daß Unabhängigkeit keine Unfehlbarkeit bedeutet, und der Journalist bedenkt, daß Kritik keine Guillotine sein darf? Wenn Toleranz und Vertrauen, Verstehenwollen und menschlicher Anstand die Alltagspraxis des Pressereferenten, Gerichtsberichterstatters und Gerichtsvorsitzenden beherrschen, wird man nicht gegenseitig Kompetenzen abzirkeln müssen. „Wir haben Redefreiheit allzumal, und nur aus dem Meinungs austausch erwächst die Verständigung und Versöhnung“ (*Sling*). Manchem skeptischen Richter und Staatsanwalt sollte das humorvolle Wort *Mostars* in Düsseldorf zu denken geben: „Nehmen Sie die Presse nicht an die Kandare, sondern an die Hand. Dann werden Sie es ihr verzeihen, wenn sie mal einen Richter am Ohr zwick.“

MinRat Dr. Kurt KLEINRAHM, Düsseldorf

### Zur Erinnerung an Max Hachenburg

Vor wenig mehr als einem Jahr gedachte die deutsche Juristen-schaft *Max Hachenburgs* zu seinem 90. Geburtstag, und jetzt kommt die wehmütige Nachricht, daß er, 91 Jahre alt, am 23. November 1951 in Kalifornien entschlafen ist. Das gibt uns Anlaß, uns noch einmal auf das zu besinnen, was er dem deutschen Rechtsleben und der deutschen Rechtswissenschaft bedeutet hat.

In seinen Lebenserinnerungen erzählt er, daß er den Wunsch gehabt hat, die akademische Laufbahn einzuschlagen, und daß ihn wirtschaftliche Gründe bestimmt haben, sich in Mannheim, seiner Heimatstadt, als Rechtsanwalt niederzulassen. Aber vielleicht folgte er bei diesem Entschlusse unbewußt einer inneren Stimme, denn die für ihn kennzeichnende wissenschaftliche Haltung, die Ablehnung der rein abstrakten Konstruktion und die Rechtsfindung im Hinblick auf den konkreten Fall mit seiner Besonderheit, konnte er wohl nur in der täglichen Berührung mit dem praktischen Leben gewinnen, die ihm die Tätigkeit als Rechtsanwalt verschaffte. Er ist nach zwei Büchern, die hauptsächlich in seiner engeren Heimat bekannt wurden, zusammen mit *Düringer* den Kommentar zum Handelsgesetzbuch veröffentlichte, war ein systematischer Kommentar in Deutschland noch wenig bekannt. Die meisten, überwiegend von Praktikern verfaßten Kommentare hatten sich mit Beschränkungen und Verweisen auf gerichtliche Entscheidungen begnügt. Als erster war es *Staub* gewesen, der in seinem Kommentar zum Handelsgesetzbuch den Stoff systematisch aufgliederte. Die *Lehrbücher* von *Düringer-Hachenburg* schloß sich dieser Methode an, ging aber noch einen Schritt weiter, indem er das Handelsrecht in seiner Verbindung mit dem bürgerlichen Recht dar-

Den beiden Kommentaren merkt man bereits die Haltung an, die mehr und mehr für Hachenburgs wissenschaftliche Tätigkeit kennzeichnend wurde. Er hat einmal, wohl in absichtlicher Zuspitzung, gesagt, daß es keine abstrakten Rechtssätze, sondern nur konkrete Fälle gebe. Dies war in der Tat die charakteristische Note in seiner wissenschaftlichen Darstellung. Seine Erläuterungen gingen den grundlegenden Fragen keineswegs aus dem Weg. Im Gegenteil, sie waren, darin weiter ausholend als der *Staub'sche* Kommentar, in einzelnen Teilen ein Lehrbuch, aber auch die lehrbuchartige Darstellung geschah doch immer im Hinblick auf den konkreten Fall und die Bedürfnisse des Lebens und des Verkehrs. Das schützte vor gefährlichen Verallgemeinerungen, und es lag in dieser Linie, daß auf Hachenburgs Anregung die Anmerkungen eingeführt wurden, die in der Juristischen Wochenschrift vielen der abgedruckten Reichsgerichtsentscheidungen beigelegt wurden. Auch sie sollten in erster Linie dazu dienen, die Tragweite der Entscheidung im Lichte des besonderen Falles herauszuarbeiten, damit nicht aus ihr ein allgemeiner Rechtssatz herausgelesen werde, der auf anders geartete Fälle nicht zutrifft.

Diesen beiden Kommentaren, die sein hauptsächliches wissenschaftliches Werk darstellen, schloß sich eine Lebensarbeit fast unvorstellbaren Umfangs an. Er hatte eine sehr ausgebreitete, über ganz Deutschland sich erstreckende Anwaltspraxis, vor allem eine gutachtliche Praxis, und eine Beratung seiner Mandanten in ihren wirtschaftlichen Angelegenheiten und Verträgen. Diese Tätigkeit gewann über den Einzelfall hinaus Bedeutung, denn indem er für neue Bedürfnisse neue Formen ersann, bereicherte er damit das Wirtschaftsleben in seiner Gesamtheit.

Daneben arbeitete er in zahlreichen Standesorganen der Anwaltschaft und der Rechtswissenschaft im allgemeinen. Er war Mitglied des Vorstands der Anwaltskammer und des Ehrengerichts in Karlsruhe sowie des Vorstands des Deutschen Anwaltsvereins. Seiner Zugehörigkeit zur Ständigen Deputation des Deutschen Juristentags ist aus Anlaß seines 90. Geburtstages gedacht worden. Dann wurde er in den Vorläufigen Reichswirtschaftsrat berufen. In allen diesen Kollegien verschaffte er sich eine angesehene Stellung, nicht zuletzt, weil seine ausgeglichene Natur ihm gestattete, die Berechtigung auch abweichender Auffassungen zu verstehen und die mittlere Linie zu finden, auf der sich die Streitenden vereinigen konnten. In der Leitung von Versammlungen erwies er ein besonderes Geschick, und die beiden Kommissionen für die Reform des Aktienrechts, die eine vom Deutschen Juristentag, die andere vom Deutschen Anwaltsverein eingesetzt, hätten ohne seine Leitung ihre Arbeit nicht vollenden können.

Das Leben hat mit Ehren nicht gekargt. Er wurde Ehrenbürger der Stadt Mannheim, der er treu blieb, obwohl ihm mehrfach andere Stellungen, die eines ordentlichen Professors an der Universität Heidelberg und die eines Rechtsanwalts beim Reichsgericht, angeboten wurden, und Ehrendoktor zweier Fakultäten, Ehrungen, an denen sich zu freuen er unbefangen genug war.

Ein tragisches Ende blieb diesem Leben nicht erspart. Er hatte lange in Deutschland ausgehalten, aber schließlich mußte er sich, wie so viele andere, zur Auswanderung entschließen. Kurz vor Kriegsausbruch reiste er nach England, von wo er, über 85-jährig, im Frühjahr 1946 nach den Vereinigten Staaten weiterzog. Sein Schaffensdrang und seine Arbeitskraft blieben auch in der Fremde ungeschwächt. Die Leser der Süddeutschen Juristen-Zeitung und der Juristen-Zeitung erinnern sich zahlreicher Veröffentlichungen zur Frage der Rückerstattung und zu internationalrechtlichen Problemen, die im Zusammenhang mit Kriegsverträgen der Siegermächte und der Gesetzgebung der Okkupationsmächte auftauchten. Auch von britischen Regierungsstellen ist er über Fragen des deutschen Rechts gutachtlich gehört worden. Zwei letzte Arbeiten aus seiner Feder erscheinen in diesem Heft. Allen diesen Veröffentlichungen seines Alters merkt man ein Nachlassen seiner geistigen Kräfte nicht an. Geblieben ist sein sehr persönlicher Stil, geblieben die Erfassung des springenden Punkts, geblieben das Verständnis für die Bedürfnisse des Lebens und die lichtvolle Darstellung. Sein Studium des angelsächsischen common law hat keinen literarischen Niederschlag gefunden. Man wüßte gern Näheres über die Reaktion seiner Denkungsart auf dieses Recht. Vieles mag ihn als verwandt angesprochen haben, denn wenn er schon gegenüber der geschriebenen Norm des deutschen Rechts die Individualität des Einzelfalles betonte, wieviel mehr muß ihm ein Recht gelegen haben, das, wie das angelsächsische common law, überhaupt keine abstrakten Normen kennt, sondern sich aus der Fülle zahlreicher Entscheidungen von Einzelfällen mosaikartig zusammensetzt.

Nun ist er von uns geschieden, und wir alle sind ärmer geworden, nicht nur die deutsche Rechtswissenschaft, sondern alle diejenigen, die ihm im Leben nahe gestanden und in der deuten Freundschaft erfahren haben. Seine Leistung wird in der deutschen Rechtswissenschaft fortleben, und fortleben wird seine lebenswürdige, warmherzige und lebendige Persönlichkeit in den Herzen aller seiner Freunde.

Prof. Dr. Ernst WOLFF

vorm. Präsident des Obersten Gerichtshofes für die Britische Zone

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# Kritische Justiz

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urteil des Bundesverfassungsgerichts  
Helmut Kramer Justiz und NS-»Eutha-  
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Alfred Rinke/Gerd Brüggemeier/  
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Rainer Erd Hoechst AG gegen  
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Dian Schefold Notizen vom Hermann-  
Heller-Symposium



Nomos  
Verlagsgesellschaft  
Baden-Baden

## Notizen vom Hermann-Heller-Symposium in Berlin

Am 5. November 1933 starb Hermann Heller (geboren am 17. Juli 1891) im spanischen Exil. Zum Gedenken an ihn fand vom 4.–6. November 1983 in Berlin ein von *Christoph Müller* (FU Berlin) und *Ilse Staff* (Frankfurt) organisiertes Symposium mit Unterstützung der Stiftung Volkswagenwerk statt. 32 Wissenschaftler hatten dazu vorher Beiträge verfaßt, die Gegenstand der Gespräche der größtenteils anwesenden Verfasser und einiger weiterer Gäste auf dem Symposium waren. Der folgende Bericht versteht sich daher zugleich als (notwendig subjektive und unvollständige) Zusammenfassung der Diskussionen des Symposiums und als Ankündigung der Veröffentlichung der Beiträge in einer Gedächtnisschrift<sup>1</sup>. Bericht und Ankündigung lassen sich vorweg dahin zusammenfassen, daß das Symposium mit den etwa gleichzeitig erschienenen Schriften über Heller<sup>2</sup> eine zweite Welle der Heller-Rezeption nach der ersten durch das Buch *W. Schluchters*, die Biographie *K. Meyers* und die Ausgabe der Gesammelten Schriften gekennzeichnet<sup>3</sup> darstellt.

1. Das Symposium begann im ominös benannten Otto Braun-Saal der Preußischen Staatsbibliothek mit einer öffentlichen Festsitzung vor internationalem Publikum, auf das die Brillanz einer Eröffnungsrede des scheidenden und insofern offenbar persönlich betroffenen Berliner Universitätspräsidenten *Eberhard Lämmert* strahlte. Lämmert zeichnete den Gegensatz zwischen idealistisch-autonomer und gesellschaftsbezogener Wissenschaft und die Tradition des Verdikts gegen die »Politisierung« nach, die einem Hermann Heller im Richtungsstreit so schwer zu schaffen machen mußte. War die Beschreibung der Frontstellung Hellers gegen Kelsen noch eher von traditionellen Erklärungsmustern bestimmt, so war die Verortung der Differenz von Heller und Radbruch als Vorwegnahme des Positivismusstreits höchst anregend, die Differenz von Heller und Carl Schmitt im Hinblick auf die Normalität als Ziel einfach zutreffend. Wenn Lämmert Heller insofern als wichtigen Wegweiser bezeichnete, so diagnostizierte er damit aktuelle Scheidewege. *Wolfgang Abendroth* (Frankfurt) arbeitete in seinem Eröffnungsvortrag über die

<sup>1</sup> *Christoph Müller/Ilse Staff* (Hrsg.), *Der soziale Rechtsstaat. Gedächtnisschrift für Hermann Heller. 1891–1933*. Baden-Baden 1984. – Es sei betont, daß die folgenden Ausführungen auf den Diskussionsnotizen des Verfassers beruhen, für die Zusammenfassung der (viel umfangreicheren) Diskussionen komprimiert und systematisiert wurden, und daß sie den Diskussionrednern vor Drucklegung nicht zur Genehmigung vorgelegt werden konnten. Mißverständnisse und die Formulierung im einzelnen verantwortet deshalb der Verfasser.

<sup>2</sup> Abgesehen von der Neuauflage von *Hermann Heller*, *Staatslehre*, 6. Aufl. Tübingen, 1983, und der grundlegenden Schrift *Wolfgang Schluchters*, *Entscheidung für den sozialen Rechtsstaat*. Hermann Heller und die staatsrechtliche Diskussion in der Weimarer Republik, 2. Aufl. Baden-Baden 1983, sind hervorzuheben *Stephan Albrecht*, *Hermann Hellers Staats- und Demokratieauffassung*. Frankfurt 1983; *Gervard Robbers*, *Hermann Heller: Staat und Kultur*, Baden-Baden 1983. *Rudolf Waser*, *Die sozialistische Idee im Denken Hermann Hellers*, Diss. Basel 1982, liegt vorerst nur als Dissertationsdruck vor.

<sup>3</sup> *Wolfgang Schluchter* (zit. Anm. 2), 1. Aufl. Köln 1968; *Klaus Meyer*, *Hermann Heller. Eine biographische Skizze*, *Politische Vierteljahresschrift* 8, 1967, S. 293; *Hermann Heller*, *Gesammelte Schriften*, 3 Bde., Leiden/Tübingen 1971.



Bedeutung Hellers für die Weimarer Republik dessen Sonderstellung heraus. Wenn die andern bedeutenderen jungen Staatsrechtslehrer der zwanziger Jahre gegen Kelsen polemisierten, dann aus einer sich dem Faschismus nähernden Gegnerschaft gegen den Positivismus. Heller dagegen erkannte spätestens nach seiner Italienreise die Gefahr des Faschismus und prangerte sie an. Während die anderen Gegner des Positivismus sich nach 1933 anpaßten, soweit sie nicht Deutschland verlassen mußten, weil sie Juden waren, war Heller außer aus rassistischen auch aus wissenschaftlichen und politischen Gründen im nationalsozialistischen Staat nicht tragbar. Dies führte dazu, daß die in Deutschland Geblienen staatsrechtliche Schulen begründen konnten, während Hellers Einfluß in der Bundesrepublik gering, sein Schüler *Drath* im Bundesverfassungsgericht isoliert blieb. Schon in der Weimarer Zeit gab es nur wenige demokratisch gesonnene Staatsrechtslehrer. Für die Jüngeren war daher Hellers Bedeutung als Vorbild groß, zumal Kelsen für eine politische Orientierung weniger hilfreich erschien. Allerdings hat auch Heller nicht gegen die Reichsexekution in Thüringen und Sachsen 1923 Stellung bezogen, und gegen den Preußenschlag nahm er nur vor Gericht Stellung, während ein realer Kampf nötig gewesen wäre. Insofern gingen die Jüngeren schon damals über seine Position hinaus; aber sie konnten, da sie noch nicht auf Lehrstühle gelangt waren, vor 1933 keinen größeren Einfluß erlangen.

Konkreteren Fragen des aktuellen Verfassungsrechts wandte sich *Ilse Staff* in einem Vortrag zur Aktualität der Staatstheorie Hellers, speziell zur Frage des sozialen Rechtsstaats zu. Ausgehend von Hellers Begriffsmerkmalen des sozialen Rechtsstaats insistierte sie auf dem Postulat, der demokratische Prozeß müsse eine inhaltliche Auseinandersetzung mit der Gestaltung der Wirtschaftsordnung führen. Dem stellte sie das besonders seit 1967 (Art. 109 II GG) die Wirtschaftspolitik der Bundesrepublik beherrschende Gleichgewichtsdenken gegenüber, das die verfassungsrechtliche Zuständigkeitsordnung, vor allem die Macht des Parlaments, leerlaufen läßt. Wenn sich Sozialstaatlichkeit nur noch auf dem Weg der Konjunktursteuerung aktualisiert, wird die Verteilungsproblematik entpolitisiert. Grundrechte werden entweder zum juristischen Verteilungsproblem oder zu gesellschaftspolitisch irrelevanten Ausgrenzungen. Das Management der Verteilung bleibt der Regierung überlassen, ohne daß sich Interessen der Bürger ihr gegenüber demokratisch artikulieren. Soweit es eine Rückbindung gibt, etwa durch die konzertierte Aktion, wird ein fiktives Gemeinwohl an die Stelle der politischen Wirkungseinheit im Sinn Hellers gesetzt. Damit laufen Mechanismen der Umverteilung wie Art. 15 GG leer. Die Eigentumsgarantie soll nun plötzlich, entgegen der früheren Rechtsprechung, auch vor Besteuerungsmaßnahmen schützen und damit eine Umverteilung blockieren. Ein Machtgewinn ergibt sich einzig für die Planungstätigkeit der Regierung. Damit werden jedoch Randgruppen isoliert, Postulate sozialer Homogenität wie die von Heller erhobenen zurückgedrängt. Damit mündete auch dieser Vortrag in die Aktualität der Alternative von Rechtsstaat oder Diktatur.

2. Nach diesen öffentlichen Vorträgen war die gesamte weitere Tagung der konkreten Diskussion unter den Teilnehmern des Symposions gewidmet.

Den Anfang machte eine Bestandsaufnahme über Fakten und Gründe der Rezeption oder Nichtrezeption Hellers, und zwar in der Form einer Spirale. Diese förderte ein frappant schillerndes Bild zutage. So beginnt in Japan die Heller-Rezeption bereits in den dreißiger Jahren im Zeichen des preußischen Einflusses und des monarchischen Scheinkonstitutionalismus, wenn auch neuere Strömungen sich in anderem Sinn auf Heller berufen (*Yamaguchi/Aichi*, Japan). Auch in Spanien und in Lateinamerika lassen sich ähnlich gebrochene Einflüsse feststellen. *Garzón Valdés* (Mainz) benannte Theoretiker des Franco-Regimes, der liberalen Opposition dazu und per-

nistischer Strömungen in Argentinien, die sich alle auf Heller beriefen. Dieser war zunächst Kronzeuge einer Ablehnung des Positivismus (*Kelsen*), die Nation und ihre Souveränität betonender Gedanken. Zugleich wurde Heller sogar zum Befürworter naturrechtlicher Positionen stilisiert. Offenbar standen auch Übersetzungsprobleme einer adäquateren Heller-Rezeption entgegen, die erst jetzt beginnt.

Für Italien erscheint der Einflußbereich Hellers zunächst schmal (*Bolaffi/Rom, Pasquino/Göttingen*). Abgesehen von einigen staatsrechtlich besonders beschnittenen Autoren wie *Treves* (dazu der Beitrag von *Portinaro/Torino*) und *Mortati*, wirkte hier der Faschismus lange Zeit als Filter, der den Einfluß Hellers abwehrte, und selbst auf dem Symposion schien der Schatten *Schmitts* für die italienischen Gäste bestimmend. Allerdings fasziniert jetzt auch der Vergleich zwischen der Weimarer SPD und dem heutigen PCI: Wie weit darf und muß sich eine Massenpartei mit dem Gedanken nationaler Einheit identifizieren, um regierungsfähig zu werden? Dabei gewinnt für die heutige italienische Fragestellung Heller durch seine Faschismuskritik weiter an Bedeutung.

Weniger kräftige Farbakzente schienen zunächst die weiter nach innen weisenden Drehungen der Spirale aufzuzeigen. Für Großbritannien wies *Ellen Kennedy* (York), die selbst daran arbeitet, Hellers Werk dort fruchtbar zu machen, auf das Fehlen englischer Übersetzungen und die schon deshalb unterbliebene Rezeption hin. Während zunächst auch die historische Ausgangssituation als »querelle allemande« abgetan werden konnte, zeigt die gegenwärtige Dekadenz von Pluralismus und Parlamentarismus in Großbritannien ähnliche Probleme, die ökonomische Krise und der Versuch, sie zu bewältigen, ähnliche Konfliktsituationen. Über *Harold Laski* hatte Heller ja in seinen letzten Lebensjahren an der *Encyclopedia of Social Sciences* mitgearbeitet; als folgenschwer erweist sich, daß es wegen Hellers Tod bei diesen Ansätzen eines Kontakts geblieben ist. – Auch für die deutschsprachigen Staaten sind erhebliche Rezeptionslücken zu konstatieren. So wurde die Bedeutung des gebürtigen Österreicherers Heller in seinem Herkunftsland völlig von *Kelsen* und *Max Adler* überschattet und erschlossen insofern die für das Symposion gelieferten Beiträge von *Kühne* (Wien) und *Leser* (Wien) weitgehend Neuland, das in Verbindung mit der gleich zu referierenden neuen Sicht des Verhältnisses von Heller und Kelsen zu sehen ist. Für die Schweiz scheint eine ähnliche Einschätzung nahe zu liegen, und vor diesem Hintergrund ist die Bedeutung der neuen Arbeit *Wasers* (Basel) erheblich. Zwar bleibt darauf hinzuweisen, daß parallel zu Heller und fast gleichzeitig *Dietrich Schindler* (Verfassungsrecht und soziale Struktur, 1932) methodisch ähnliche Gedanken wie Heller entwickelte, die das weitere Staatsdenken in der Schweiz beeinflusst haben. Um so auffälliger ist das sozialwissenschaftliche Defizit dieser Richtungen, das erst neuerdings ausgeglichen wird. Auch für die DDR, die immerhin durch *Haney* (Jena) vertreten war, konstatierte dieser das Ausbleiben jeder Rezeption. Inhaltlich führte er als Teilgrund Hellers Hegel-Mißverständnisse, vor allem hinsichtlich des Wirklichkeitsbegriffs an. Dennoch sah auch er einen gewissen Nachholbedarf für Geschichte und Konstituierung sozialwissenschaftlicher Arbeit in der Staatsrechtswissenschaft der DDR.

Der weitere Gang der Diskussion kreiste vor allem um die Wirkungen Hellers in der Bundesrepublik Deutschland. Auch hier war vorweg die relativ geringe Bedeutung Hellers zu konstatieren (*Richter/Hamburg*, anders z. B. für Frankfurt *Staff*). Im übrigen ließ die Diskussion, abgesehen von historisch interessanten Beiträgen zum Klima in der Staatsrechtslehre der Berliner zwanziger Jahre, speziell am Kaiser-Wilhelm-Institut (*Brandt/Bonn-Berlin*) und zur Einordnung Hellers in einen spezifisch österreichischen Zweig der deutschen Staatsrechtslehre (*Müller*), vor allem zwei Richtungen erkennen. Die Politikwissenschaftler (insb. *Hennig/Kassel*, *Fijal-*



kowski/Berlin) wiesen auf die Bedeutung Hellers für *Carlo Schmid*, *M. Friedrich* und die Arbeiten des Frankfurter Instituts für Sozialforschung bis hin zu *Habermas* sowie auf die Umdeutung Hellers durch *Abendroth* hin, die eine Ablösung von den romantischen, durch die Jugendbewegung geprägten Komponenten voraussetzte. Jedoch seien die jüngeren sozialistischen Autoren der späten Weimarer Republik (*Fraenkel*, *Kirchheimer*, *F. Neumann*) auf längere Sicht für die heutige Theoriebildung wichtiger. Demgegenüber legten die meisten Vertreter des öffentlichen Rechts (so *Schneider/Hannover*, *Penski/Siegen*, *Robbers/Karlsruhe*, *Meinck/Göttingen*, *Schefold/Bremen* u. a.) das Hauptgewicht auf die indirekten Wirkungen Hellers, vor allem in Ergänzung der *Smend'schen* Integrationslehre. Diese erhielt erst durch Hellers sozialwissenschaftliche Analyse eine konkretere Grundlage, die vom alten *Smend* auch ausdrücklich akzeptiert wurde und die sich in der Rechtsprechung des Bundesverfassungsgerichts auswirkt. Die Bewertung dieses Methodensynkretismus blieb freilich unterschiedlich. Gegen den Hinweis auf die positive Funktion etwa in der Zeit der Studentenbewegung (*Kaiser/Berlin*) und für den gegenwärtigen Stand der staatsrechtlichen Methodendiskussion (so die meisten Genannten) setzten andere den Vorwurf des Irrationalismus und der Beliebigkeit der Methode (*Meinck, Staff*). Am schärfsten argumentierte insofern *Abendroth*, der die vom Bundesverfassungsgericht unter Berufung auf die sozialwissenschaftlich angereicherte Integrationslehre beanspruchten Interpretationsspielräume kritisierte und betonte, wie stark die deutsche Staatsrechtslehre nach 1945 von den Kontinuitäten der NS-Zeit geprägt war. Wirklich bedeutsam sei nur Hellers Aufdeckung des antagonistischen Charakters des Weimarer Staates und dessen Überbrückung durch die Lehre vom sozialen Rechtsstaat gewesen, die für das Grundgesetz fruchtbar gemacht werden könne. Die Kontroversen ließen allerdings erkennen, daß die eigentliche Frage mehr die nach der Wirkungsgeschichte als nach der konkreten Rezeption individuell zurechenbarer Gedanken war (*Rädle/Bonn*).

3. Die nächste Gesprächsrunde galt der politischen Verortung der Lehre Hellers zwischen Sozialismus, Faschismus und Nationalismus. Zum Ausgangspunkt nahm *Schneider* seine Untersuchung des Verhältnisses Hellers zu Radbruch. Von einer engen Zusammenarbeit in Kiel, die auch zu ähnlichen Auffassungen in der Frage des Verhältnisses zur Nation führte, entwickelten sich die Gedankengänge in unterschiedlichen Richtungen, als Radbruch nach Heidelberg ging und in Verbindung zu *Anschütz* kam, während Heller seine Schriften über »Sozialismus und Nation« und zur Souveränität verfaßte. Die Entfremdung ging so weit, daß Radbruch Heller nach dem Erscheinen von dessen Faschismus-Studie brieflich ironisch fragte, ob er etwa Philofaschist geworden sei, was Heller natürlich, etwas verletzt, zurückwies. Allerdings mochte Radbruch angesichts der positiven Erwähnung der Jugendbewegung, *Carl Schmitts* und des konkreten Ordnungsdenkens Anlaß zu seiner Frage gesehen haben. *Abendroth* stimmte dem zu mit dem Hinweis, Heller und Radbruch seien Antikommunisten und insofern – wie viele andere – präfaschistischen Tendenzen zugänglich gewesen; sie hätten die Notwendigkeit autoritärer Elemente auch in der demokratischen Revolution nicht erkannt (ähnlich *Haney*). Eine andere, klärungsbedürftige Frage sei freilich die nach dem Verhältnis Hellers zu den weit problematischeren Führer-Gedanken *Leonhard Nelsons*, der ja auch dem Heller entgegengesetzten Hannoveraner Kreis angehörte. Dazu gab *Schneider* theoriegeschichtliche, *Müller* einige biographische und wirkungsgeschichtliche Informationen. *Albrecht* (Hamburg) betonte die analytische Bedeutung der Faschismusschrift. Indessen blieb gerade diese Frage umstritten. *Hennig* problematisierte die Konsistenz eines Transformationskonzepts zum Sozialismus in der Form von Hellers Theorie des sozialen Rechtsstaats. Diese sei eher eine autoritär-integrationistische

Konzeption im Sinn *Hellers* über der materiellen Rechtsstaatlichkeit eines *Robert von Mohl*, klammere aber die Marx'sche Kritik am Gothaer Programm völlig aus und setze, anders als die Arbeiten *Kirchheimers* und *F. Neumanns*, den Staat autonom, so daß eine korporatistische Lösung der Klassenfrage denkbar werde. Allerdings habe Heller die lebensphilosophischen Elemente des Faschismus zutreffend kritisiert. Auch *Müller* räumte das Fehlen eines tragfähigen Transformationskonzepts bei Heller ein, wies aber darauf hin, daß die Staatskritik bei *Kirchheimer* und *Neumann* von der *Carl Schmitts* beeinflusst war, die die Weimarer Verfassung im gegenrevolutionären Sinn diskreditierte. Die Entscheidung gegen die soziale Transformation sei 1919, als Heller zu schreiben begann, bereits gefallen gewesen, so daß 1931/32 die Option für bürgerliche Demokratie und sozialen Rechtsstaat entgegen diktatorischen Konzepten noch am ehesten aussichtsreich gewesen, die Rückprojektion heutiger Fragestellungen unhistorisch sei. Wichtig waren *Wasers* und *Schneiders* Hinweise auf die Entwicklung Hellers. Während in »Sozialismus und Nation« und noch in der Faschismus-Schrift Anklänge an einen Nationalismus mit irrationalen Komponenten vorherrschten, habe Heller spätestens ab 1932, vor allem in der Staatslehre, die Klassenanalyse deutlicher formuliert und das Wesen des Faschismus klarer erfaßt. Auch *Luthardt* (Berlin) wies auf die Bedeutung der Verteidigung des Parlamentarismus nach 1930 und die Gefahren einer positiven Bewertung der (linken) Diktatur durch *Kirchheimer* hin. Historisch sei ein Zusammengehen kommunistischer und sozialistischer Strömungen damals ausgeschlossen, Hellers Entscheidung für den sozialen Rechtsstaat gegen Faschismus, Bolschewismus und bürgerlichen Rechtsstaat daher folgerichtig gewesen. Weitergehend suchten andere Diskussionsredner, insb. *Staff* und *Pasquino*, die Heller'sche Theorie als Transformationskonzept zu deuten. Auch *Abendroth* akzeptierte diese Ansätze, die er für das Grundgesetz fruchtbar zu machen gesucht habe, insistierte freilich für die Weimarer Zeit auf der Alternative Sozialismus oder Barbarei. Gegen letztere habe Heller die Demokratie und damit die soziale Transformation in den konkreten Konflikten nicht hinreichend revolutionär verteidigt.

Konkreter suchte *Hennig* zeitgeschichtlich Hellers Äußerungen zur sozialen Homogenität (1927) in Verbindung zur Arbeitslosenversicherung, die Äußerungen zum sozialen Rechtsstaat (1929) in Verbindung zur sozialdemokratischen Wahlprogrammatik zu bringen. Heller habe aber die Verfassung weniger geschickt als *Carl Schmitt* zu nutzen gewußt. Seine Interpretation des zweiten Hauptteils der Reichsverfassung sei wirkungslos, die des Prinzips der sozialen Demokratie nicht hinreichend operationalisiert gewesen. Diese Ausführungen wurden durch *Bolaffi* bei positiverer Würdigung von Hellers Leistung ergänzt, auch durch Parallelen zu Italien. Die Linke habe erst auf den zweiten, ab 1932 auf den ersten Hauptteil der Weimarer Verfassung gesetzt, *Carl Schmitt*, umgekehrt, erst auf den ersten Hauptteil (Art. 48), dann auf den zweiten (das konkrete Ordnungsdenken). Spekulationen über einen von *Schleicher* angestrebten »dritten Weg« aus der Sicht von 1932/33 (*Brandt*) stellte *Hentschel* (Mainz) eine wirtschaftsgeschichtliche Einordnung von Hellers Theorie entgegen. Von einem sozialdemokratischen Standpunkt aus war eine Rechtsdiktatur ohne Nationalsozialisten ähnlich gefährlich wie diese und daher inakzeptabel. Quintessenz mußte von Hellers Standpunkt aus die Ratlosigkeit sein, die durch seine Staatslehre und deren zeitgenössische Rezeption (bzw. Nicht-Rezeption) hindurchschimmert.

4. Damit war die Diskussion zum Begriff des sozialen Rechtsstaats bereits vorstrukturiert. *Meinck* relativierte dessen Bedeutung, da es sich nur um die Beschreibung der demokratisch-parlamentarischen Umgestaltung des bürgerlichen Rechtsstaats gehandelt habe, Heller den Bezug zur Antinomie von Rechtsgrundsätzen und posi-



tivem Recht nicht diskutiert und die Funktion des Begriffs in der Staatslehre nicht weiter entwickelt habe. *Abendroth* widersprach diesem Befund aus historischer Sicht nicht und gestand zu, daß Sozialstaatlichkeit in jeder die Schwachen unterstützenden Staatstätigkeit, etwa der Sozialgesetzgebung des Kaiserreichs, gesehen werden könne. Aber die Bedeutung von Hellers Begriffsbildung liege darin, daß er den Kompromißcharakter der Weimarer Verfassung benannt habe. Dieser sei zwar im Grundgesetz inhaltlich schwächer, aber als eigentlicher Rechtsgrundsatz verankert, so daß Hellers Beschreibung heute normativ faßbar gemacht werden könne und müsse. Auch *Staff* bezog den Begriff des sozialen Rechtsstaats in Hellers Konzept der Wandlung des Rechts in der sozialen Wirklichkeit, die die Beliebigkeit der politischen Entscheidung begrenze, ein und betonte die Aktualität dieser Sichtweise. In ähnlichem Sinn sprachen sich *Pasquino*, *Penski* und *Richter* aus, dieser unter Betonung des politischen Formprinzips gegenüber einer bloßen Zusammenfassung einzelner sozialer Rechte, *Pasquino* mit dem Hinweis auf die wirklichkeitswissenschaftliche, Freyer beeinflussende Methode Hellers, die zwischen Idealismus und historischem Materialismus einen eigenen Stellenwert habe. Wie er sah *Waser* bei Heller konkret die Verbindung zwischen Analyse des Klassenkampfes und der Fortexistenz der parlamentarischen Demokratie, die beide notwendig seien. Sozialstaatlichkeit bedeute deshalb progressive, praxisbezogene Demokratisierung von unten nach oben. *Hennig* wandte dagegen ein, Hellers Betonung des Mehrheitsprinzips bleibe einer auch von Konservativen wie Popitz und der Schwerindustrie in Anknüpfung an Theorien des materiellen Rechtsstaats (R. von Mohl) betonten bürgerlichen Sozialpolitik verhaftet. *Kirchheimer* habe durch die Unterscheidung von Direktionssphäre und Verteilungssphäre die Problematik genauer erfaßt. *Schneider* zeigte den Zusammenhang zwischen Hellers sozialem Rechtsstaat und Radbruchs Begriff des sozialen Rechts, das mehr Schutz- als Herrschaftscharakter habe, auf, *Luthardt* den durch die damalige Zeitschrift für soziales Recht und durch F. Neumanns grundrechtstheoretische Schriften bestimmten Rahmen, von dem sich Neumann freilich schon 1934 distanzierte.

5. Von diesem Befund ging die Diskussion zur systematischen Behandlung der Bedeutung der Rechtsgrundsätze bei Heller über. Die Frage erwies sich weitgehend als durch die Auseinandersetzung mit Kelsen geprägt, so daß in erster Linie gefragt wurde, wie beide Autoren die Normativität der Grundsätze begründeten. *Paulson* (St. Louis/USA) hatte in seinem Beitrag den Wandel des Normativitätsgedankens, vor allem der Bedeutung der hypothetischen Grundnorm, bei Kelsen im Lauf der zwanziger Jahre (gipfelnd in der Schrift von 1928 über die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus) herausgearbeitet. Während die hypothetische Grundnorm zunächst nur logische Voraussetzung der Rechtsordnung gewesen sei, werde sie allmählich im neukantianischen Sinn zur transzendentalen Begründung des Rechts. Wenn Heller Kelsens Grundnorm als bloße Umbenennung des Staatswillens kritisiert habe, so treffe dies Kelsens ursprüngliche Lehre, lasse aber deren Entwicklung außer acht. Hellers Gegnerschaft gegen Kelsen beruhe daher weitgehend auf einem Mißverständnis. In Wirklichkeit sei eine gewisse Konvergenz festzustellen. Diese These wurde durch mehrere Votanten akzeptiert und ergänzt. *Schneider* wies auf die südwestdeutsche Ausprägung des Neukantianismus (Emil Lask) hin, der einerseits über Radbruch Heller, andererseits auch Kelsen beeinflusst habe, und auf den namentlich die These der Erzeugung der Wirksamkeit und Geltung einer Norm durch deren Befolgung zurückgehe. Auch *Bolaffi* problematisierte die neukantianisch aufgefaßte Grundnorm, die bei Kelsen zu einer Betonung von Normen und zur Verdrängung des Ausnahmezustands, bei Carl Schmitt jedoch zu einer Politischen Theologie geführt habe, die von *Staff* als Ideologie kri-

tisiert wurde. *Meinck* vermißte bei Heller einen einheitlichen Normativitätsbegriff. Hellers Rechtsgrundsätze würden einerseits als empirische Seinsbegriffe, andererseits als objektive, ethische Idealität verstanden, ähnlich wie Smends Integrationsbegriff und Carl Schmitts Dezision, die ebenfalls nicht beliebig sei. Diesen Positionen sei Kelsens Normativitätsbegriff überlegen. Demgegenüber stellte sich *Waser* auf Hellers Seite und betonte das Verdienst, das Verhältnis und Sein und Sollen dialektisch zu sehen. Wenn Kelsen die Normativität in das erkennende Subjekt verlagere, so entstehe ein Riß, der durch die gesamte gesellschaftliche Wirklichkeit gehe. Am nachdrücklichsten setzte sich *Müller* dafür ein, Heller und Kelsen stärker miteinander verbunden zu sehen, um eine juristische Methode, die die geschriebene Verfassung mißachte, zu vermeiden. Insofern behielten Kelsens Vorwürfe gegen Smend, die Integrationslehre sei ein Vorwand zum Verfassungsbruch, ihre Bedeutung, und habe Heller in Kelsen den möglichen Bundesgenossen nicht erkannt. Die logischen Rechtsgrundsätze Hellers seien Kelsens Grundnorm vergleichbar; aber auch bei den ethischen sei eine Annäherung beider Autoren denkbar. Eine neue Sicht des Verhältnisses Hellers zu Kelsen sei daher geboten. Sie wurde, wie die referierten Aussagen zeigen, auf dem Symposium weitgehend strukturiert.

6. Wie die bisherigen Erörterungen gezeigt hatten, bedurfte der Begriff der Entscheidung (Dezision) noch der weiteren Diskussion. Ansatzpunkt war dabei einerseits die Frage, ob die ihre Rechtfertigung in sich selbst tragende Entscheidung im Sinne Carl Schmitts für die Begründung der staatlichen Entscheidungseinheit im Sinn Hellers fruchtbar gemacht werden könne, was insbesondere *Schneider*, *Albrecht*, *Staff* und *Schefold* mit dem Hinweis auf den sozialen und rechtlichen Kontext der von Heller beschriebenen Entscheidungssituation verneinten, die bei Schmitt ausgeblendet bleibe; andererseits das Verhältnis der Entscheidung bei Heller zur Konkretisierung des Rechts im Sinn der Reinen Rechtslehre Kelsens, die von *Müller* und *Paulson*, in Anlehnung an Einflüsse der Freirechtsschule, ebenfalls als Entscheidungssituation charakterisiert wurde (anders *Garzón Valdés*). Allerdings hat die Freirechtsschule auch Schmitt beeinflusst (*Schefold*). *Müller* akzeptierte dies, wies aber darauf hin, daß Schmitt, von Eugen Ehrlich abweichend, die rechtssoziologischen Grundlagen der Entscheidung nur noch selektiv berücksichtigt habe. Hellers Lehre vom Rechtsbruch sei eine Verarbeitung der Revolutionserfahrungen. *Staff* betonte ebenfalls, daß die Dezision Schmitts sozial völlig undeterminiert sei, wenn sie auch seinen politischen Zielvorstellungen durchaus habe dienstbar gemacht werden können.

*Meinck* rückte demgegenüber Heller stärker in die Nähe von Schmitt, da auch dieser eine Legitimation der Entscheidung aus der Akklamation in der identitären Demokratie postuliere und dadurch Ordnungen stiften, das ethische Postulat des inneren Friedens im Sinn von Hobbes verwirklichen wolle. Gewiß sei die Entscheidungssituation, anders bei Kelsen, vom Recht gelöst; aber die Möglichkeit einer Entscheidung gegen das Recht gehöre auch zur Heller'schen Staatslehre. Ähnlich argumentierte *Hennig*. Schmitts akklamatorische Legitimation sei zwar von Hellers Postulat des Volksbildungsgedankens weit entfernt. Aber die Kritik am Pluralismus und an den intermediären Instanzen, letztlich am quantitativ totalen, schwachen Staat sei als autoritäres politisches Gegenmodell zu Heller höchst fruchtbar gewesen: positiv im analytischen Sinn, wie negativ in der praktischen Politik ab 1933. Auch *Penski* insistierte auf der realen gesellschaftlichen Verankerung der Schmitt'schen Dezision, sah freilich das Verdienst Hellers ihm und Kelsen gegenüber in der Einbeziehung der Rechtsgrundsätze. *Schneider* und auch *Schefold* wiesen darauf hin, daß Schmitt auf Hobbes und Rousseau in totalitärer Intention eklektizistisch Bezug genommen habe, um eine beliebige, freilich bestimmten politischen Zielen dienstbare Entscheidung zu begründen. *Hennig* sah darin eine geschickte Ausnutzung der staatstheore-



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tischen Quellen wie auch der verfassungsrechtlichen Möglichkeiten, die Schmitt als guten Juristen und Verteidiger realer Interessen des Kapitalismus ausweise. *Haney* versuchte, die Positionen aus unterschiedlichen Reaktionen auf den sozialen Wandel zum Imperialismus zu erklären, der bei allen drei Autoren den Hintergrund gebildet habe. Das Recht sei als Form der Bewegung von Widersprüchen zu verstehen. Heller habe allerdings den Vorzug, der realen Bedürfnissituation der Menschen am ehesten entsprochen zu haben. Konkreter meinte *Schneider*, nach Heller könne sich ein Staat, der revolutionäres Recht als sozialer Rechtsstaat verwirkliche, an die Spitze der gesellschaftlichen Entwicklung stellen – was *Hennig*, freilich nicht in *Schneiders* Sinn, mit dem Begriff der Diktatur des Proletariats umschrieb. *Waser* konstatierte insofern eine Entwicklung vom Souveränitätsbuch, in dem Heller die Durchsetzung des Staats auch gegen das Recht betont habe, zur insofern vorsichtigeren, eher auf ein kommunikatives Diskursprinzip ausgerichteten Darstellung in der Staatslehre. Schließlich unterstrich *Müller* zusammenfassend nochmals die Nähe von Kelsen und Heller in der Frage der Rechtsgrundsätze.

7. Als Schwerpunkt der Abschlußdiskussion, die die noch offenen Fragen – auch aus dem Bereich der Kulturpolitik – einbeziehen sollte, schälte sich vor allem die Überordnung des Staates über die gesellschaftlichen Kräfte heraus. *Müller* verwies auf Hellers Ablehnung des (insb. spanischen) Anarcho-Sozialismus und den Primat der Politik gegenüber der Wirtschaft, *Schneider* auf die im Anschluß an Radbruch formulierte Überordnung des Staates über das Recht, *Kennedy* auf das (auch liberale) Postulat des starken Staates. Dessen Bindungen seien bei Heller (wie bei Schmitt) romantisch verklärt, etwa in den von heute aus antiquierten Schriften zur Arbeiterbildung, während Schmitts politische Theologie die Bindungen des staatlichen Bereichs aus diesem verbanne. *Staff* hob Hellers Bindungen des Staates, vor allem seinen demokratie-immanenten Kulturbegriff, von Schmitts verfälschter politischer Theologie ab, sah für die Gegenwart jedoch größere Schwierigkeiten, den Interessenpluralismus der Gesellschaft in tragfähige parlamentarische Entscheidungen zu übersetzen.

*Kaiser* kritisierte die praktische Entscheidungsschwäche Hellers, die sich im Prozeß vor dem Reichsstaatsgerichtshof gegen den Preußenschlag in der defensiven Vorgehensweise Hellers und der SPD gezeigt habe, im Gegensatz zur aggressiv-triumphierenden Position des Schmitt'schen Dezisionismus. *Schneider* hielt dem die Schwäche der Position Hellers entgegen, da er sich aus der Souveränitätsschrift zu entnehmende Argumente entgegenhalten lassen mußte. Zugleich lehnte *Schneider* für Heller den Begriff der politischen Romantik ab. Sein Rationalismus führe notwendig zur pluralistisch-parlamentarischen, relativistischen Demokratie, mit Appell-Möglichkeit an das Volk zur Behebung der (ähnlich wie von Schmitt) gesehenen Defizite, wobei allerdings manche Schriften optimistisch und staatsgläubig, andere in der Perspektive düsterer seien. *Haney* bezeichnete Hellers Staatsbejahung als Reformismus, der die Entfaltung sozialer Energien behindert habe, z. B. im Prozeß Preußen contra Reich.

*Luthardt* problematisierte die Überordnung des Staates als Monopolisten der physischen Gewalt über die Wirtschaft, wenn dieser Staat in die Wirtschaft intervenieren solle, wie Heller (gegen Schmitt) forderte. Heller habe den Staat statisch in sich ruhend, die Gesellschaft anarchisch gesehen und deshalb den Staat reformistisch einsetzen wollen. Dabei habe er die qualitative Veränderung des Interventionsstaats, wie sie Kirchheimer und Fraenkel analysierten (Bonapartismus-Theorie), übersehen. Entsprechend mußte der Reformismus des sozialen Rechtsstaats an ökonomischen Strukturen scheitern. *Albrecht* bestritt, daß Hellers Demokratiebegriff relativistisch sei. Er diene den konkret umschriebenen sozialen Zwecken, der Entwicklung zum

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sozialen Rechtsstaat. Das Scheitern dieser Entwicklung sei bei Heller allerdings theoretisch nicht verarbeitet. Diese Aussagen fanden weithin Zustimmung. Insofern zeichnete sich als von mehreren Diskussionsrednern aufgegriffene Formel die des nicht zu Ende gegangenen Weges ab (*Haney, Staff*).

8. Also eine ermutigend-konstruktive Bilanz, ganz im Sinn von Hellers »verzweifelt-Optimismus«? Das Symposium hat, im Zusammenwirken vieler Wissenschaftler und gewichtiger Beiträge, viel aufgearbeitet, von der noch kaum bekannten internationalen Wirkung Hellers über das bisher wohl vernachlässigte Verhältnis zu Radbruch bis zur in Konturen erkennbaren neuen Sicht des Verhältnisses zu Kelsen. In weiteren Zentralfragen wie der des Verhältnisses zum Dezisionismus und zu Carl Schmitt, der Rolle der Rechtsgrundsätze und der Tragfähigkeit des Prinzips des sozialen Rechtsstaats konnte natürlich kein Konsens, aber doch eine Gegenüberstellung von Meinungen erreicht werden. Sie war fruchtbar und führte manchmal zur Annäherung, mindestens aber zur Verdeutlichung der Standpunkte. Wissenschaftsgeschichtlich wichtig dürfte insofern besonders die Präzisierung von *Abendroths* Aussagen sein.<sup>4</sup> Daß die Fragen der Kulturstaatlichkeit und Arbeiterbildung, zu denen Beiträge von *Borinski* (Baden-Baden), *Richter*, *Robbers* vorlagen, kaum besprochen wurden, ist zwar bedauerlich, aber eine vertretbare Gewichtung.

Auffallender waren andere Lücken. Die Veranstalter haben zwar ausländische Gäste über die Grenzen der Kontinente hinweg, Fachwissenschaftler über den Bereich der Rechtswissenschaft hinaus versammelt und so in eindrucklicher Weise die internationale und interdisziplinäre, besonders auch politikwissenschaftliche Bedeutung Hellers herausgearbeitet. Die deutsche Staatsrechtslehre dagegen war in Grenzen vertreten: abgesehen von ihrem Linksaußen und der einzigen Frau gerade noch durch ein deutsches Mitglied der Staatsrechtslehrer-Vereinigung, sonst durchgängig durch ihr nicht oder noch nicht angehörige Wissenschaftler. Das hat nicht an der Einladungspolitik gelegen. Um so signifikanter ist es für die Fortdauer der Isolierung von Hellers Werk, so sehr es in den Zusammenhang der Entwicklung der deutschen Staatsrechtslehre gehört. Es bleibt zu hoffen, daß auch dieser Widerspruch fruchtbar wird.

*Dian Schefold*

<sup>4</sup> Vgl. *Wolfgang Abendroth*, Ein Leben in der Arbeiterbewegung, Frankfurt 1976, S. 145 f., 213 f.



Hermann-Heller-Symposion

4.-6. November 1983 an der Freien Universität Berlin

5

Diese Fassung des Beitrags  
ist noch nicht abschließend genehmigt

Antonio López-Pina

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Wiederbegegnung mit Hermann Heller. Ideologische Basis und materiell-  
ökonomische Bedingungen der Rezeption in Spanien und Lateinamerika<sup>1</sup>

15 Der Gedenktag Hellers könnte uns im Rahmen der alten akademischen Tradition  
dazu anregen, alle verfügbaren - mündlichen oder schriftlichen - Zeugnisse und  
Dokumente zur Rezeption zu sammeln und darzustellen. Weniger konventionell und  
wahrscheinlich dem eigenen Berufsverständnis Hellers angemessener scheint mir  
ein anderes Verfahren: Die Reflexion über seine Wirkung zum Anlaß zu nehmen,  
20 über das spanische politische Denken der letzten Jahrzehnte nachzudenken, und  
zwar konkret über die ideologische Basis und die materiell-ökonomischen Be-  
dingungen der Auseinandersetzung, die im Laufe eines halben Jahrhunderts unter  
uns stattgefunden hat. Der besondere Charakter der Heller-Rezeption und die  
außergewöhnliche Wirkungskraft der Hellerschen 'Botschaft' in Spanien ver-  
25 schaffen uns eine mehr als einladende, einzigartige Gelegenheit dazu, die wir  
nicht ungenützt vorübergehen lassen sollten.

In dieser Absicht werden wir zunächst in kurzen Zügen die markantesten Statio-  
nen der Heller-Rezeption aufzeigen, um dann zur Behandlung der Frage überzuge-  
30 hen, welchen Platz Heller in unserer ideologischen Auseinandersetzung ein-  
nimmt.

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<sup>1</sup>Dieser Aufsatz schließt die Heller-Rezeption in Lateinamerika nur insoweit  
ein, als die spanischen Wissenschaftler, die wir erwähnen, jenseits des At-  
lantik dessen Botschaft übermitteln. Gewiß ist ihre Wirkung von Buenos Aires,  
La Habana, Mexico oder Caracas aus nicht gering gewesen; aber es ist evident,  
daß sie nicht die ganze Rezeption ausmachen. Der von Madrid aus beschränkte  
Zugang zu Dokumenten oder persönlichem Zeugnis machen dem Autor eine Aufgabe  
unmöglich, die von den hispano-amerikanischen Universitäten aus unternommen  
werden müßte.

1. Die wesentlichen Züge der Heller-Rezeption

Auf beiden Fronten des Bürgerkriegs und auf beiden Seiten des Atlantiks herrschte Übereinstimmung in der Heller-Rezeption, insofern es sich um seine Rolle  
5 als Kritiker des juristischen Positivismus und Erneuerer der Reflexion über  
den Staat handelte - von Ayala zu Sánchez Agesta; von Recasens Siches, Pedro-  
so und Fernando de los Ríos, zu Conde, Gómez Arboleya, Fraga und Ollero<sup>2</sup> haben  
alle die Wichtigkeit seines methodologischen Beitrages hervorgehoben. Aber  
ausgehend von dieser allgemeinen Anerkennung verlief die Rezeption bei den  
10 einzelnen Wissenschaftlern in selektiver Weise, wobei man die verschiedenen  
Autoren in folgendes Spektrum einordnen kann: von der reinen Ablehnung - Con-  
de, Gómez Arboleya, Fraga, García Valdecasas, Corts Grau usw. - bis hin zu  
seiner neuerlichen Beanspruchung als Ideologe der 'politischen Reform' - Lucas  
Verdu, García Pelayo, Garrarena. Für die ablehnenden Positionen existieren  
15 allerdings sehr verschieden abgestufte Begründungen, die ihrerseits von den  
kritischen Positionen des Demo-Liberalismus bis zu extrem scholastisch-katho-  
lischen Haltungen reichen.

Zwischen diesen extremen Polen wird der Name Hellers von einer dritten Gruppe,  
20 den Vertretern eines 'Katheders-Liberalismus', mit der Naturrechtslehre (Galán)  
identifiziert; dient als ideologische Unterstützung für die Kritik am 'Dezi-  
sionismus' (Ollero) und am Nationalismus (Murillo); begleitet die ideologi-  
schen Schwankungen eines Pérez Serrano, und erhält schließlich - reduziert auf  
die Bedeutung einer historischen Randfigur - eine abschätzige Behandlung durch  
25 die Verwaltungsrechtler und Rechtsphilosophen (E. Díaz).

Die differenzierteste und kontinuierlichste Rezeption Hellers ist bei García  
Pelayo nachzuweisen, obgleich er Heller mit dem demo-liberalen Konstitutiona-  
lismus identifizierte und ihn für dessen Epigonen hielt, während sich dieser

<sup>2</sup>Für ihre Kooperation und dafür, daß sie ihr Wissen und persönliche Erfahrung zur Verfügung gestellt haben, möchte ich meinen Dank aussprechen: den Staatsrechtlern: Francisco Ayala; Luis Sánchez Agesta; Manuel Fraga Iribarne; Carlos Ollero; Francisco Murillo; Manuel García Pelayo; Raul Morodo; Pablo Lucas Verdu; den Zivilrechtlern: Alfonso García Valdecasas; Federico de Castro; dem Völkerrechtler: Mariano Aguilar Navarro; den Rechtsphilosophen: Eustaquio Galán; Antonio Truyol; Eliás Díaz; ferner: Luis Tobío, dem Diplomaten und Übersetzer der 'Staatslehre' Hellers; Mabel und Nicolás Pérez-Serrano Jáuregui; Manuel Victor de Luna; Pedro Gamero del Castillo, dem Gründer des 'Instituto de Estudios Políticos' (1939); ebenso danke ich Alfonso Ortí für seine kritischen Hinweise; Ignacio María de Lojendio, Rodrigo Fernández-Carvajal, Juan Linz, José María Hernández Rubio, Pedro de Vega, José Jiménez Blanco, Manuel Aragón und Carlos Alba für ihre wertvollen Anregungen; und dem Centro de Estudios Constitucionales, Francisco Bobillo sowie der Universidad Internacional Menéndez y Pelayo, Salvador Gómez de Arceche, Luis Villacorta, Enrique Moral und Guillermo Dionis für ihre Hilfe bei der Materialbeschaffung.



bereits in der Krise befand. Aber später betont er, daß der Ansatz Hellers noch heute Gültigkeit für die Erarbeitung einer neuen Staatslehre hat.<sup>3</sup>

Erst kürzlich (im Jahre 1980) hat Angel Garrorena in seiner Monographie über 5 die spanische Verfassung von 1978<sup>4</sup> den Leser daran erinnert,

"man dürfe nicht vergessen, daß der Begriff 'Sozialstaat' (genauer 'sozialer Rechtsstaat') 1929 von Heller, einem der berühmtesten Staatsrechtler dieses Jahrhunderts, Mitglied der SPD, in 'Rechtsstaat oder Diktatur?' geprägt worden 10 ist, und zwar mit der Absicht, die unumgängliche soziale Verpflichtung in unserer Zeit zu unterstreichen".

Zweiundfünfzig Jahre sind vergangen, seit Recasens Siches als erster den Hellerschen 'Anti-Formalismus' als wichtigen Zug herausstellte.<sup>5</sup>

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Durch sechs Jahrzehnte hindurch - von den zwanziger Jahren bis heute - ist Hellers Werk - unabhängig von den Sektoren des ideologischen Spektrums, dem sich der jeweilige Wissenschaftler zurechnete, - ein klassischer Referenzrahmen geblieben. Die erste Rezeption findet im letzten Drittel der zwanziger 20 Jahre durch Recasens und Pedroso statt. Beide vertieften ihre Kenntnisse in Deutschland - einer Tradition folgend, die durch die Institución Libre de Enseñanza und die Junta de Ampliación de Estudios<sup>6</sup> gefördert wurde - und erlangten im Jahre 1927 einen Lehrstuhl: Recasens Siches den für Rechtsphilosophie an der Universität Santiago de Compostela (Dezember 1927), Pedroso den 25 für Staatsrecht und Politik an der Universität Salamanca (Februar 1927).

1928 beginnt Recasens, sich in seinen Veröffentlichungen<sup>7</sup> und Vorträgen an der Universidad Internacional Santander<sup>8</sup> auf Heller zu beziehen. Pedroso zeichnet sich unter seinen Generationengenossen auf der einen Seite durch seine aner- 30 kannte Fähigkeit als Dozent aus, auf der anderen durch seine Weigerung, seine

<sup>3</sup>Vgl. García Pelago, Las transformaciones del Estado Contemporáneo (1977), 3. verbesserte und erweiterte Aufl., Madrid: Alianza Editorial 1982, S. 183.,

<sup>4</sup>Vgl. Angel Garrorena, El Estado español como Estado social y democrático de Derecho, Murcia 1980 (Universidad de Murcia, Publicaciones).

<sup>5</sup>Vgl. Recasens Siches, Direcciones contemporáneas del Pensamiento jurídico (La Filosofía del Derecho del Siglo XX) (Vorwort 1928, Santiago de Compostela, datiert), Barcelona-Buenos Aires: Ed. Labor, 1929.

<sup>6</sup>Institutionen gegründet im Geist des 'Krausismus' und zum Dienste der 'Europäisierung von Spanien'.

<sup>7</sup>Vgl. Benito Madariaga/Cecilia Valbuena, La Universidad de Verano en Santander (1933-1936), Madrid: Universidad Internacional Menéndez Pelayo, 1981; Ministerio de Universidades e Investigación. Seminare über 'Crisis de método y objeto en la Ciencia del Derecho'; 'Crisis de método y objeto en la Sociología'; Information von Raul Morodo und Francisco Bobillo vermittelt.

<sup>8</sup>Vgl. Recasens Siches, Vida humana, Sociedad y Derecho, Aufl. 1940, 1945, 1953; Englisch 1948; ders., Lecciones de Sociología, 1948; ders., Panorama del Pensamiento Jurídico en el Siglo XX, México: Editorial Porrúa, 1963.



Gedanken schriftlich zu formulieren, aus. Aber seine Studenten von den Semestern 1929-30 in Sevilla<sup>9</sup> bezeugen, daß er sich in seinen Vorlesungen über den Staat auf die Schriften von Heller stützte.

5 Wie wir später noch sehen werden, spielte Fernando de los Ríos y Urruti - zuerst Professor für Staatsrecht und Politik in Granada (1911) und dann (seit 1930) in Madrid - eine wichtige Rolle bei der Einladung Hellers nach Spanien. Aber aus seinen Schriften<sup>10</sup> läßt sich nicht ersehen, daß er in den zwanziger Jahren sehr aufmerksam der Entwicklung des Hellerschen Denkens gefolgt wäre  
10 oder von den großen Auseinandersetzungen in der Vereinigung der deutschen Staatsrechtslehrer Kenntnis genommen hätte. Sein beträchtliches politisches Engagement für den PSOE (Spanische Sozialistische Arbeiterpartei) und seine Beteiligung an der Bewegung, die den Sturz der Monarchie herbeiführte, lenkten wahrscheinlich seine Aufmerksamkeit von der wissenschaftlichen Auseinanderset-  
15 zung ab, die aus der Sicht Spaniens als lediglich akademisch relevant beurteilt werden konnte.

Zwei spanische Wissenschaftler, die für die Heller-Rezeption zunächst in Spanien und später in Lateinamerika ausschlaggebend wurden, trafen im Jahre  
20 1929-30 zufällig an der Humboldt-Universität zusammen: Francisco Ayala und Luis Tobío. Ersterer war als Stipendiat der Universität Santiago de Compostela von Nicolás Pérez Serrano<sup>11</sup> angeregt worden, nach Berlin zu gehen, um bei Triepel Jura zu studieren. Aber nach seiner Ankunft dort - so erzählt er selbst - faszinierten ihn die Vorlesungen von Hermann Heller, und er und Luis  
25 Tobío stellten bei der Lektüre von 'Die Souveränität' ihre neuerworbenen deutschen Sprachkenntnisse auf die Probe.

1930 übersetzt Pedroso 'Die politischen Ideenkreise der Gegenwart' für den Verlag Editorial Labor - denselben, in dem Recasens zwei Jahre zuvor auf die  
30 Bedeutung von Heller<sup>12</sup> hingewiesen hatte. Und 1931 übersetzt Conde - eine andere Persönlichkeit, deren Werk wir noch erwähnen müssen - für den Verlag Espan\_a das Buch 'Europa und der Fascismus'.<sup>13</sup>

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<sup>9</sup>Mündliches Zeugnis von Carlos Ollero.

<sup>10</sup>Vgl. Fernando de los Ríos y Urruti, Adónde va el Estado? Estudios filosófico-políticos (Prefacio von Luis Jiménez de Assua), Buenos Aires: Editorial Sudamericana, 1951.

<sup>11</sup>Vgl. Francisco Ayala, Recuerdos y Olvidos, Madrid: Alianza Editorial, 1982.

<sup>12</sup>Vgl. Hermann Heller, Las Ideas políticas contemporáneas, übersetzt von Manuel Pedroso, Barcelona-Buenos Aires: Editorial Labor, 1930.

<sup>13</sup>Hermann Heller, Europa y el Fascismo, übersetzt von Francisco Javier Conde, Madrid: Editorial Espan\_a, 1931, Sucesores de Rivadeneyra.



Aufgrund der Machtergreifung Hitlers entstand 1933 eine internationale Bewegung zur Unterstützung der durch den Faschismus verfolgten Intellektuellen. Die spanische Republik schloß sich dieser Bewegung an, wodurch der Aufenthalt Hellers in Madrid ermöglicht wurde. Auf die Initiative von Antonio de Luna -  
 5 Professor für Völkerrecht an der Universität Madrid - hin, sandte Fernando de los Ríos in seiner Eigenschaft als Kultus-Minister in der Azana Regierung eine Einladung an Heller, als Lehrbeauftragter am Instituto de Estudios Internacionales y Económicos zu lehren.<sup>14</sup> Bei dieser Operation dürfte Salvador de Madariaga - damals spanischer Botschafter im Völkerbund - eine wichtige Rolle ge-  
 10 spielt haben.<sup>15</sup>

Heller muß im Frühjahr 1933 in Madrid angekommen sein - ein Brief von ihm an seine Frau vom 1. März 1933 stammt noch aus Oxford, Balliol College. Ein Foto von Heller mit Antonio de Luna in der Madrider Straße Carrera de San Jerónimo,  
 15 das zu jener Zeit von Carlos Ollero aufgenommen wurde, hängt noch heute in dessen Arbeitszimmer. Luis Tobío<sup>16</sup> spricht davon, daß Heller in dem Colegio Mayor Del Amo an der Universitätsstadt gewohnt habe. Die Version, die Niemeyer und Manfred Friedrich<sup>17</sup> von der Zerstörung der Villa Hellers im Bürgerkrieg geben, scheint Tobíos Angabe zu unterstützen. Allerdings behauptet Eustaquio  
 20 Galán<sup>18</sup>, daß Heller zu Fuß von seiner Wohnung in Claudio Coello zu seinen Vorlesungen im 'Pabellón Valdecillas' an der Straße San Bernardo gegangen sei und daß von dort auch der Begräbniszug zum städtischen Friedhof seinen Ausgang genommen habe.

25 Im Sommer 1933 hielt Heller an der Universidad Internacional von Santander einige Vorträge über 'Formalismo y Post-formalismo an la Teoría del Estado' - im Rahmen eines Kurses über den modernen Staat. Mit ihm zusammen nahmen auch Harold Laski und Luis Recasens Siches an diesem Kurs teil.<sup>19</sup>

30 Im Herbst 1933 begann Heller ein Seminar über Politische Wissenschaft an der Universität Madrid, an dem als Studenten Eustaquio Galán, Manuel García Pelayo, Manuel Tunón de Lara, Antonio Truyol, Maravall, Salvador de Lissarrague und Mariano Aguilar Navarro teilnahmen. Sie alle wurden Zeugen des Herzan-

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<sup>14</sup>Vgl. Klaus Meyer, Hermann Heller. Eine biographische Skizze (1967), oben S. xxx ff.

<sup>15</sup>Diese Annahme kann ich allerdings nicht belegen.

<sup>16</sup>Persönliche Mitteilung.

<sup>17</sup>Vgl. Meyer, Klaus, aaO.

<sup>18</sup>Persönliche Mitteilung.

<sup>19</sup>Madariaga/Valbuena, La Universidad de Verano, aaO. (Anm. 7).



falls, den er während einer Vorlesung erlitt und an dessen Folgen er am 5. November starb.<sup>20</sup>

Francisco Ayala kann sich nicht mehr genau daran erinnern, ob er selbst es war, der Heller Zugang zur Jura-Fakultät der Universität Madrid verschafft hat. Möglich ist es, wenn man neben den persönlichen Beziehungen seit seiner Berliner Zeit die Tatsache berücksichtigt, daß er damals Fakultätssekretär und Assistent am Lehrstuhl für Staatsrecht und Politik von Adolfo Posada, den seit 1932 Pérez Serrano innehatte, war. Jedenfalls erhielt Heller einen Lehrauftrag.<sup>21</sup>

Pérez Serrano und Antonio de Luna sorgten auch für die Präsenz Hellers in wissenschaftlichen Zeitschriften, indem sie Arbeiten von ihm - den Artikel 'Political Science',<sup>22</sup> 'La justificación del Estado'<sup>23</sup> - in die Revistas für Privat-Recht und Cruz y Raya übernahmen. Die Trauerrede auf dem städtischen Friedhof hielt Pérez Serrano;<sup>24</sup> auch der Nachruf, der in der Revista de Derecho Publico erschien,<sup>25</sup> stammt von ihm.

Nach seinem Tod zog sich Gerhart Niemeyer, der Heller ins Exil begleitet hatte, nach Tossa de Mar - einem Fischerdorf an der Costa Brava - mit der Absicht

<sup>20</sup>Vgl. Eustaquio Galán, La concepción estatal de Heller en referencia a la filosofía política de su época, in Revista General de Legislación y Jurisprudencia, 1945 (Sept.-Dic.).

<sup>21</sup>Ernennung als 'Profesor Encargado de Curso' in der Facultad de Derecho, 16. Mai 1933, Boletín Oficial del Ministerio de Instrucción Pública y Bellas Artes, 3. Juni 1933.

<sup>22</sup>Hermann Heller, Concepto, desarrollo y función de la Ciencia Política, übersetzt von Nicolás Pérez Serrano, Madrid 1933, Ed. Revista de Derecho Privado; englische Fassung in Encyclopaedia of the Social Sciences, 12 (1934), S. 207-224, jetzt in Heller, Gesammelte Schriften, Leiden/Tübingen 1971, Bd. 3, S. 45-75.

<sup>23</sup>Heller, Hermann, La Justificación del Estado, in: Revista Cruz y Raya, Madrid 1933 (Dez.). - Die ideologische Heterogenität der Heller-Vermittler wird nicht erst beim Ausbruch des Bürgerkrieges deutlich. Die Zeitschrift Cruz y Raya - eine katholische Avantgarde-Zeitschrift -, in deren Gründungs-Mannschaft sehr unterschiedliche Persönlichkeiten zusammentrafen - von dem katholischen Republikaner José Bergamín bis zu den Franquisten Alfonso García Valdecasas, Antonio Garrigues, Antonio de Luna und Juan Lladó - hat eine wichtige Rolle bei der Verbreitung der Hellerschen Gedanken gespielt. Derselbe García Valdecasas, der im Monat Oktober 1933 die Falange gründet, nimmt zwei Monate später einen Artikel von dem demo-liberalen Heller in Cruz y Raya auf. Gleichzeitig veröffentlicht er die Beurteilung von Carl Schmitt über Donoso Cortés in der rechts-extremistischen Zeitschrift 'Acción Española' - die Cruz y Raya im katholischen Ideenkreis entgegengesetzt ist -.

<sup>24</sup>Vgl. Galán, La concepción estatal de Heller, aaO. (Anm. 20).

<sup>25</sup>Pérez Serrano, Hermann Heller (Necrología), in: Revista de Derecho Publico, Año II, no. 23, 15. November 1933, S. 321.



zurück, die Notizen Hellers zu ordnen und in Form der Staatslehre herauszugeben.<sup>26</sup>

In den Jahren 1933-34, resp. 1934-35 arbeiten Francisco Javier Conde und Enrique Gómez Arboleya in Berlin an ihrer Doktorarbeit. Bei Conde's Arbeit - 'El Pensamiento político de Bodino' - stellt Heller einen wichtigen bibliographischen Bezugspunkt dar, während Gómez Arboleya über das Thema 'Rasgos fundamentales del Pensamiento de Hermann Heller' schreibt. Beide sollten später zu den wichtigsten Vermittlern der Gedanken Hellers innerhalb der intellektuellen francoistischen Gemeinschaft werden.

Die Heller-Rezeption teilt das tragische Schicksal der spanischen Gesellschaft, die durch den Bürgerkrieg auseinander gerissen wurde: Ein Teil der intellektuellen Vermittler gehört zu den Schlüsselfiguren bei der Verteidigung der Republik, der andere unterstützt den Militärputsch, dessen Sieg zur Diktatur führte. Recasens Siches, der zunächst Ministerialrat für Lokalverwaltung und später Staatssekretär im Industrieministerium war, verließ Spanien mit dem Ziel Südamerika zwischen Juli und November 1936. Fernando de los Ríos wechselte in kurzer Zeit die Rolle eines Unterhändlers bei wichtigen Verhandlungen mit der französischen Regierung mit der des Rektors der Universität Madrid, um kurz darauf - am 20. September 1936 - zum Botschafter in Washington ernannt zu werden.<sup>27</sup>

Manuel M. Pedroso gehörte zu den Auserwählten der spanischen Intelligentsia, die als Mitglieder einer Staatsdelegation in Mexico an der 'Casa de España'<sup>28</sup> in Sicherheit gebracht wurden. Francisco Ayala blieb bis zum Ende des Bürgerkriegs in Spanien und ging dann an die Universität Buenos Aires<sup>29</sup>. Nur Recasens und Ayala gelang es, später nach Spanien zurückzukehren; in den anderen Fällen mußte die geistige und persönliche Erinnerung an Heller notwendigerweise jenseits des Atlantiks gepflegt werden.

Von den Persönlichkeiten, die ein engeres Verhältnis zu Heller hatten, blieben Antonio de Luna, Pérez Serrano und García Pelayo - letzterer bis 1950 - in Spanien. Ich habe bei Luna in schriftlicher Form keinen Nachweis für eine spätere intellektuelle Anerkennung Hellers finden können; trotzdem ist aber sein

<sup>26</sup> Persönliche Mitteilung von Luis Tobío und Francisco Ayala.

<sup>27</sup> Vgl. Libro de la Primera Reunión de Profesores Universitarios Españoles Emigrados, La Habana: Talleres Tipográficos 'La Mercantil', 1944.

<sup>28</sup> Vgl. Libro Conmemorativo del 45 Aniversario, Fondo de Cultura Económica, México: Fondo de Cultura Económica, 1980 ; bestätigende persönliche Mitteilung von Amaro del Rosal.

<sup>29</sup> Vgl. Ayala, Recuerdos, aaO. (Anm. 11).



Gewicht in der Rezeption nicht allein auf seine Initiative zur Einladung Hellers nach Spanien zurückzuführen. Gómez Arboleya - in dessen Monographie notwendigerweise die ganze spätere Rezeption aufgenommen wurde - war Schüler und persönlicher Freund von Luna, so daß nicht auszuschließen ist, daß die Anregung zu der Doktorarbeit über Heller von diesem kam.<sup>30</sup>

Pérez Serrano verfaßte die Überlegungen, die im 'Tratado de Derecho Político'<sup>31</sup> zusammengefaßt sind (zwischen 1935 und 1937 nach der Erinnerung seiner Tochter Mabel, zwischen 1936 und 1939 in der Version seines Sohnes), wobei er die gesamten Veröffentlichungen Hellers zitiert. Die Heller-Rezeption bei Pérez Serrano scheint durch ihre persönliche Bekanntschaft in Madrid angeregt worden zu sein, denn noch die Arbeit über Begriff, Methode, Quellen und Programm des spanischen Staatsrechts im Vergleich mit dem des Auslands,<sup>32</sup> die Pérez Serrano 1932 schrieb, belegt zwar die für ihn typische außerordentliche Belesenheit, läßt aber jeglichen Bezug auf Heller vermissen. Auch am 2. Februar 1933 findet Heller in dem Vortrag über 'Die Funktion des Präsidenten und moderierende Gewalt'<sup>33</sup> noch kein Echo. Allerdings wird im gleichen Jahr Hellers Monographie 'Die Souveränität' in Pérez Serranos Arbeit 'El Concepto clásico de Soberanía y su Revisión Actual'<sup>34</sup> zitiert, und von hier geht die volle Rezeption aus, die im 'Tratado de Derecho Político' zutage tritt.

Die Doktorarbeit über Heller, die Gómez Arboleya in Berlin 1934-35 geschrieben und - ohne Datumsangabe - in der Universität Madrid vorgelegt hat, wurde erst zwischen April und Juni 1940 gedruckt.<sup>35</sup> Im Jahre 1949<sup>36</sup> kam Gómez Arboleya in

<sup>30</sup> Nach einer persönlichen Mitteilung von Federico de Castro arbeitete Enrique Gómez Arboleya zunächst an einer Doktorarbeit in Privatrecht. Erst nach der Aufgabe dieses Planes entschloß er sich, sich mit dem Werke Hellers zu beschäftigen. Alle mündlichen Zeugnisse betonen die intellektuelle und korporative Führung, die Antonio de Luna unter den Wissenschaftlern aus Granada ausübte, sowie die enge freundschaftliche Beziehung zwischen Gómez Arboleya und ihm. In diesem Sinne genießt die Vermutung, daß die Themenwahl von Gómez Arboleya auf die Inspiration von Antonio de Luna zurückzuführen ist, eine ziemliche Glaubwürdigkeit in der akademischen Gemeinschaft.

<sup>31</sup> Vgl. Pérez Serrano, Tratado de Derecho Político, Madrid: Editorial Civitas, 1976.

<sup>32</sup> Vgl. Estudio acerca del Concepto, Método, Fuentes y Programa del Derecho Político Español comparado con el Extranjero, que para las Oposiciones a dicha Cátedra, vacante en la Universidad de Madrid, presenta Nicolás Pérez Serrano, Agosto 1932 (das Pérez Serrano aus Anlaß der Lehrstuhlprüfungen für den Madrider Lehrstuhl präsentierte).

<sup>33</sup> Vortrag, gehalten am 2.2.1933 im Centro de Intercambio Intelectual Germano-Español.

<sup>34</sup> Nicolás Pérez Serrano, El concepto clásico de soberanía y su revisión actual, Madrid: Tipografía de Archivos, 1933.

<sup>35</sup> Vgl. Gómez Arboleya, Hermann Heller, Boletín de la Universidad de Granada, nos. 58 (Abril 1940), S. 141-182; und no. 59 (Juni 1940), S. 305-343.

<sup>36</sup> Enrique Gómez Arboleya, La Teoría del Derecho Internacional en el Pensamiento (Fortsetzung Fußnote)



seiner Arbeit 'La Teoría del Derecho Internacional en el Pensamiento de Hermann Heller' auf das Thema zurück.

Ein anderer spanischer Gelehrter, der Heller kontinuierlich zitiert, ist Francisco Javier Conde, der sich - mit dem Werk Hellers seit seiner Übersetzung von 'Europa und der Fascismus'<sup>37</sup> und seiner eigenen Doktorarbeit<sup>38</sup> bekannt - auf der einen Seite rühmt, persönliche Beziehungen zu Heller gehabt zu haben, und auf der anderen Seite den Anspruch erhebt, der Hauptideologe des Franquismus zu sein.<sup>39/40</sup>

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Inzwischen bereitete Luis Tobío auf der anderen Seite des Atlantiks - im Exil in La Habana - seit 1939 die spanische Fassung der Staatslehre vor, die 1942 in der Reihe 'Política y Derecho' - herausgegeben von Pedroso - im Fondo de Cultura Económica erschien.<sup>41</sup>

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Von Buenos Aires aus reagierte Ayala 1943 auf die spanische Ausgabe der Staatslehre.<sup>42</sup> 1951 wurden dort zwei Bücher herausgegeben, die bedeutsame Beziehungen zum Denken Hellers aufweisen: 'Adonde va el Estado?'<sup>43</sup>, eine postume Sammlung der philosophisch-politischen Aufsätze von Fernando de los Ríos, und  
20 eine 'Introducción a la Teoría del Estado'<sup>44</sup> de Arturo Enrique Sampay.

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to de Hermann Heller, in: Revista de Derecho Internacional, vol. II, no. 3, 1949, S. 841-892.

<sup>37</sup>Heller, Europa y el Fascismo, aaO. (Anm. 13).

<sup>38</sup>Vgl. Francisco J. Conde, El pensamiento político de Bodino (1935), in Escritos y Fragmentos Políticos, Madrid: Instituto de Estudios Políticos, 1974.

<sup>39</sup>Francisco J. Conde, La idea actual española de nación (1939); aaO., Espejo del Caudillaje (1941); aaO., Representación política (1945).

<sup>40</sup>Vgl. Francisco J. Conde, Introducción al Derecho Político actual, Madrid: Ed. Escorial 1942; ders., Teoría y sistema de las Formas políticas (1944).

<sup>41</sup>Luis Tobío kam 1939 als Flüchtling nach Kuba. Vielleicht befand sich das erste Exemplar der 'Staatslehre', das nach Latein-Amerika gelangte, in Händen von Professor Dr. Bustamante, Inhaber des Lehrstuhls für Rechtsphilosophie der Universität La Habana. Bustamante bat Tobío um die Übersetzung eines der Kapitel der 'Staatslehre' für die juristische Zeitschrift der Universität. Tobío übersetzte dann aus eigener Initiative die ganze 'Staatslehre'; das Manuskript samt Gepäck begleiteten ihn auf seinen Reisen zwischen La Habana, México und Montevideo. Im Sommer 1940 bekam er die Möglichkeit, die Übersetzung dem Fondo de Cultura Económica anzubieten, der nach dem positiven Urteil des Lektors, Herrn Larrea - einem alten Mitglied der Zeitschrift Cruz y Raya - ihre Veröffentlichung in der Reihe von 'Política y Derecho', geleitet von Manuel Pedroso, beschloß. Persönliche Mitteilung.

<sup>42</sup>Ayala, Los Políticos, Buenos Aires: Editorial Depalma, 1944.

<sup>43</sup>Ayala, Adónde va el Estado, aao. (Anm. 10).

<sup>44</sup>Arturo Enrique Sampay, Introducción a la teoría del Estado, Buenos Aires 1951.



Was Spanien anbelangt, so bezieht sich Luis Sánchez Agesta seit 1942 auf das Werk Hellers.<sup>45</sup> Eustaquio Galán, der sich voll mit Hellers Gedanken identifiziert, widmete ihm zwei Monographien.<sup>46</sup>

5 Manuel García Pelayo, einer der Schüler von Heller in dessen Madrider Seminar 1933, der zunächst in Spanien blieb, hat dessen Gedankengut seit 1948, dem Erscheinungsdatum von 'Constitución y derecho constitucional: Evolución y crisis de ambos conceptos',<sup>47</sup> kontinuierlich weitergegeben: 1950 gab die Editorial Revista de Occidente sein 'Derecho constitucional comparado'<sup>48</sup> heraus, und 1982  
10 brachte Alianza Editorial die dritte Auflage seines Buches 'Las Transformaciones del Estado Contemporáneo';<sup>49</sup> beide Bücher verweisen auf Probleme, die Heller aufgeworfen hat. García Pelayo, der heute Präsident des Verfassungsgerichts ist, hat erst vor einigen Jahren seine lange Wirkungszeit als Professor in Venezuela beendet, wodurch er in seiner Rolle als Vermittler des Heller-  
15 schen Vermächtnisses auf beiden Seiten des Atlantiks einzigartig dasteht.

Im Jahr 1955 kreuzen sich die gegensätzlichen ideologischen Rezeptionslinien: In zeitlich sehr nahe aufeinanderfolgenden Publikationen wird Heller von den Vertretern konterrevolutionärer Positionen - in 'La Crisis del Estado', von  
20 Fraga Iribarne<sup>50</sup> - verworfen, wird ihm von liberaler Seite - 'Estudios de Ciencia Política', von Carlos Ollero<sup>51</sup> - akademische Anerkennung gezollt, und wird er schließlich von seiten derer, die für Spanien einen Rechtsstaat fordern - 'Estado liberal de derecho y Estado social de derecho', von Lucas Verdu,<sup>52</sup> - ignoriert.

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<sup>45</sup> Luis Sánchez Agesta, Teoría y Realidad en el Conocimiento político, Granada: Anejos del Boletín de la Universidad de Granada, 1944.

<sup>46</sup> Eustaquio Galán, La concepción estatal de Heller en referencia a la filosofía política de su época, in Revista General de Legislación y Jurisprudencia, 1945 (Sept.-Dic), und ders., Estado, naturaleza y cultura (El Estado como un trozo vivo de la realidad social y sus factores condicionantes naturales y culturales según Heller), in Revista General de Legislación y Jurisprudencia, Madrid, 1946 (Abril-Mayo-Junio), Instituto Editorial Reus.

<sup>47</sup> Manuel García Pelayo, Constitución y derecho constitucional: Evolución y crisis de ambos conceptos, in Revista des Estudios Políticos, 1948, nos. 37 y  
<sup>38</sup>

<sup>48</sup> Manuel García Pelayo, Derecho constitucional comparado, Madrid 1950.

<sup>49</sup> Pelayo, Las transformaciones, aaO. (Anm. 3).

<sup>50</sup> Fraga Iribarne, La Crisis del Estado (Estudios de Teoría del Estado Contemporáneo), 1. Auflage, Madrid 1955, Editorial Aguilar; 2. verbesserte Auflage, Madrid 1958, Editorial Aguilar, - als Prolog zwischen 1931 und 1933 verfaßt. Nach der Mitteilung des Autors schrieb er die Studien zwischen seinem 23. und  
<sup>27</sup> Lebensjahr, d.h. zwischen 1945 und 1949.

<sup>51</sup> Carlos Ollero, Estudios de Ciencia Política, Madrid: Editora Nacional, 1955.

<sup>52</sup> Vgl. Lucas Verdu, Estado liberal de derecho y Estado social de derecho, in: Universidad de Salamanca 1955, Acta Salmanticensia, Derecho, Tomo II, no. 3.



In der Linie der Problemstellung von Lucas hat sich sein Schüler Eliás Díaz seit 1963 als einer der Protagonisten im Kampf um die Umgestaltung unseres öffentlichen Lebens als Rechtsstaat einen Namen gemacht.<sup>53</sup> Aber bei diesem Autor ist der Bezug auf Heller nur eine Randerscheinung, während der Einfluß von Forsthoff, der katholischen Enzykliken von Johannes XXIII und italienischen Denkern - Bobbio usw. - im Vordergrund steht.

Die geistige Vermittlung des Werkes von Heller hat sich aber auch später nicht auf das gedruckte Wort beschränkt. Zwischen 1954 und 1960 wiesen die liberaleren 'Meister' der neuen Studenten-Generation ihre Schüler - unter ihnen Raul Morodo, José Jiménez Blanco und ich selbst<sup>54</sup> - auf den Vorrang der Lektüre der Staatslehre Hellers vor anderen Werken hin.

So konnte es möglich werden, daß im Jahre 1980 zwei Wissenschaftler der jüngsten Professoren-Generation, Carlos de Cabo und Angel Garrorena, ihren Reflexionen über die Souveränität<sup>55</sup> und den Rechtsstaat<sup>56</sup> den fruchtbaren Ansatz Hellers zugrunde legten. Auch wurde bei den letzten Habilitationsprüfungen in Staatsrecht und Politik - von Mai bis Oktober 1982 - seitens der achtundzwanzig Kandidaten ständig auf Heller Bezug genommen.

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## 2. Ideologische Grundlagen und materiell-ökonomische Bedingungen: Ortsbestimmung Hellers in der ideologischen Auseinandersetzung

Die bloße chronologische Aufzählung einer so zahlreichen und qualifizierten Rezeption würde bereits ein ausreichendes Bild vom Einfluß Hellers in Spanien entstehen lassen. Wenn wir uns im weiteren bei der Behandlung der Frage nach Hellers Wirkung auf eine dem konventionellen akademischen Kanon verpflichtete Exegese beschränkten, würden wir seiner Wirkungskraft nicht nur nicht gerecht

<sup>53</sup>Vgl. Eliás Díaz, Teoría general del Estado de derecho, in Revista de Estudios Políticos, 1963; ders., Estado de derecho y sociedad democrática, 1966, Ed. Cuadernos para el Diálogo. - Die Arbeiten von Eliás Díaz stellen eine Dokumentation der Auseinandersetzung zur Zeit um den 'Rechtsstaat' dar. Er versteht seine Aufgabe mehr als Chronist als als Analytiker der Debatte. Daher muß die relative Abwesenheit von Heller in seinem Werk nicht so sehr als von seiner persönlichen Entscheidung abhängige Interpretation verstanden werden, als als Registrierung der Eklipse von Hellers Denken bei den damaligen Auseinandersetzungen.

<sup>54</sup>Meine erste Heller-Lektüre fand 1960 auf Anregung von Carlos Ollero hin, im Colegio Mayor César Carlos, statt, und zwar mit einem Exemplar von Raul Morodo, das dieser mir freundlicherweise zur Verfügung stellte.

<sup>55</sup>Vgl. Carlos de Cabo, Revisión histórico-política de la doctrina de la soberanía, Universidad de Salamanca 1980, Publicaciones del Departamento de Derecho Político.

<sup>56</sup>Angel Garrorena, El Estado español, aaO. (Anm. 4).



werden, sondern eine adäquate Analyse von Hellers Beziehung zu Spanien gerade-  
zu blockieren. Die Heller-Rezeption ist im wesentlichen ein ideologisches Phä-  
nomen gewesen. Und deshalb sollte das bisher Ausgeführte meiner Meinung nach  
weniger durch eine Chronik über die Entwicklung der Staatslehre in Spanien  
5 vertieft werden, als durch den Versuch, eine Antwort auf die Frage zu geben,  
welchen Platz Heller in der ideologischen Auseinandersetzung einnimmt, von der  
die spanische Kultur in den letzten fünfzig Jahren geprägt worden ist.

Die Tatsache, daß seine Rezeption so wenig lineal verlaufen ist, beweist, daß  
10 die Ortsbestimmung Hellers je nachdem wechselte, welchen Platz der jeweilige  
Rezipient in der ideologischen Auseinandersetzung einnahm, die Spanien während  
des Bürgerkriegs und in der Folgezeit gespalten hat. Anders ausgedrückt: Hel-  
lers Ortsbestimmung ist in Spanien immer eine Resultante gewesen! Als solche  
hat sie die fundamentalen Konflikte nur reflektieren können: erstens, den Kon-  
15 flikt der sich gegenseitig bekämpfenden Bourgeoisie; und zweitens, den Kon-  
flikt zwischen der Definition der Situation durch die führende Schicht und dem  
Emanzipationsstreben der Mittelschichten, der innerhalb des franquistischen  
Spaniens ausgetragen wurde.

20 Auf den ersten Blick scheinen sich die spanischen Wissenschaftler die methodo-  
logischen Innovationen Hellers anzueignen, - unabhängig von ihrer ideologi-  
schen Position: als Wichtigstes seine Kritik am juristischen Positivismus, die  
Wiedergewinnung von Wirklichkeit und Wandel in Recht und Politik für die  
Staatswissenschaften.

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Wenn man genauer nachliest, bemerkt man allerdings, daß es sich um eine sehr  
differenzierte methodologische Rezeption handelt, hinter der sich die ideolo-  
gischen Positionen, die der jeweilige weitere Diskurs zutage fördert, verber-  
gen. Und so ist die wirkliche Rezeption weniger durch den gemeinsamen Nenner  
30 allgemeiner Anerkennung als durch den Grad der Abweichung oder die Betonung  
verschiedener Elemente der Hellerschen Methodik gekennzeichnet. Die neuere  
spanische Ideengeschichte hatte - vom Krausismus und der Institución Libre de  
Ensenanza kommend - nun den Organizismus als soziale und politische Theorie  
assimiliert: In diesem Zusammenhang schien nichts logischer, als daß de los  
35 Ríos, Pedroso und García Pelayo unter den Republikanern, und Conde auf der  
Seite der franquistischen Intelligentsia, eine besondere Sensibilität für die  
Idee Hellers vom Staat als Organisation entwickelten.

Die Dezisionismus-Komponente in der Hellerschen Version fand besonderen Wider-  
40 hall bei den Franquisten Conde und Gómez Arboleya. Schließlich wurde Hellers



Glaube an das Naturrecht von Recasens Siches und Pedroso auf der einen und Sánchez Agesta und Gómez Arboleya auf der anderen Seite mit Freude begrüßt, um ihre jeweiligen Thesen in diesem Sinne zu unterstützen.

5 Man bedient sich also nur allzu gern der Gedanken Hellers, wo man sie als Bürgen im Dienste der Entfaltung des eigenen Diskurses gebrauchen kann; sobald sie aber in Konflikt mit den eigenen Positionen geraten, spart man nicht mit Verdächtigungen und klagt ihn der Deviation an. Dabei kann entweder der säkulare oder der religiöse Aspekt mehr betont werden. Conde<sup>57</sup> zum Beispiel betont  
10 den säkularen, wenn er schreibt:

"...wir sind Zeugen beim Zusammenbruch der vom nationalen Gesichtspunkt aus perfektesten politischen Form, die der Mensch geschaffen hat: dem modernen Staat. Keiner der großen Juristen dieser Epoche hat es unterlassen, seine eigene  
15 Diagnose zu stellen: auf der einen Seite stehen die, die glauben, daß die Krise eine Krise einer Weltsicht ist, ...unter ihnen Heller...  
...die ganze Literatur über die Krise kann nur als eine verunglückte Anstrengung und eine oberflächliche Diagnose betrachtet werden... es handelt sich nicht nur um eine Krise des liberalen juristisch-politischen Denkens...was im  
20 Moment zusammenbricht ist nichts weniger als der Staat (selbst)...beim Zusammenbruch des demoliberalen Staates ist das ihm eingepflanzte juristisch-politische Denken in einen Auflösungszustand geraten, es hat sich beinahe verflüchtigt...Gleichzeitig erlangen ungeheure Mengen klassischen Gedankengutes eine authentische Rechtsgültigkeit, fähig die politische Form der Zukunft üppig zu  
25 befruchten...dieses Denken ist Teil der vorletzten Phase des modernen Staates und mit seinem Schicksal: dem demoliberalen Staat verbunden...Einige Elemente können sich retten und dienen nun dazu, die Offensive zu verstärken, die sich heute siegreich auf dem Boden einer neuen politischen Konfiguration erhebt: der totalitäre Staat ... in dem Durcheinander der Gegenwart sind nur einige  
30 Elemente des juristisch-politischen Denkens auf neue Ziele ausgerichtet, auf eine neue politische Form, die sich vom modernen Staat unterscheidet und die sich vor unseren Augen kristallisiert".

Conde meint einen Widerspruch zwischen Hellers Unterordnung unter die sozialen  
35 Kräfte und seiner eigenen Version von der Macht als bloßer Instanz, die höchsten Normen in Recht umzusetzen, zu sehen. Später, als er die theoretische Kraft des Hellerschen Zentral-Begriffs der Organisation anerkennt, fühlt er sich gezwungen einzuwenden:

40 "...die Erklärung von unten, von dem organisierten Zusammenspiel der sozialen Kräfte aus, scheint den Staat seiner letzten Rechtfertigung zu berauben. Das Soziale zieht so alles nur mögliche Recht auf seine Ebene herab. Tatsächlich kann man mit dem Begriff der Organisation jegliche menschliche Aktivität fördern und alles erklären. Die Staatstheorie Hellers versucht im Moment, die gefährlichsten Klippen zu umschiffen. Der Liberalismus, den Heller atmet, ohne  
45 es zu merken, bringt ihn zum Ersticken. Heller versucht, sich davon zu befreien, indem er den Staat den höchsten Normen des Naturrechts unterwirft. Der Staat ist nur gerechtfertigt, wenn er dieses höchste Diktat erfüllt. Am schwerwiegendsten ist, daß dies das ganze System in Frage stellt. Ist es zu-

<sup>57</sup> Kondensierung des Diskurses von Conde nach den oben zitierten Werken.



lässig, vom Staat als einer bloßen Organisation der sozialen Kräfte seiner Basis zu sprechen, oder muß man das ganze in einem tieferen Zusammenhang sehen: in dem Zusammenhang der moralischen und seinsmäßigen Bestimmung des Menschen? Muß man nicht noch tiefer gehen und die Gesellschaft von der Metaphysik der Person her rechtfertigen - und von da aus den Staat? Dann würde alles eine andere Gestalt annehmen: und schon könnten wir diesen inneren Widerspruch bei Heller auflösen, der auf der einen Seite die sozialen Beziehungen als eine Tatsache, die keiner Rechtfertigung bedarf, annimmt, um darauf den Staat aufzubauen, und der später, nachdem er einen neutralen Begriff eingeführt hat, diesen in den Dienst eines ethischen Mandats stellen will".

Im logischen Verlauf einer solchen Argumentation ist nichts leichter, als Heller schließlich als Opfer seines Liberalismus hinzustellen:

"...es liegt an seiner liberalen Durchdringung, daß der Horizont Hellers nicht über den modernen Staat in seiner demokratischen Phase hinausreicht. Was die Grenze des demokratischen Massen-Staates überschreitet, paßt nicht mehr ins System Hellers, verwandelt sich in 'Diktatur'. ..Die Staatstheorie von Heller ist eine konkrete Theorie des modernen Staates. Darin liegt ihre Fruchtbarkeit und ihre Begrenzung in der gegenwärtigen Situation".

Die Kritik von Gómez Arboleya entspricht einer ähnlichen Absicht, allerdings zieht er in erster Linie religiöse Aspekte heran:<sup>58</sup>

"...Heller hat seinen Feind nicht besiegt, weil er zum Teil sein eigener Feind war. Die Notwendigkeit, sich von einem logischen Normativismus zu trennen, hat Heller dazu geführt, die Dezision als letzte Wurzel des politischen Kosmos zu betrachten...aber seine Option für den Begriff der Organisation bringt ihn in eine gefährliche Nähe zu einem gewissen sozialen Utilitarismus.."

In diesem Zusammenhang vermißt der spanische Rechtsphilosoph einen zureichenden Begriff von der menschlichen Person. Seiner Meinung nach

"...hat Heller mit Beharrlichkeit die Idee einer konkreten Positivität bezüglich des Rechts vertreten. Er hat versucht, den korrupten Rest des Naturrechts, das nur in sich noch Halt findet, zu überwinden, um es in einen Willen einzufügen; in einen Willen, der nicht willkürlich ist, sondern den Bedürfnissen der Organisation unterworfen".

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Aber vor den 'Bedürfnissen der Organisation' wachsen die Bedenken von Gómez Arboleya,

"...denn die modernen Gefahren kommen nicht von der Seite des Individualismus, sondern von der eines sozialen Pragmatismus. Heller stellt einige logische und einige moralische Grundsätze auf, von denen wir nicht wissen, wie sie im menschlichen Zusammenleben wirken...Aber solche vagen Begriffe von Gerech-

<sup>58</sup> Kondensierung des Denkens von Gómez Arboleya, gestützt auf die oben erwähnten Werke.



tigkeit sind nicht Recht, denn das Recht ist für Heller Norm und als solche Norm, Positivität durch einen Willen."\_

In diesem Sinne kritisiert er bei Heller,

5

"...daß die moralische Welt nicht als Natur-Ordnung dargestellt wird, sondern offen für unsere Entscheidung bleibt..."\_

Im Endeffekt sind es gerade das demokratische Verbindungsglied der Staatstheo-  
10 rie und die ideologische Distanz, die den scholastischen Katholizismus von der demokratischen Begründung des rationalen Naturrechts trennt, die die zunächst wohlwollende Haltung von Gómez Arboleya Heller gegenüber schließlich doch zu-  
nichte macht. Wie könnte Heller auch auf der Gültigkeit seiner Positionen be-  
harren? Vor den ewigen Wahrheiten, die das unanfechtbare Inquisitionsgericht  
15 regieren, muß Heller samt seiner Lehre - der Heterodoxie überführt - fallen -  
zu allem Luxus mit der Anerkennung seiner intellektuellen Fähigkeiten.

\_2.1 Das franquistische Spanien: die national-katholische faschistische  
20 Bourgeoisie\_

Wie hätte es auch anders sein können? Die Heller-Rezeption findet im franqui-  
stischen Spanien nicht im Schutze einer Akademie statt, einer Hüterin der  
Weisheit im Kleide der 'reinen Wissenschaft', sondern sie wird von dem fa-  
25 schistischen national-katholischen Diskurs - beherrscht vom Gefühl der Vor-  
macht und Unangreifbarkeit - eingerahmt. Die Ortsbestimmung Hellers in Spanien  
ist ohne die Berücksichtigung einer ideologischen Konstruktion wie der folgen-  
den von Conde nicht möglich:

30 "...die Gegenwart stellt sich als Totalisierung der verschiedenen Ereignisli-  
nien dar, die vom Jahre 1948 ausgehen; der Kampf Staat-Gesellschaft ist zur  
Aktualisierung seiner extremen Möglichkeiten gekommen...Der radikale Rationa-  
lisierungsprozeß hat nach und nach den Elementen, die früher eine feste Grund-  
lage der politischen Einheit bildeten, alle Kraft entrissen".\_

35

Oder lassen wir Fraga zu Worte kommen:

"Das revolutionäre Prinzip - von Frankreich eingeführt - fegte die letzten  
Reste des Legitimitätsprinzips hinweg - das monarchistische Prinzip und die  
40 Stände - ... Das ganze Gerüst des Sozialkörpers lag am Boden: das Eigentum  
wurde in seinem traditionellen Aspekt liquidiert, ebenso das Erbe, die Fami-  
lie...weder axiologische Instanzen, noch führende Minderheiten, noch Auswahl-  
kriterien (blieben bestehen) ... die führenden Minderheiten wurden abtrünnig,  
die europäische Intelligentsia verbastardisierte...Die Absurdität des rein



demokratischen Prinzips führte zur Herrschaft des Volkes, der Plebejer, der Masse".<sup>59</sup>

Dabei versuchte der Franquismus, sich hobbesianische Grundlagen zuzuschreiben, um in ihnen eine Legitimation zu finden: Fraga spricht von dem "Gefühl eines totalen Unterganges des Abendlandes", und Conde meint, "man müsse, ausgehend von der heillosen Unordnung, eine Ordnung um jeden Preis schaffen".

Bis hierher scheint sich der Diskurs auf einer relativ säkularen Ebene zu entwickeln. Aber es wäre ein Irrtum, diesen Eindruck mit der globalen Ideologie gleichzusetzen, wie aus folgendem Zitat-Zuschnitt von Corts Grau hervorgeht:<sup>60</sup>

"...Mit der Ablehnung des göttlichen Autoritätsprinzips geht auch der Begriff der menschlichen Autorität zugrunde. ...die Partizipation des Menschen am Ewigen Gesetz geriet ins Wanken, als die protestantische Spekulation mildere Saiten aufzog (und führte schließlich) bis hin zum Auseinanderbrechen des Positivismus in seinen vielfältigen Entartungen... Als der Mensch sich von der Wahrheit entfernte, entwurzelte ihn schließlich die liberale Utopie aus seinem Vaterland... die religiösen Bindungen waren zerrissen... Wenn die Wahrheit sich aufzulösen beginnt, beschleunigt sich der Prozeß des politischen Zerfalls... das Zerreißen der religiösen Bindung impliziert den Bruch jeglicher Norm".

Von hier aus erarbeitet das franquistische Denken die ideologischen Elemente für eine Antwort:

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<sup>59</sup>Zusammenfassung der Gedanken von Fraga Iribarne nach dem Buch 'La Crisis del Estado', aaO (Anm. 50). Das Denken, das Werk und das öffentliche Leben von Fraga sind nicht auf die Thesen, die das zitierte Werk darlegt, zu reduzieren. Er selbst hat sich von diesem Buch distanziert, indem er keine 3. Auflage autorisierte. Auf der anderen Seite sind Donoso Cortés und Carl Schmitt in später publizierten Arbeiten und öffentlichen Interventionen nicht mehr so wichtige ideologische Beziehungspunkte gewesen, wie sie damals darstellten. Es kommt dem Autor in diesem Aufsatz nicht zu, die Intentionen Fragas zu beurteilen und herauszuarbeiten, welche der verschiedenen biographischen Phasen den authentischen Fraga zeigt. Zweifellos setzte er zu der Zeit, als er 'La Crisis del Estado' schrieb, auf die Konterrevolution im Sinne von Donoso Cortés und Carl Schmitt. Inzwischen war er Minister und Botschafter von verschiedenen Regierungen der Diktatur. Aber er nahm im Jahr 1977 mit seiner Partei 'Alianza Popular' an den Wahlen zu den konstituierenden Cortes teil. Im Laufe der Legislaturperiode gehörte er mit zum Verfassungsausschuß; stimmte 1978 für die Verfassung und ist heute schließlich offizieller Oppositionsführer. Es ist klar, daß sich eine solche Persönlichkeit mit einem so reichen öffentlichen Leben nicht auf Thesen und Urteile, die in einer relativ frühen biographischen Etappe formuliert wurden, reduzieren läßt. Der Grund dafür, daß wir uns auf 'La Crisis del Estado' gestützt haben, liegt vielmehr darin, daß dieses Werk ein unersetzbares Stück innerhalb der Doktrin der Diktatur darstellt und in engem Zusammenhang - zeitlich und inhaltsmäßig - mit den Werken der beiden anderen Wissenschaftler steht.

<sup>60</sup>Vgl. Corts Grau, Motivos de la España Eterna, Madrid 1945, Instituto de Estudios Políticos.



"...wenn im 19. Jahrhundert die zwei großen neuen Elemente, die nationale Idee und das revolutionäre Prinzip, mit ihren jeweiligen Faktoren, Revolution und Konterrevolution als die sichtbarsten Faktoren, die die historische Bewegung zu bestimmen schienen, auftauchen, beginnt sich die nationale Idee in den 5 dreißiger Jahren von den politischen demokratischen Prinzipien, die sie hervorgebracht hatten, zu trennen... Die Nation als Legitimitäts-Prinzip der Herrschaft löst sich von der national-demokratischen Organisation...Gegenüber dem individualistischen Atomisierungsprozeß (erscheint) die Nation als hierarchisch strukturierte Gemeinschaft, die fähig ist, die Klassengegensätze in der 10 höheren nationalen Einheit zu beseitigen...die Nation als ständiger Prozeß, individuelle Schicksale in die universelle Aufgabe der Bestimmung eines Volkes einzugliedern...die Nation als Möglichkeit der Integration und Harmonie mit Perspektiven der restaurierenden Konterrevolution..."(Fraga)\_

15 Der Nationalismus als Kern der politischen franquistischen Antwort muß mit einer unbezweifelten Bedingung zusammengehen:

"...die Liebe zum Vaterland ist eine Quelle vielartiger Tugenden, wenn sie durch das Christliche Gebot geordnet ist. Der Katholizismus ist unser erster 20 geistiger Wert - er ist unser wahres Vaterland - als Nation sind wir durch die Kirche geschmiedet worden...(Corts Grau) ... Die Nation und der Staat haben sich nach drei Jahrhunderten wiedergefunden, wir sind wieder Spanier durch die Gnade Gottes... Unser Kreuzzug hat uns Wege zur Rettung eröffnet ...die ewige Weisheit ist unendlich erhabener als der Volkswillen... der Artikel 24 der Fa- 25 lange, der die Aufnahme des katholischen Geistes in den nationalen Wiederaufbau verfißt, ist die höchste Anerkennung dieser Wahrheit" (Corts Grau). \_

Von solchen Prämissen ausgehend ist nichts leichter, als auf die Ebene des Millenarismus und der Prädestination abzugleiten:

30

"...es scheint, als ob die Vorsehung in ihrem Plan einigen Völkern vorbehalten hat, der Idee der Humanität einzigartigen Ausdruck zu verleihen... In dem Augenblick, in dem all unser Ansehen und unsere Legitimität am Boden liegen, können nur Länder wie das unsere im Glauben etwas Hoffnung schöpfen (Fraga) 35 ...der Katholizismus wird auf den Ruinen von Babel die authentische Zivilisation errichten... nicht durch Massenversammlungen und Blendwerk, sondern durch Organismen, die in unserer Tradition verwurzelt sind - ebensowenig könnte sich der Willen der Menschen auf dem Fundament des Rechts konstituieren - (der Katholizismus) wird die Regierung berufen, die Gott am nächsten steht...: wir 40 sind aufgerufen, die geistigen Wiedereroberer der Welt zu sein. Unsere Halbinsel stellt das Bollwerk dar, das Gott für eine neue Reconquista, die zu einer neuen Übergabe führt, aufgehoben hat. Der Herr scheint uns als Instrument auserwählt zu haben. Der Kreuzzug hat schon unvergängliches Leben in unserer Seele angenommen, das uns verpflichtet, uns auserwählt zu fühlen"(Corts 45 Grau). \_

Rein hypothetisch hätte die national-katholische Bourgeoisie auch alternative politische Formeln in Betracht ziehen können. Sowohl Fraga als auch Conde und Corts Grau optierten jedoch für eine einzige:

50

"in den Ruinen der verfallenen Institutionen sucht man überall den Mann, der die Ordnung wiederherstellt... Ein Volk bedarf immer eines Mannes, der seinen Willen versteht, zusammenfaßt, ihn erklärt und ihn zu seiner Bestimmung führt



... Die Führerschaft des außergewöhnlichen Menschen ist immer unvermeidlich  
... Wenn sich die Gesellschaft auflöst, wird sie in der Einheit der Führung  
wiederhergestellt... Die Diktatur ist ein außerordentliches, altes und frucht-  
bares Mittel (um Probleme zu lösen) (Fraga)".

5

Ebenso sieht Conde den Ausweg in

"dem 'Caudillaje' als revolutionäre Diktatur, gestützt auf die konstituie-  
rende Kraft des Volkes, dessen Willen darin zum Ausdruck kam, daß es zu den  
10 Waffen griff".

Diese Diktatur soll nicht nur vorübergehend Ordnung schaffen, sondern

"an keine zeitliche Begrenzung, die Bewältigung einer Ausnahmesituation oder  
15 an die Verfolgung konkreter Ziele gebunden sein" (Conde).

Und Corts Grau betrachtet den Faschismus als eine 'dringende Maßnahme' und  
behauptet, daß

20 "der Mann auf der Straße nach einer Diktatur verlangt. .. Der Faschismus a-  
la-espanola wirkt auf die Autoritätskrise ein... und begegnet mit dem Ruf zur  
Einheit und gegen die Zersplitterung dem Versöhnungsgeist, der im Gegensatz  
zum Geist des Klassenkampfes steht."

25 Wenn es um die persönliche Repräsentation des Führer-Prinzips geht, ist  
schließlich bei den zitierten Autoren kaum ein größerer Mangel an Abstraktion  
denkbar:

"Die Stunde schlägt, da Franco entscheidet, seine Prophezeiungen einzulösen"  
30 (Corts Grau).

Oder:

"Franco, der höchste Wächter, der Souverän, der die Gemeinschaft der Werte  
35 der spanischen Tradition wieder zu neuem Leben erweckt" (Conde).

Oder:

"Franco übernahm die Aufgabe, in dem Moment ein Volk auf seine Schultern zu  
40 nehmen, als es im Begriff ist, den Verstand zu verlieren" (Fraga) ... Dank  
diesen Männern, die die Vorsehung im rechten Augenblick auf die Welt sendet,  
bleibt diese bestehen" (Corts Grau).



Der Rest des Ideenverlaufs erscheint im weiteren kohärent:

5 "Die Repräsentation versucht, ihren alten Sinn als existentielles Phänomen  
wiederzuerlangen, indem sie ihren fiktiven Deckmantel verläßt, während die  
öffentliche Meinung als moderne Formel der Akklamation Gestalt annimmt" (Fra-  
ga). "... die Repräsentation als Volksgeist verbirgt in sich die Zerstörung  
der (im liberalen Sinn) Repräsentation zugunsten der Identität ... Die Herr-  
schaft schließt die Repräsentation in sich selbst ein. Derjenige, der  
herrscht, ist durch die Tatsache seiner Herrschaft Repräsentant ... Die Stufe  
10 und Qualität der 'Auctoritas' bestimmt das Maß und und die Qualität der Reprä-  
sentation" (Conde).\_

In diesem Zusammenhang wird das Denken Hellers für die eigennützigsten Argu-  
mentationen herangezogen. Am Beispiel der Registrierung von historischen Zä-  
15 suren wird Heller bei Conde als Bürge des Despersonalisierungsprozesses der  
Macht herangezogen:

"Der radikale Rationalisierungs-Prozeß beraubt nach und nach die früheren  
20 Inhalte, die ein festes Fundament der politischen Einheit bildeten, ihrer  
ganzen Kraft. Die religiösen Prinzipien, die traditionellen Werte und das  
monarchische Prinzip von Gottes Gnaden lösen sich unter dem Druck der ra-  
tionalen Prinzipien auf, die anstreben, die politische Macht auf rein imma-  
nenter Basis zu errichten. Parallel zu diesem Rationalisierungs-Prozeß findet  
in Spanien der wachsende Legalisierungs-Prozeß des Rechtsstaates statt, bis  
25 hin zu der radikalen Entpersönlichung der politischen Macht."\_

Und...Conde verweist den Leser auf die 'vorzügliche Monographie 'Die Souve-  
ränität' als Bürgschaft für seine Ausdeutung!

30 In bezug auf Heller beklagt Fraga die Armseligkeit der politischen Macht, daß  
es

"im Liberalismus nicht mehr Staatsmacht gibt, die das Recht als Naturkraft,  
als Herrschaft, als Zwang, als unwiderstehliche oder zwingende eigene Macht  
35 anerkennt, daß sich die Souveränität auf eine Frage der Gültigkeit der juri-  
stischen Ordnung reduziert".\_

Bei Corts Grau erscheint Heller als der Wissenschaftler, der die liberale  
Demokratie definiert und vertritt, eine Regierungsform,

40

"der gegenüber alle Gründe aus dem klassischen Schatz und aus der eigenen  
Erfahrung der Konterrevolutionäre des XIX. Jahrhunderts gültig bleiben".\_

Für Fraga verkörpert Heller die Autorität der Doktrin, wenn es darum geht, den  
45 Liberalismus als "Negation des Übernatürlichen" zu charakterisieren. Es  
scheint nur konsequent, wenn Conde



"hinter dem polemischen Zusammenstoß der großen Systeme des Staatsrechts - dem System von Kelsen, der Integrationstheorie, der Polemik zwischen Schmitt und Heller -" die Kurve zu entdecken vorgibt, die "zum Zusammenbruch führt".

5 Genötigt von der Rechtfertigung des Faschismus verweist Corts Grau auf das Zeugnis von Heller über den Liberalismus im Sinne "eines Abfluß-Kanals einer ideellen und politischen Hoffnungslosigkeit". Von hier aus glaubt er, nicht auf das geringste logische oder empirische Hindernis zu treffen, um zu behaupten, daß der Faschismus

10

"die Befreiung von einem führungslosen Despotismus gewesen ist, der den eigentlichen Begriff vom Volk (als spanischer katholischer Nation) erniedrigt hatte".

15 Die Verwendbarkeit der Hellerschen Gedanken erscheint in den Händen solcher Vermittler praktisch unerschöpflich, weshalb wir uns nicht zu wundern brauchen, daß sie auch im Dienste des 'spanischen Deszisionismus' in den Arbeiten von Conde über 'Caudillaje' und 'Repräsentation' Verwendung fanden. Schließlich diene Hellers eigene Staatskonzeption nach Fragas Ansicht dazu, den Weg  
20 zurück zur Demokratie unmöglich zu machen:

"Wenn wir nicht zum Pluralismus zurückkehren wollen, muß man auf der Höhe der Staatsgewalt die oberste Dezisionseinheit, von der Heller gesprochen hat, anerkennen".

25

## 2.2 Das liberale Spanien

Im Unterschied zu dem franquistischen Diskurs, der hauptsächlich in den vier-  
30 ziger Jahren geprägt worden ist, verläuft das liberale Denken in einem größeren Zeitraum, nämlich im Laufe der Jahre, die zwischen der Republik und der parlamentarischen Monarchie liegen. Auf der einen Seite fehlt es dem liberalen Denken durch diesen langsameren Zeitverlauf an Dichte; auf der anderen Seite zeichnet es sich aber gerade wegen seines wesensmäßig langen Bestehens durch  
35 seine besondere Gründlichkeit aus. Wir wollen hier einen kurzen Überblick über die republikanischen Wissenschaftler, den 'Katheders-Liberalismus' unter dem Franquismus, die kulturelle Wende in den fünfziger Jahren, die Eklipse Hellers während der sechziger und sein Wiedererscheinen in den siebziger Jahren geben.

40 Das republikanische Bürgertum, das sich in den zwanziger Jahren sehr in der Bewegung zum Sturz der Monarchie engagiert hatte und in den dreißiger Jahren auf der Seite der Republik im Bürgerkrieg involviert war, hatte nur zwischen



Tod und Emigration zu wählen. 1934 veröffentlichte Francisco Ayala eine scharfsinnige Analyse des auflösenden Charakters vom Dezisionismus bei Schmitt.<sup>61</sup> 1936 setzt Recasens Siches die Überlieferung des Hellerschen Denkens fort, womit er 1928 begonnen hatte. 1943 widmet Ayala der spanischen Ver-  
 5 sion der Staatslehre Hellers einige freundliche Bemerkungen,<sup>62</sup> wobei er vor allem auf dessen methodologische Grundsätze eingeht. 1951 erschienen postum verschiedene Monographien von Fernando de los Ríos, in denen er sich auf Hel-  
 10 ler stützt, um sich mit dem Formalismus Kelsens auseinanderzusetzen.<sup>63</sup>

10 In dem 'Kathedern-Liberalismus', dem es an der franquistischen Universität ge-  
 lingt zu überleben, heben sich einige Gelehrte als besonders originell hervor. Gerade in einer historischen Phase, in der der Nationalismus blüht, kommt der kritischen Relativierung, die Murillo<sup>64</sup> der Nation und den Nationalismen als historischen Realitäten, die wesensgemäß der Vergänglichkeit unterworfen sind,  
 15 angeeignet, besondere Bedeutung zu:

"...Auf dem Grund des Prozesses wachsender Nationalisierung in Europa macht  
 sich eine antagonistische und potentiell kriegerische geistige Haltung bemerk-  
 bar... ..Nachdem der Prozeß der inneren Integration beendet ist, führte der  
 20 eigene polemische Charakter der gebrauchten Mittel dazu, daß der Aspekt der nationalen Eigenart betont wurde, wodurch die pathologischen Entartungen vom Nationalismus (Chauvinismus, Imperialismus) entstanden".

Im ganzen 'approach' Murillos kommt deutlich zum Ausdruck, daß bei diesem Hel-  
 25 ler-Schüler dessen Denkansätze zu einer reifen Verarbeitung gelangen. Leider hat Murillo an dieser Stelle seinen Gedankengang über den Nationalismus abgebrochen, ohne auf die wesentliche Kausalitätskette zurückzugehen. Das ist umso mehr zu bedauern, als es sich dabei - wenn man seine anerkannte Sensibilität für Ungleichheit, ökonomische Macht und soziale Klassen berücksichtigt - nur  
 30 um eine bewußte Unterbrechung des Denkprozesses, einen Akt der Selbstzensur handeln kann.

Eine zusätzliche Abweichung von der kulturell und politisch führenden Denkwei-  
 se erscheint in doppelter Ausprägung; einmal in negativer, in Form einer Kri-  
 35 tik:

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<sup>61</sup> Francisco Ayala, Prólogo a traducción de Teoría de la Constitución, von Carl Schmitt, Madrid 1934.

<sup>62</sup> AaO.

<sup>63</sup> AaO.

<sup>64</sup> Vgl. Francisco Murillo, Nación y Crisis, Madrid 1951, Revista de Estudios Políticos, nor. 58; vgl. aaO., Estudios des Sociología Política, Madrid 1963, Ed. ecnos; aaO., Las Clases medias, Granada 1950, Publicaciones de la Universidad de Granada; aaO., Estudio sobre la Desigualdad en España (en curso).



"...Man ist durch einen der schärfsten zeitgenössischen Denker zur Abseignung des Politik-Begriffes als existentiellen Kampf gekommen ... die Theorie von Carl Schmitt bedeutet die radikale Auslieferung der ganzen Konzeption von Recht und Ethik an die Macht ... der Kriegszustand ist die Folge davon ... Der doktrinaire Aufbau der 'Staatskrise' ist von Beweggründen ausgegangen, die mit sehr konkreten hegemonischen Vorstellungen assoziiert sind";

und positiv, in Form eines politischen Programms für ein liberales Spanien:

10 "Die Grundprinzipien, die die politischen Organisationen vor vierzig Jahren leiteten, enthalten Wesenszüge, die wahrscheinlich erhaltenswert sind und die bedroht sind, sich in dem schwindelerregenden Relativierungs-Prozeß zu verflüchtigen. Die Aufgabe, aus diesen Prinzipien ihren unverzichtbaren Teil herauszustellen, ist zweifellos die große politische Mission unserer Zeit... Die Inhalte dieser Prinzipien - nationale Gemeinschaften, Achtung vor der Freiheit und der Menschenwürde, Beteiligung des Volkes an den Entscheidungsprozessen - hat noch genug reale Gültigkeit, um die politischen Organisationen zu leiten ... Die Ordnung entsteht nicht durch die bloße Existenz von Macht. Die Gültigkeit der Organisation (ist) ein Produkt der freiwilligen und freien menschlichen Zustimmung".

Der gleiche Autor faßt übrigens auch zu einem relativ frühen Zeitpunkt - 1961 - die Möglichkeit einer Restauration der Monarchie ins Auge.<sup>65</sup>

25 Auch hier dient Heller als ideologische Unterstützung für die Distanzierung von Schmitt, für die Kritik an Positionen, die unter dem Vorwand der 'Staatskrise' die Diktatur legitimierten, und für das Aufrechterhalten des liberalen Glaubens. Auch hier ist der Diskurs nicht komplett; auch hier erleidet er eine ungewollte Unterbrechung. Allerdings ist die Betonung anders: wenn sich bei 30 Murillo wahrscheinlich die Selbstzensur hinsichtlich seiner erwiesenen Sensibilität für soziale Spannungen auswirkte, so stellt sich ein Denker wie Ollero die Umverteilung der Macht als Hauptproblem - die sich nach dem Autor notwendigerweise - oder zumindest von ihm erhofft - im Zusammenhang mit der Restauration der Monarchie vollziehen sollte.

35

Der ideologische Beitrag von Heller dient im 'Katheders-Liberalismus' nicht nur der Kritik am Nationalismus oder dem Entwurf einer alternativen liberalen Formel. Andere Autoren unterstreichen den Iusnaturalismus, der die Hellersche Rechtfertigung des Staates durchdringt:

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<sup>65</sup>Vgl. Carlos Ollero, Introducción a una Teoría de la Política, Madrid 1945; Revista de Estudios Políticos; aa0., La relativización actual de los Principios políticos, Madrid 1951, Revista de Estudios Políticos, no. 55; aa0., El sistema representativa, Madrid 1961, Revista de Estudios Políticos, no. 119; aa0., Dinámica social, desarrollo económico y forma política (La Monarquía del Siglo XX). Discurso de recepción como Académico de número, Sesión de 15 de Marzo de 1966, Madrid, Real Academia de Ciencias Morales y Políticas.



"... an der Spitze der staatlichen Organisation befindet sich nach Heller die souveräne politische Macht als höchste Entscheidungsinstanz, die die juristischen suprapositiven Werte normt und zur Wirkung bringt. Die höchste Entscheidungsgewalt, in der die Organisation des Staates gipfelt, ist für Heller von einem naturrechtlichen Gesichtspunkt aus - Werte oder sittliche Vernunft-Grundsätze - gerechtfertigt ... wenn Heller vom Recht spricht, so versteht er es als suprapositives Wert-Kriterium, als objektives Maß der Gerechtigkeit, d.h. im Sinne des Naturrechts... Nur mit dem Verdienst eines Sollens kann sich der Staat rechtfertigen, aber eines suprapositiven, nicht eines rein technisch-juristischen Sollens..."

Die Identifizierung mit Heller dient ihm auch als Schutz, "in die Irrtümer seiner Epoche zu verfallen", z.B.

"die einseitigen und extremen Gesichtspunkte von Schmitt und Kelsen anzunehmen. Heller erkannte an, daß nur ein reines liberales politisches Ethos vereinbar mit der Würde der menschlichen Person ist. Aber er merkte, daß der bloße bürgerliche politische Liberalismus sich nicht auf der Höhe der Zeit befand. Er apostrophierte die Theoretiker der Diktatur als Ästheten der Macht und sagte das Verenden des Faschismus in seinen ersten Anfängen mit fast mathematischer Genauigkeit voraus. Und hinsichtlich des Sozialismus hatte er gleichzeitig die Rechtfertigung ihrer fundamentalen Forderungen und die Einseitigkeit ihrer schrägen marxistischen Position genau im Auge..."

Bei allen denen, die später von aller Welt hinsichtlich ihrer liberalen Einstellung, ihrer Bildung und ihres vornehmen Vorgehens wegen sowie ideologisch als Antipoden des Franquismus gepriesen wurden, - bei ihnen allen führte das Scheitern der geistigen Kommunikation mit Hellers Denken unweigerlich zu ideologischen Schwankungen und einem kulturellen Pessimismus, die schließlich zum Schiffbruch führen mußten. Die Reflexionen von ihnen selbst - nach den Worten von Ayala, "brachte sie der Bürgerkrieg zum Schwanken" - überliefern uns besser als jedes andere Dokument das Drama einer ganzen Generation. Hier einige Beispiele:

"...der Konstitutionalismus als Inspiration, Motor, Mythos hat an Kraft verloren ... das krankhafte Wuchern von Parteien und Fraktionen sterilisiert jede mögliche Aktion der Regierung ... Der Mißbrauch von Streiks und aufrührerischen Bewegungen zieht das Autoritätsprinzip in Zweifel und führt dazu, daß die Freiheit zur Tyrannei der Massen oder Gewerkschaften degeneriert ... Mit der Eliminierung gewisser Wahlmechanismen - plurale Abstimmung mit der Berücksichtigung von Familien, Klassen, usw. - hat man das Steuer riesigen ungeordneten Massen in die Hand gegeben, die unzulänglich ausgebildet sind: es fehlt ihnen an Mäßigung, Abwägung, Erfahrung im Verhandeln Verantwortungsgefühl ... Vermassung und Verschwinden des Individuums und der führenden Minderheiten ... ist ebenso ein Zeichen der Zeit wie die Demokratisierung der Welt, wobei die Triebkraft, die früher die Freiheit - Schöpferin persönlicher Unterschiede - gewesen ist, nun durch eine homogenisierende Gleichheit ersetzt

<sup>66</sup>Vgl. Galán, La concepción estatal de Heller, aaO. (Anm. 20).



wird, die dazu neigt, alle persönlichen Züge zu verflachen. ...Die Hierarchie hat sich aufgelöst: die Qualität erscheint lästig und verletzend".<sup>67</sup>

Dieser Krise des Liberalismus gegenüber wächst das Gefühl der Impotenz, und von da ist es nur ein kleiner Schritt bis zum Verlust jeden ideologischen Halts, der die Abwehrkräfte gegen die Selbst-Auslieferung an die Verführung der Faschismen stärken könnte. So meint Pérez Serrano,

"... man sollte nicht hartnäckig die Augen vor der Evidenz verschließen und die neuen Systeme von unleugbarer Stoßkraft als pathologische und vorübergehende Abweichungen betrachten ... Der italienische Faschismus ist keine pathologische Abirrung, sondern eine neue Konzeption vom Staat und seiner Funktion ... Italien ist zum Rang einer Imperialmacht aufgestiegen ... Deutschland hat seine Kategorie als Großmacht wiedergewonnen - das Ergebnis übertrifft alle Hoffnungen -...Die ganze Organisation unterdrückt jegliche Manifestation des auflösenden Pluralismus...die persönlichen Werte werden rehabilitiert...ein neuer Typ von politischer Gemeinschaft von einer nie erreichten Kohärenz entsteht."

Das Gefühl der Besorgnis kann bis zu dem Punkt Verwirrung stiften, daß liberale Denker das faschistische Modell als einzige Alternative verteidigen - für alle, "die nicht das russische Modell bevorzugen".<sup>68</sup>

In der Mitte der fünfziger Jahre findet ein wichtiger kultureller Wandel statt, der einmal durch die eigene Erfahrung und Distanz der emigrierten Spanier und auf der anderen Seite durch das mit den USA geschlossene Abkommen in Bewegung kommt:

"Der Bürgerkrieg stellt ein Phänomen dar, das dem der Aufhebung des Ediktes von Nantes analog ist. Eine bedeutende intellektuelle Minderheit geht ins Exil. Diese Emigration bringt sie in Kontakt mit anderen Kulturen; vor allem bringt sie sie in den Einflußbereich - mit mehr oder weniger Distanz - der nordamerikanischen Kultur. Die intellektuelle Minderheit überschwemmt den spanischen Büchermarkt mit Übersetzungen. Darunter Bücher der modernen Soziologie, die der deutschen Ausbildung der spanischen Intelligentsia entsprachen. Aber daneben verschafft der Kontakt mit der amerikanischen Wissenschaft einem neuen und entscheidenden Wissenszweig Zugang in Spanien: der Geschichte und der Soziologie aus dem englischen Sprachraum. Das Ergebnis war nicht nur ein quantitatives Wachstum, sondern das neue Element hat auch in gewissem Maße die Wissensstruktur modifiziert, indem es große Gebiete der geisteswissenschaftlichen Disziplinen auf sich gelenkt hat ... Was sich ereignete, war die Ankunft einer neuen Mentalität. Die spanische Soziologie hatte sich von dem deutschen Einfluß befreit."<sup>69</sup>

<sup>67</sup> S. Nicolás Pérez Serrano, Cien Anos de Derecho Político (1958-1958). Discurso leído en la sesión científica celebrada el 11 de Diciembre para conmemorar el Primer centenario de su constitución, Madrid 1958, Real Academia de Ciencias Morales y Políticas.

<sup>68</sup> AaO., Tratado de Derecho Político.

<sup>69</sup> Vgl. Enrique Gómez Arboleya, Sociología en España, Madrid 1958, Revista de Estudios Políticos, no. 98.



Die Wendung zum angelsächsischen Kulturkreis verläuft eine Zeitlang parallel zum Weiterwirken der Gedanken Hellers: 1960 - im Angelpunkt zweier Jahrzehnte - bleibt die Staatslehre als klassisches Werk weiter Pflichtlektüre für alle, die eine Universitätskarriere anstreben; die Arbeit von Morodo, 'Constitución, 5 legalidad, legitimidad' von 1962<sup>70</sup> könnte als letztes geistiges Zeugnis der Heller-Rezeption in den sechziger Jahren angesehen werden.

Von da an verläuft die Debatte über den Rechtsstaat, die in der ersten Hälfte der sechziger Jahre begonnen wurde und die sich bis zur Eröffnung des konstituierenden Prozesses hinziehen sollte, unter einem gewissen Ausschluß von Heller. In der Arbeit von Eliás Díaz,<sup>71</sup> die einen bedeutsamen Platz in der ideologischen Auseinandersetzung in Richtung auf die neue verfassungsgebende Versammlung einnimmt, wird Heller nur mit einer Randbemerkung bedacht. Bei den Verwaltungsrechtlern, die sich auf Forsthoff stützen und durch ihre einseitige 15 berufliche Perspektive dazu neigen, den Staat auf Verwaltung zu reduzieren, ist Heller einfach von der Bildfläche verschwunden.

Und dennoch wird in dem Maße, in dem sich die Wiedereröffnung des konstituierenden Prozesses nähert, die Erinnerung an Heller wieder lebendig. Es könnte 20 sein, daß das Erscheinen des Buches von Abendroth 'Antagonistische Gesellschaft und pluralistische Demokratie' in seiner spanischen Fassung, 1973, auf die spanische Akademie wie eine Gedächtnishilfe gewirkt hat. So sieht es zumindest Lucas Verdu im Jahre 1975.<sup>72</sup>

25 Der Charakter des konstituierenden Prozesses als juristischer Bruch und bloße politische Reform<sup>73</sup> läßt die Gestaltung der parlamentarischen Monarchie als 'sozialen Rechtsstaat' nur logisch erscheinen. Die von Heller stammende Bezeichnung wird in dem Art. 1.1 der Verfassung aufgenommen. Von daher war Garrarena in seiner Arbeit, die wir oben erwähnt haben, schon verpflichtet, 30 auf Heller hinzuweisen.

In außergewöhnlicher Weise wird die Heller-Rezeption von einem spanischen Wissenschaftler getragen, und zwar über historische Phasen und Regierungsformen hinweg, und auf beiden Seiten des Atlantik: Es handelt sich um Manuel García

<sup>70</sup>Siehe Raul Morodo, Constitución, Legalidad, Legitimidad, aaO.

<sup>71</sup>Vgl. Eliás Díaz, aaO.

<sup>72</sup>Vgl. Pablo Lucas Verdu, La lucha por el Estado de Derecho, Bolonia 1975, Studia Albornotiana, Publicaciones del Real Colegio de Espana.

<sup>73</sup>Vgl. Antonio López Pina, Comentario zu 'El cambio político español y la Constitución', Barcelona 1982, Planeta, von Antonio Hernández Gil, in Revista de Estudios Políticos, no. 29, Sept.-Dez. 1982, Madrid, Centro de Estudios Constitucionales.



Pelayo, der 1933 Schüler Hellers in Madrid gewesen ist, und der Heller als Epigonen des liberalen Konstitutionalismus betrachtet hatte.<sup>74</sup> Nachdem er fünfundzwanzig Jahre in Südamerika als Professor tätig war, kehrte er nach Spanien zurück, um sich dem konstituierenden Prozeß anzuschließen. Seine Rückkehr konnte nicht stattfinden, ohne daß Heller wieder im Vordergrund der Betrachtungen über Staat und Politik erschien:

"Die Formulierung der Idee vom sozialen Staat oder konkreter, vom sozialen Rechtsstaat, verdanken wir Hermann Heller, der seine Mitgliedschaft bei der SPD mit der Eigenschaft verband, einer der bedeutendsten Staatsrechtler in den zwanziger und dreißiger Jahren zu sein. Heller setzt sich mit dem konkreten Problem der Krise der Demokratie und des Rechtsstaats auseinander, den man nach seinen Überlegungen nicht nur vor der faschistischen Diktatur retten muß, sondern auch vor der Degeneration, zu der ihn der juristische Positivismus und die Interessen der herrschenden Schichten geführt haben, die ihn in eine Idee verwandelt haben, die entweder nichts bedeutet oder unfähig ist, gegen die zwei Fronten zu kämpfen, die die Irrationalität entfaltet: auf der einen Seite die Irrationalität des kapitalistischen Systems, das einen neuen ökonomischen Feudalismus erzeugt, den der formale Rechtsstaat deckt. Auf der anderen Seite die faschistische Irrationalität. Die Lösung besteht nicht darin, auf den Rechtsstaat zu verzichten, sondern ihm einen ökonomischen und sozialen Inhalt zu geben, innerhalb seines Rahmens eine neue Arbeitsordnung und ein System der Vermögensverteilung zu verwirklichen: nur der soziale Rechtsstaat kann eine gültige Alternative gegenüber der ökonomischen Anarchie und der faschistischen Diktatur sein, und daher kann nur er den politischen Weg darstellen, um die Werte der Zivilisation zu retten".

### Epilog

30

Bis hierher ist unsere Überlegung dem ideologischen Gesichtspunkt gefolgt. Wir haben versucht, drei in politischer Hinsicht verschiedene ideologische Gruppen bei der Heller-Rezeption herauszuarbeiten: die Republikaner, die franquistisch national-katholische Bourgeoisie und die Vertreter eines 'Katheders-Liberalismus'.

Es gibt noch eine weitere Ebene der Analyse, die die ideologische vertiefen und nuancieren sollte, die wir aber hier aus Raumgründen nur kurz umreißen können, um sie bei anderer Gelegenheit genauer zu entwickeln: ich meine die Beziehung zwischen Ideologie und Sozialklasse. Auf dem Hintergrund der Heller-Rezeption durch die verschiedenen Gruppen zeichnet sich über die ideologischen Unterschiede hinaus die Sozialklasse ab. In der Heller-Rezeption brechen sich wie in einem Prisma die sozialen Spannungen als Ideologie.

<sup>74</sup>Vgl. Manuel García Pelayo, aaO.

<sup>75</sup>S. Manuel García Pelayo, aaO.



Der ideologische Diskurs erfüllt die Funktion einer Signifikante. In einer tiefergehenden Analyse erweist sich das bisher Gesagte als eine unbewußte Idealisierung oder eine bewußte Verschleierung der realen Interessen oder Triebkräfte. Als gemeinsamer Hintergrund erscheinen verschiedene und gelegent-

5 lich antagonistische Konzeptionen der Beziehung zwischen Staat und Gesellschaft und ... der Klassenkampf. Die wirklichen Beweggründe, die sich häufig unter dem barocken - zuweilen formal brillianten - Diskurs der spanischen Wissenschaftler verstecken, werden durch eine solche Analyse ans Licht gebracht.

10 Bei Francisco Javier Conde überrascht das Maß an serviler Schmeichelei gegenüber den Machtinhabern. Alle seine Zeitgenossen bezeugen bei ihm den Eifer eines Emporkömmlings; und obwohl ihm niemand sein Wissen, seine fachliche Kompetenz und seine Sensibilität streitig machen würde, so hat doch kein Zweifel daran bestanden, daß er seine Ideen mit mehr oder weniger Erfolg zu verkaufen

15 versuchte. Dem Wort 'caudillaje' (Führungskraft) z.B. hat er im rechten Augenblick seinen charismatischen Inhalt gegeben und damit den Begriff zum Symbol erhoben. Auch hat er sich vorgenommen,

20 "der gegenwärtig einzigartig dastehenden Form von Herrschaft ihre immanente Begründung und begriffliche Genauigkeit zu geben".

Im Dienste dieses Vorhabens verläuft sein Gedankengang folgendermaßen:

25 "Das Ziel und die Natur der Beziehung zwischen Führer und Geführten machen den 'caudillaje' zu einer spezifischen legitimen Art zu herrschen. Die erste Eigenschaft, die den 'caudillaje' definiert, ist die Legitimität. Führen heißt vor allem anderen, legitim herrschen. 'Caudillaje' ist kein Synonym, sondern ein Kontrapunkt zur Diktatur... Die Logik der Konstruktion verpflichtet dazu, den Begriff des 'caudillaje' als kommissorische Diktatur aufzugeben und ihn

30 als souveräne Diktatur zu interpretieren, die nicht an eine zeitliche Begrenzung, an die Bewältigung einer Ausnahmesituation oder an die Erlangung objektiver Ziele gebunden ist. Der 'caudillaje' ist eine revolutionäre Diktatur, die sich auf die konstituierende Gewalt des Volkes stützt, deren Willen sich im Rückgriff auf die Waffen, d.h. im Cäsarismus manifestiert. Die Legitimität

35 des 'caudillaje' ist demokratische Legitimität. Führen heißt mit Charisma herrschen. Der 'caudillaje' stellt genaugenommen die Verbindung der charismatischen Welt mit der Tradition dar. Die dritte Eigenschaft des 'caudillaje' ist der persönliche Charakter der Herrschaft; führen heißt persönlich herrschen. Die Proklamation des Charismas erfüllt eine konstituierende Funktion.

40 Die persönliche Beziehung zwischen Führer und Geführten ist nicht Ursprung von Knechtschaft, sondern von Freiheit... Franco, der höchste Wächter, Souverän, der die Wertegemeinschaft, die die spanische Tradition in sich birgt, zu neuem Leben erweckt ... der große Traum spanischen Ursprungs - den modernen Leviathan zu besiegen - scheint sich ganz und gar erfüllt zu haben, denn der

45 'caudillaje' ist ein sicheres Vorzeichen seiner Überwältigung."

Man würde aber wohl in der Bewertung des Voluntarismus bei Conde zu weit gehen, wenn man diesen allein auf den Eifer des Emporkömmlings zurückführte.

<sup>76</sup>S. Francisco Javier Conde, Espejo del Caudillaje, aa0.



Dazu erscheint er mir als Ausdruck des Macht-Ästhetizismus, der sein Denken gefangennahm:

"...wenn sich der Unterschied zwischen Staat und Gesellschaft verwischt, werden auch die Begriffe problematisch, die sich auf diesen Dualismus stützen. Die freie Sphäre, das Soziale, das, was nicht der Staat ist, wird Staat. Der Staat nimmt den ganzen Bereich der Gesellschaft, Wirtschaft, Kultur, der Ausbildung usw. ein. Der Staat wird ... total ... erst das Aufbrechen der nationalen Idee und des revolutionären Prinzips auf der historischen Bühne haben zum ersten Mal die Möglichkeit geschaffen, daß eine Gruppe von Menschen sich so in sich selbst zusammenschließt, daß sie fähig ist, allen die Stirn zu bieten. Erst diese haben die Möglichkeit der totalen Mobilisierung der Seelen und der Menschen geschaffen, die das einzigartige Wesen der Großmacht begründet... Der totalitäre Staat ist die Organisationsart der Großmacht in seiner Fülle...er ist die eigene Organisationsart des modernen Staates in seiner qualitativ differenzierten Phase als Großmacht ... Der totalitäre Staat, wie der moderne Staat in allen seinen Etappen - ... ist auch wert-neutral."<sup>77</sup>

Bei einer genaueren Lektüre von Fraga sind es Ständedenken, Elitegeist, Unsicherheit und Faszination durch die persönliche Macht, die als unterliegende Dimension Gestalt gewinnen:

"...so solide Teilstücke der alten Ordnung wie das Eigentum, die Erbschaft, die Familie bilden - im Begriff sich in ihrem traditionellen Aspekt aufzulösen - keine Grundlagen mehr...Vertreibung der traditionellen Führungsschichten ... Unmöglichkeit eines Konkubinats zwischen Tradition und Revolution ... Die Revolution fegte die Stände hinweg ... Das soziologische Erbe des Ancien Régime zerbrach ... das ganze Gerüst des Sozial-Körpers lag am Boden ... Inmitten vom Fortschritt sah man von Tag zu Tag ein der westlichen Zivilisation fremdes Element sich ausbreiten, das moderne Proletariat, voll von Drohungen ... Es vollzog sich eine schnelle Proletarisierung unserer Gesellschaften ... gegenüber der wachsenden Zunahme an bürgerlichen und politischen Rechten wurde die Sicherheit in jeder Hinsicht immer geringer ... Unter allen Gesellschaftsschichten gab es einen latenten Krieg, der bei der ersten Gelegenheit zum erklärten Krieg werden sollte ... die Führerschaft des außergewöhnlichen Menschen ist immer unvermeidlich."<sup>78</sup>

Bei Corts Grau schließlich erscheint hinter seiner geistigen Verklärung das Gefühl der Angst, sowie die Tendenz, Unsicherheit in Mythifizierung umzusetzen:

"Die menschliche Gleichheit - im Sinne der Demokratie-Theoretiker - ein reines Produkt des Ressentiments ... hat eine steuerlose Nation unterminiert ... Der Liberalismus war der Hauptfaktor beim Vermassungsprozeß in Spanien ... Korrosion der Einheit und hierarchischen Ordnung, Abgleiten der Vernunft zum Instinkt, des Willens zu bloßen Gelüsten... und als Begleiterscheinung einer solchen Auflösung wird uns die Gewalt als logische Explosion der Unordnung überkommen".

<sup>77</sup>Vgl. Francisco Javier Conde, aaO.

<sup>78</sup>S. Manuel Fraga Iribarne, La Crisis del Estado, aaO.



In diesem Zusammenhang und zur Verdeutlichung unserer These fügt Corts Grau in seinen 'Randbemerkungen eines Befreiten' zur Ausschmückung den Hinweis hinzu, daß er

5 "während des glorreichen Nationalen Kreuzzuges in Valencia der Verfolgung ausgesetzt war."<sup>79</sup> -

Dieser Diskurs entspricht in sozialer Hinsicht der vermögenden Bourgeoisie, die in ihrem Verständnis vom Eigentum als Zinsbasis in stärkstem Widerspruch  
10 zu dem Modell der kapitalistischen Entwicklung im Spanien der dreißiger und vierziger Jahre steht. Da diese Bourgeoisie unfähig ist, sich eine andere Organisationsform vorzustellen, als die auf das Eigentum fixierte, fühlt sie sich in ihrer Existenz bedroht, sobald sie bemerkt, daß ihr Eigentum in Gefahr ist. Der ganze Diskurs über das Chaos, die Gewalt, den Zusammenbruch des  
15 Staates, die Auflösung der Ordnung usw. ist auf die Befürchtung zurückzuführen, daß eine historische Phase zu Ende gehen könnte, in der das Eigentum den Knotenpunkt aller sozialen Beziehungen bildete. Was dieser Diskurs letzten Endes durchscheinen läßt, ist die Ideologie der vermögenden Großbourgeoisie, die klar in der Hegemonie der Großbourgeoisie der Latifundien zum Ausdruck  
20 kommt. Er spiegelt die Spannungen wider, die durch die Struktur des Landbesitzes und die Beziehung zwischen Eigentum und Arbeit verursacht werden. Der ganze gedankliche Aufbau von Wissenschaftlern wie Conde, Fraga, Corts Grau usw. ist letztlich nur eine rhetorische Verschleierung der wirklichen Ursachen des Bürgerkrieges - vorweggenommen durch die Gedanken, die von Donoso Cortés<sup>80</sup>

<sup>79</sup>S. José Corts Grau, Motivos de la Espana Eterna, aa0.

<sup>80</sup>Die Ortsbestimmung von Donoso Cortés ist mit den Ereignissen von 1848 und dem konterrevolutionären Denken eng verbunden. Der deutsche Wissenschaftler ist im allgemeinen mit dem Namen von Donoso Cortés durch die Verbreitung seines Denkens seitens Carl Schmitt vertraut, vgl. Schmitt, Zur Staatsphilosophie der Gegenrevolution, 1922; ders., Donoso Cortés in Berlin, 1927, Hochland; ders., Der unbekanntene Donoso Cortés, 1929; ders., Donoso Cortés in gesamteuropäischer Interpretation, Madrid 1944, Academia de Jurisprudencia y Legislación. Ebenso Edmund Schramm, Donoso Cortés, Leben und Werk eines spanischen Antiliberalen, Hamburg 1935, Iberoamerikanisches Institut; Dietmar Westemayer, O.F.M., Donoso Cortés, Staatsmann und Theologe, Paderborn 1940. Was in Deutschland und in Spanien selbst vielleicht weniger bekannt ist, ist das beträchtliche Ausmaß, in dem die Verbreitung des Denkens von Donoso Cortés im Spanien der dreißiger und vierziger Jahre und seine enge Verbindung zu der Ortsbestimmung von Hermann Heller in der spanischen ideologischen Auseinandersetzung, mit dem Apostolat von Carl Schmitt im Zusammenhang steht. Francisco Ayala weist auf dieses Phänomen hin in Donoso Cortés, Energumeno portentoso (Los Políticos, aa0.); Eustaquio Galán und Carlos Ollero (aa0.) kommen später auf das gleiche Thema ausführlich zu sprechen. Dabei scheint es interessant, die Dürftigkeit der Werkausgaben von Donoso Cortés zwischen 1948 und 1922 (nur 1851, 1854, 1880, 1904) zu verifizieren. Nach der Verbreitung seiner Gedanken durch Schmitt erscheinen nach kurzer Zeit Ausgaben seiner ausgewählten Werke (1930 und 1933) und 1934 seine 'Pensamientos' in dem angesehenen Verlag Es-  
(Fortsetzung Fußnote)



und Cánovas<sup>81</sup> zu der Acción Española<sup>82</sup> führen, und gefördert durch die Auseinandersetzung in der Weimarer Republik selbst.

Dagegen ist der liberale Diskurs - von Ayala und de los Ríos zu Murillo, Olle-  
5 ro, Galán und García Pelayo - in allen seinen Schattierungen der Diskurs der  
Mittelschicht, dem der vermögenden Bourgeoisie entgegengesetzt. Diese Wissen-  
schaftler sehen sich nicht genötigt - wie die Franquisten -, Heller zu miß-  
brauchen, ihn zu manipulieren oder für sich zu beschlagnahmen. Ihnen genügt  
es, seine Gedanken zu reproduzieren, gerade weil sie in Spanien in sozialer  
10 Hinsicht die gleiche geistige Richtung vertreten, in der der Sozial-Libera-  
lismus von Hermann Heller entstanden ist. Die gebildete spanische Mittel-  
schicht paßt sich dem Lauf der ökonomischen und sozialen Entwicklung an; die  
gebildete Mittelschicht setzt auf den Übergang von einem juristischen zu einem  
sozialen Liberalismus, in dem der Staat als der große Vermittler zwischen al-  
15 len sozialen Schichten auftritt. Wenn der Staat bei der vermögenden Bourgeoi-  
sie und in den unterliegenden Dimensionen des franquistischen Diskurses dem  
Diktat des Eigentums unterworfen ist, so ist es in der Vorstellung der Mit-  
telschicht die Gesellschaft, die sich als dem Staat als höhere Instanz unter-  
worfen betrachten muß.

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Innerhalb der Mittelschicht kann ein politischer Reformismus angestrebt werden  
- wie bei Carlos Ollero -, kann ein sozialer Reformismus sein Recht fordern -  
wie bei Francisco Murillo -, kann auch ambivalent mit den Ideen und dem Recht  
als einer Ware, die der persönlichen Bereicherung dient, spekuliert werden,  
25 wie es in gewissen freiberuflichen Kreisen der Fall ist. Aber in allen diesen  
Haltungen erscheint der Staat als vermittelnde Instanz<sup>83</sup>, und alle stellen das

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pasa-Calpe. Die Arbeit von Edmund Schramm (aaO.) wird unverzüglich in der  
Zeitschrift der extrem rechten 'Acción Española' kommentiert, und zwar von  
einer Persönlichkeit von Rang und Namen eines Alfonso García Valdecasas. Kurz  
darauf erscheint die Übersetzung jener Arbeit ins Spanische. Während des Bür-  
gerkriegs und der Diktatur dient das Denken von Donoso Cortés als Angriffswaf-  
fe und ideologische Deckung, wobei die Ausgaben seiner Werke bis zu seinem  
100. Todestag aufeinander folgen: 1938, 1941, 1942, 1944, 1946, 1954. Ebenso  
erscheinen zahlreiche Glossen von Donoso Cortés, dessen Ideen - zumindest  
teilweise - die Werke von Francisco Javier Conde, Manuel Fraga Iribarne, José  
Corts Grau, Luis Díez del Corral, Luis Sánchez Agesta inspirieren. Die Ver-  
dammung des Hellerschen Denkens als heterodox von solchen Positionen aus ver-  
sucht, sich dokumentarisch durch die Ideen von Donoso Cortés und Carl Schmitt  
abzusichern.

<sup>81</sup>Über Cánovas, s. z.B. Luis Díez del Corral, El Liberalismo Doctrinario, Mad-  
rid 1945, Instituto de Estudios Políticos; ebenso Luis Sánchez Agesta, Historia  
del Constitucionalismo Español, aaO.

<sup>82</sup>Vgl. Raul Morodo, Orígenes ideológicos del Franquismo. Acción Española,  
Madrid 1980, Tucur Ediciones.

<sup>83</sup>Für eine Verifizierung des Ausmaßes, in dem dieses Problem den konstituie-  
renden Prozeß der parlamentarischen Monarchie bestimmte, vgl. Antonio López  
(Fortsetzung Fußnote)



Eigentum als wichtigsten Bezugspunkt des politischen Prozesses in Frage.

Fassen wir zusammen: die geistige Überlebenskraft<sup>84</sup> von Heller ist um so bemerkenswerter, als die spanische Geschichte in den letzten fünfzig Jahren zweifellos weniger gradlinig verlaufen ist als im übrigen Westen. Die spanische Gesellschaft und die spanische Kultur haben einen traumatisierenden Prozeß von Verstümmelung, Repression und einer späten und mühsamen neuerlichen Emanzipation durchgemacht. Hellers Botschaft hat nicht nur eine bis zum Bürgerkrieg führende ideologische Polarisierung überdauert, sondern auch die Diaspora, die Unterbrechung des Dialogs, die Getto-Situation der intellektuellen Auseinandersetzung sowohl in der 'Espana peregrina' (unter den Emigranten) als auch in der 'Espana cautiva' (dem gefangenen Spanien), und schließlich die allmähliche Wiederaufnahme des Dialogs und der Kommunikation seit Beginn der fünfziger Jahre. Die Botschaft Hellers übergreift kulturelle Wendepunkte, die für sich beanspruchen, die vorangehenden historischen Phasen auszulöschen - die Konterrevolution gegenüber dem Demo-Liberalismus, den demokratischen Aufbruch gegenüber der Diktatur -, wobei ein so bedeutsamer Wechsel der Regierungsformen stattfindet wie konstitutionelle Monarchie, Republik, Diktatur und parlamentarische Monarchie. Die Botschaft Hellers überdauert auch den historischen Moment, in dem sich das spanische kulturelle Interesse von dem germanischen Kulturkreis abwendet und sich auf eine Interpretation der reichen ideologischen Quellen des 'Siglo de Oro' im Dienste der Diktatur zurückzieht. Sie überdauert die Abhängigkeit von der nordamerikanischen Hegemonie und reicht bis zum gegenwärtigen Streben nach kultureller Autonomie im Zusammenhang mit einer Annäherung an Westeuropa.

Die Bezugnahme auf Heller ist bei den spanischen Wissenschaftlern nicht auf konventionellem Wege erfolgt. Dies war auch kaum möglich: Wie sollte man den Hellerschen Denkansatz auf der Ebene der rein akademischen Lehre vom Staatsrecht gerecht werden können? So unterscheidet sich die Bezugnahme auf Heller

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 Pina, The Shaping of the Constitution, in Spain at the Polls, ed. Howard Penman, Washington D.C. 1983, American E. Institute, La Espana Democrática y Europa, Edición de Antonio López Pina, Madrid 1977, Editorial Cambio 16; La Constitución de la Monarquía Parlamentaria, edición de Antonio López Pina, Madrid 1983, Fondo de Cultura Económica. Ebenso, Alfonso Ortí, El Significado del Desencanto (Desencanto popular y transición postfranquista), in Revista "Canto General", Madrid/Mexico 1981, no. 1, Enero-Febrero 1982.

<sup>84</sup> Acht Auflagen mit insgesamt 45.000 Exemplaren. Mit dieser Zahl rangiert Hellers "Staatslehre" vor folgenden wichtigen Werken, die in der gleichen Reihe herausgegeben wurden: La Democracia en América, A. de Tocqueville; El Federalista, Hamilton, Madison, Jay; La Imaginación sociológica, C.W. Mills; El Ser y el Tiempo, M. Heidegger; La Fenomenología del Espíritu, G.W.F. Hegel, Carl J. Friedrich, Teoría y Realidad de la Organización constitucional democrática; schließlich, La Revolución de la Esperanza, E. Fromm.



beträchtlich von den schöngeistigen Zitaten eines Max Webers, eines Diltheys, eines Alfred Webers, eines Jellineks. Die geistige Präsenz und Vermittlung von Heller hat sich offensichtlich dadurch verstärkt, daß sie sich auf den historischen Hintergrund des Zusammenbruchs des deutschen Liberalismus und des  
5 Kampfes gegen den Faschismus im Bürgerkrieg und im Zweiten Weltkrieg projiziert sah. Nach der langen franquistischen Diktatur und beim Anbruch eines neuen konstituierenden Prozesses - 1973 - dient die Bezugnahme auf Heller der politischen Reform in ihrem Vorhaben, die Herrschaft des Rechts auf erneuerten Grundlagen wiederherzustellen.

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All das wäre nicht möglich gewesen ohne das Zusammentreffen einer Reihe von besonderen Phänomenen: die engen kulturellen Beziehungen zu Deutschland; die sozial-liberale Position von Heller in den für die Weimarer wie für die spanische Republik kritischen Momenten, und das Gewicht, das seinen persönlichen  
15 Kontakten zukommt - die geistigen Vermittler der Heller-Rezeption stehen im Vordergrund, wenn es darum geht, eine politische Verpflichtung mit der Republik einzugehen oder einen Kompromiß mit dem Militärputsch, dessen Sieg der Diktatur den Weg geebnet hat, zu schließen. Dazu ist seine Rolle bei der Legitimation gewisser Thesen der franquistischen Intelligentsia zu erwähnen,  
20 sowie schließlich die Verlagerung der Auseinandersetzung zwischen Heller, Kelsen und Schmitt in der Weimarer Republik - durch Reisen, Kontakte und Publikationen, schon seit 1922 - auf den spanischen Schauplatz.<sup>85</sup>

Einer der wichtigsten Gründe für die Wirkungskraft Hellers besteht in der in-  
25 nerspanischen Grenzsituation während der Diktatur: bei aller Größe von Marx haben die materiell-ökonomischen Bedingungen dazu geführt, daß nicht er es war, sondern Heller, der der gebildeten Mittelschicht ideologisch geholfen hat, sich zu retten. Das Abgleiten in den Faschismus oder das Sich-Einmauern in den 'Katheders-Liberalismus' hängen davon ab, welchen Gebrauch man vom Heller-  
30 Denken gemacht hat.

Der Geist Hellers hat in Spanien das Schicksal von Freiheit und Vernunft auf seinem unheilvollen Weg durch ein halbes Jahrhundert hindurch begleitet. Da sich am Ende die soziale Klasse als entscheidender Faktor für die Heller-Re-  
35 zeption erwiesen hat, wird ihre Zukunft - unabhängig von den Persönlichkeiten, über die wir in diesem Zusammenhang referiert haben - davon abhängig sein, inwieweit die soziale Klasse in den Spannungen und im inneren Verlauf der spanischen Gesellschaft und Kultur ihre tragende Bedeutung behält.

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<sup>85</sup>Vgl. Hugo Kehrer, Deutschland in Spanien. Beziehung, Einfluß und Abhängigkeit. München 1953, D.W. Callwey Verlag.



Herbig



## PRE-MURDEROUS KINDNESS AND POST-MURDER GRIEF

HANS VON HENTIG

The author is a member of the Editorial Board of this Journal. After a long period of teaching and research in the United States, he returned to the University of Bonn where he was Professor and Dean of Law, and where, before World War II, he had been associated with Professor Gustav Aschaffenburg. His two volume work on "Punishment", and his study of the "American Desperado" have now been followed by studies dealing with "undeveloped" aspects of murder, the mechanics of murder, evolution of the murderous idea, murder collectives and the non-resisting or provocative victim and a recent book on the confidence man.—EDITOR.

### I

Preparing the act to come and screening the deed done—these devices enter largely into the composition of murderous tactics. The defensive methods may question the legal qualification, allege self-defense, mistake of fact or enforcement of law, or impute the case of decease to suicide, accident, natural causes or the interference of third persons. They may try to obliterate the incriminating relation in time and space and thus establish an alibi. Of greater weight is what we would like to call the psychological alibi. The murderer is bent on introducing the element of improbability into the hazy set of circumstances. No stone is left unturned to create the impression that he could not possibly be the perpetrator of an atrocious crime. The conjecture to which he tries to lead the investigation is expressed by the familiar saying, heard so often and denoting our lacking insight into human character, that nobody would have thought the culprit capable of a murder.

Few murderers fight their victim man to man. The assassin is on the lookout for situations of defencelessness. We do protect ourselves first of all by mechanical means, bolted doors, closed windows, guns or watch dogs. Yet only hermits can seclude themselves from human society. All those who live in common can not for long maintain mechanical barriers. Whenever the door bell rings and is answered this pattern of safety has come to an end. It is reduced in passing a street or a park, in driving a car, when fishing, bathing, hiking and hunting.

When "uncovered" we protect ourselves by mobilizing defensive mental attitudes, suspicion, caution, alertness. In meeting, maybe only sensing, hostility mechanisms of alarm are set in motion. It is the main task of the man who plans foul play to overcome mistrust. His deceptive maneuvers have the additional subsequent advantage of misleading the investigators and public opinion; model husbands or kind-hearted and untiring nurses do not kill. They couldn't have done it! It is hard to say whether it is more difficult to hide physically from the police, from the purchase of poison, or a ticklish motive. In family tragedies the murderer has to stay. His guard is limited to an attempt at removing suspicion, perhaps constructing a precarious alibi. A cynical judge has expressed the opinion that, in the case of a married couple, there was no need to look for the murder motive, since marriage was a motive in itself! Many couples, having no children, no servants, few friends, living in a place



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Sinn einer nachträglichen Gesamtstrafenbildung nach § 79 StGB oder, wie hier, nach § 460 StPO ist, daß ein Angekl. nicht anders gestellt werden soll, als wenn alle seine Taten in *einem* und zwar dem zuerst durchgeführten Verfahren abgeurteilt worden wären. Er soll dadurch, daß seine verschiedenen Taten infolge mehr oder weniger zufälliger Umstände in verschiedenen Verfahren abgeurteilt werden, nicht bevorzugt und nicht benachteiligt werden (BGHSt 7, 180; 19, 362 [= JZ 64, 775]). Das gilt nicht nur für die eigentliche Strafzumessung, sondern auch für die Frage der Strafaussetzung. So entfällt beispielsweise die für eine Einzelstrafe von weniger als neun Monaten gewährte Aussetzung, wenn die nachträglich gebildete Gesamtstrafe die Neunmonatsgrenze übersteigt (BGHSt 7, 180). Der Grundsatz findet auch dann Anwendung, wenn sich die Frage stellt, ob die in eine Gesamtstrafe einbezogenen Verurteilungen für eine später verhängte Freiheitsstrafe förmliche Ausschließungsgründe im Sinne von § 23 III Nr. 2 oder 3 StGB sind. In einem Falle, in dem für eine von mehreren Einzelstrafen dem Angekl. Strafaussetzung gewährt worden, die Strafaussetzung aber später infolge der Gesamtstrafenbildung nach § 79 StGB entfallen war, hat der BGH betont, der Angekl. müsse so behandelt werden, als ob das spätere die Gesamtstrafe enthaltende Urteil bereits zum Zeitpunkt der früheren Verurteilung ergangen wäre; nach dem Sinn des § 79 StGB sei daher die Bewilligung der Strafaussetzung *rückwirkend* entfallen (BGHSt 19, 362). Demgemäß hat der BGH die dem § 23 III Nr. 2 StGB zugrunde liegende Erwägung, der Täter, der sich eine Strafaussetzung nicht habe zur Lehre dienen lassen, solle eine zweite derartige Vergünstigung innerhalb von fünf Jahren nicht erhalten, zurücktreten lassen hinter den mit der nachträglichen Gesamtstrafenbildung verbundenen Zweck, den Angekl. so zu stellen, als wenn alle seine Taten in einem, dem zuerst durchgeführten Verfahren, abgeurteilt worden wären. Dieser Zweck verlangt es auch dann, an die erste Verurteilung anzuknüpfen und nicht an eine nachträgliche Gesamtstrafenbildung, wenn es, wie hier, darum geht, ob der Angekl. innerhalb eines Zeitraumes von fünf Jahren vor Begehung der neuen Tat zu einer Freiheitsstrafe von mehr als sechs Monaten verurteilt worden ist.

Die Ausführungen der Revision, die die Selbständigkeit einer nachträglichen Gesamtstrafenbildung betonen und darauf hinweisen, daß die Nebenfolgen erneut festgesetzt werden müßten, auch über die Frage der Strafaussetzung zur Bewährung bei einer Gesamtstrafe von weniger als neun Monaten erneut entschieden werden müsse, schlagen demgegenüber nicht durch. Daß der mit der Gesamtstrafenbildung nach § 79 StGB oder § 460 StPO befaßte Richter mehr oder weniger selbständige Erwägungen anzustellen hat und daß seine Entscheidung die Grundlage für die Strafvollstreckung bildet, liegt auf einer ganz anderen Ebene als die Frage, ob es einen Angekl. je nach den Umständen begünstigen oder benachteiligen soll, daß die Gesamtstrafe erst nachträglich gebildet wird.

GLÜCKWÜNSCHE

Hans von Hentig zum 80. Geburtstag

waren, sah sich zunächst einmal tüchtig in Welt und juristischer Praxis um und gelangte eher spät in die engere akademische Laufbahn — das brav-beflissene Aufsteigen von der üblichen Schmalspur her war nicht von seiner Art. Giessen (1929), Kiel (1931) und Bonn (1934) waren denn auch nicht mehr als akademische Stationen. Von Bonn aus ging er, der den Simplifikatoren jener Zeit unverhohlene Verachtung zeigte, ungezwungen nach den Vereinigten Staaten, denen es aber auch nicht gelang, ihn zum Konformisten, auch nicht zum Konformisten der Emigration, zu machen. So hatte er auch „drüben“ manchen Strauß zu bestehen. Mit der ihm eigenen Unbekümmertheit beschränkt er, in Yale/Calif., Colorado, Oregon, Porto Rico, Iowa und Kansas City, seine eigenen Wege. Man weiß nicht, wer der Gebende, wer der Empfangende war: er gegenüber den Amerikanern oder Amerika im Verhältnis zu einem überall, wo es not tat, munter zugreifenden Berater von Justizbehörden und zu einem Lehrer, der sich gewiß nie an enge Schulregeln hielt. Von

wird deutlich, daß die entsprechende Anwendung des § 210 II StPO auf den Beschluß des Amtsrichters, den Strafantrag als unbegründet zurückzuweisen, einer besonderen Begründung bedarf. Diese Begründung steckt wiederum in den tatsächlichen Erwägungen, die verdeckt bleiben, wenn man aus der Anwendung des § 204 StPO im Rahmen des Strafbefehlsverfahrens ohne weiteres auf die „entsprechende“ Anwendung des § 210 II StPO schließt. Für den vorliegenden Fall möge die Erwägung folgenden Inhalt gehabt haben: für die entscheidende Kammer ist die Rechtslage klar; durch die entsprechende Anwendung des § 210 II StPO und damit des § 211 StPO kann das Verfahren ohne großen Aufwand und mit dem besten Ergebnis beendet werden; es wäre sinnlos, § 210 II StPO nicht entsprechend anzuwenden; man würde nur riskieren, daß die Staatsanwaltschaft wirklich Anklage erhebt und im Strafprozess eine Verurteilung erreicht. Solche Erwägungen sind jedoch nicht für alle Fälle zu, in denen der Antrag auf Erlassung eines Strafbefehls vom Amtsrichter als unbegründet zurückgewiesen wird. Das bedeutet: ob § 210 II StPO in diesen Fällen „entsprechend“ anzuwenden ist, hängt von den im Einzelfall anzustellenden praktischen Erwägungen ab. Es wird nicht zu geben, in denen es praktischer ist, die Anfechtung des Beschlusses des Amtsrichters nach § 210 II StPO nicht zuzulassen und damit die Staatsanwaltschaft zu der Entscheidung zu bewegen, ob sie Anklage erheben will.

Prof. Dr. Wolfgang NAUCKE, Kiel

§ 23 III Ziff. 3, IV; StPO § 460.  
 In den Fällen der Gesamtstrafenbeschluß zwar innerhalb, die Gesamtstrafenfähigen Vorverurteilungen jedoch außerhalb des Zeitraums von fünf Jahren vor Begehung der Straftat, so hindert dies die Aussetzung der Freiheitsstrafe zur Bewährung nicht.

Köln, Urteil v. 3. 3. 1967 — 1 Ss 693/66.  
 Die Gründe:  
 Das Schöffengericht hat den Angekl. wegen Betruges zu einer Freiheitsstrafe von fünf Monaten verurteilt. Die Strafkammer hat die Änderung des erstinstanzlichen Urteils die Vollstreckung der Freiheitsstrafe zur Bewährung ausgesetzt. Hiergegen wendet sich der Angekl. in zulässiger Weise beschränkte — Revision der Staatsanwaltschaft. Das Rechtsmittel hat keinen Erfolg.  
 Innerhalb der letzten fünf Jahre vor Begehung der Straftat, die im vorliegenden Fall dieses Verfahrens ist, sind keine Urteile gegen den Angekl. ergangen, durch die er zu Freiheitsstrafen von mehr als sechs Monaten verurteilt worden wäre (§ 23 III Nr. 3 StGB). Sämtliche Urteile mit Freiheitsstrafen liegen länger zurück, auch wenn die Strafkammer in die Frist die Zeit einrechnet, in der der Angekl. Freiheitsstrafe verbüßt hat. Wohl ist innerhalb der nach § 23 IV StGB bestimmten Frist gemäß § 460 StPO durch Beschluß eine Gesamtstrafe von einem Jahr und einem Monat Gefängnis gebildet worden. Diese Gesamtstrafe ist aus drei Einzelstrafen aus rechtskräftigen Urteilen zurückgebildet worden. Mit Recht hat sich die Strafkammer bei dieser Bildung der Gesamtstrafe nicht gehindert gesehen, Strafaussetzung zu gewähren.

3. Juni 1967 wird Hans von Hentig 80 Jahre alt. Wer ihn kennt, weiß, daß er ein Mann ist, der nicht nur ein guter Autor ist, sondern auch ein guter Mensch. Er hat ein Leben lang seinen geistvollen Arbeiten aus seiner Feder — besser gesagt aus seiner behenden Schreibmaschine — zur Hand nimmt, und er hat daran glauben, daß er sich anschickt, in das neunte Lebensjahr zu treten. Aber es ist so. Und wenn man das Verzeichnis seiner Werke, eine schier unabsehbare Liste, zur Hand nimmt, läßt man sich überzeugen: aus dem Jahre 1912 stammt seine erste Studie über den strafrechtlichen Schutz des literarischen Eigentums, der dann rasch, durch den Ersten Weltkrieg nur mit geringen Unterbrechungen, eine Fülle weiterer Schriften, die den Bereich der herkömmlichen Jurisprudenz hinaus, folgt. Er ist ein tüchtiger Berliner, Sohn eines bedeutenden Juristen und eines tüchtigen Mannes, dem auf dem Lebensweg des Vaters Jugendjahre in den deutschen Südstädten und in Mitteldeutschland beschieden



überall her empfing er, ehemals wie heute ein wacher Beobachter und flinker Leser, Anregungen. Sie verdichteten sich, um Zwischenergebnisse hier zu übergehen, 1947 in seinem bedeutsamen Buch über „Crime, causes and conditions“. Dabei war er Europa, nicht zuletzt über die Schweiz und die „Schweizerische Zeitschrift für Strafrecht“, die ihm in gefährdeter Zeit ihre Spalten offenhielt, ständig verbunden geblieben. 1951 rief ihn die Universität Bonn für einige Jahre ins Lehramt zurück. Seit 1955 lebt er als Emeritus in einem Status, der alles andere eher ist als ein „Ruhestand“. Die großen Werke über „Die Strafe“, 1931 erstmals konzipiert und 1954/55 zu einem Standardwerk ausgebaut, und über „Das Verbrechen“ (1961/62), die einzelnen Bände „Zur Psychologie der Einzeldelikte“ (1954 ff.), Monographien über den Desperado (1956) und über den Gangster (1959), zahlreiche kriminalgeschichtliche Studien, deren wichtigste 1962 als Gabe zum 75. Geburtstag in einem Sammelband zusammengefaßt wurden, in den letzten Jahren sexualwissenschaftlich-kriminologische Arbeiten etwa über die lesbische Frau (1959) und über den homo- und zoophilen Menschen (1960/61) und viele andere entstanden über einem offenbar unerschöpflichen Rohstoff und aus einem ebenso offenkundig unversiegbaren Sachgedächtnis mit einer verblüffenden Windeseile. Sein Wohnhaus bei Bad Tölz liegt auf einer Flurparzelle, die den Namen „Im Schuß“ trägt: nomen est omen!

Hans von Hentig läßt sich in gängige Kategorien der Schulweisheit und in das enzyklopädische Gefüge der juristischen Disziplinen nicht einordnen. Von den jüngeren Mannesjahren her zeigt er deutliche geistige Verwandtschaft mit dem, was man vor dem Ersten Weltkrieg „Ethnologische Jurisprudenz“ nannte. Biologische Probleme sind ihm, weit über das in der Kriminalbiologie Übliche hinaus, vertraut. Als Kriminalpsychologe widersetzt er sich von vornherein, auch zuzeiten, da er maßgeblich die ehemals so betitelte „Monatsschrift für Kriminalpsychologie und Strafrechtsreform“ — gemeinsam mit G. Aschaffenburg — betreute, unbekümmert dem Schulstreit zwischen Psychiatrie und Psychoanalyse. Als Soziologe macht er den zeitüblichen Wortschwall einer künstlich überzüchteten Fachterminologie so wenig mit wie den Dünkel eines jungen Faches. Von der juristischen Dogmatik, die um der Dogmatik willen betrieben wird, hält er nicht viel; dabei bleibt sein Blickfeld, wie etwa die Studie über das Wiederaufnahmerecht von 1930 zeigt, das des durch Denkdisziplin geschulten Juristen. An dem Fachjuristen gezogene Grenzen hält sich der politisch-historische Schriftsteller erst recht nicht. Man muß, wenn man wissen will, wer Hans von Hentig ist und wo er steht, daran denken, daß er 1920 „Über den Zusammenhang von kosmischen, biologischen und sozialen Krisen“, 1924 über Machiavelli und Robespierre, 1952 über „Friedensschluß Geist und Technik einer verlorenen Kunst“, um nur einiges wenige zu nennen, schrieb. Er pakt zu, wo es ihm

paßt — „... und wo Ihr's pakt, da ist's interessant“. Den gestrengen Herrn „vom Bau“ (etwa in Justizministerien) ein Ärgernis, den gestrengen Herrn „vom Fach“ (in der Lehrjurisprudenz) zum mindesten oft suspekt, ist es ihm gerade recht, Anstoß zu erregen, wenn er glaubt, daß es des Anstoßes bedürfe. Und damit hat er alle Türen zu freiem Blick auf unbebautes Land aufgestoßen. Am 80. Geburtstag wird für Hans von Hentig kein Abschluß, kein behutsames Schließen der Türen sein. Möge die ungeheure Vitalität dem physischen Alter noch lange trotzen!

Prof. Dr. Karl S. BADER, Zürich

#### Gerhard Erdsiek zum 70. Geburtstag

Am 13. Mai ds. Js. hat Gerhard Erdsiek seinen 70. Geburtstag begangen. Ein Berufsleben, das von Anbeginn dem Recht und der Rechtsprechung bewußt gewidmet war, hat damit einen Höhepunkt erreicht. Richter aus Leidenschaft, war Erdsiek vom Assessoramt ab an Berliner Gerichten tätig, die längste Zeit als Beisitzer der Zivilkammern am Landgericht. Nach 1933 wurde ihm nicht nur verdiente Beförderung versagt, sondern die Ehre zuteil, während des Krieges auf Grund der Ermächtigung Hitlers durch den Reichstag vom 26. 4. 1942 aus dem Richteramt entfernt zu werden.

An seinem Wohnsitz in Celle bei Wiederaufnahme deutscher Gerichtsbarkeit an das altberühmte dortige OLG berufen, wurde er bald dessen Vizepräsident, eine Tätigkeit, die er nur schwer aus Herzens aufgab, um als Nachfolger von Ministerialdirektor Erich Petersen die Führung der zivilrechtlichen Abteilung des BJM zu übernehmen. Die von der Leitung des BJM hierbei verfolgte Absicht, durch die Erfahrungen der gerichtlichen Praxis die gesetzgeberische Arbeit zu befruchten, hat Erdsiek in vollem Maße erfüllt. Die gesetzliche Altersgrenze endete vor fünf Jahren die Stufe seines Wirkens. Für ihn bedeutete das jedoch eine neue Wendung seiner Aufgaben: Zum Honorarprofessor an der Universität Köln und zugleich an der Hochschule für Verwaltungswissenschaften Speyer ernannt, vermittelt er seitdem den Reichstag seiner Erfahrungen und Gedanken an nachfolgende Generationen. Der gesamten juristischen Öffentlichkeit dient er darüber hinaus als Herausgeber des seit 1960 erscheinenden inhaltsreichen Juristen-Jahrbuchs.

Von früh an mit der englischen Rechtswelt, auch durch längeren Studienaufenthalt in England, vertraut, hat er durch Herausgabe von Wörterbüchern der englischen Rechtssprache großen Nutzen gestiftet.

Eine Persönlichkeit vielseitiger Interessen, ein Mensch frohen Lebensmuts auch in Zeiten der Unbill, tritt Gerhard Erdsiek voller Schaffenskraft in ein neues Lebensjahrzehnt ein, zu dem ihm seine vielen Freunde ihre herzlichsten Glückwünsche aussprechen.

Staatssekretär a. D. Dr. Walter STRAUSS, Luxemburg

## BERICHTE

### 34. Deutscher Anwaltstag in Bremen

Vom 10.—12. 5. 1967 fand in der Freien Hansestadt Bremen, in der das Recht, wie Bürgermeister Dehnkamp in seinem Willkommensgruß hervorhob, stets eine gute und freie Stätte hatte, der 34. Deutsche Anwaltstag statt.

1. In der festlichen Eröffnungssitzung konnte der Präsident des Deutschen Anwaltvereins Dr. habil. Hans Merkel den Bundesminister der Justiz, Dr. Dr. Gustav Heinemann, die Präsidenten der oberen Bundesgerichte sowie Solicitor Blatch, London, als Vertreter der ausländischen Anwaltschaft begrüßen. Merkel warnte in seiner Eröffnungsansprache nachdrücklich davor, die Reform der Justiz als bloßes gesetzestechnisches Werk, als eine Art Sandkastenspiel aufzufassen. Es handele sich vielmehr in erster Linie um ein soziologisches Problem, dessen Bewältigung eine genaue Kenntnis der tatsächlichen Lebensverhältnisse voraussetze. Statt einsame Entschlüsse zu fassen, sei ein dauerndes vertrauensvolles Zusammenwirken aller Organe der Rechtspflege geboten. Wie so oft verlange auch hier die Lösung der anstehenden Fragen in erster Linie Männer und nicht Maßnahmen\*. — Bundesjustizminister Dr. Dr. Heinemann begrüßte das Gespräch der Anwälte mit dem Gesetzgeber, das schon immer zu den legitimen Aufgaben gerade der Anwaltstage gehöre. Er kenne die Nöte der Anwälte, und man könne eines willigen Gehörs beim Bundesjustizministerium sicher sein. Das Thema des Festvortrages („Die Kunst, Prozesse zu verhüten“) ausweitend, sprach Heinemann von der Kunst, Frieden zu stiften. Die Anwaltschaft sei zur Mitwirkung

\* Über die Stellungnahme des Deutschen Anwaltvereins zur geplanten ZPO- und GVG-Reform vgl. näher unten 3.

an der Schaffung einer Weltordnung des Rechts aufgerufen, in der die bisherige Weltpolitik zu einer Weltinnenpolitik werden könnte. — Der Präsident des Bundesverwaltungsgerichts Prof. Dr. Fritz Werner erinnerte an das Spannungsverhältnis zwischen Anwalt und Richter im Alltag, wo man sich sozusagen an vorderster Front begegne, darüber dürfe die allgemeine Feststimmung nicht hinwegtäuschen. Dieses Spannungsverhältnis sei indessen kein schroffes Gegenüber, denn Richter und Anwalt dienten letztlich, wenn auch in verschiedenen Rollen, demselben Zweck, nämlich dem Schutz des Einzelnen durch das Recht, dem Rechtsschutz in der ursprünglichen Bedeutung des Wortes. Die Distanz, mit der der Richter dabei aufträte, dürfe nicht mißverstanden werden, denn der Richter distanziere sich damit vor allem von seiner eigenen Person und ihren Einflüssen auf die Urteilsfindung. Werner forderte eine beratende Mitwirkung von Richtern und Anwälten am Gesetzgebungsverfahren, etwa in Gestalt eines beim Rechtsausschuß des Deutschen Bundestages gebildeten Ausschusses. Es könne der Rechtsklarheit nur förderlich sein, wenn die Rechtsanwender ihre Erfahrungen schon bei der Schaffung der Gesetze zur Geltung bringen würden. Wenn Anwälte und Richter keine Referentenkommentare zu neuen Gesetzen mehr zu kaufen bräuchten, sei der Gesetzesstaat ein gutes Stück vorangekommen. Der Gewaltenteilungsgrundsatz stehe nach Auffassung Werner einer Beteiligung von Organen der Rechtspflege an der Gesetzgebung nicht entgegen. Wie abwegig derartige Bedenken seien, zeige schon ein Hinweis auf den Einfluß der Ministerialbürokratie auf die Legislative. — Solicitor Blatch, London, überbrachte dem 34. Deutschen Anwaltstag die Grüße der International Bar Association und der International Association of Lawyers.



Das Ziel ist die Reformreform. Bis dahin ist noch ein weiterer Einwand, besonders, wie gewohnt, von juristischer Seite zu erwarten. Wir kennen heute die soziokulturelle Standbundenheit der Juristen und die daraus resultierenden Mentalitäten und Einstellungen. Aber die empirische Erforschung des Reformverhaltens der Soziologen hat noch kaum begonnen. Sie dürfte überraschende Erkenntnisse zutage fördern.

Ermer wird gefragt werden, wo denn die Mängel der Reformen lägen, die ihre Reform erfordern. Dieser Einwand erlegt sich selbst. Keine der bisher in Angriff genommenen Reformen wäre je in Gang gekommen, wenn man sich mit der bisherigen Feststellung eklatanter Mängel auf dem betr. Gebiet hätte aufhalten wollen, jedenfalls wäre sie zu spät gekommen. Man sage nicht, das Herkömmliche habe sich bewährt, die autoritäre Erziehung habe eine antiautoritäre Jugend erbracht, das traditionelle Habilitations- und Berufungsverfahren einen *Wiethölter*, die überkommene Juristenausbildung und -laufbahn einen *Wassermann* usw. Will jemand im Recht behaupten, die Justiz, das Beamtentum, die Ingenieur- und Hochschulwesen seien nicht dringend reformbedürftig, nur weil die Richter nicht parteiisch und die Justizbeamten, wie zuzugeben ist, zahlenmäßig sehr gering, die Beamten nicht bestechlich sind, Brücken und Häuser fast nie zusammenbrechen und Studenten weder dumm noch faul sind? Also frage man nicht nach Mängeln der Reformen, ehe man ihre Reform beginnt. Es kommt nur darauf an, den Maßstab hoch genug anzusetzen, dann ergibt sich die Reformbedürftigkeit überall von selbst.

Zur Reformforschung werden umfangreiche Experimente gemacht, Probereformen auf allen sozialen Gebieten. Zu den konservativen Verzögerungstaktiken gehört es, wenn gern mit dem obersten Zeigefinger vor Experimenten gewarnt und diese als „Menschenversuche“ bezeichnet werden. Was verantwortungsbewußte Menschen mit modernen soziowissenschaftlichen Methoden in Kindergärten, Jugendlagern erarbeiten, soll ja eben die emanzipativen Voraussetzungen der sogenannten „Menschenwürde“ erst schaffen. Bei der Realisierung einer wissenschaftlichen, wertfrei konzipierten und eben so realen, sozialbezogenen Gesellschaftskonzeption müssen sie sich zurückziehen, bloß subjektiven „Interessen“ des Individuums nachgeben. Im übrigen dürfte in der auf Veränderung angelegten, modernen, arbeitsteiligen Industriegesellschaft heute und morgen eines jedenfalls zweifelsfrei feststehen: *Worum es sich handelt, das gewagteste Experiment ist es so zu lassen, wie es ist.* Das gilt auch und erst recht

für die Reform. Es muß endlich wirklich das ganze menschliche Leben der wissenschaftlichen Kontrolle unterworfen werden, damit Demokratie und Freiheit laut Verfassungsauftrag realisiert werden können. Die von interessierter Seite willkürlich tabuisierten sogenannten „Grundrechte“ sollten dem nicht länger im Wege stehen können.

Schließlich wird die eingewurzelte Scheu vor der „Kompliziertheit“ einer neuen Aufgabe zu überwinden sein. Haben wir die in zunehmendem Maße zu beobachtende Kompliziertheit der modernen sozialen Verhältnisse selbst geschaffen, so werden wir sie auch mit den uns heute zur Verfügung stehenden technischen und intellektuellen Mitteln bewältigen können. Daß z. B. die Prüfungsordnungen für 4 Fachrichtungen einer Fakultät jedes zweite Jahr geändert werden, jeweils mit Fortgeltung der alten Fassung für 5 Jahre, so daß in kurzer Zeit 20 Regelungen nebeneinander gelten, ist heute bereits eine alltägliche Erscheinung, die sich auch ohne weiteres bewältigen ließe, wenn man derartige Texte endlich von juristischen Tabuisierungen, die im Namen einer angeblichen, in Wirklichkeit irrationalen, „Gerechtigkeit“ festgehalten werden, befreien und EDV-gerecht konzipieren würde. Es läßt sich zeigen, daß Sekundärprobleme wie die Reformreform heute schon relativ häufig sind. In ihrem Gefolge werden Tertiär-, Quartär- usw. -probleme auftreten. Unsere Vorfahren haben nur gelehrt oder gelernt. Wir wissen heute, daß wir in steigendem Umfang lernen lernen und lernen lehren müssen, und wir müssen uns mit der Vorstellung vertraut machen, daß lernen lehren lernen, lehren lernen lehren usw. erst der Anfang der Forderungen sind, mit denen wir in wachsendem Maße konfrontiert werden und die uns zwingen, unsere Denkmethode ständig zu verfeinern und zu rationalisieren. Daran können wir uns durch das längst widerlegte Priesternärrchen vom babylonischen Turm nicht hindern lassen. Das Ziel ist im Gegensatz zu vielen heute noch konservierenden Einzelreformen der soziale Fortschritt als solcher. Trotz, oder vielleicht gerade wegen ihrer nüchternen Sachlichkeit engagiert sich die moderne Wissenschaft — kritisch! — für den progressus in infinitum. Fortschritt — Forttrieb — Fortgalopp? man verschone uns mit solchen Witzeleien, die den Zweckpessimismus ihrer konservativen Urheber kaum verhüllen. Wenn er fällt, dann schreit er? Die historisch notwendige Entwicklung der modernen Gesellschaft wird über Ammenweise unbarmherzig hinwegschreiten.

„Im Ernst, im Ernst, ihr Herrn, dies ängstigt mich“.

Wilhelm HENKE, Nürnberg

## Glückwunsch

### Ernst E. Hirsch 70 Jahre

Am 23. Januar ds. Js. vollendete in seinem schönen Heim im *Wald der emeritierte Ordinarius der Freien Universität Berlin Ernst E. Hirsch*, sein 70. Lebensjahr. Wohl selten ist es einem Lehrer so wie *Hirsch* vergönnt gewesen, auf allen drei Tätigkeitsfeldern: in Forschung, Lehre und Beteiligung an der Verwaltung gleichermaßen Hervorragendes geleistet zu haben. Er hat sich dabei in den Dienst selbstloser Aufbauarbeit gegeben. Promotion bei *Leo Rosenberg*, Assessor-Examen „mit Auszeichnung“ und Habilitation in Frankfurt/M. brachte ihm das Jahr 1928. „Kriegs- und politischen“ Gründen den Verlust seiner Dozentenstellung an der *Reichsuniversität*. Noch im gleichen Jahr wurde er in der *Reichsuniversität* Istanbul und im Jahre 1943 in der neu begründeten *Reichsuniversität* in Ankara zum Inhaber des Lehrstuhls für *Rechtsgeschichte und Rechtsphilosophie* ernannt. Hier in der Türkei hat er die Aufgabe gestellt, im Rahmen der Umwandlung des *Rechtsapparats* auf die Anwendung des importierten *westlichen Rechts* hinzuwirken. Der Dogmatiker des interdisziplinären *Handels- und Wechselrechts* entdeckte unter diesen Gesetzen für sich, sozusagen von neuem die *Rechtssoziologie*, die

er in Ankara und seit seiner Rückkehr nach Deutschland an der *Freien Universität Berlin* in Forschung und Lehre als eigenständiges *Universitätsfach* vertreten hat. Er wurde *Berater der türkischen Regierung* in Gesetzgebungsfragen, die ihm im Jahre 1943 die *Ehrenstaatsbürgerschaft* verlieh, und verfaßte die Entwürfe zu wichtigen türkischen Wirtschaftsgesetzen, insbesondere zum *Handelsgesetzbuch* und zum *Urheberrechtsgesetz*. Welch großen Nachhall seine Tätigkeit in der *Türkei* hat, davon zeugt nicht nur die Fülle seiner türkischen Veröffentlichungen und die anhängliche Liebe seiner zahlreichen Schüler, sondern auch die umfangreiche Festschrift, die ihm die *juristische Fakultät Ankara* gewidmet hat (Ernst E. Hirsch's *Annagan*, Ankara 1964).

1950 folgte *Hirsch* einer Anregung von *Ernst Reuter* und stellte sich für den Aufbau der *Freien Universität* zur Verfügung. Trotz seines durch die Emigrationszeit angegriffenen Gesundheitszustandes hat er dort während der schweren Aufbaujahre in Lehrbetrieb und Selbstverwaltung in vorderster Reihe gestanden. Viele Jahre stellte er sich der *Universität* sowie der *Westdeutschen Rektorenkonferenz* ehrenamtlich zur Verfügung. 1953—1955 bekleidete er das Amt des *Rektors*. Neben der Abfassung pädagogisch wertvoller Grundrisse und Fallsammlungen wurde er zum *Wiederbegründer* der *deutschen Rechtssoziologie*, der er die Anerkennung als ordnungsmäßiges Lehr- und Prüfungsfach in Berlin und den wissen-



schaftlichen Aufschwung durch Begründung eines Forschungsinstituts, einer Schriftenreihe und durch grundlegende eigene Veröffentlichungen sowie zahlreiche Arbeiten seiner Schüler erkämpfte. Weiter erwarb er sich große Verdienste durch die Förderung des zu Unrecht vernachlässigten Kulturrechts, insbesondere des Urheberrechts, des Film- und Fernsehrechts und des Presserechts. Er war lange Zeit Vorsitzender des Vorstandes des von ihm mitbegründeten Instituts für Film- und Fernsehrecht (München), dessen Mitglieder ihn durch eine Festschrift ehrten (Ehregabe für Ernst E. Hirsch, Schriftenreihe der UFITA Bd. 26, Baden-Baden 1963). Seine wissenschaftlichen Publikationen auf diesem Gebiet wurden durch die Verleihung der Richard-Strauss-Medaille gewürdigt. Anlässlich seiner Emeritierung hat ihm seine Fakultät eine Festschrift darge-

bracht (Berliner Festschrift für Ernst E. Hirsch, Berlin 1968). Er ist seitdem, trotz mancher gesundheitlicher Behinderungen, nicht tätig geblieben. Mag er heute seine Aufbauarbeit an der Universität gefährdet sehen, ungefährdet bleiben indes sein wissenschaftliches Werk und seine Wirkung als begeisterter Lehrer und liebenswerter Mensch auf all diejenigen, die ihn persönlich kennen, besonders wenn sie an seinen „Sonntagsrunden“ teilgenommen durften, zu denen er regelmäßig ausländische und auswärtige Studenten in sein Berliner Haus geladen hat. Noch heute finden viele der alten und so manche neue Schüler den Weg in den Schwarzwald. Jeder dieser Besuche wird zu einem Erlebnis, das man sich freut und an das man gern zurückdenkt.

Manfred REHBINDER, Bielefeld

## Literatur

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*Lackner-Maassen*: Strafgesetzbuch mit Erläuterungen von *Karl Lackner* und *Hermann Maassen*. 6., neubearb. Aufl. München: Beck. 1970. XXXIX u. 840 S. Lw. 26.50

*Schönke-Schröder*: Strafgesetzbuch. Kommentar begründet von *Adolf Schönke*, fortgeführt von *Horst Schröder*. 15., neubearb. Aufl. München: Beck. 1970. XVII u. 1777 S. Lw. 98.—

*Schröder, Horst*: Drittes Gesetz zur Reform des Strafrechts. Demonstrationsnovelle mit Zehntem Strafrechtsänderungsgesetz und Straffreiheitsgesetz 1970. München: Beck. 1970. 72 S. kart. 5.80

Es wäre eine nur äußerliche Unterscheidung wollte man bei der Anzeige der drei Erläuterungsbücher zum StGB entscheidend auf ihren äußeren Umfang hinweisen. Denn dieser sagt nichts aus über die Stoffbeherrschung, verarbeitetes Material und den Gehalt des Dargebotenen. Insoweit stehen die angezeigten Werke m. E. einander nichts nach. Dagegen sind sie in der Art, aber auch in der Ausführlichkeit ihrer Darlegungen entsprechend dem jeweils verfolgten Zweck, wie noch zu zeigen sein wird, „ungleiche Brüder“.

Der „*Dreher*“ ist kein „Kurzkommentar“ im eigentlichen Sinn. In ihm wird, wie schon oft zu Recht betont wurde, ein Höchstmaß von Rechtsprechung verarbeitet und dem Leser verständlich dargeboten. Wo ein dogmatischer Streit für die Praxis nicht von entscheidender Bedeutung ist, tritt er in den Hintergrund. Aber wo es für das Verständnis des tiefer-eindringen-wollenden Praktikers notwendig erscheint, wird, wie z. B. bei § 13 (Stratzumessung) aus einer Anmerkung eine umfassende systematische — auch das Verfahrensrecht einbeziehende — Abhandlung.

Der „*Dreher*“ gilt deshalb mit Recht als ein hohes Anspruchs genügendes verlässliches Nachschlagewerk für die Praxis. Es orientiert sich deshalb auch mehr als z. B. der Kommentar von *Schröder* an der höchstrichterlichen Rechtsprechung, ohne allerdings das Schrifttum zu vernachlässigen. Das gilt auch für die Neuauflage. Sie wurde nicht nur notwendig, weil die Voraufgabe schnell vergriffen war. Sie war insbesondere bedingt durch die Verarbeitung des seit dem 1. StrRG in reichem Maße veröffentlichten Schrifttums und der inzwischen ergangenen Rechtsprechung, durch das neue sog. Demonstrationsstrafrecht und seine Auswirkungen, die Änderung des § 361 Nr. 6 e und durch das G. v. 27. 7. 70, durch das anstelle des früheren Offenbarungseides eine entsprechende eidesstattliche Versicherung trat. Die Kommentierung des neuen Rechts und die Aufdeckung von Beziehungen und Auswirkungen zu dem bisherigen Recht sind dem Verfasser in der ihm nur sehr kurz zur Verfügung stehenden Zeit aufgrund seiner steten Verbundenheit mit dem Strafrecht, seinen Problemen, insbesondere aber auch mit allen Reformbestrebungen, voll geglückt. Auch in dieser Auflage stellt also „*Dreher*“ ein unentbehrliches Nachschlagewerk für die Praxis dar.

Einen anderen Zweck verfolgen die auf nur 748 Seiten straff zusammengefaßten, aber doch leicht verständlichen Erläuterungen von *Lackner-Maassen* zu den geltenden Bestimmungen des StGB. Sie wollen, wie im Vorwort zur 4. Auflage ausgeführt wird, „dem Lernenden — vornehmlich an der Hand der höchstrichterlichen Entscheidungen aber auch des wichtigsten Schrifttums — die Grundlinien des Strafrechts sichtbar machen und dem strafrechtlichen Praktiker eine erste zuverlässige Orientierung bieten“. Diesen etwas zu bescheiden angegebenen Zweck erfüllt auch die neue Auflage in einem hohen Maße. Darin werden vor allem die Änderungen des 3. StrRG erläutert und die in der Voraufgabe eingearbeiteten

ten Anmerkungen zum 1. StrRG unter Berücksichtigung der inzwischen veröffentlichten Entscheidungen und Aufsätze vertieft.

Es ist immer wieder erstaunlich, welche Fülle von Stoff auf verhältnismäßig knappem Raum verarbeitet und dargeboten wird. Insbesondere wird in den einzelnen Abschnitten jeweils ausgehenden „Vorbemerkungen“ die Systematik des Folgenden herausgearbeitet. Auch die Struktur der einzelnen Vorschriften tritt in den Anmerkungen deutlich zu Tage. So wird dem Leser die Wesentliche an Zweifelsfragen und an Rechtsprechung zuverlässig vermittelt. Wo der Zielsetzung entsprechend eine weitere Vertiefung zu weitgehend erscheint, weisen Schrifttumsangaben auf Möglichkeiten hierzu hin. Alles in allem: Das kleine und verhältnismäßig preiswerte Werk leistet der Ausbildung aber auch der Praxis unschätzbare Dienste.

Seit dem Tode *Adolf Schönkes* im Jahre 1953 wird der von ihm noch im Kriege begonnene Kommentar von *Horst Schröder* weitergeführt. Aus dem „*Schönke*“ ist dem Inhalt nach längst ein „*Schröder*“ geworden. Geblieben ist der ursprüngliche Zweck, Studenten ein klar gegliedertes, leicht faßliches und umfassendes Erläuterungswerk zum StGB an die Hand zu geben. Das Werk ist aber inzwischen über diesen Zweck hinausgewachsen. Das zeigt sich nicht an dem notwendigerweise bedeutend vermehrten Umfang, sondern an seinem Inhalt. Es bietet jedem, sei er Lernender, Lehrender oder ein das Recht in der Praxis Anwendender, eine Fülle von durch sachkundige Hand übersichtlich geordnetes und durch eigene Gedanken aufgeschlossenes Material; daüber hinaus vermag es zu weiterem selbständigen wissenschaftlichen Denken anzuregen. Der Kommentar ist damit, wie er es nach seinem Vorwort zur 7. Auflage erstrebt, zu einem „hervorragenden Mittler zwischen Wissenschaft und Praxis“ geworden. Die Fülle des an Schrifttum und Rechtsprechung Dargebotenen macht ihn zugleich zu einem „Handbuch des materiellen Strafrechts“ (so schon *Lackner* JZ 65, 510).

In der 15. Auflage hat es der Verfasser — wie schon in der 14. — verstanden, die in der Zwischenzeit ergangenen Reformgesetze und Novellen nahtlos in das Werk einzuarbeiten. Zu diesem Zweck wurden nicht nur der dogmatische Bestand und die vorhandene Rechtsprechung auf ihre Vereinbarkeit mit dem Neuen überprüft, sondern auch Rückwirkungen der Novellen auf durch sie nicht unmittelbar betroffene Vorschriften, ins Auge gefaßt und dargelegt.

Das Werk steht deshalb nicht nur mit Recht in Studierzimmern, es wird auch von Richtern und Anwälten mit großem Nutzen gebraucht. Jeder findet dort eine umfassende, klar gegliederte Information über den Stand von Literatur und Rechtsprechung. Besonders ausführliche Schrifttumsverzeichnisse vor der Kommentierung der einzelnen Vorschriften ermöglichen eine etwa für notwendig gehaltene weitere Vertiefung. Ein gutes Gesamtinhaltsverzeichnis erleichtert insbesondere das Auffinden der Stellen, an denen allg. meinere Probleme abgehandelt werden.

Wer das Werk zur Hand nimmt, ist mit diesem Handwerkszeug — zusammen mit dem in gleicher Weise zu lobenden Nachtrag über das Demonstrationsrecht, das 10. StrÄG und das StFG 1970 — wohl beraten. Zu bedauern ist nur, daß das 2. StrRG nicht wie bei *Dreher* und *Lackner-Maassen* mit abgedruckt ist.

Oberlandesgerichtsrat a. D. Hans Werner LAY, Karlsruhe

*Mayer, Franz*: Allgemeines Verwaltungsrecht. Eine Einführung. Stuttgart-München-Hannover: R. Boorberg Verlag. 1970. 180 S. 14.50 (1971 erschien eine 2. Aufl.; dabei handelt es sich um einen Nachdruck mit unwesentlichen Änderungen)

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wohl Gustav Boehmer mit ganzem Herzen an Freiburg und Umgebung hängt, er hier den Höhepunkt seines Lebens erreicht, ihn langjährige nahe Beziehungen mit Frankreich und seiner Kultur verbinden<sup>4</sup> und seine geistige Eigenart, namentlich Elastizität, seine schnellen und scharfen Reaktionen, seine Anteilnahme an den Kulturen der Hinterpommern. Er wurde in Körlin bei Kolberg als Sohn einer alten Juristenfamilie geboren. Nachdem er dort die Schule besucht und traditions- und wesensgemäß „Blücherhüsar“ in Stolp gewesen war, studierte er vorwiegend in Greifswald. Er promovierte dort im Jahre 1907 mit einer Arbeit über die Konstruktion der befreienden Schuldübernahme und habilitierte sich 1909 mit seinem Buch über den Erfüllungswillen bei Stampe und Jung. In den Jahren 1913 zog ihn ein Ruf als Extraordinarius nach Neuchâtel. Unter seinen vor dem 1. Weltkrieg veröffentlichten Arbeiten sind vor allem die Aufsätze über „Hypothek und Forderung“ und „Realofferte“ im Archiv für Bürgerliches Recht hervorzuheben. Während des Weltkrieges geriet er in französische Kriegsgefangenschaft. Aber er trübte nicht seine Beziehungen zu Frankreich. Wie seine vielen aufschlußreichen rechtsvergleichenden Bemerkungen beweisen, die besonders schweizerisches und französisches Recht behandeln, hat er stets eine nahe Verbindung zur Kultur unserer südlichen Nachbarn behalten<sup>5</sup>.

Im Jahre 1919 wurde Gustav Boehmer als Nachfolger v. Tuhrs an das Stammlersche Ordinariat nach Halle berufen. Neben zahlreichen kleineren Abhandlungen, auch arbeits- und wirtschaftsrechtlichen Charakters, die er in der Neuen Zeitschrift für Arbeitsrecht veröffentlichte, verfaßte er während seiner Tätigkeit in Halle ein Buch über „Erbfolge und Erbenhaftung“ (1927), seinen Beitrag „Übergang des Pflichtlebens des Erblassers auf die Erben“ in der Reichsgerichts-Festschrift, Bd. III, seine Abhandlung über den „Rechtsübergang“ in der Zeitschrift für Vergleichendes Recht, hrsg. von Nipperdey, und seine „Einführung in die Rechtswissenschaft“ (1932). Nach 1933 wurde er — namentlich wegen des Satzes in dieser Einführung (S. 38), daß „eine Zurückziehung der Juden durch Eheverbote, Beschränkungen in der Geschäftstätigkeit oder im Erwerb von Grundbesitz, ganz abgesehen von der Zweifelhafteit der Rassenbestimmung . . . das Rad der Geschichte um mehr als ein Jahrhundert zurückdrehen“ würde — aus dem Amt suspendiert, gerade als er einen Ruf nach Frankfurt angenommen hatte (1934). Im Verlauf des erst im Jahre 1936 eingeleiteten Disziplinarverfahrens ging er an die Universität Marburg. Dort hielt er seine einfallsreichen, anspruchsvollen, die juristischen Wissenschaften stets in den weiten Zusammenhang geschichtlichen Geschehnisse rechtsvergleichender Betrachtung und unter die Maßstäbe sozialer und sozialer Wertens stellenden, grundlegenden Vorlesungen allen seinen Hörern, zu denen auch der Unterzeichnete gehörte, ein Erlebnis waren. Aus dieser Zeit stammen neben zahl-

reichen Aufsätzen — namentlich über die Erbenhaftung (JW 38, 2634 ff.) an größeren Arbeiten seine Bearbeitung des ersten Teils des Erbrechts in der 10. Auflage des Staudingerschen Kommentars (1937) sowie seine „Vorschläge zur Neuordnung der gesetzlichen Erbfolge“ (1938), die er im Rahmen der Akademie für Deutsches Recht erstattete.

Der Ruf nach Freiburg erreichte Gustav Boehmer im Jahre 1941. Trotz vielfacher Bindungen an die Marburger Philipps-Universität leistete er ihm Folge, wissend, daß ihm die Atmosphäre dieser Stadt und Universität viel geben würde. Im Jahre 1941 veröffentlichte er hier sein Buch über „Die Rechtsstellung des Stiefkindes“, „das Lieblingskind Boehmers“<sup>6</sup>, und im Jahre 1943 „Die Vermögensverfassung des deutschen Hauses“. Nach dem Kriege schuf er vor allem seine enzyklopädischen, das Hauptthema seines Faches ansprechenden „Grundlagen der bürgerlichen Rechtsordnung“ (Bd. I, 1950; Bd. II, 1, 1951; Bd. II, 2, 1952). Er gab fernerhin eine zweite, völlig neubearbeitete Auflage seiner „Einführung in das Bürgerliche Recht“ heraus und die 11. Auflage seiner Teile des Erbrechts im Kommentar von Staudinger. Außerdem bearbeitete er Art. 14 GG in den „Grundrechten“, hrsg. von Neumann-Nipperdey-Schöner.

Die Namen der Gelehrten und Freunde, denen Gustav Boehmer seine Grundlagen sowie seine Einführung gewidmet hat, Franz Beyerle, Franz Leonhard, Fritz Pringsheim und Leo Raape, kennzeichnen gut den menschlichen und fachlichen Standpunkt, den Gustav Boehmer im Laufe seines Lebens erreicht hat. Das Zentralthema seiner Untersuchungen bildet — trotz der Vielgestaltigkeit seiner Interessen und Neigungen — die Arbeit am Bürgerlichen Gesetzbuch, dessen Inkrafttreten mit dem Beginn seines juristischen Studiums zusammenfällt. Seine Interpretationen des Gesetzbuches weisen nie engen Formalismus auf, sondern suchen stets den verschiedenen Interessenlagen gerecht zu werden. Er hebt überall die sozialethischen Momente hervor mit offenem Blick für die geschichtlichen Wurzeln und systematischen Zusammenhänge. Namentlich in seinen grundlegenden Arbeiten aus dem Familien- und Erbrecht sucht er, weit über das „Nur-Juristische“ hinausgehend, zwischen den sozialen, ökonomischen, psychischen Realfaktoren und den überzeitlichen, vielgestaltigen Idealfaktoren eine Synthese herzustellen. Denn „wie der Mediziner Individualarzt am menschlichen Einzelkörper ist, so ist der Jurist Sozialarzt am menschlichen Volkskörper“ (Grundlagen, I, 1950, S. XI). Sein menschliches und berufliches Anliegen ist, wie er selbst gesagt hat, „die rechtsbefähigte Jugend in die großen, geschichtlichen, rechtsdogmatischen und rechtspolitischen Zusammenhänge des Werdens und Seins unserer Privatrechtsordnung einzuführen, ihr die Problematik der Rechtsschöpfung nahe-zubringen und sie zu rechtsstaatlichem Denken und charaktervoller Haltung für ihre künftige Berufstätigkeit zu erziehen“ (Grundlagen, I, S. X).

In diesem Sinne gilt ihm unser herzlichster Wunsch: Ad multos annos!

Prof. Dr. Dr. Wolfram MÜLLER-FREIENFELS, Frankfurt a. M.

<sup>6</sup> Heburich Lange, NJW 57, 1387.

## NACHRUF

### Heinrich Hoeniger †

Heinrich Hoeniger ist am 14. April 1961 in Frankfurt a. M. verstorben. Im vergangenen Jahre konnte er noch, geistig rege und körperlich wohlhau von einem Mittelmeeraufenthalt zurückgekehrt, die Reise der Frankfurter Juristenfakultät seinen 80. Geburtstag begehen, wozu ihn die Stadt Frankfurt durch Verleihung einer Ehrenplakette ehrte. Im Sommersemester 1961 hielt er noch Vorlesungen über Fragen des amerikanischen Arbeitsrechts. Im Sommersemester 1960 wurde er. Der Tod kam ihm jetzt als Freund. Er führte ein reiches, aus einem Leben, das voll steter Arbeit, aber ohne Unzufriedenheit war, das er auch in den Jahren des Erfolges mit Zurückhaltung verbrachte, dem die Wirrnisse der Welt nicht ersparten — das im Ganzen aber in der Tat und erfüllt seinen Ausklang gefunden hat.

Heinrich Hoeniger und sein älterer Bruder Viktor (der Reichsminister für Arbeit und Soziales) stammen aus einem oberschlesischen Bankierhaus. Heinrich wurde in Ratibor am 26. Dezember 1879 ge-

Weg an die Universität Freiburg i. Br. Dort schuf er sich die breite römischrechtliche und zivilistische Grundlage, die ihn noch mit der Tradition des Gemeinen Rechts verknüpfte und später auch seinen Arbeiten zum modernen Handels-, Wirtschafts- und Arbeitsrecht in selten gewordenem Umfang den universellen Zusammenhang mit der allgemeinen zivilistischen Dogmatik und Systematik sicherte. Fridolin Eisele, Otto Lenel, Heinrich Rosin (der „Forscher und Förderer des sozialen Rechts“, wie ihn Hoeniger später in der freundschaftlichen Widmung des I. Bandes seines Jahrbuchs des Arbeitsrechts nannte) gehörten zu seinen Freiburger Lehrern — vor allem aber Gustav Rümelin. Bei ihm wurde er 1906 mit seinen „Vorstudien zum Problem der gemischten Verträge“ promoviert. Aus diesen ist dann seine Habilitationsschrift „Die gemischten Verträge in ihren Grundformen“ erwachsen (1910 in Buchform als „Untersuchungen zum Problem der gemischten Verträge“, I. Band, erschienen). In den glücklichen Freiburger Jahren vor dem ersten Weltkrieg knüpften sich feste fachliche und persönliche Bande auch zu den Wirtschaftswissenschaften und zu deren Freiburger Vertretern wie C. v. Schulze-Gävernitz, K. Diehl, H. Schönitz und M. R. Weyermann. Der erste Weltkrieg unterbrach die wissenschaftliche Arbeit durch einige Jahre Militärdienst.

Seit 1919 Ordinarius an der Universität Freiburg i. Br., konnte Hoeniger eine umfassende und außerordentlich fruchtbare Lehr-



tätigkeit entfalten. Er war einer der vorzüglichsten und beliebtesten deutschen Zivilrechtslehrer, einprägsam ebenso durch seinen freien und anschaulichen Vortrag wie durch die Klarheit und Geschlossenheit der Gedankenführung. Immer wurden auch die wirtschaftlichen Hintergründe der Rechtsnormen greifbar. Neben der hervorragenden Pflege der romanistischen und germanistischen Rechtsgeschichte gelangte in dem Freiburg der zwanziger Jahre auch die Zivilistik dank Hoenigers Wirken zu Ansehen und Glanz.

1932 folgte Hoeniger einem Ruf an die Universität Kiel. Die dortige Fakultät war vorzüglich besetzt. Harms, v. Hentig, G. Husserl, H. U. Kantorowicz und Wedemeyer gehörten ihr an. Auch die ausgezeichneten Arbeitsbedingungen in dem Harms'schen Institut für Weltwirtschaft und in dem von Walter Jellinek großzügig ausgebauten Juristischen Seminar lockten dorthin. Hoeniger war in Kiel noch ein Jahr anregender und ungestörter Arbeit beschieden.

Der neue politische Kurs führte 1934 zu seiner Versetzung an die Universität Frankfurt a. M. und zur Zerruhesetzung, bald auch zu seiner Entlassung. 1938 siedelte Hoeniger mit seiner Familie nach den USA über. Das angesehene Hunter College in New York eröffnete ihm die Lehrtätigkeit im Bereiche der Sozialpolitik und des Arbeitsrechts. Er hatte schon in seinen Freiburger Jahren Rechtsvergleichung im Arbeitsrecht systematisch getrieben. Jetzt wurde er einer der besten Kenner des nordamerikanischen Arbeitsrechts und seiner Praxis. Die Tätigkeit am Hunter College behielt er bis zum vollendeten 70. Lebensjahre bei.

Ihm, dem das Lehren Lebenselement war, lag es nicht, sich nach seiner Rückkehr nach Deutschland im Jahre 1950 zur Ruhe zu setzen. Er übte vielmehr als Gastprofessor an der Universität Frankfurt a. M. noch ein volles Jahrzehnt eine ausgedehnte und segensreiche Lehrtätigkeit aus, sowohl in der Rechtswissenschaftlichen als auch in der Wirtschafts- und Sozialwissenschaftlichen Fakultät. Besonders um den Wiederaufbau der arbeitsrechtlichen Disziplin erwarb er sich hohe Verdienste. Die Verleihung des Dr. rer. pol. h. c. durch die Frankfurter Wirtschafts- und Sozialwissenschaftliche Fakultät krönte diese Tätigkeit.

Hoeniger war einer der bedeutendsten Wegbereiter des modernen Arbeitsrechts. Ihm galt sein Interesse schon in frühen Freiburger

Jahren. Er war in Deutschland einer der ersten, die systematische Vorlesungen über Arbeitsrecht hielten. In den 12 Bänden „Jahrbuch des Arbeitsrechts“ (seit 1919/20) hat er dessen Entwicklung begleitet, sie in zahlreichen Abhandlungen und in seiner knappen Gesamtdarstellung in Stammers Enzyklopädie (I. Band) beeinflusst. Der Vergleich zwischen deutschem und nordamerikanischem Arbeitsrecht diente vor allem seine Forschungsarbeit während seines letzten Lebensjahrzehnts. Bei alledem war ihm das Arbeitsrecht nie eine Spezialwissenschaft, er sah es immer in größeren übergreifenden Ordnungen des Rechtssystems. Und er es nie ohne gründliche Berücksichtigung und Wertung der tatsächlichen Gegebenheiten des Soziallebens.

Auch dem Handels- und Wirtschaftsrecht hat Hoeniger seine kluge und wirklichkeitsgerechte Arbeiten gewidmet. Er war einer der ersten, der gründlich den damals neuen Problemen der Sicherungsübereignung (1911) und der Diskontierung von Buchforderungen nachging (1912). Zur Erkenntnis der Unternehmungsgesellschaft, der Pfandklausel, der Innengesellschaft, der Struktur der Bauspargesellschaft hat er Wesentliches beigetragen.

Am deutlichsten zeigen Hoenigers bürgerlichrechtliche Arbeiten die Vorzüge seiner Methode. Er war ein Meister darin, im Allgemeinen die Differenzierungen und im Speziellen das allgemeine Gesetz zu erkennen. Er verstand es, die Schwerpunkte im System richtig zu setzen, aber auch die gleitenden Zwischenformen zu analysieren („es heißt zu erkennen, daß die Rechtsbegriffe gewissermaßen nur besonders markante Grenzsteine sind, zwischen denen mancherlei bald der einen, bald der anderen Grenze näher liegt“).

Es war kein Zufall, daß Hoeniger in den ersten Jahren nach dem ersten Weltkrieg in Freiburg seinen praktischen Beitrag zur Sicherung des Arbeitsfriedens als Vorsitzender des dortigen Schlichtungsausschusses geleistet hat. Er war auch sonst ein Mann kluger Vermittlung, verständnisvollen Ausgleichs und hilfsbereiter Güte. Eine große Zahl dankbarer Schüler und guter Freunde wird seine Gedanken in hohen Ehren halten.

Prof. Dr. Hellmut Georg ISELE, Frankfurt a. M.

## LITERATUR

*Enneccerus-Nipperdey*: Allgemeiner Teil des bürgerlichen Rechts. 1. u. 2. Halbbd. 15. Bearb. Tübingen: Mohr (Siebeck). 1959-1960. XIV, 856 u. IX, 855 S. Lw. 1. Halbbd 61.-, 2. Halbbd. 60.-

Die von Nipperdey vorgelegte Neubearbeitung des „Allgemeinen Teils des Bürgerlichen Rechts“ legt ein lebendiges Zeugnis dafür ab, daß die Stagnation der deutschen Zivilrechtswissenschaft überwunden ist. Das Buch berichtet plastisch von der Entwicklung, die diese Wissenschaft in jüngster Zeit genommen hat; vor allem aber ist es Nipperdey selbst, der zahlreiche neue Impulse und Anregungen vermittelt. So vereinigen sich Dokumentation und eigenes Vorschreiten in glücklicher Weise. Die Darstellung dient dem, der sich über den Stand einer Rechtsfrage orientieren will, mit klarer Unterrichtung und einer Fülle von Material, und schlägt damit manchen Kommentar weit aus dem Felde; sie bereichert aber auch jeden, der sich Gedanken über die Entwicklungslinien des deutschen bürgerlichen Rechts macht und bei diesem Bemühen Hilfe und Anhalt sucht. Es liegt auf der Hand, daß ein solches Werk die entsagungsvolle, arbeitsreiche Tätigkeit des „Sammlers“ ebenso erfordert wie die überlegene Kunst des erfahrenen Dogmatikers, aber auch — und nicht zuletzt — die gebändigte Phantasie dessen, der auf der Grundlage des bisher Erarbeiteten die neuen Ufer zu ahnen vermag. Dies alles verdient um so mehr Anerkennung, als jedes von einem anderen Autor begonnene Werk — aus welchen Gründen auch immer — dazu verleitet, sich an das Überkommene zu halten und Neues lediglich „nachzutragen“. Das führt zu der bekannten Erscheinung der „Jahresringe“, die konservierende Tätigkeit unterdrückt die reformatorische. Von einem solchen Vorwurf weiß sich Nipperdey frei.

Man würde einem Werk dieser Qualität (und seinem Autor) nicht gerecht werden, wollte man versuchen, auch nur annähernd seinen Inhalt zu schildern und da und dort eine eigene abweichende Meinung zu begründen. So möge es gestattet sein, einige Partien herauszugreifen, die dem Rezensenten aufgefallen sind (wobei ich von den Kernstücken des Buches, etwa der sogen. absoluten Wirkung der Grundrechte oder der Übernahme der finalen Handlungs-

lehre ins Zivilrecht absehe, da sie von anderen wiederholt und eingehend gewürdigt worden sind).

1. In § 72 behandelt N. den „Begriff der subjektiven Rechte im allgemeinen“. Er geht von der herkömmlichen Vorstellung aus, nach „das subjektive Recht begrifflich eine Rechtsmacht ist, die dem Einzelnen durch die Rechtsordnung verliehen ist, seinem Zweck nach ein Mittel zur Befriedigung menschlicher Interessen“. Das subjektive Recht habe einen rechtsethischen Gehalt, sei aber gleichzeitig ein rechtstechnisches Hilfsmittel. Entscheidend sei ein von der Rechtsordnung der Person „zugeeignetes Machtverhältnis“. Nipperdey behandelt dann die Frage, ob sich aus der Gewährung der Freisetzung- und Unterlassungsklage für „Rechtsgüter“ ergebe, daß in Wahrheit „subjektive Rechte auf Unterlassung“ bestehen, und es sich „um die Verletzung subjektiver Rechte, nämlich des Rechts auf Unterlassung des tatbestandsmäßigen rechtswidrigen Eingriffs“ handle. Mit dieser These sieht sich N. in Gegensatz zu den Auffassungen von Nikisch (Zivilprozeßrecht, 2. Aufl. 1952, S. 149), Larenz (Schuldrecht, II, 4. Aufl. 1960, § 70 II) und Esser (Schuldrecht, 2. Aufl. 1960, § 211, 4), die sich gegen die Gleichstellung von subjektivem Recht und prozessualem Anspruch wenden und „die vorbeugende Unterlassungsklage als prozessuales Rechtsinstitut ohne materiellen Anspruch begreifen“ (so Esser aaO S. 932). Auf die praktische Bedeutung dieser Kontroverse soll hier nicht eingegangen werden. Für eine theoretische Betrachtung ist sie aus zwei Gründen interessant: einmal zeigt sie, daß die Nahtstellen zwischen materiellem Recht und Prozeßrecht in unserer Doktrin noch nicht die nötige Aufhellung erfahren haben (läßt sich die Behauptung der vollen Eigenständigkeit des Prozeßrechts wirklich halten?; steckt in der These N.s der richtige Kern, daß das „frontnahe“, zum Handelsrecht gezwungene Prozeßrecht die Bahn zur Entwicklung neuer materiell-rechtlicher Institute bricht, ein Gedanke, der sich insbesondere auch bei Beobachtung der neuerdings der einstweiligen Verfügung — etwa im Warenzeichen- und Wettbewerbsrecht — zugesprochenen Funktionen aufdrängt?). Zum anderen deutet die Auseinandersetzung darauf hin, daß mit dem überkommenen Begriff des subjektiven Rechts offenbar nicht weiterzukommen ist, daß es vielmehr



Honig



Deutsche Strafrechtsreform  
im Lichte amerikanischer Strafrechtsgrundsätze

Vortrag vor der Forensisch-Psychologischen Gesellschaft in Hamburg

Von Professor Dr. Richard M. Honig, Göttingen

Nach einem Jahrhundert scharf geschliffener analytischer Arbeiten der deutschen Strafrechtler, einem Jahrhundert, das Späteren als das Zeitalter der klassischen deutschen Strafrechtswissenschaft erscheinen könnte, gleichviel ob es sich um Arbeiten der sog. klassischen oder der modernen Schule handelte, stößt man in den Beratungen der Großen Strafrechtskommission zum Entwurf des Allgemeinen Teils eines Strafgesetzbuchs hier und da auf Erwägungen, welche der der Laiensphäre entspringenden Rechtsprechung der amerikanischen Gerichte zugrunde liegen. Wenngleich in den Beratungen, soweit ich sehe, das amerikanische Recht nicht herangezogen worden ist, drängt sich die Frage auf: Wie haben gewisse Leitsätze der amerikanischen Rechtsprechung sich bewährt; wie weit sind sie geeignet, bei der Gestaltung eines neuen deutschen Strafgesetzbuchs berücksichtigt zu werden?

Von der amerikanischen Rechtsprechung und nicht von den seit der Mitte des 19. Jahrhunderts geschaffenen Strafgesetzbüchern der 48 Bundesstaaten auszugehen, erscheint gerechtfertigt, weil diese Gesetze im wesentlichen nichts anderes sind, als ein Spiegel des durch sie abgelösten common law. Ist in unserem StGB z. B. die Urkundenfälschung im weitesten Sinne genommen, also einschließlich der Bestimmungen über die Wiederverwendung von Wertzeichen, der Grenzverrückung und des Mißbrauchs von Ausweispapieren, in 12 kurzen Paragraphen geregelt, so beansprucht die entsprechende Materie in „The Penal Law of the State of New York“ nicht weniger als neun Kleindruckspalten normalen Buchformats. Grund hierfür: Die Verbote enthalten nicht abstrakte Deliktsmerkmale; vielmehr werden alle denkbaren Handlungsobjekte und alle nur möglichen Betätigungen an ihnen und mit ihnen aneinander gereiht, die jemals Gegenstand der Urteilsfindung gewesen sind. Dieses Beispiel mag als Indiz dafür genommen werden, daß dem Amerikaner der abstrakte Begriff der Tatbestandsmäßigkeit fremd ist. Dieser Mangel hat weitreichende Folgen:

Deutsche Strafrechtsreform  
in englischer Sicht

von

Prof. Dr. Dr. h. c. Hermann Mannheim O. B. E.

Senatspräsident a. D.

Mitbegründer und Mitherausgeber des British Journal  
of Delinquency

Präsident der wissenschaftlichen Kommission der  
Internationalen Gesellschaft für Kriminologie

Tatbestandes gegeben? Auch hier drängt sich die Frage auf, wo — nach dem Entw. — die Grenze zwischen Vorbereitung und Versuch verläuft.

2. Im Gebiet der Teilnahme fehlen dem amerikanischen Strafrecht die abstrakten Begriffsmerkmale für den Täter, Anstifter und Gehilfen. Um den sich im Hintergrund haltenden, an der Tat und ihren Folgen jedoch unmittelbar interessierten Teilnehmer als Täter fassen zu können, hilft die amerikanische Rechtsprechung und Doktrin sich mit der Fiktion der constructive presences. Mit ihrer Zweckbestimmung deckt sich annäherungsweise die der Tatherrschaft. Mit diesem Begriff glaubt man, wie die Begründung zum Entw. hervorhebt, neuerdings den Gegensatz zwischen den objektiven und subjektiven Teilnahmelehren überbrücken zu können. Ihm gibt auch der Entw. Raum. Wie bewährt er sich in den Grenzfällen, die die amerikanische Rechtsprechung mit Hilfe der Fiktion der constructive presence löst?

3. Das amerikanische Strafrecht kennt nicht ein einheitliches abstraktes subjektives Tatmerkmal, das unserem Begriff vorsätzliche entsprechen würde. Anstatt dessen finden sich zur Kennzeich-



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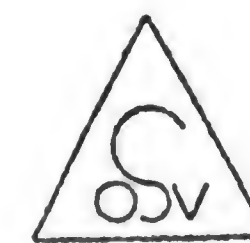


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FESTSCHRIFT  
FÜR  
RICHARD M. HONIG

Zum 80. Geburtstag  
3. Januar 1970

Dargebracht von Freunden  
und Kollegen



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Die Juristische Fakultät der Universität Göttingen sowie Freunde und Kollegen des Jubilars widmen diese Festschrift Richard M. *Honig* zum 80. Geburtstag am 3. Januar 1970. Mit der Widmung möchten sie herzliche Glückwünsche und zugleich aufrichtigen Dank zum Ausdruck bringen. Dieser Dank gilt einem Gelehrten, der durch seine über ein halbes Jahrhundert fortgesetzte Tätigkeit in Forschung und Lehre insbesondere die Strafrechtsdogmatik, die Kirchenrechtsgeschichte und die Rechtsvergleichung um tiefgründige Werke bereichert und ihnen fortwirkende Impulse verliehen hat. Der Dank gilt aber auch in besonderem Maße dem Mann, den das ihm durch seine Vertreibung im Jahre 1933 zugefügte Unrecht nicht gehindert hat, den Weg zu seiner Wirkungsstätte in Deutschland zurückzufinden, alte Freundschaften zu erneuern und neue zu begründen und durch seine jüngsten Arbeiten zur amerikanisch-deutschen Rechtsvergleichung ein Mittler zwischen den Rechtswelten seiner alten und neuen Heimat zu werden.

*Großfeld*

Dekan der Juristischen Fakultät in Göttingen



Husare



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15, 1935; clk. at Addis Ababa Apr. 8, 1936; at The Hague May 14, 1937; v.c. at Casablanca at Casablanca May at Hankow Apr. 30, 1946; For. Ser. June 20, 1946; For. Ser. v.c. at Mexico City June 20, 1946; cons. at Mexico June 20, 1947; cons.

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Hurm, Otto, Dr. techn., Dipl.-Ing., tit. ao. Prof. TH., P.- u. HonDoz. Akad. d. bild. Künste, Mitgl. d. Prüfungs-Fachrichtung Kunstlerziehung, Wien XIII, Innocentiagasse 1. (Wien 9. XI. 93) Ornamentale Schrift u. Heraldik.

Hurtig, Theodor, Dr. phil., UProf. m. LStuhl komm. Dir. Geogr. UInst. Greifswald, Friedrich-Krüger-Str. 14. (Königsberg/Pr. 17. XII. 97) P. U. Rostock 46. Geographie. ( )

Huscher, Herbert, Dr. phil., o. UProf. Würzburg, Meyer-Oberslebenstr. 1. (Dresden 23. IV. 93) o. P. U. Würzburg 50. Engl. Sprache u. Lit.

Huschke, Konrad, Dr. jur., ObRegR. a. D., Musikschriftsteller, Musikwissenschaftler u. -kritiker, Weimar, Cranachstr. 13. (Auma/Thür. 25. IX. 75) Musikwissenschaft u. -gesch. ( )

Huschke, Wolfgang, Dr. phil., Landesarchivar, Weimar, Cranachstr. 30. (Greiz/Thür. 8. V. 11) Landesarchivar Weimar 51. Geschichte, bes. Thür. Landes- u. Weimarer Orts- u. Personengesch. 2: Die Geschichte d. Parkes v. Weimar 51. 3: Die Beamtenschaft d. Weimarer Zentralbehörden beim Eintritt Goethes in d. Weimarer Staatsdienst (1776) (Festschr. H. Kretschmer) 53. 4: Schicksalswende im Leben Weimarer Ratsgeschlechter (Familie u. Volk) 53.

Husemann, Carl, Dr. rer. nat., o. Prof., Dir. Inst. f. Kulturtechnik u. Grünlandw. d. TU. Berlin-Dahlem, Lentzeallee 76. (Stolzenau/Weser 20. IV. 95) o. P. L.-Stuhl f. Kulturtechnik u. Grünlandwirt. TU. Berlin 53. Kulturtechnik u. Grünlandwirtschaft.

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Husemann, Eilfriede, Dr. phil. nat., apl. UProf. f. org. Chemie, Leit. Med. Abt. Chem. Labor. Freiburg/Br., Lerchenstr. 23. (Gütersloh/Westf. 27. XII. 08) Makromolekulare Chemie, med. Chem. ( )

Husfeld, Bernhard, Dr. phil., Prof., Dir. BundesforschAnst. f. Rebenzüchtung Geilweilerhof, Siebeldingen/Pfalz. (Berlin 9. V. 00) Züchtungsforschung. 3: I più recenti contributi tedeschi alla genetica della vite. Centri d'origine della vite e loro importanza per l'avvenire della viticoltura (Atti des Convegno di Genetica Agraria) 50; Aussichten auf Qualitätsreben bei d. Resistenzzüchtung (Der dt. Weinbau 19) 52.

Husmann, Heinrich, Dr. phil., Prof., Leit. Musikwiss. Inst. U. Hamburg. (Köln-Sülz 16. XII. 08) Musik d. Mittelalters u. Orients, Tonpsychol. 2: Fünf- u. siebenstellige Centstufen 51; Vom Wesen d. Konsonanz 53.

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2: Bisher 48 wiss. Arb. aus d. Geb. d. Gyn. u. Geburtsh. m. bes. Bevorz. d. Gyn. Endokrinol. Erschienen in den verschied. dtsprach. Fachzs. u. in franz. u. ital. Zs.

Hustedt, Friedrich, Dr. rer. nat. h. c., wiss. Mitarb. Hydrobiol. Anst. d. Max-Planck-Ges. Plön/Holst., Hydrobiol. Anst. (Bremen 15. XII. 86) Systematik, Ökologie u. Morphol. d. Diatomeen.

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Huter, Franz, Dr. phil., ao. Prof. f. österr. u. allg. Wirtschaftsgesch. Innsbruck, Innrain 52. (Bozen 14. VIII. 99) Wirtschaftsgesch., histor. Hilfswiss., Landesgesch.

2: Die Südtiroler Notariatsimbreviaturen d. 13. Jahrh. 2. T. (Acta Tirolensia IV), m. H. v. Voltelinl 51; Die Matrikel d. U. Innsbruck 1 (Matricula Philosophica 1671/1700) 52.

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3: Möglichk. u. Grenzen d. Rorschachtests (Grenzgeb. Med.) 49; D. Wege in d. Berufe u. ihre Problematik (Berufserz.) 50; Neigung u. Eignung (Berufser. u. Berufsbildg) 51; Regionale Begabungsunterschiede in d. bayr. Jugend (Raum u. Gesellsch.) 52.

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2: The American & Nature (J. of Warburg & Courtauld Inst. 13) 50. Huth, Otto, Dr. phil., ao. Prof. Tübingen, Denzenbergstr. 26. (Bonn 9. V. 06) Religionswiss., Volkskunde. 2: Märchen u. Gnosis 53.

3: Märchen u. Megalithreligion (Paldeuma) 50.

Hutschenreuter, Rudolf, Dr. phil., DiplChem., Leit. chem. techn. Hauptlabor. d. Bundesforschungsanst. f. Fischerei, Inst. f. Fischverarb. Hamburg 20, Robert-Koch-Stieg 1. (Recklinghausen 29. X. 00) Technologie, Stoffkde, Warenkde d. Fischind.

2: Mitarb. d. Zs. Lebensm.-Unters. u. -Forsch., Fischwirtsch.

Huttenlocher, Friedrich, Dr. phil., ao. UProf. f. Geogr. Tübingen, Im Rotbad 19.

(Stuttgart 2. IX. 93) ao. P. Tübingen 52. Geographie Südwestdeutschlands, Geogr. Landeskunde, Siedlungsgeogr. 2: Die Landformen (Amtl. Beschr. d. Kr. Balingen) 53.

Huttenlocher, Heinrich, Dr. phil., o. UProf. Bern, Dir. Mineral.-petrograph. UInst. Gumligen/Schweiz. (10. IV. 90) PDoz. U. Bern 26, ao. P. 36, o. P. 44. Mineralogie, Petrogr. ( )

Hutter, Karl, Dr. med., PDoz., tit. ao. UProf. Wien III, Salesianergasse 16. (Wien 25. XII. 92) Urologie. ( )

Huttmann, Arnold, Dr. med., Chefarzt Abt. f. Herz- u. Rheumakranke am Staatsspital. Oraşul Stalin, Str. Pavel Tcacenco 19 Rumänien (Braşov 4. I. 12) Innere Medizin.

2: Hilfstafeln z. elektrokardiogr. Diagnostik 50.

3: Über d. Arbeitselektrokardiogr., m. J. Rini-E. Spiegl (Zs. Kreislaufforsch. 27) 35; Unters. üb. eine merkwürd. Stör. d. Wasserhaush. (Zs. klin. Med. 131) 37; Über d. Bez. d. Herzaktionsphasen z. Herzschlagfrequenz, m. A. Eiser (Cardiologia 3) 39; Über d. Verh. d. QT-Dauer in d. drei Ableit. d. menschl. Elektrokardiogr. (Klin. Wschr. 19) 40; Klin. u. statist. Hochdruckstud. (Cardiologia 12) 47; Verlauf, Typus u. Momentanachsen d. Elektrokardiogrammzacken in ihrem Verhältnis zueinander (Zs. Kreislaufforsch. 37) 48; Klin.-statist. Beitr. z. Problem d. Hypotension (Cardiologia 14) 49; Die Progn. d. Herzklappenfehler (Zs. ges. Inn. Med., Grenzgeb. 5) 50; Le pronostic de l'infarctus du myocarde (Arch. d. Maladies Coeur 43) 50; Reactia Eflimov-Buscaino-Kimbarowski in reumatismul Sokolski-Bouillaud (Rev. Stiintelor Med. 4) 52.

Huwer, Günther, Dr. med., apl. Prof. f. Gynäkologie u. Geburtsh. Wipperfurth NW., Talstr. (Saarbrücken I. XII. 99) habil. U. Jena 33, ao. P. 35, apl. P. 39, o. P. Sun-Yatsen-U. Canton, China 35, Leit. d. Gyn.-Geburtsh.-Abt. Dt. Hospital Peking 39-5, o. P. Kwangsi Provinz-U. Kweilin 48-52. Vergl. Gynäkologie, Stud. an Chinesinnen.

2: Der Blutfarbstoffw. in d. Gravidität usw. (Zs. Gyn. Geburtsh. 106) 33; Kreislaufverhältn. u. Laparotomie in Süchina (Tung-Chi Med. Mschr. 1) 35; Der postoperat. Gefäßkollaps (Kwangsi Prov. Med. Coll. Kweilin) 49; Krit. Erwäg. üb. d. Geburtsmechanismus (Zbl. Gyn.) 53; Über Genitalunterentwickl. in Süchina (Geburtsh. u. Frauenheilkde 13) 53; Formverschiedenh. zwischen d. chin. u. europ. weibl. Becken usw. (Zbl. Gyn.) 53.

Huyskens, Albert, Dr., Arch.- u. Bibli.-Dir. L. R., nb. ao. Prof. a. D. Aachen, Goethestr. 8. (M.-Gladbach 30. VII. 79) Dt. u. rhein. Geschichte. 2: Siegel, Wappen u. Fahne d. Stadt Aachen (Zs. Aachener Gesch. 63) 51;

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... Grenland-Kurier, Vienne -  
... (Kenzi): Soldat in Südost, 1942;  
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... Lyrik, 1919 (Diss.); John Paga's  
... 1927; Ob. Eigenart u. Ur-  
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... (2), 1933. Herausg.: Poems of  
... 1941; Poems of William  
... 1942; Claire Clairmont's Lost  
... (Keats-Shelley Memorial  
... 1935; Charles Gault's Clairmont  
... The Clairmont Enigma (XI)  
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... (XVI), 1965.

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... Jahre: Aus Tagen d. Not) - 1956 Edwin-  
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47. 1874, 7—104; ADB 13, 406 ff.; RE<sup>3</sup> 8,  
450—455; RGG 3, 200 f.; RGG<sup>2</sup> 2, 2050;  
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loge“ K. B. H. Theol. Diss. Halle 1959.

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bis 1964; Assess. im HDienst 1. 5. 1964,  
StudR. im HDienst 1965; Fach: Franz.,  
spez. FranzSprache.

HUPFELD, Renatus, \* Schleusingen 3.  
12. 1879; Stud. Tübingen, Halle, Mar-  
burg, Greifswald 1898—1905; Prom. Lic.  
theol. Greifswald 19. 5. 1906; Habil.  
Bonn 8. 10. 1919; Pfr. Bonn 1916; ao.  
Prof. Bonn 21. 4. 1925; o. Prof. Rostock  
1925, Heidelberg 1931, em. 1950; Fach:  
PraktTheol. (ev.); D. theol. Bonn 16. 2.  
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digen, hg. v. TheolFak. z. 80. Geburtstag.  
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68.

HUPPERTZ, Karl, \* Loevenich 25. 2.  
1847, † Bonn 5. 2. 1919; Stud. Berlin  
1868—1872; RegBaumeister; HonDoz.  
Popp. 1. 4. 1884—1887; etatmäß. Prof.  
Popp. 31. 5. 1892; Fach: Baukunde, Me-  
liorationswesen; Geh. RegR. 3. 6. 1912.

Seehaus Pers. 61; Seehaus II, 3, 529.

HURLIMANN, Jeannine, \* Lausanne  
18. 8. 1932; Stud. Lausanne 1951—1955;  
Lic. ès lettres; apl. Lektorin Bonn 1. 10.  
1959—15. 6. 1960; Fach: Franz.

HUSSAK, Eugen, \* Wildon/Steiermark  
10. 3. 1856, † 1911; Stud. Graz, Wien,  
Leipzig 1874—1878; Prom. Dr. phil.  
Leipzig. Febr. 1878; Habil. Graz 1882,  
Umhabil. Bonn 29. 4. 1888; 1890 aus-  
geschied.; Chef. d. geogr. u. geol. Landes-  
aufnahme d. Staates Sao Paulo/Brasilien  
1888, Fach: Mineral., Petrogr., Allg.  
Geol.

Poggendorff 3 u. 4; Chronik 1887/88; Ku-  
kula: Alm. 1888, 370.

HUSSERL, Gerhart, \* Halle 22. 12. 1893;  
Stud. Freiburg/Br., Göttingen, Leipzig  
1912—1914, 1916; Prom. Dr. jur. Frei-  
burg/Br. 1921; Habil. Bonn 22. 7. 1924;  
o. Prof. Kiel 18. 11. 1926, Göttingen  
1933, Frankfurt/M. 1934, U of Virginia  
1938, Washington National U Law Sch.  
1940—1948, Gastprof. Köln 1953; Hon-  
Prof. Freiburg/Br. 1954; Fach: Röm.  
Recht, BürgerlRecht, Zivilprozeßrecht,  
Anglo-Am. Recht; Dr. phil. h. c. Gie-  
ßen 1964.

Kürschner 1966; Wer 1967/68; Vollbehr.

HUTCHISON, Terence Wilmot, \* Bour-  
nemouth 13. 8. 1912; Stud. Cambridge;  
B. A. Cambridge 15. 6. 1934, M. A.  
1937; Lektor Bonn SS. 1935—1. 10.  
1938; Prof. Bagdad Teachers' Training

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II

HUSSERL, GERHART, prof. of law; b. Halle, Prussian Saxony, Ger. 22 Dec. 1893. E: 1934 U.S., 1952 Fed. Repub. Ger. Cit: 1941 U.S. F: Edmund H, b. Prossnitz, Moravia, Aus. (Prostejow, C.S.S.R.) 1859, d. Freiburg, Baden, 1938, Protestant, fmly. Jewish, founder of phenomenological philos, prof. of philos. at Univs. Göttingen and Freiburg/Breisgau.

II

1912-16 studied <sup>at</sup> Univs. Göttingen, Freiburg/Breisgau, and Leipzig; 1921 Dr. jur, Freiburg. 1924 Habil, Univ. Bonn. 1924-26 district judge, 1926-33 o Prof. law, Univ. Kiel; 1929 dean <sup>of</sup> law sch. 1933 o Prof. Univ. Göttingen, 1934 Univ. Frankfurt/M but unable to assume function at either. 1934 emigr. to U.S. 1934-40 vis. prof, Univ. Virginia; 1940-48 prof. <sup>(of law)</sup> National Univ, Washington, DC. 1937-41 legal adv, Am. Law Inst. 1946-47 with legal div, O.M.G.U.S, Berlin. 1948-52 fgn. serv. off, U.S. State Dept, at Off. of Gen. Counsel, H.I.C.O.G, Berlin and Frankfurt/M. 1952 returned ~~ret~~ to Fed. Repub. Ger. 1952-53 vis. prof, Univ. Cologne, 1953 emer. Recd: Grosses B.V.K. (19360); Dr.phil. h.c, Univ. Giessen (1964).

II

Biblio: Rechtskraft und Rechtsgeltung (1925); Rechtsgegenstand (1933); Recht und Zeit, fünf rechtsphilosophische Essays (1955); Arbeitskreis für eine Reform der deutschen Juristen (led by G.H.), Die Ausbildung der deutschen Juristen, Darstellung, Kritik und Reform (1960); Recht und Welt (1963). Sources: Hand, News. - R.F.J.I.

Arch: S.P.S.L.



**Hermann-Heller-Symposion**  
**4.-6. November 1983 an der Freien Universität Berlin**

5

Diese Fassung des Beitrags  
ist noch nicht abschließend genehmigt

Antonio López-Pina

10

Wiederbegegnung mit Hermann Heller. Ideologische Basis und materiell-  
ökonomische Bedingungen der Rezeption in Spanien und Lateinamerika<sup>1</sup>

15 Der Gedenktag Hellers könnte uns im Rahmen der alten akademischen Tradition  
dazu anregen, alle verfügbaren - mündlichen oder schriftlichen - Zeugnisse und  
Dokumente zur Rezeption zu sammeln und darzustellen. Weniger konventionell und  
wahrscheinlich dem eigenen Berufsverständnis Hellers angemessener scheint mir  
ein anderes Verfahren: Die Reflexion über seine Wirkung zum Anlaß zu nehmen,  
20 über das spanische politische Denken der letzten Jahrzehnte nachzudenken, und  
zwar konkret über die ideologische Basis und die materiell-ökonomischen Be-  
dingungen der Auseinandersetzung, die im Laufe eines halben Jahrhunderts unter  
uns stattgefunden hat. Der besondere Charakter der Heller-Rezeption und die  
außergewöhnliche Wirkungskraft der Hellerschen 'Botschaft' in Spanien ver-  
25 schaffen uns eine mehr als einladende, einzigartige Gelegenheit dazu, die wir  
nicht ungenützt vorübergehen lassen sollten.

In dieser Absicht werden wir zunächst in kurzen Zügen die markantesten Statio-  
nen der Heller-Rezeption aufzeigen, um dann zur Behandlung der Frage überzuge-  
30 hen, welchen Platz Heller in unserer ideologischen Auseinandersetzung ein-  
nimmt.

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<sup>1</sup>Dieser Aufsatz schließt die Heller-Rezeption in Lateinamerika nur insoweit  
ein, als die spanischen Wissenschaftler, die wir erwähnen, jenseits des At-  
lantik dessen Botschaft übermitteln. Gewiß ist ihre Wirkung von Buenos Aires,  
La Habana, Mexico oder Caracas aus nicht gering gewesen; aber es ist evident,  
daß sie nicht die ganze Rezeption ausmachen. Der von Madrid aus beschränkte  
Zugang zu Dokumenten oder persönlichem Zeugnis machen dem Autor eine Aufgabe  
unmöglich, die von den hispano-amerikanischen Universitäten aus unternommen  
werden müßte.



1. Die wesentlichen Züge der Heller-Rezeption

Auf beiden Fronten des Bürgerkriegs und auf beiden Seiten des Atlantiks herrschte Übereinstimmung in der Heller-Rezeption, insofern es sich um seine Rolle  
5 als Kritiker des juristischen Positivismus und Erneuerer der Reflexion über  
den Staat handelte - von Ayala zu Sánchez Agesta; von Recasens Siches, Pedro-  
so und Fernando de los Ríos, zu Conde, Gómez Arboleya, Fraga und Ollero<sup>2</sup> haben  
alle die Wichtigkeit seines methodologischen Beitrages hervorgehoben. Aber  
ausgehend von dieser allgemeinen Anerkennung verlief die Rezeption bei den  
10 einzelnen Wissenschaftlern in selektiver Weise, wobei man die verschiedenen  
Autoren in folgendes Spektrum einordnen kann: von der reinen Ablehnung - Con-  
de, Gómez Arboleya, Fraga, García Valdecasas, Corts Grau usw. - bis hin zu  
seiner neuerlichen Beanspruchung als Ideologe der 'politischen Reform' - Lucas  
Verdu, García Pelayo, Garrarena. Für die ablehnenden Positionen existieren  
15 allerdings sehr verschieden abgestufte Begründungen, die ihrerseits von den  
kritischen Positionen des Demo-Liberalismus bis zu extrem scholastisch-katho-  
lischen Haltungen reichen.

Zwischen diesen extremen Polen wird der Name Hellers von einer dritten Gruppe,  
20 den Vertretern eines 'Katheders-Liberalismus', mit der Naturrechtslehre (Galán)  
identifiziert; dient als ideologische Unterstützung für die Kritik am 'Dezi-  
sionismus' (Ollero) und am Nationalismus (Murillo); begleitet die ideologi-  
schen Schwankungen eines Pérez Serrano, und erhält schließlich - reduziert auf  
die Bedeutung einer historischen Randfigur - eine abschätzig Behandlung durch  
25 die Verwaltungsrechtler und Rechtsphilosophen (E. Díaz).

Die differenzierteste und kontinuierlichste Rezeption Hellers ist bei García  
Pelayo nachzuweisen, obgleich er Heller mit dem demo-liberalen Konstitutiona-  
lismus identifizierte und ihn für dessen Epigonen hielt, während sich dieser

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<sup>2</sup>Für ihre Kooperation und dafür, daß sie ihr Wissen und persönliche Erfahrung zur Verfügung gestellt haben, möchte ich meinen Dank aussprechen: den Staatsrechtlern: Francisco Ayala; Luis Sánchez Agesta; Manuel Fraga Iribarne; Carlos Ollero; Francisco Murillo; Manuel García Pelayo; Raul Morodo; Pablo Lucas Verdu; den Zivilrechtlern: Alfonso García Valdecasas; Federico de Castro; dem Völkerrechtler: Mariano Aguilar Navarro; den Rechtsphilosophen: Eustaquio Galán; Antonio Truyol; Eliás Díaz; ferner: Luis Tobío, dem Diplomaten und Übersetzer der 'Staatslehre' Hellers; Mabel und Nicolás Pérez-Serrano Jáuregui; Manuel Victor de Luna; Pedro Gamero del Castillo, dem Gründer des 'Instituto de Estudios Políticos' (1939); ebenso danke ich Alfonso Ortí für seine kritischen Hinweise; Ignacio María de Lojendio, Rodrigo Fernández-Carvajal, Juan Linz, José María Hernández Rubio, Pedro de Vega, José Jiménez Blanco, Manuel Aragón und Carlos Alba für ihre wertvollen Anregungen; und dem Centro de Estudios Constitucionales, Francisco Bobillo sowie der Universidad Internacional Menéndez y Pelayo, Salvador Gómez de Arteche, Luis Villacorta, Enrique Moral und Guillermo Dionis für ihre Hilfe bei der Materialbeschaffung.



bereits in der Krise befand. Aber später betont er, daß der Ansatz Hellers noch heute Gültigkeit für die Erarbeitung einer neuen Staatslehre hat.<sup>3</sup>

Erst kürzlich (im Jahre 1980) hat Angel Garrorena in seiner Monographie über  
5 die spanische Verfassung von 1978<sup>4</sup> den Leser daran erinnert,

"man dürfe nicht vergessen, daß der Begriff 'Sozialstaat' (genauer 'sozialer  
Rechtsstaat') 1929 von Heller, einem der berühmtesten Staatsrechtler dieses  
Jahrhunderts, Mitglied der SPD, in 'Rechtsstaat oder Diktatur?' geprägt worden  
10 ist, und zwar mit der Absicht, die unumgängliche soziale Verpflichtung in  
unserer Zeit zu unterstreichen".

Zweiundfünfzig Jahre sind vergangen, seit Recasens Siches als erster den Hellerschen 'Anti-Formalismus' als wichtigen Zug herausstellte.<sup>5</sup>

15

Durch sechs Jahrzehnte hindurch - von den zwanziger Jahren bis heute - ist  
Hellers Werk - unabhängig von den Sektoren des ideologischen Spektrums, dem  
sich der jeweilige Wissenschaftler zurechnete, - ein klassischer Referenz-  
rahmen geblieben. Die erste Rezeption findet im letzten Drittel der zwanziger  
20 Jahre durch Recasens und Pedroso statt. Beide vertieften ihre Kenntnisse in  
Deutschland - einer Tradition folgend, die durch die Institución Libre de En-  
senanza und die Junta de Ampliación de Estudios<sup>6</sup> gefördert wurde - und er-  
langten im Jahre 1927 einen Lehrstuhl: Recasens Siches den für Rechtsphilo-  
sophie an der Universität Santiago de Compostela (Dezember 1927), Pedroso den  
25 für Staatsrecht und Politik an der Universität Salamanca (Februar 1927).

1928 beginnt Recasens, sich in seinen Veröffentlichungen<sup>7</sup> und Vorträgen an der  
Universidad Internacional Santander<sup>8</sup> auf Heller zu beziehen. Pedroso zeichnet  
sich unter seinen Generationengenossen auf der einen Seite durch seine aner-  
30 kannte Fähigkeit als Dozent aus, auf der anderen durch seine Weigerung, seine

<sup>3</sup>Vgl. García Pelago, Las transformaciones del Estado Contemporáneo (1977), 3. verbesserte und erweiterte Aufl., Madrid: Alianza Editorial 1982, S. 183.,

<sup>4</sup>Vgl. Angel Garrorena, El Estado español como Estado social y democrático de Derecho, Murcia 1980 (Universidad de Murcia, Publicaciones).

<sup>5</sup>Vgl. Recasens Siches, Direcciones contemporáneas del Pensamiento jurídico (La Filosofía del Derecho del Siglo XX) (Vorwort 1928, Santiago de Compostela, datiert), Barcelona-Buenos Aires: Ed. Labor, 1929.

<sup>6</sup>Institutionen gegründet im Geist des 'Krausismus' und zum Dienste der 'Europäisierung von Spanien'.

<sup>7</sup>Vgl. Benito Madariaga/Cecilia Valbuena, La Universidad de Verano en Santander (1933-1936), Madrid: Universidad Internacional Menéndez Pelayo, 1981; Ministerio de Universidades e Investigación. Seminare über 'Crisis de método y objeto en la Ciencia del Derecho'; 'Crisis de método y objeto en la Sociología'; Information von Rau l Morodo und Francisco Bobillo vermittelt.

<sup>8</sup>Vgl. Recasens Siches, Vida humana, Sociedad y Derecho, Aufl. 1940, 1945, 1953; Englisch 1948; ders., Lecciones de Sociología, 1948; ders., Panorama del Pensamiento Jurídico en el Siglo XX, México: Editorial Porrúa, 1963.



Gedanken schriftlich zu formulieren, aus. Aber seine Studenten von den Semestern 1929-30 in Sevilla<sup>9</sup> bezeugen, daß er sich in seinen Vorlesungen über den Staat auf die Schriften von Heller stützte.

5 Wie wir später noch sehen werden, spielte Fernando de los Ríos y Urruti - zuerst Professor für Staatsrecht und Politik in Granada (1911) und dann (seit 1930) in Madrid - eine wichtige Rolle bei der Einladung Hellers nach Spanien. Aber aus seinen Schriften<sup>10</sup> läßt sich nicht ersehen, daß er in den zwanziger Jahren sehr aufmerksam der Entwicklung des Hellerschen Denkens gefolgt wäre  
10 oder von den großen Auseinandersetzungen in der Vereinigung der deutschen Staatsrechtslehrer Kenntnis genommen hätte. Sein beträchtliches politisches Engagement für den PSOE (Spanische Sozialistische Arbeiterpartei) und seine Beteiligung an der Bewegung, die den Sturz der Monarchie herbeiführte, lenkten wahrscheinlich seine Aufmerksamkeit von der wissenschaftlichen Auseinanderset-  
15 zung ab, die aus der Sicht Spaniens als lediglich akademisch relevant beurteilt werden konnte.

Zwei spanische Wissenschaftler, die für die Heller-Rezeption zunächst in Spanien und später in Lateinamerika ausschlaggebend wurden, trafen im Jahre  
20 1929-30 zufällig an der Humboldt-Universität zusammen: Francisco Ayala und Luis Tobío. Ersterer war als Stipendiat der Universität Santiago de Compostela von Nicolás Pérez Serrano<sup>11</sup> angeregt worden, nach Berlin zu gehen, um bei Triepel Jura zu studieren. Aber nach seiner Ankunft dort - so erzählt er selbst - faszinierten ihn die Vorlesungen von Hermann Heller, und er und Luis  
25 Tobío stellten bei der Lektüre von 'Die Souveränität' ihre neuerworbenen deutschen Sprachkenntnisse auf die Probe.

1930 übersetzt Pedroso 'Die politischen Ideenkreise der Gegenwart' für den Verlag Editorial Labor - denselben, in dem Recasens zwei Jahre zuvor auf die  
30 Bedeutung von Heller<sup>12</sup> hingewiesen hatte. Und 1931 übersetzt Conde - eine andere Persönlichkeit, deren Werk wir noch erwähnen müssen - für den Verlag Espan\_a das Buch 'Europa und der Fascismus'.<sup>13</sup>

<sup>9</sup>Mündliches Zeugnis von Carlos Ollero.

<sup>10</sup>Vgl. Fernando de los Ríos y Urruti, Adónde va el Estado? Estudios filosófico-políticos (Prefacio von Luis Jiménez de Assua), Buenos Aires: Editorial Sudamericana, 1951.

<sup>11</sup>Vgl. Francisco Ayala, Recuerdos y Olvidos, Madrid: Alianza Editorial, 1982.

<sup>12</sup>Vgl. Hermann Heller, Las Ideas políticas contemporáneas, übersetzt von Manuel Pedroso, Barcelona-Buenos Aires: Editorial Labor, 1930.

<sup>13</sup>Hermann Heller, Europa y el Fascismo, übersetzt von Francisco Javier Conde, Madrid: Editorial Espan\_a, 1931, Sucesores de Rivadeneyra.



Aufgrund der Machtergreifung Hitlers entstand 1933 eine internationale Bewegung zur Unterstützung der durch den Faschismus verfolgten Intellektuellen. Die spanische Republik schloß sich dieser Bewegung an, wodurch der Aufenthalt Hellers in Madrid ermöglicht wurde. Auf die Initiative von Antonio de Luna - Professor für Völkerrecht an der Universität Madrid - hin, sandte Fernando de los Ríos in seiner Eigenschaft als Kultus-Minister in der Azana Regierung eine Einladung an Heller, als Lehrbeauftragter am Instituto de Estudios Internacionales y Económicos zu lehren.<sup>14</sup> Bei dieser Operation dürfte Salvador de Madariaga - damals spanischer Botschafter im Völkerbund - eine wichtige Rolle gespielt haben.<sup>15</sup>

Heller muß im Frühjahr 1933 in Madrid angekommen sein - ein Brief von ihm an seine Frau vom 1. März 1933 stammt noch aus Oxford, Balliol College. Ein Foto von Heller mit Antonio de Luna in der Madrider Straße Carrera de San Jerónimo, das zu jener Zeit von Carlos Ollero aufgenommen wurde, hängt noch heute in dessen Arbeitszimmer. Luis Tobío<sup>16</sup> spricht davon, daß Heller in dem Colegio Mayor Del Amo an der Universitätsstadt gewohnt habe. Die Version, die Niemeyer und Manfred Friedrich<sup>17</sup> von der Zerstörung der Villa Hellers im Bürgerkrieg geben, scheint Tobíos Angabe zu unterstützen. Allerdings behauptet Eustaquio Galán<sup>18</sup>, daß Heller zu Fuß von seiner Wohnung in Claudio Coello zu seinen Vorlesungen im 'Pabellón Valdecillas' an der Straße San Bernardo gegangen sei und daß von dort auch der Begräbniszug zum städtischen Friedhof seinen Ausgang genommen habe.

Im Sommer 1933 hielt Heller an der Universidad Internacional von Santander einige Vorträge über 'Formalismo y Post-formalismo an la Teoría del Estado' - im Rahmen eines Kurses über den modernen Staat. Mit ihm zusammen nahmen auch Harold Laski und Luis Recasens Siches an diesem Kurs teil.<sup>19</sup>

Im Herbst 1933 begann Heller ein Seminar über Politische Wissenschaft an der Universität Madrid, an dem als Studenten Eustaquio Galán, Manuel García Pelayo, Manuel Tunón de Lara, Antonio Truyol, Maravall, Salvador de Lissarrague und Mariano Aguilar Navarro teilnahmen. Sie alle wurden Zeugen des Herzan-

<sup>14</sup>Vgl. Klaus Meyer, Hermann Heller. Eine biographische Skizze (1967), oben S. XXX ff.

<sup>15</sup>Diese Annahme kann ich allerdings nicht belegen.

<sup>16</sup>Persönliche Mitteilung.

<sup>17</sup>Vgl. Meyer, Klaus, aaO.

<sup>18</sup>Persönliche Mitteilung.

<sup>19</sup>Madariaga/Valbuena, La Universidad de Verano, aaO. (Anm. 7).



falls, den er während einer Vorlesung erlitt und an dessen Folgen er am 5. November starb.<sup>20</sup>

Francisco Ayala kann sich nicht mehr genau daran erinnern, ob er selbst es war, der Heller Zugang zur Jura-Fakultät der Universität Madrid verschafft hat. Möglich ist es, wenn man neben den persönlichen Beziehungen seit seiner Berliner Zeit die Tatsache berücksichtigt, daß er damals Fakultätssekretär und Assistent am Lehrstuhl für Staatsrecht und Politik von Adolfo Posada, den seit 1932 Pérez Serrano innehatte, war. Jedenfalls erhielt Heller einen Lehrauftrag.<sup>21</sup>

Pérez Serrano und Antonio de Luna sorgten auch für die Präsenz Hellers in wissenschaftlichen Zeitschriften, indem sie Arbeiten von ihm - den Artikel 'Political Science',<sup>22</sup> 'La justificación del Estado'<sup>23</sup> - in die Revistas für Privat-Recht und Cruz y Raya übernahmen. Die Trauerrede auf dem städtischen Friedhof hielt Pérez Serrano;<sup>24</sup> auch der Nachruf, der in der Revista de Derecho Publico erschien,<sup>25</sup> stammt von ihm.

Nach seinem Tod zog sich Gerhart Niemeyer, der Heller ins Exil begleitet hatte, nach Tossa de Mar - einem Fischerdorf an der Costa Brava - mit der Absicht

<sup>20</sup> Vgl. Eustaquio Galán, La concepción estatal de Heller en referencia a la filosofía política de su época, in Revista General des Legislación y Jurisprudencia, 1945 (Sept.-Dic.).

<sup>21</sup> Ernennung als 'Profesor Encargado de Curso' in der Facultad de Derecho, 16. Mai 1933, Boletín Oficial del Ministerio de Instrucción Pública y Bellas Artes, 3. Juni 1933.

<sup>22</sup> Hermann Heller, Concepto, desarrollo y función de la Ciencia Política, übersetzt von Nicolás Pérez Serrano, Madrid 1933, Ed. Revista de Derecho Privado; englische Fassung in Encyclopaedia of the Social Sciences, 12 (1934), S. 207-224, jetzt in Heller, Gesammelte Schriften, Leiden/Tübingen 1971, Bd. 3, S. 45-75.

<sup>23</sup> Heller, Hermann, La Justificación del Estado, in: Revista Cruz y Raya, Madrid 1933 (Dez.). - Die ideologische Heterogenität der Heller-Vermittler wird nicht erst beim Ausbruch des Bürgerkrieges deutlich. Die Zeitschrift Cruz y Raya - eine katholische Avantgarde-Zeitschrift -, in deren Gründungs-Mannschaft sehr unterschiedliche Persönlichkeiten zusammentrafen - von dem katholischen Republikaner José Bergamín bis zu den Franquisten Alfonso García Valdecasas, Antonio Garrigues, Antonio de Luna und Juan Lladó - hat eine wichtige Rolle bei der Verbreitung der Hellerschen Gedanken gespielt. Derselbe García Valdecasas, der im Monat Oktober 1933 die Falange gründet, nimmt zwei Monate später einen Artikel von dem demo-liberalen Heller in Cruz y Raya auf. Gleichzeitig veröffentlicht er die Beurteilung von Carl Schmitt über Donoso Cortés in der rechts-extremistischen Zeitschrift 'Acción Española' - die Cruz y Raya im katholischen Ideenkreis entgegengesetzt ist -.

<sup>24</sup> Vgl. Galán, La concepción estatal de Heller, aaO. (Anm. 20).

<sup>25</sup> Pérez Serrano, Hermann Heller (Necrología), in: Revista de Derecho Publico, Año II, no. 23, 15. November 1933, , S. 321.



zurück, die Notizen Hellers zu ordnen und in Form der Staatslehre herauszugeben.<sup>26</sup>

In den Jahren 1933-34, resp. 1934-35 arbeiten Francisco Javier Conde und Enrique Gómez Arboleya in Berlin an ihrer Doktorarbeit. Bei Conde's Arbeit - 'El Pensamiento político de Bodino' - stellt Heller einen wichtigen bibliographischen Bezugspunkt dar, während Gómez Arboleya über das Thema 'Rasgos fundamentales del Pensamiento de Hermann Heller' schreibt. Beide sollten später zu den wichtigsten Vermittlern der Gedanken Hellers innerhalb der intellektuellen francoistischen Gemeinschaft werden.

Die Heller-Rezeption teilt das tragische Schicksal der spanischen Gesellschaft, die durch den Bürgerkrieg auseinander gerissen wurde: Ein Teil der intellektuellen Vermittler gehört zu den Schlüsselfiguren bei der Verteidigung der Republik, der andere unterstützt den Militärputsch, dessen Sieg zur Diktatur führte. Recasens Siches, der zunächst Ministerialrat für Lokalverwaltung und später Staatssekretär im Industrieministerium war, verließ Spanien mit dem Ziel Südamerika zwischen Juli und November 1936. Fernando de los Ríos wechselte in kurzer Zeit die Rolle eines Unterhändlers bei wichtigen Verhandlungen mit der französischen Regierung mit der des Rektors der Universität Madrid, um kurz darauf - am 20. September 1936 - zum Botschafter in Washington ernannt zu werden.<sup>27</sup>

Manuel M. Pedroso gehörte zu den Auserwählten der spanischen Intelligentsia, die als Mitglieder einer Staatsdelegation in Mexico an der 'Casa de España' in Sicherheit gebracht wurden. Francisco Ayala blieb bis zum Ende des Bürgerkriegs in Spanien und ging dann an die Universität Buenos Aires<sup>29</sup>. Nur Recasens und Ayala gelang es, später nach Spanien zurückzukehren; in den anderen Fällen mußte die geistige und persönliche Erinnerung an Heller notwendigerweise jenseits des Atlantiks gepflegt werden.

Von den Persönlichkeiten, die ein engeres Verhältnis zu Heller hatten, blieben Antonio de Luna, Pérez Serrano und García Pelayo - letzterer bis 1950 - in Spanien. Ich habe bei Luna in schriftlicher Form keinen Nachweis für eine spätere intellektuelle Anerkennung Hellers finden können; trotzdem ist aber sein

<sup>26</sup> Persönliche Mitteilung von Luis Tobío und Francisco Ayala.

<sup>27</sup> Vgl. Libro de la Primera Reunión de Profesores Universitarios Españoles Emigrados, La Habana: Talleres Tipográficos 'La Mercantil', 1944.

<sup>28</sup> Vgl. Libro Conmemorativo del 45 Aniversario, Fondo de Cultura Económica, México: Fondo de Cultura Económica, 1980 ; bestätigende persönliche Mitteilung von Amaro del Rosal.

<sup>29</sup> Vgl. Ayala, Recuerdos, aaO. (Anm. 11).



Gewicht in der Rezeption nicht allein auf seine Initiative zur Einladung Hellers nach Spanien zurückzuführen. Gómez Arboleya - in dessen Monographie notwendigerweise die ganze spätere Rezeption aufgenommen wurde - war Schüler und persönlicher Freund von Luna, so daß nicht auszuschließen ist, daß die Anre-  
5 gung zu der Doktorarbeit über Heller von diesem kam.<sup>30</sup>

Pérez Serrano verfaßte die Überlegungen, die im 'Tratado de Derecho Políti-  
co',<sup>31</sup> zusammengefaßt sind (zwischen 1935 und 1937 nach der Erinnerung seiner  
Tochter Mabel, zwischen 1936 und 1939 in der Version seines Sohnes), wobei er  
10 die gesamten Veröffentlichungen Hellers zitiert. Die Heller-Rezeption bei Pé-  
rez Serrano scheint durch ihre persönliche Bekanntschaft in Madrid angeregt  
worden zu sein, denn noch die Arbeit über Begriff, Methode, Quellen und Pro-  
gramm des spanischen Staatsrechts im Vergleich mit dem des Auslands,<sup>32</sup> die  
Pérez Serrano 1932 schrieb, belegt zwar die für ihn typische außerordentliche  
15 Belesenheit, läßt aber jeglichen Bezug auf Heller vermissen. Auch am 2. Febru-  
ar 1933 findet Heller in dem Vortrag über 'Die Funktion des Präsidenten und  
moderierende Gewalt'<sup>33</sup> noch kein Echo. Allerdings wird im gleichen Jahr Hel-  
lers Monographie 'Die Souveränität' in Pérez Serranos Arbeit 'El Concepto clá-  
sico de Soberanía y su Revisión Actual'<sup>34</sup> zitiert, und von hier geht die volle  
20 Rezeption aus, die im 'Tratado de Derecho Político' zutage tritt.

Die Doktorarbeit über Heller, die Gómez Arboleya in Berlin 1934-35 geschrieben  
und - ohne Datumsangabe - in der Universität Madrid vorgelegt hat, wurde erst  
zwischen April und Juni 1940 gedruckt.<sup>35</sup> Im Jahre 1949<sup>36</sup> kam Gómez Arboleya in

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<sup>30</sup> Nach einer persönlichen Mitteilung von Federico de Castro arbeitete Enrique Gómez Arboleya zunächst an einer Doktorarbeit in Privatrecht. Erst nach der Aufgabe dieses Planes entschloß er sich, sich mit dem Werke Hellers zu beschäftigen. Alle mündlichen Zeugnisse betonen die intellektuelle und korporative Führung, die Antonio de Luna unter den Wissenschaftlern aus Granada ausübte, sowie die enge freundschaftliche Beziehung zwischen Gómez Arboleya und ihm. In diesem Sinne genießt die Vermutung, daß die Themenwahl von Gómez Arboleya auf die Inspiration von Antonio de Luna zurückzuführen ist, eine ziemliche Glaubwürdigkeit in der akademischen Gemeinschaft.

<sup>31</sup> Vgl. Pérez Serrano, Tratado de Derecho Político, Madrid: Editorial Civitas, 1976,

<sup>32</sup> Vgl. Estudio acerca del Concepto, Método, Fuentes y Programa del Derecho Político Español comparado con el Extranjero, que para las Oposiciones a dicha Cátedra, vacante en la Universidad de Madrid, presenta Nicolás Pérez Serrano, Agosto 1932 (das Pérez Serrano aus Anlaß der Lehrstuhlprüfungen für den Madrider Lehrstuhl präsentierte).

<sup>33</sup> Vortrag, gehalten am 2.2.1933 im Centro de Intercambio Intelectual Germano-Español.

<sup>34</sup> Nicolás Pérez Serrano, El concepto clásico de soberanía y su revisión actual, Madrid: Tipografía de Archivos, 1933.

<sup>35</sup> Vgl. Gómez Arboleya, Hermann Heller, Boletín de la Universidad de Granada, nos. 58 (Abril 1940), S. 141-182; und no. 59 (Juni 1940), S. 305-343.

<sup>36</sup> Enrique Gómez Arboleya, La Teoría del Derecho Internacional en el Pensamien-  
(Fortsetzung Fußnote)



seiner Arbeit 'La Teoría del Derecho Internacional en el Pensamiento de Hermann Heller' auf das Thema zurück.

Ein anderer spanischer Gelehrter, der Heller kontinuierlich zitiert, ist Francisco Javier Conde, der sich - mit dem Werk Hellers seit seiner Übersetzung von 'Europa und der Fascismus'<sup>37</sup> und seiner eigenen Doktorarbeit<sup>38</sup> bekannt - auf der einen Seite rühmt, persönliche Beziehungen zu Heller gehabt zu haben, und auf der anderen Seite den Anspruch erhebt, der Hauptideologe des Franquismus zu sein.<sup>39/40</sup>

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Inzwischen bereitete Luis Tobío auf der anderen Seite des Atlantiks - im Exil in La Habana - seit 1939 die spanische Fassung der Staatslehre vor, die 1942 in der Reihe 'Política y Derecho' - herausgegeben von Pedroso - im Fondo de Cultura Económica erschien.<sup>41</sup>

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Von Buenos Aires aus reagierte Ayala 1943 auf die spanische Ausgabe der Staatslehre.<sup>42</sup> 1951 wurden dort zwei Bücher herausgegeben, die bedeutsame Beziehungen zum Denken Hellers aufweisen: 'Adonde va el Estado?'<sup>43</sup>, eine postume Sammlung der philosophisch-politischen Aufsätze von Fernando de los Ríos, und  
20 eine 'Introducción a la Teoría del Estado'<sup>44</sup> de Arturo Enrique Sampay.

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to de Hermann Heller, in: Revista de Derecho Internacional, vol. II, no. 3, 1949, S. 841-892.

<sup>37</sup> Heller, Europa y el Fascismo, aaO. (Anm. 13).

<sup>38</sup> Vgl. Francisco J. Conde, El pensamiento político de Bodino (1935), in Escritos y Fragmentos Políticos, Madrid: Instituto de Estudios Políticos, 1974.

<sup>39</sup> Francisco J. Conde, La idea actual española de nación (1939); aaO., Espejo del Caudillaje (1941); aaO., Representación política (1945).

<sup>40</sup> Vgl. Francisco J. Conde, Introducción al Derecho Político actual, Madrid: Ed. Escorial 1942; ders., Teoría y sistema de las Formas políticas (1944).

<sup>41</sup> Luis Tobío kam 1939 als Flüchtling nach Kuba. Vielleicht befand sich das erste Exemplar der 'Staatslehre', das nach Latein-Amerika gelangte, in Händen von Professor Dr. Bustamante, Inhaber des Lehrstuhls für Rechtsphilosophie der Universität La Habana. Bustamante bat Tobío um die Übersetzung eines der Kapitel der 'Staatslehre' für die juristische Zeitschrift der Universität. Tobío übersetzte dann aus eigener Initiative die ganze 'Staatslehre'; das Manuskript samt Gepäck begleiteten ihn auf seinen Reisen zwischen La Habana, México und Montevideo. Im Sommer 1940 bekam er die Möglichkeit, die Übersetzung dem Fondo de Cultura Económica anzubieten, der nach dem positiven Urteil des Lektors, Herrn Larrea - einem alten Mitglied der Zeitschrift Cruz y Raya - ihre Veröffentlichung in der Reihe von 'Política y Derecho', geleitet von Manuel Pedroso, beschloß. Persönliche Mitteilung.

<sup>42</sup> Ayala, Los Políticos, Buenos Aires: Editorial Depalma, 1944.

<sup>43</sup> Ayala, Adónde va el Estado, aao. (Anm. 10).

<sup>44</sup> Arturo Enrique Sampay, Introducción a la teoría del Estado, Buenos Aires 1951.



Was Spanien anbelangt, so bezieht sich Luis Sánchez Agesta seit 1942 auf das Werk Hellers.<sup>45</sup> Eustaquio Galán, der sich voll mit Hellers Gedanken identifiziert, widmete ihm zwei Monographien.<sup>46</sup>

5 Manuel García Pelayo, einer der Schüler von Heller in dessen Madrider Seminar 1933, der zunächst in Spanien blieb, hat dessen Gedankengut seit 1948, dem Erscheinungsdatum von 'Constitución y derecho constitucional: Evolución y crisis de ambos conceptos'<sup>47</sup> kontinuierlich weitergegeben: 1950 gab die Editorial Revista de Occidente sein 'Derecho constitucional comparado'<sup>48</sup> heraus, und 1982  
10 brachte Alianza Editorial die dritte Auflage seines Buches 'Las Transformaciones del Estado Contemporáneo';<sup>49</sup> beide Bücher verweisen auf Probleme, die Heller aufgeworfen hat. García Pelayo, der heute Präsident des Verfassungsgerichts ist, hat erst vor einigen Jahren seine lange Wirkungszeit als Professor in Venezuela beendet, wodurch er in seiner Rolle als Vermittler des Heller-  
15 schen Vermächtnisses auf beiden Seiten des Atlantiks einzigartig dasteht.

Im Jahr 1955 kreuzen sich die gegensätzlichen ideologischen Rezeptionslinien: In zeitlich sehr nahe aufeinanderfolgenden Publikationen wird Heller von den Vertretern konterrevolutionärer Positionen - in 'La Crisis del Estado', von  
20 Fraga Iribarne<sup>50</sup> - verworfen, wird ihm von liberaler Seite - 'Estudios de Ciencia Política', von Carlos Ollero<sup>51</sup> - akademische Anerkennung gezollt, und wird er schließlich von seiten derer, die für Spanien einen Rechtsstaat fordern - 'Estado liberal de derecho y Estado social de derecho', von Lucas Verdu,<sup>52</sup> - ignoriert.

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<sup>45</sup> Luis Sánchez Agesta, Teoría y Realidad en el Conocimiento político, Granada: Apejos del Boletín de la Universidad de Granada, 1944.

<sup>46</sup> Eustaquio Galán, La concepción estatal de Heller en referencia a la filosofía política de su época, in Revista General de Legislación y Jurisprudencia, 1945 (Sept.-Dic), und ders., Estado, naturaleza y cultura (El Estado como un trozo vivo de la realidad social y sus factores condicionantes naturales y culturales según Heller), in Revista General de Legislación y Jurisprudencia, Madrid, 1946 (Abril-Mayo-Junio), Instituto Editorial Reus.

<sup>47</sup> Manuel García Pelayo, Constitución y derecho constitucional: Evolución y crisis de ambos conceptos, in Revista des Estudios Políticos, 1948, nos. 37 y 38.

<sup>48</sup> Manuel García Pelayo, Derecho constitucional comparado, Madrid 1950.

<sup>49</sup> Pelayo, Las transformaciones, aaO. (Anm. 3).

<sup>50</sup> Fraga Iribarne, La Crisis del Estado (Estudios de Teoría del Estado Contemporáneo), 1. Auflage, Madrid 1955, Editorial Aguilar; 2. verbesserte Auflage, Madrid 1958, Editorial Aguilar, - als Prolog zwischen 1931 und 1933 verfaßt. Nach der Mitteilung des Autors schrieb er die Studien zwischen seinem 23. und 27. Lebensjahr, d.h. zwischen 1945 und 1949.

<sup>51</sup> Carlos Ollero, Estudios de Ciencia Política, Madrid: Editora Nacional, 1955.

<sup>52</sup> Vgl. Lucas Verdu, Estado liberal de derecho y Estado social de derecho, in: Universidad de Salamanca 1955, Acta Salmanticensia, Derecho, Tomo II, no. 3.



In der Linie der Problemstellung von Lucas hat sich sein Schüler Eliás Díaz seit 1963 als einer der Protagonisten im Kampf um die Umgestaltung unseres öffentlichen Lebens als Rechtsstaat einen Namen gemacht.<sup>53</sup> Aber bei diesem Autor ist der Bezug auf Heller nur eine Randerscheinung, während der Einfluß von Forsthoff, der katholischen Enzykliken von Johannes XXIII und italienischen Denkern - Bobbio usw. - im Vordergrund steht.

Die geistige Vermittlung des Werkes von Heller hat sich aber auch später nicht auf das gedruckte Wort beschränkt. Zwischen 1954 und 1960 wiesen die liberaler  
10 'Meister' der neuen Studenten-Generation ihre Schüler - unter ihnen Raul Morodo, José Jiménez Blanco und ich selbst<sup>54</sup> - auf den Vorrang der Lektüre der Staatslehre Hellers vor anderen Werken hin.

So konnte es möglich werden, daß im Jahre 1980 zwei Wissenschaftler der jüng-  
15 sten Professoren-Generation, Carlos de Cabo und Angel Garrorena, ihren Reflexionen über die Souveränität<sup>55</sup> und den Rechtsstaat<sup>56</sup> den fruchtbaren Ansatz Hellers zugrunde legten. Auch wurde bei den letzten Habilitationsprüfungen in Staatsrecht und Politik - von Mai bis Oktober 1982 - seitens der achtundzwanzig Kandidaten ständig auf Heller Bezug genommen.

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## 2. Ideologische Grundlagen und materiell-ökonomische Bedingungen: Ortsbestimmung Hellers in der ideologischen Auseinandersetzung

25 Die bloße chronologische Aufzählung einer so zahlreichen und qualifizierten Rezeption würde bereits ein ausreichendes Bild vom Einfluß Hellers in Spanien entstehen lassen. Wenn wir uns im weiteren bei der Behandlung der Frage nach Hellers Wirkung auf eine dem konventionellen akademischen Kanon verpflichtete Exegese beschränkten, würden wir seiner Wirkungskraft nicht nur nicht gerecht

<sup>53</sup>Vgl. Eliás Díaz, Teoría general del Estado de derecho, in Revista de Estudios Políticos, 1963; ders., Estado de derecho y sociedad democrática, 1966, Ed. Cuadernos para el Diálogo. - Die Arbeiten von Eliás Díaz stellen eine Dokumentation der Auseinandersetzung zur Zeit um den 'Rechtsstaat' dar. Er versteht seine Aufgabe mehr als Chronist als als Analytiker der Debatte. Daher muß die relative Abwesenheit von Heller in seinem Werk nicht so sehr als von seiner persönlichen Entscheidung abhängige Interpretation verstanden werden, als als Registrierung der Eklipse von Hellers Denken bei den damaligen Auseinandersetzungen.

<sup>54</sup>Meine erste Heller-Lektüre fand 1960 auf Anregung von Carlos Ollero hin, im Colegio Mayor César Carlos, statt, und zwar mit einem Exemplar von Raul Morodo, das dieser mir freundlicherweise zur Verfügung stellte.

<sup>55</sup>Vgl. Carlos de Cabo, Revisión histórico-política de la doctrina de la soberanía, Universidad de Salamanca 1980, Publicaciones del Departamento de Derecho Político.

<sup>56</sup>Angel Garrorena, El Estado español, aaO. (Anm. 4).



werden, sondern eine adäquate Analyse von Hellers Beziehung zu Spanien gerade-  
zu blockieren. Die Heller-Rezeption ist im wesentlichen ein ideologisches Phä-  
nomen gewesen. Und deshalb sollte das bisher Ausgeführte meiner Meinung nach  
weniger durch eine Chronik über die Entwicklung der Staatslehre in Spanien  
5 vertieft werden, als durch den Versuch, eine Antwort auf die Frage zu geben,  
welchen Platz Heller in der ideologischen Auseinandersetzung einnimmt, von der  
die spanische Kultur in den letzten fünfzig Jahren geprägt worden ist.

Die Tatsache, daß seine Rezeption so wenig lineal verlaufen ist, beweist, daß  
10 die Ortsbestimmung Hellers je nachdem wechselte, welchen Platz der jeweilige  
Rezipient in der ideologischen Auseinandersetzung einnahm, die Spanien während  
des Bürgerkriegs und in der Folgezeit gespalten hat. Anders ausgedrückt: Hel-  
lers Ortsbestimmung ist in Spanien immer eine Resultante gewesen! Als solche  
hat sie die fundamentalen Konflikte nur reflektieren können: erstens, den Kon-  
15 flikt der sich gegenseitig bekämpfenden Bourgeoisie; und zweitens, den Kon-  
flikt zwischen der Definition der Situation durch die führende Schicht und dem  
Emanzipationsstreben der Mittelschichten, der innerhalb des franquistischen  
Spaniens ausgetragen wurde.

20 Auf den ersten Blick scheinen sich die spanischen Wissenschaftler die methodo-  
logischen Innovationen Hellers anzueignen, - unabhängig von ihrer ideologi-  
schen Position: als Wichtigstes seine Kritik am juristischen Positivismus, die  
Wiedergewinnung von Wirklichkeit und Wandel in Recht und Politik für die  
Staatswissenschaften.

25  
Wenn man genauer nachliest, bemerkt man allerdings, daß es sich um eine sehr  
differenzierte methodologische Rezeption handelt, hinter der sich die ideolo-  
gischen Positionen, die der jeweilige weitere Diskurs zutage fördert, verber-  
gen. Und so ist die wirkliche Rezeption weniger durch den gemeinsamen Nenner  
30 allgemeiner Anerkennung als durch den Grad der Abweichung oder die Betonung  
verschiedener Elemente der Hellerschen Methodik gekennzeichnet. Die neuere  
spanische Ideengeschichte hatte - vom Krausismus und der Institución Libre de  
Ensenanza kommend - nun den Organizismus als soziale und politische Theorie  
assimiliert: In diesem Zusammenhang schien nichts logischer, als daß de los  
35 Ríos, Pedroso und García Pelayo unter den Republikanern, und Conde auf der  
Seite der franquistischen Intelligentsia, eine besondere Sensibilität für die  
Idee Hellers vom Staat als Organisation entwickelten.

Die Dezisionismus-Komponente in der Hellerschen Version fand besonderen Wider-  
40 hall bei den Franquisten Conde und Gómez Arboleya. Schließlich wurde Hellers



Glaube an das Naturrecht von Recasens Siches und Pedroso auf der einen und Sánchez Agesta und Gómez Arboleya auf der anderen Seite mit Freude begrüßt, um ihre jeweiligen Thesen in diesem Sinne zu unterstützen.

5 Man bedient sich also nur allzu gern der Gedanken Hellers, wo man sie als Bürgen im Dienste der Entfaltung des eigenen Diskurses gebrauchen kann; sobald sie aber in Konflikt mit den eigenen Positionen geraten, spart man nicht mit Verdächtigungen und klagt ihn der Deviation an. Dabei kann entweder der säkulare oder der religiöse Aspekt mehr betont werden. Conde<sup>57</sup> zum Beispiel betont  
10 den säkularen, wenn er schreibt:

"...wir sind Zeugen beim Zusammenbruch der vom nationalen Gesichtspunkt aus  
perfektesten politischen Form, die der Mensch geschaffen hat: dem modernen  
Staat. Keiner der großen Juristen dieser Epoche hat es unterlassen, seine ei-  
15 gene Diagnose zu stellen: auf der einen Seite stehen die, die glauben, daß die  
Krise eine Krise einer Weltsicht ist, ...unter ihnen Heller...  
...die ganze Literatur über die Krise kann nur als eine verunglückte Anstren-  
gung und eine oberflächliche Diagnose betrachtet werden... es handelt sich  
nicht nur um eine Krise des liberalen juristisch-politischen Denkens...was im  
20 Moment zusammenbricht ist nichts weniger als der Staat (selbst)...beim Zusam-  
menbruch des demoliberalen Staates ist das ihm eingepflanzte juristisch-politi-  
sche Denken in einen Auflösungszustand geraten, es hat sich beinahe verflüch-  
tigt...Gleichzeitig erlangen ungeheure Mengen klassischen Gedankengutes eine  
authentische Rechtsgültigkeit, fähig die politische Form der Zukunft üppig zu  
25 befruchten...dieses Denken ist Teil der vorletzten Phase des modernen Staates  
und mit seinem Schicksal: dem demoliberalen Staat verbunden...Einige Elemente  
können sich retten und dienen nun dazu, die Offensive zu verstärken, die sich  
heute siegreich auf dem Boden einer neuen politischen Konfiguration erhebt:  
der totalitäre Staat ... in dem Durcheinander der Gegenwart sind nur einige  
30 Elemente des juristisch-politischen Denkens auf neue Ziele ausgerichtet, auf  
eine neue politische Form, die sich vom modernen Staat unterscheidet und die  
sich vor unseren Augen kristallisiert".

Conde meint einen Widerspruch zwischen Hellers Unterordnung unter die sozialen  
35 Kräfte und seiner eigenen Version von der Macht als bloßer Instanz, die höch-  
sten Normen in Recht umzusetzen, zu sehen. Später, als er die theoretische  
Kraft des Hellerschen Zentral-Begriffs der Organisation anerkennt, fühlt er  
sich gezwungen einzuwenden:

40 "...die Erklärung von unten, von dem organisierten Zusammenspiel der sozialen  
Kräfte aus, scheint den Staat seiner letzten Rechtfertigung zu berauben. Das  
Soziale zieht so alles nur mögliche Recht auf seine Ebene herab. Tatsächlich  
kann man mit dem Begriff der Organisation jegliche menschliche Aktivität för-  
dern und alles erklären. Die Staatstheorie Hellers versucht im Moment, die ge-  
45 fährlichsten Klippen zu umschiffen. Der Liberalismus, den Heller atmet, ohne  
es zu merken, bringt ihn zum Ersticken. Heller versucht, sich davon zu befrei-  
en, indem er den Staat den höchsten Normen des Naturrechts unterwirft. Der  
Staat ist nur gerechtfertigt, wenn er dieses höchste Diktat erfüllt. Am  
schwerwiegendsten ist, daß dies das ganze System in Frage stellt. Ist es zu-

<sup>57</sup> Kondensierung des Diskurses von Conde nach den oben zitierten Werken.



lässig, vom Staat als einer bloßen Organisation der sozialen Kräfte seiner Basis zu sprechen, oder muß man das ganze in einem tieferen Zusammenhang sehen: in dem Zusammenhang der moralischen und seinsmäßigen Bestimmung des Menschen? Muß man nicht noch tiefer gehen und die Gesellschaft von der Metaphysik der Person her rechtfertigen - und von da aus den Staat? Dann würde alles eine andere Gestalt annehmen: und schon könnten wir diesen inneren Widerspruch bei Heller auflösen, der auf der einen Seite die sozialen Beziehungen als eine Tatsache, die keiner Rechtfertigung bedarf, annimmt, um darauf den Staat aufzubauen, und der später, nachdem er einen neutralen Begriff eingeführt hat, diesen in den Dienst eines ethischen Mandats stellen will".

Im logischen Verlauf einer solchen Argumentation ist nichts leichter, als Heller schließlich als Opfer seines Liberalismus hinzustellen:

15 "...es liegt an seiner liberalen Durchdringung, daß der Horizont Hellers nicht über den modernen Staat in seiner demokratischen Phase hinausreicht. Was die Grenze des demokratischen Massen-Staates überschreitet, paßt nicht mehr ins System Hellers, verwandelt sich in 'Diktatur'...Die Staatstheorie von Heller ist eine konkrete Theorie des modernen Staates. Darin liegt ihre Fruchtbarkeit und ihre Begrenzung in der gegenwärtigen Situation".

Die Kritik von Gómez Arboleya entspricht einer ähnlichen Absicht, allerdings zieht er in erster Linie religiöse Aspekte heran:<sup>58</sup>

25 "...Heller hat seinen Feind nicht besiegt, weil er zum Teil sein eigener Feind war. Die Notwendigkeit, sich von einem logischen Normativismus zu trennen, hat Heller dazu geführt, die Dezision als letzte Wurzel des politischen Kosmos zu betrachten...aber seine Option für den Begriff der Organisation bringt ihn in eine gefährliche Nähe zu einem gewissen sozialen Utilitarismus.."

In diesem Zusammenhang vermißt der spanische Rechtsphilosoph einen zureichenden Begriff von der menschlichen Person. Seiner Meinung nach

35 "...hat Heller mit Beharrlichkeit die Idee einer konkreten Positivität bezüglich des Rechts vertreten. Er hat versucht, den korrupten Rest des Naturrechts, das nur in sich noch Halt findet, zu überwinden, um es in einen Willen einzufügen; in einen Willen, der nicht willkürlich ist, sondern den Bedürfnissen der Organisation unterworfen".

40

Aber vor den 'Bedürfnissen der Organisation' wachsen die Bedenken von Gómez Arboleya,

45 "...denn die modernen Gefahren kommen nicht von der Seite des Individualismus, sondern von der eines sozialen Pragmatismus. Heller stellt einige logische und einige moralische Grundsätze auf, von denen wir nicht wissen, wie sie im menschlichen Zusammenleben wirken...Aber solche vagen Begriffe von Gerech-

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<sup>58</sup>Kondensierung des Denkens von Gómez Arboleya, gestützt auf die oben erwähnten Werke.



tigkeit sind nicht Recht, denn das Recht ist für Heller Norm und als solche Norm, Positivität durch einen Willen."\_

In diesem Sinne kritisiert er bei Heller,

5

"...daß die moralische Welt nicht als Natur-Ordnung dargestellt wird, sondern offen für unsere Entscheidung bleibt..."\_

Im Endeffekt sind es gerade das demokratische Verbindungsglied der Staatstheo-  
10 rie und die ideologische Distanz, die den scholastischen Katholizismus von der demokratischen Begründung des rationalen Naturrechts trennt, die die zunächst wohlwollende Haltung von Gómez Arboleya Heller gegenüber schließlich doch zu-  
nichte macht. Wie könnte Heller auch auf der Gültigkeit seiner Positionen be-  
harren? Vor den ewigen Wahrheiten, die das unanfechtbare Inquisitionsgericht  
15 regieren, muß Heller samt seiner Lehre - der Heterodoxie überführt - fallen -  
zu allem Luxus mit der Anerkennung seiner intellektuellen Fähigkeiten.

\_2.1 Das franquistische Spanien: die national-katholische faschistische  
20 Bourgeoisie\_

Wie hätte es auch anders sein können? Die Heller-Rezeption findet im franqui-  
stischen Spanien nicht im Schutze einer Akademie statt, einer Hüterin der  
Weisheit im Kleide der 'reinen Wissenschaft', sondern sie wird von dem fa-  
25 schistischen national-katholischen Diskurs - beherrscht vom Gefühl der Vor-  
macht und Unangreifbarkeit - eingerahmt. Die Ortsbestimmung Hellers in Spanien  
ist ohne die Berücksichtigung einer ideologischen Konstruktion wie der folgen-  
den von Conde nicht möglich:

30 "...die Gegenwart stellt sich als Totalisierung der verschiedenen Ereignisli-  
nien dar, die vom Jahre 1948 ausgehen; der Kampf Staat-Gesellschaft ist zur  
Aktualisierung seiner extremen Möglichkeiten gekommen...Der radikale Rationa-  
lisierungsprozeß hat nach und nach den Elementen, die früher eine feste Grund-  
lage der politischen Einheit bildeten, alle Kraft entrissen".\_

35

Oder lassen wir Fraga zu Worte kommen:

"Das revolutionäre Prinzip - von Frankreich eingeführt - fegte die letzten  
\_Reste des Legitimitätsprinzips hinweg - das monarchistische Prinzip und die  
40 Stände - ... Das ganze Gerüst des Sozialkörpers lag am Boden: das Eigentum  
wurde in seinem traditionellen Aspekt liquidiert, ebenso das Erbe, die Fami-  
lie...weder axiologische Instanzen, noch führende Minderheiten, noch Auswahl-  
kriterien (blieben bestehen) ... die führenden Minderheiten wurden abtrünnig,  
die europäische Intelligentsia verbastardisierte...Die Absurdität des rein



demokratischen Prinzips führte zur Herrschaft des Volkes, der Plebejer, der Masse".<sup>59</sup>

Dabei versuchte der Franquismus, sich hobbesianische Grundlagen zuzuschreiben, um in ihnen eine Legitimation zu finden: Fraga spricht von dem "Gefühl eines totalen Unterganges des Abendlandes", und Conde meint, "man müsse, ausgehend von der heillosen Unordnung, eine Ordnung um jeden Preis schaffen".

Bis hierher scheint sich der Diskurs auf einer relativ säkularen Ebene zu entwickeln. Aber es wäre ein Irrtum, diesen Eindruck mit der globalen Ideologie gleichzusetzen, wie aus folgendem Zitat-Zuschnitt von Corts Grau hervorgeht:<sup>60</sup>

"...Mit der Ablehnung des göttlichen Autoritätsprinzips geht auch der Begriff der menschlichen Autorität zugrunde. ...die Partizipation des Menschen am Ewigen Gesetz geriet ins Wanken, als die protestantische Spekulation mildere Saiten aufzog (und führte schließlich) bis hin zum Auseinanderbrechen des Positivismus in seinen vielfältigen Entartungen... Als der Mensch sich von der Wahrheit entfernte, entwurzelte ihn schließlich die liberale Utopie aus seinem Vaterland... die religiösen Bindungen waren zerrissen... Wenn die Wahrheit sich aufzulösen beginnt, beschleunigt sich der Prozeß des politischen Zerfalls... das Zerreißen der religiösen Bindung impliziert den Bruch jeglicher Norm".

Von hier aus erarbeitet das franquistische Denken die ideologischen Elemente für eine Antwort:

<sup>59</sup> Zusammenfassung der Gedanken von Fraga Iribarne nach dem Buch 'La Crisis del Estado', aaO (Anm. 50). Das Denken, das Werk und das öffentliche Leben von Fraga sind nicht auf die Thesen, die das zitierte Werk darlegt, zu reduzieren. Er selbst hat sich von diesem Buch distanziert, indem er keine 3. Auflage autorisierte. Auf der anderen Seite sind Donoso Cortés und Carl Schmitt in später publizierten Arbeiten und öffentlichen Interventionen nicht mehr so wichtige ideologische Beziehungspunkte gewesen, wie sie damals darstellten. Es kommt dem Autor in diesem Aufsatz nicht zu, die Intentionen Fragas zu beurteilen und herauszuarbeiten, welche der verschiedenen biographischen Phasen den authentischen Fraga zeigt. Zweifellos setzte er zu der Zeit, als er 'La Crisis del Estado' schrieb, auf die Konterrevolution im Sinne von Donoso Cortés und Carl Schmitt. Inzwischen war er Minister und Botschafter von verschiedenen Regierungen der Diktatur. Aber er nahm im Jahr 1977 mit seiner Partei 'Alianza Popular' an den Wahlen zu den konstituierenden Cortes teil. Im Laufe der Legislaturperiode gehörte er mit zum Verfassungsausschuß; stimmte 1978 für die Verfassung und ist heute schließlich offizieller Oppositionsführer. Es ist klar, daß sich eine solche Persönlichkeit mit einem so reichen öffentlichen Leben nicht auf Thesen und Urteile, die in einer relativ frühen biographischen Etappe formuliert wurden, reduzieren läßt. Der Grund dafür, daß wir uns auf 'La Crisis del Estado' gestützt haben, liegt vielmehr darin, daß dieses Werk ein unersetzbares Stück innerhalb der Doktrin der Diktatur darstellt und in engem Zusammenhang - zeitlich und inhaltsmäßig - mit den Werken der beiden anderen Wissenschaftler steht.

<sup>60</sup> Vgl. Corts Grau, Motivos de la España Eterna, Madrid 1945, Instituto de Estudios Políticos.



"...wenn im 19. Jahrhundert die zwei großen neuen Elemente, die nationale Idee und das revolutionäre Prinzip, mit ihren jeweiligen Faktoren, Revolution und Konterrevolution als die sichtbarsten Faktoren, die die historische Bewegung zu bestimmen schienen, auftauchen, beginnt sich die nationale Idee in den 5 dreißiger Jahren von den politischen demokratischen Prinzipien, die sie hervorgebracht hatten, zu trennen... Die Nation als Legitimitäts-Prinzip der Herrschaft löst sich von der national-demokratischen Organisation...Gegenüber dem individualistischen Atomisierungsprozeß (erscheint) die Nation als hierarchisch strukturierte Gemeinschaft, die fähig ist, die Klassengegensätze in der 10 höheren nationalen Einheit zu beseitigen...die Nation als ständiger Prozeß, individuelle Schicksale in die universelle Aufgabe der Bestimmung eines Volkes einzugliedern...die Nation als Möglichkeit der Integration und Harmonie mit Perspektiven der restaurierenden Konterrevolution..."(Fraga)\_

15 Der Nationalismus als Kern der politischen franquistischen Antwort muß mit einer unbezweifelten Bedingung zusammengehen:

"...die Liebe zum Vaterland ist eine Quelle vielartiger Tugenden, wenn sie durch das Christliche Gebot geordnet ist. Der Katholizismus ist unser erster 20 geistiger Wert - er ist unser wahres Vaterland - als Nation sind wir durch die Kirche geschmiedet worden...(Corts Grau) ... Die Nation und der Staat haben sich nach drei Jahrhunderten wiedergefunden, wir sind wieder Spanier durch die Gnade Gottes... Unser Kreuzzug hat uns Wege zur Rettung eröffnet ...die ewige Weisheit ist unendlich erhabener als der Volkswillen... der Artikel 24 der Fa- 25 lange, der die Aufnahme des katholischen Geistes in den nationalen Wiederaufbau verfißt, ist die höchste Anerkennung dieser Wahrheit" (Corts Grau).\_

Von solchen Prämissen ausgehend ist nichts leichter, als auf die Ebene des Millenarismus und der Prädestination abzugleiten:

30

"...es scheint, als ob die Vorsehung in ihrem Plan einigen Völkern vorbehalten hat, der Idee der Humanität einzigartigen Ausdruck zu verleihen... In dem Augenblick, in dem all unser Ansehen und unsere Legitimität am Boden liegen, können nur Länder wie das unsere im Glauben etwas Hoffnung schöpfen (Fraga) 35 ...der Katholizismus wird auf den Ruinen von Babel die authentische Zivilisation errichten... nicht durch Massenversammlungen und Blendwerk, sondern durch Organismen, die in unserer Tradition verwurzelt sind - ebensowenig könnte sich der Willen der Menschen auf dem Fundament des Rechts konstituieren - (der Katholizismus) wird die Regierung berufen, die Gott am nächsten steht...: wir 40 sind aufgerufen, die geistigen Wiedereroberer der Welt zu sein. Unsere Halbinsel stellt das Bollwerk dar, das Gott für eine neue Reconquista, die zu einer neuen Übergabe führt, aufgehoben hat. Der Herr scheint uns als Instrument auserwählt zu haben. Der Kreuzzug hat schon unvergängliches Leben in unserer Seele angenommen, das uns verpflichtet, uns auserwählt zu fühlen"(Corts 45 Grau).\_

Rein hypothetisch hätte die national-katholische Bourgeoisie auch alternative politische Formeln in Betracht ziehen können. Sowohl Fraga als auch Conde und Corts Grau optierten jedoch für eine einzige:

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"in den Ruinen der verfallenen Institutionen sucht man überall den Mann, der die Ordnung wiederherstellt... Ein Volk bedarf immer eines Mannes, der seinen Willen versteht, zusammenfaßt, ihn erklärt und ihn zu seiner Bestimmung führt



... Die Führerschaft des außergewöhnlichen Menschen ist immer unvermeidlich  
... Wenn sich die Gesellschaft auflöst, wird sie in der Einheit der Führung  
wiederhergestellt... Die Diktatur ist ein außerordentliches, altes und frucht-  
bares Mittel (um Probleme zu lösen) (Fraga)".

5

Ebenso sieht Conde den Ausweg in

"dem 'Caudillaje' als revolutionäre Diktatur, gestützt auf die konstituie-  
rende Kraft des Volkes, dessen Willen darin zum Ausdruck kam, daß es zu den  
10 Waffen griff".

Diese Diktatur soll nicht nur vorübergehend Ordnung schaffen, sondern

"an keine zeitliche Begrenzung, die Bewältigung einer Ausnahmesituation oder  
15 an die Verfolgung konkreter Ziele gebunden sein" (Conde).

Und Corts Grau betrachtet den Faschismus als eine 'dringende Maßnahme' und  
behauptet, daß

20 "der Mann auf der Straße nach einer Diktatur verlangt. .. Der Faschismus a-  
la-espanola wirkt auf die Autoritätskrise ein... und begegnet mit dem Ruf zur  
Einheit und gegen die Zersplitterung dem Versöhnungsgeist, der im Gegensatz  
zum Geist des Klassenkampfes steht."

25 Wenn es um die persönliche Repräsentation des Führer-Prinzips geht, ist  
schließlich bei den zitierten Autoren kaum ein größerer Mangel an Abstraktion  
denkbar:

"Die Stunde schlägt, da Franco entscheidet, seine Prophezeiungen einzulösen"  
30 (Corts Grau).

Oder:

"Franco, der höchste Wächter, der Souverän, der die Gemeinschaft der Werte  
35 der spanischen Tradition wieder zu neuem Leben erweckt" (Conde).

Oder:

"Franco übernahm die Aufgabe, in dem Moment ein Volk auf seine Schultern zu  
40 nehmen, als es im Begriff ist, den Verstand zu verlieren" (Fraga) ... Dank  
diesen Männern, die die Vorsehung im rechten Augenblick auf die Welt sendet,  
bleibt diese bestehen" (Corts Grau).



Der Rest des Ideenverlaufs erscheint im weiteren kohärent:

"Die Repräsentation versucht, ihren alten Sinn als existentielles Phänomen wiederzuerlangen, indem sie ihren fiktiven Deckmantel verläßt, während die öffentliche Meinung als moderne Formel der Akklamation Gestalt annimmt" (Fraga). "... die Repräsentation als Volksgeist verbirgt in sich die Zerstörung der (im liberalen Sinn) Repräsentation zugunsten der Identität ... Die Herrschaft schließt die Repräsentation in sich selbst ein. Derjenige, der herrscht, ist durch die Tatsache seiner Herrschaft Repräsentant ... Die Stufe und Qualität der 'Auctoritas' bestimmt das Maß und die Qualität der Repräsentation" (Conde).<sub>5</sub>

In diesem Zusammenhang wird das Denken Hellers für die eigennützigsten Argumentationen herangezogen. Am Beispiel der Registrierung von historischen Zäsuren wird Heller bei Conde als Bürge des Despersonalisierungsprozesses der Macht herangezogen:<sub>15</sub>

"Der radikale Rationalisierungs-Prozeß beraubt nach und nach die früheren Inhalte, die ein festes Fundament der politischen Einheit bildeten, ihrer ganzen Kraft. Die religiösen Prinzipien, die traditionellen Werte und das monarchische Prinzip von Gottes Gnaden lösen sich unter dem Druck der rationalen Prinzipien auf, die anstreben, die politische Macht auf rein immaterieller Basis zu errichten. Parallel zu diesem Rationalisierungs-Prozeß findet in Spanien der wachsende Legalisierungs-Prozeß des Rechtsstaates statt, bis hin zu der radikalen Entpersönlichung der politischen Macht."<sub>20</sub>

Und...Conde verweist den Leser auf die 'vorzügliche Monographie 'Die Souveränität' als Bürgschaft für seine Ausdeutung!

In bezug auf Heller beklagt Fraga die Armseligkeit der politischen Macht, daß es

"im Liberalismus nicht mehr Staatsmacht gibt, die das Recht als Naturkraft, als Herrschaft, als Zwang, als unwiderstehliche oder zwingende eigene Macht anerkennt, daß sich die Souveränität auf eine Frage der Gültigkeit der juristischen Ordnung reduziert".<sub>35</sub>

Bei Corts Grau erscheint Heller als der Wissenschaftler, der die liberale Demokratie definiert und vertritt, eine Regierungsform,

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"der gegenüber alle Gründe aus dem klassischen Schatz und aus der eigenen Erfahrung der Konterrevolutionäre des XIX. Jahrhunderts gültig bleiben".<sub>40</sub>

Für Fraga verkörpert Heller die Autorität der Doktrin, wenn es darum geht, den Liberalismus als "Negation des Übernatürlichen" zu charakterisieren. Es scheint nur konsequent, wenn Conde



"hinter dem polemischen Zusammenstoß der großen Systeme des Staatsrechts - dem System von Kelsen, der Integrationstheorie, der Polemik zwischen Schmitt und Heller -" die Kurve zu entdecken vorgibt, die "zum Zusammenbruch führt".

5 Genötigt von der Rechtfertigung des Faschismus verweist Corts Grau auf das Zeugnis von Heller über den Liberalismus im Sinne "eines Abfluß-Kanals einer ideellen und politischen Hoffnungslosigkeit". Von hier aus glaubt er, nicht auf das geringste logische oder empirische Hindernis zu treffen, um zu behaupten, daß der Faschismus

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"die Befreiung von einem führungslosen Despotismus gewesen ist, der den eigentlichen Begriff vom Volk (als spanischer katholischer Nation) erniedrigt hatte".

15 Die Verwendbarkeit der Hellerschen Gedanken erscheint in den Händen solcher Vermittler praktisch unerschöpflich, weshalb wir uns nicht zu wundern brauchen, daß sie auch im Dienste des 'spanischen Deszisionismus' in den Arbeiten von Conde über 'Caudillaje' und 'Repräsentation' Verwendung fanden. Schließlich diente Hellers eigene Staatskonzeption nach Fragas Ansicht dazu, den Weg  
20 zurück zur Demokratie unmöglich zu machen:

"Wenn wir nicht zum Pluralismus zurückkehren wollen, muß man auf der Höhe der Staatsgewalt die oberste Dezisionseinheit, von der Heller gesprochen hat, anerkennen".

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## 2.2 Das liberale Spanien

Im Unterschied zu dem franquistischen Diskurs, der hauptsächlich in den vier-  
30 ziger Jahren geprägt worden ist, verläuft das liberale Denken in einem größeren Zeitraum, nämlich im Laufe der Jahre, die zwischen der Republik und der parlamentarischen Monarchie liegen. Auf der einen Seite fehlt es dem liberalen Denken durch diesen langsameren Zeitverlauf an Dichte; auf der anderen Seite zeichnet es sich aber gerade wegen seines wesensmäßig langen Bestehens durch  
35 seine besondere Gründlichkeit aus. Wir wollen hier einen kurzen Überblick über die republikanischen Wissenschaftler, den 'Kathedern-Liberalismus' unter dem Franquismus, die kulturelle Wende in den fünfziger Jahren, die Eklipse Hellers während der sechziger und sein Wiedererscheinen in den siebziger Jahren geben.

40 Das republikanische Bürgertum, das sich in den zwanziger Jahren sehr in der Bewegung zum Sturz der Monarchie engagiert hatte und in den dreißiger Jahren auf der Seite der Republik im Bürgerkrieg involviert war, hatte nur zwischen



Tod und Emigration zu wählen. 1934 veröffentlichte Francisco Ayala eine scharfsinnige Analyse des auflösenden Charakters vom Dezisionismus bei Schmitt.<sup>61</sup> 1936 setzt Recasens Siches die Überlieferung des Hellerschen Denkens fort, womit er 1928 begonnen hatte. 1943 widmet Ayala der spanischen Version der Staatslehre Hellers einige freundliche Bemerkungen,<sup>62</sup> wobei er vor allem auf dessen methodologische Grundsätze eingeht. 1951 erschienen postum verschiedene Monographien von Fernando de los Ríos, in denen er sich auf Heller stützt, um sich mit dem Formalismus Kelsens auseinanderzusetzen.<sup>63</sup>

10 In dem 'Kathedern-Liberalismus', dem es an der franquistischen Universität gelingt zu überleben, heben sich einige Gelehrte als besonders originell hervor. Gerade in einer historischen Phase, in der der Nationalismus blüht, kommt der kritischen Relativierung, die Murillo<sup>64</sup> der Nation und den Nationalismen als historischen Realitäten, die wesensgemäß der Vergänglichkeit unterworfen sind, 15 angedeihen läßt, besondere Bedeutung zu:

"...Auf dem Grund des Prozesses wachsender Nationalisierung in Europa macht sich eine antagonistische und potentiell kriegerische geistige Haltung bemerkbar... ..Nachdem der Prozeß der inneren Integration beendet ist, führte der eigene polemische Charakter der gebrauchten Mittel dazu, daß der Aspekt der nationalen Eigenart betont wurde, wodurch die pathologischen Entartungen vom Nationalismus (Chauvinismus, Imperialismus) entstanden".<sub>20</sub>

Im ganzen 'approach' Murillos kommt deutlich zum Ausdruck, daß bei diesem Heller-Schüler dessen Denkansätze zu einer reifen Verarbeitung gelangen. Leider hat Murillo an dieser Stelle seinen Gedankengang über den Nationalismus abgebrochen, ohne auf die wesentliche Kausalitätskette zurückzugehen. Das ist umso mehr zu bedauern, als es sich dabei - wenn man seine anerkannte Sensibilität für Ungleichheit, ökonomische Macht und soziale Klassen berücksichtigt - nur 30 um eine bewußte Unterbrechung des Denkprozesses, einen Akt der Selbstzensur handeln kann.

Eine zusätzliche Abweichung von der kulturell und politisch führenden Denkweise erscheint in doppelter Ausprägung; einmal in negativer, in Form einer Kritik:<sub>35</sub>

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<sup>61</sup> Francisco Ayala, Prólogo a traducción de Teoría de la Constitución, von Carl Schmitt, Madrid 1934.

<sup>62</sup> AaO.

<sup>63</sup> AaO.

<sup>64</sup> Vgl. Francisco Murillo, Nación y Crisis, Madrid 1951, Revista de Estudios Políticos, nor. 58; vgl. aaO., Estudios des Sociología Política, Madrid 1963, Ed. ecnos; aaO., Las Clases medias, Granada 1950, Publicaciones de la Universidad de Granada; aaO., Estudio sobre la Desigualdad en España (en curso).



"...Man ist durch einen der schärfsten zeitgenössischen Denker zur Absegnung des Politik-Begriffes als existentiellstem Kampf gekommen ... die Theorie von Carl Schmitt bedeutet die radikale Auslieferung der ganzen Konzeption von Recht und Ethik an die Macht ... der Kriegszustand ist die Folge davon ... Der doktrinaire Aufbau der 'Staatskrise' ist von Beweggründen ausgegangen, die mit sehr konkreten hegemonischen Vorstellungen assoziiert sind";

und positiv, in Form eines politischen Programms für ein liberales Spanien:

10 "Die Grundprinzipien, die die politischen Organisationen vor vierzig Jahren  
leiteten, enthalten Wesenszüge, die wahrscheinlich erhaltenswert sind und die  
bedroht sind, sich in dem schwindelerregenden Relativierungs-Prozeß zu ver-  
flüchtigen. Die Aufgabe, aus diesen Prinzipien ihren unverzichtbaren Teil her-  
auszustellen, ist zweifellos die große politische Mission unserer Zeit... Die  
15 Inhalte dieser Prinzipien - nationale Gemeinschaften, Achtung vor der Freiheit  
und der Menschenwürde, Beteiligung des Volkes an den Entscheidungsprozessen -  
hat noch genug reale Gültigkeit, um die politischen Organisationen zu leiten  
... Die Ordnung entsteht nicht durch die bloße Existenz von Macht. Die Gültig-  
20 keit der Organisation (ist) ein Produkt der freiwilligen und freien menschi-  
chen Zustimmung".

Der gleiche Autor faßt übrigens auch zu einem relativ frühen Zeitpunkt - 1961  
- die Möglichkeit einer Restauration der Monarchie ins Auge.<sup>65</sup>

25 Auch hier dient Heller als ideologische Unterstützung für die Distanzierung  
von Schmitt, für die Kritik an Positionen, die unter dem Vorwand der 'Staats-  
krise' die Diktatur legitimierten, und für das Aufrechterhalten des liberalen  
Glaubens. Auch hier ist der Diskurs nicht komplett; auch hier erleidet er eine  
ungewollte Unterbrechung. Allerdings ist die Betonung anders: wenn sich bei  
30 Murillo wahrscheinlich die Selbstzensur hinsichtlich seiner erwiesenen Sensi-  
bilität für soziale Spannungen auswirkte, so stellt sich ein Denker wie Olle-  
ro die Umverteilung der Macht als Hauptproblem - die sich nach dem Autor not-  
wendigerweise - oder zumindest von ihm erhofft - im Zusammenhang mit der Re-  
stauration der Monarchie vollziehen sollte.

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Der ideologische Beitrag von Heller dient im 'Katheders-Liberalismus' nicht nur  
der Kritik am Nationalismus oder dem Entwurf einer alternativen liberalen For-  
mel. Andere Autoren unterstreichen den Iusnaturalismus, der die Hellersche  
Rechtfertigung des Staates durchdringt:

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<sup>65</sup> Vgl. Carlos Ollero, Introducción a una Teoría de la Política, Madrid 1945; Revista de Estudios Políticos; aaO., La relativización actual de los Principios políticos, Madrid 1951, Revista de Estudios Políticos, no. 55; aaO., El sistema representativa, Madrid 1961, Revista de Estudios Políticos, no. 119; aaO., Dinámica social, desarrollo económico y forma política (La Monarquía del Siglo XX). Discurso de recepción como Académico de número, Sesión de 15 de Marzo de 1966, Madrid, Real Academia de Ciencias Morales y Políticas.



"... an der Spitze der staatlichen Organisation befindet sich nach Heller die souveräne politische Macht als höchste Entscheidungsinstanz, die die juristischen suprapositiven Werte normt und zur Wirkung bringt. Die höchste Entscheidungsgewalt, in der die Organisation des Staates gipfelt, ist für Heller von einem naturrechtlichen Gesichtspunkt aus - Werte oder sittliche Vernunft-Grundsätze - gerechtfertigt ... wenn Heller vom Recht spricht, so versteht er es als suprapositives Wert-Kriterium, als objektives Maß der Gerechtigkeit, d.h. im Sinne des Naturrechts... Nur mit dem Verdienst eines Sollens kann sich der Staat rechtfertigen, aber eines suprapositiven, nicht eines rein technisch-juristischen Sollens..."

Die Identifizierung mit Heller dient ihm auch als Schutz, "in die Irrtümer seiner Epoche zu verfallen", z.B.

"die einseitigen und extremen Gesichtspunkte von Schmitt und Kelsen anzunehmen. Heller erkannte an, daß nur ein reines liberales politisches Ethos vereinbar mit der Würde der menschlichen Person ist. Aber er merkte, daß der bloße bürgerliche politische Liberalismus sich nicht auf der Höhe der Zeit befand. Er apostrophierte die Theoretiker der Diktatur als Ästheten der Macht und sagte das Verenden des Faschismus in seinen ersten Anfängen mit fast mathematischer Genauigkeit voraus. Und hinsichtlich des Sozialismus hatte er gleichzeitig die Rechtfertigung ihrer fundamentalen Forderungen und die Einseitigkeit ihrer schrägen marxistischen Position genau im Auge..."<sup>66</sup>

Bei allen denen, die später von aller Welt hinsichtlich ihrer liberalen Einstellung, ihrer Bildung und ihres vornehmen Vorgehens wegen sowie ideologisch als Antipoden des Franquismus gepriesen wurden, - bei ihnen allen führte das Scheitern der geistigen Kommunikation mit Hellers Denken unweigerlich zu ideologischen Schwankungen und einem kulturellen Pessimismus, die schließlich zum Schiffbruch führen mußten. Die Reflexionen von ihnen selbst - nach den Worten von Ayala, "brachte sie der Bürgerkrieg zum Schwanken" - überliefern uns besser als jedes andere Dokument das Drama einer ganzen Generation. Hier einige Beispiele:

"...der Konstitutionalismus als Inspiration, Motor, Mythos hat an Kraft verloren ... das krankhafte Wuchern von Parteien und Fraktionen sterilisiert jede mögliche Aktion der Regierung ... Der Mißbrauch von Streiks und aufrührerischen Bewegungen zieht das Autoritätsprinzip in Zweifel und führt dazu, daß die Freiheit zur Tyrannei der Massen oder Gewerkschaften degeneriert ... Mit der Eliminierung gewisser Wahlmechanismen - plurale Abstimmung mit der Berücksichtigung von Familien, Klassen, usw. - hat man das Steuer riesigen ungeordneten Massen in die Hand gegeben, die unzulänglich ausgebildet sind: es fehlt ihnen an Mäßigung, Abwägung, Erfahrung im Verhandeln Verantwortungsgefühl ... Vermassung und Verschwinden des Individuums und der führenden Minderheiten ... ist ebenso ein Zeichen der Zeit wie die Demokratisierung der Welt, wobei die Triebkraft, die früher die Freiheit - Schöpferin persönlicher Unterschiede - gewesen ist, nun durch eine homogenisierende Gleichheit ersetzt

<sup>66</sup> Vgl. Galán, La concepción estatal de Heller, aaO. (Anm. 20).



wird, die dazu neigt, alle persönlichen Züge zu verflachen. ...Die Hierarchie hat sich aufgelöst: die Qualität erscheint lästig und verletzend".<sup>67</sup>

Dieser Krise des Liberalismus gegenüber wächst das Gefühl der Impotenz, und von da ist es nur ein kleiner Schritt bis zum Verlust jeden ideologischen Halts, der die Abwehrkräfte gegen die Selbst-Auslieferung an die Verführung der Faschisten stärken könnte. So meint Pérez Serrano,

"... man sollte nicht hartnäckig die Augen vor der Evidenz verschließen und die neuen Systeme von unleugbarer Stoßkraft als pathologische und vorübergehende Abweichungen betrachten ... Der italienische Faschismus ist keine pathologische Abirrung, sondern eine neue Konzeption vom Staat und seiner Funktion ... Italien ist zum Rang einer Imperialmacht aufgestiegen ... Deutschland hat seine Kategorie als Großmacht wiedergewonnen - das Ergebnis übertrifft alle Hoffnungen - ... Die ganze Organisation unterdrückt jegliche Manifestation des auflösenden Pluralismus... die persönlichen Werte werden rehabilitiert... ein neuer Typ von politischer Gemeinschaft von einer nie erreichten Kohärenz entsteht." -

Das Gefühl der Besorgnis kann bis zu dem Punkt Verwirrung stiften, daß liberale Denker das faschistische Modell als einzige Alternative verteidigen - für alle, "die nicht das russische Modell bevorzugen".<sup>68</sup>

In der Mitte der fünfziger Jahre findet ein wichtiger kultureller Wandel statt, der einmal durch die eigene Erfahrung und Distanz der emigrierten Spanier und auf der anderen Seite durch das mit den USA geschlossene Abkommen in Bewegung kommt:

"Der Bürgerkrieg stellt ein Phänomen dar, das dem der Aufhebung des Ediktes von Nantes analog ist. Eine bedeutende intellektuelle Minderheit geht ins Exil. Diese Emigration bringt sie in Kontakt mit anderen Kulturen; vor allem bringt sie sie in den Einflußbereich - mit mehr oder weniger Distanz - der nordamerikanischen Kultur. Die intellektuelle Minderheit überschwemmt den spanischen Büchermarkt mit Übersetzungen. Darunter Bücher der modernen Soziologie, die der deutschen Ausbildung der spanischen Intelligentsia entsprachen. Aber daneben verschafft der Kontakt mit der amerikanischen Wissenschaft einem neuen und entscheidenden Wissenszweig Zugang in Spanien: der Geschichte und der Soziologie aus dem englischen Sprachraum. Das Ergebnis war nicht nur ein quantitatives Wachstum, sondern das neue Element hat auch in gewissem Maße die Wissensstruktur modifiziert, indem es große Gebiete der geisteswissenschaftlichen Disziplinen auf sich gelenkt hat ... Was sich ereignete, war die Ankunft einer neuen Mentalität. Die spanische Soziologie hatte sich von dem deutschen Einfluß befreit."<sup>69</sup>

<sup>67</sup> S. Nicolás Pérez Serrano, Cien Anos de Derecho Político (1958-1958). Discurso leído en la sesión científica celebrada el 11 de Diciembre para conmemorar el Primer centenario de su constitución, Madrid 1958, Real Academia de Ciencias Morales y Políticas.

<sup>68</sup> AaO., Tratado de Derecho Político.

<sup>69</sup> Vgl. Enrique Gómez Arboleya, Sociología en España, Madrid 1958, Revista de Estudios Políticos, no. 98.



Die Wendung zum angelsächsischen Kulturkreis verläuft eine Zeitlang parallel zum Weiterwirken der Gedanken Hellers: 1960 - im Angelpunkt zweier Jahrzehnte - bleibt die Staatslehre als klassisches Werk weiter Pflichtlektüre für alle, die eine Universitätskarriere anstreben; die Arbeit von Morodo, 'Constitución, 5 legalidad, legitimidad' von 1962<sup>70</sup> könnte als letztes geistiges Zeugnis der Heller-Rezeption in den sechziger Jahren angesehen werden.

Von da an verläuft die Debatte über den Rechtsstaat, die in der ersten Hälfte der sechziger Jahre begonnen wurde und die sich bis zur Eröffnung des konstituierenden Prozesses hinziehen sollte, unter einem gewissen Ausschluß von Heller. In der Arbeit von Eliás Díaz,<sup>71</sup> die einen bedeutsamen Platz in der ideologischen Auseinandersetzung in Richtung auf die neue verfassungsgebende Versammlung einnimmt, wird Heller nur mit einer Randbemerkung bedacht. Bei den Verwaltungsrechtlern, die sich auf Forsthoff stützen und durch ihre einseitige 15 berufliche Perspektive dazu neigen, den Staat auf Verwaltung zu reduzieren, ist Heller einfach von der Bildfläche verschwunden.

Und dennoch wird in dem Maße, in dem sich die Wiedereröffnung des konstituierenden Prozesses nähert, die Erinnerung an Heller wieder lebendig. Es könnte 20 sein, daß das Erscheinen des Buches von Abendroth 'Antagonistische Gesellschaft und pluralistische Demokratie' in seiner spanischen Fassung, 1973, auf die spanische Akademia wie eine Gedächtnishilfe gewirkt hat. So sieht es zumindest Lucas Verdu im Jahre 1975.<sup>72</sup>

25 Der Charakter des konstituierenden Prozesses als juristischer Bruch und bloße politische Reform<sup>73</sup> läßt die Gestaltung der parlamentarischen Monarchie als 'sozialen Rechtsstaat' nur logisch erscheinen. Die von Heller stammende Bezeichnung wird in dem Art. 1.1 der Verfassung aufgenommen. Von daher war Garrarena in seiner Arbeit, die wir oben erwähnt haben, schon verpflichtet, 30 auf Heller hinzuweisen.

In außergewöhnlicher Weise wird die Heller-Rezeption von einem spanischen Wissenschaftler getragen, und zwar über historische Phasen und Regierungsformen hinweg, und auf beiden Seiten des Atlantik: Es handelt sich um Manuel García

<sup>70</sup>Siehe Raul Morodo, Constitución, Legalidad, Legitimidad, aaO.

<sup>71</sup>Vgl. Eliás Díaz, aaO.

<sup>72</sup>Vgl. Pablo Lucas Verdu, La lucha por el Estado de Derecho, Bolonia 1975, Studia Albornotiana, Publicaciones del Real Colegio de Espana.

<sup>73</sup>Vgl. Antonio López Pina, Comentario zu 'El cambio político español y la Constitución', Barcelona 1982, Planeta, von Antonio Hernández Gil, in Revista de Estudios Políticos, no. 29, Sept.-Dez. 1982, Madrid, Centro de Estudios Constitucionales.



## ELLEN ASH PETERS

When Ellen Ash Peters was named Chief Justice of Connecticut's Supreme Court in 1984, Harry Wellington, Dean of the Yale Law School and John Marshall Harlan Visiting Professor at New York Law School for the 1985-1986 academic year, offered a concise description of her judicial bearing: "She is a person not captured by ideologies at all." Her respect for the stability of the law, according to Dean Wellington, is well balanced by her sensitivity to the need for the law to deal with changing times.

Justice Peters graduated Phi Beta Kappa from Swarthmore College in 1951 and subsequently attended Yale Law School, where she graduated *cum laude* in 1954. After serving as a law clerk to U.S. Circuit Court Judge Charles E. Clark for a year, and teaching law for another year at the University of California's Berkeley campus, she returned to Yale in 1956 as an assistant professor. She was appointed full professor in 1964 - the first woman to hold a tenured position at Yale Law School - and held the prestigious position of Southmayd Professor of Law there from 1975 to 1978. In 1978, the late Governor Ella Grasso named Justice Peters to the Connecticut Supreme Court, the first woman to hold that position since the Court was founded in 1711.

Among numerous awards and honors, Justice Peters received the first Ella Grasso Distinguished Service Medal in 1982 and the Yale Law School Distinguished Service Medal in 1983. Her professional activities include service on the Connecticut Judiciary Executive Committee and the Connecticut State-Federal Judicial Council, both since 1981, and service on the Connecticut Law Revision Commission between 1978 and 1984.

The balance between legal theory and reality has been a major concern in Justice Peters' literature. In several important articles - "Grant Gilmore and the Illusion of Certainty," (*Yale Law Journal*, 1982) and "Reality and the Language of the Law," (*Yale Law Journal*, 1981) - she probes the point of confluence between the formal, abstract structures of the law and the often undisciplined realities it is intended to regulate. After recounting Professor Gilmore's pedagogical premise that "certainty" is an illusion and that the object of legal education is the generation of further dialogue rather than a set of static, accomplished facts, she characterizes Gilmore's enduring message as follows: ". . . abandonment of the illusion of certainty did not signal nihilism, or anarchy, or anti-intellectualism. On the contrary, we learned . . . that the only legal certainty is the certainty of legal change." Similarly, in "Reality and the Language of the Law," she observes that because differing nomenclatures can change our perception of the same set of legal issues, "we can hope at most to find ways to illuminate reality, to search for recognizable patterns," which "by teaching us what is relevant . . . instruct us in what to overlook." She continues,

The great contribution of the law and schools is to educate us to different patterns of exclusion and inclusion. Each prism refracts . . . a different ray of light. Each, however, captures only a small fraction of reality. The effort to fuse the various refractions into a workable beacon is a challenge that is yet unmet.

In assuming her responsibilities as Connecticut's highest judicial officer, Justice Peters acknowledged the problem of the Court's growing caseload was indeed a serious one, but also expressed a sense of optimism about the Court's potential for charting new directions in the development of law and legal theory.

"We have to simultaneously move cases and move them fairly," she said in an interview after assuming the bench. "All of us, I think, have to be aware of the fact that those two goals are essential and are sometimes in conflict. When they come into conflict, the more important goal is to move cases fairly." "The role of the Supreme Court," she continued, "has to be to keep the law abreast of the needs of this century . . . and to keep our case law abreast of developments the legislature is concerned with."

Justice Ellen Ash Peters, distinguished legal scholar and esteemed jurist, in recognition of your invaluable contributions to the study of commercial law and to the administration of justice, the Board of Trustees of New York Law School is pleased and honored to confer upon you the degree of doctor of laws, *honoris causa*, with all the rights, privileges and honors thereunto appertaining.



## DONNA E. SHALALA

In 1980 Donna E. Shalala became the tenth President of Hunter College of The City University of New York. In an uncannily precise way, the presidency of Hunter encapsulates the widely variegated interests and accomplishments of her career: a deep commitment to educational excellence, a long-standing involvement with the women's movement, an illustrious academic career in several of New York's major educational institutions, administrative responsibilities in both city and federal government, and a love of this, her adopted city.

A native of Cleveland, Dr. Shalala graduated from Western College for Women in Oxford, Ohio in 1962. After serving two years in the Peace Corps, she entered Syracuse University's Maxwell School of Citizenship and Public Affairs where she completed her doctoral work in urban planning in 1970.

During the next several years her academic career flourished in New York, first as an assistant professor at City University's Bernard M. Baruch College and subsequently as tenured professor and chairwoman of the graduate program in politics and education at Teachers College of Columbia University. Her publications, which number more than 40, include articles, monographs and books in the fields of urban affairs and the political economy of schools. Dr. Shalala's expertise in municipal finance was firmly established in 1971 with the publication of "New York City - Statehood: An Idea Whose Time Has Passed," a report written for the Citizens Union. Her other publications include *The City and the Constitution*, the definitive study of the 1967 New York State Convention, and *The Property Tax and the Voters*, a pioneering analysis of state finance referenda.

In 1975 Dr. Shalala received widespread recognition for her work as a director and treasurer of the Municipal Assistance Corporation, the agency convened to help solve New York City's financial crisis. In 1977 she became one of the leading women in the Carter Administration where she served as Assistant Secretary for Policy Development and Research of the United States Department of Housing and Urban Development. During her three-year tenure at HUD, she initiated a national mortgage credit program for women together with an extensive study of the problems of women in urban environments. Concurrently, she was instrumental in founding the Washington Women's Network, one of the most prestigious and influential women's movement organizations in the country.

As an extraordinarily creative member of New York's academic and business communities, Dr. Shalala has dedicated her energies to the linking of academic achievement with the substantive needs of the community surrounding the university. "A public college has to have a commitment to excellence in scholarship, but it also has a very special relationship to other public institutions," she said in an interview shortly after assuming the presidency of Hunter. For Dr. Shalala, academic excellence is not a goal in itself, but rather the medium through which the university fulfills "its mission of improving the quality of city life."

Dr. Shalala is the recipient of numerous awards and honors, including the Young Scholar Award of the American Association of University Women (1976) and election to the National Academy of Public Administration (1975). During those same years she was a John Simon Guggenheim Fellow. She is a Governor of the American Stock Exchange, Vice President of the American Political Science Association, Trustee of the Committee for Economic Development, Charles F. Kettering Foundation, and a Director of the Institute for International Economics, the Children's Defense Fund and the American Arbitration Association. In addition, Dr. Shalala is a member of the Governor of New York's Council on Fiscal and Economic Priorities and is president of the Women's Forum, a group whose membership includes many of the nation's highest women achievers.

Dr. Donna Edna Shalala, in recognition of your outstanding academic accomplishments, your commitment to educational excellence and vocational opportunity for women, and your dedicated efforts on behalf of New York City, the Board of Trustees of New York Law School is pleased and proud to confer upon you the degree of doctor of laws, *honoris causa*, with all the rights, privileges and honors thereunto appertaining.



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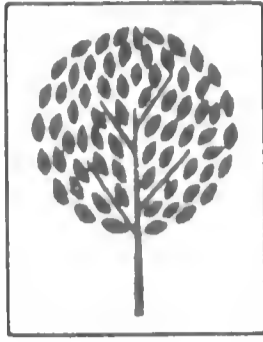


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**WERKLESUNG ISAAC BASHEVIS SINGERS:** Der Literaturnobelpreisträger Isaac Bashevis Singer hält an diesem Sonntag, 13. Oktober, 3 Uhr nachm., im Henry Lindenbaum Jewish Community Center (270 West 89th St.) eine Lesung aus seinen Werken. Singer gibt diese Proben seines literarischen Schaffens sowohl auf englisch als auch auf jiddisch. Die Lesung findet im Rahmen der vom YIVO Institute for Jewish Research veranstalteten Konferenz "Yiddish Literature in America: Immigrant Voices in the New World" statt. Eintritt zur Autorenlesung: \$10,00. Weitere Informationen telefonisch unter (212) 535-6700.

Foto: Gilles Vaclair

## Zum 75. Geburtstag von Werner Marx

(hm) Während eines kurzen Aufenthalts in Freiburg erfuhr ich, dass am 20. September der Philosophie-Professor Werner Marx, der von 1964 bis zu seiner Emeritierung im Jahr 1976 den Lehrstuhl seines einstigen Lehrers Martin Heidegger einnahm, seinen 75. Geburtstag beging. Vielen unserer Leser wird er sicherlich durch seine langjährige Tätigkeit an der University in Exile und der späteren Graduate Faculty der New School for Social Research bekannt sein. Etwas verspätet, aber nicht minder herzlich wollen wir uns in den grossen Kreis der Gratulanten einreihen.

Marx, der aus Mülheim/Ruhr stammt, begann in Freiburg im Jahr 1929 sein Studium der Jurisprudenz und Philosophie. Ersteres setzte er an der Universität Berlin fort, wo u.a. Rudolf Smend und Hermann Heller seine Lehrer waren und wo er noch kurz vor der sog. Machtergreifung zum Dr. jur. promovieren konnte. Ein Vierteljahrhundert, von 1938-63, lebte er dann in New York, wo er an der New School zunächst Nationalökonomie studierte, dann aber wieder zur Philosophie zurückfand; hier waren u.a. Kurt Riezler und Karl Lowith seine Lehrer. Er promovierte zum Ph.D. mit einer Dissertation über die Ontologie des Aristoteles. 1949 trat er in den Lehrkörper der New School ein und gehörte ihm bis zu seiner Berufung nach Freiburg an, zuletzt als ordentlicher Professor.

Als sein Hauptwerk muss die 1961 auf deutsch und ein Jahrzehnt später auf englisch erschienene Darstellung *Heidegger und die Tradition* gelten. Seine *Einführung in Aristoteles' Theorie vom Seienden* (1975), in der er an seine Dissertation anknüpft, legt Grundkategorien des Seienden fest. Während sein wissenschaftliches Hauptaugenmerk Heidegger gilt, dessen Werk er in die Tradition des deutschen Idealismus einband, hat er sich auch mit Fichte, Hegel und Schelling befasst und viele neue Erkenntnisse zutage gefördert. In der Leitung des Philosophischen

Seminars I — jahrelang die Domäne Heideggers — hat er sich auch grosse Verdienste um den Ausbau des Husserl-Archivs an der Universität Freiburg erworben. Vor ihm sollten trotz seiner Emeritierung noch viele Jahre erfolgreichen Wirkens liegen. In Gratulationsbriefen dankten der baden-württembergische Wissenschaftsminister Dr. Engler Prof. Marx für seine Freiburger Tätigkeit und für die "vielfältigen Bemühungen, die Aussöhnung zwischen dem deutschen und dem jüdischen Volk Schritt für Schritt voranzutreiben", und der Freiburger Oberbürgermeister Dr. Rolf Böhme für "Ihre herausragenden Verdienste um unsere Universität" und "um die Aussöhnung zwischen Deutschen und Juden".

## E.B. White gestorben

Im Alter von 86 Jahren ist am 1. Oktober in North Brooklin (Maine) der amerikanische Schriftsteller E.B. (Elwyn Brooks) White gestorben. Der am 11. Juli 1899 in Mount Vernon (New York) geborene Autor war seit 1927 jahrzehntelang Mitarbeiter der Literatur- und Kulturzeitschrift *The New Yorker*. Bekannt geworden ist E.B. White als Kinderbuchautor (*Stuart Little*, *Charlotte's Web*, *The Trumpet of the Swan*), Essayist, Lyriker und nicht zuletzt als Verfasser (zusammen mit William Strunk) einer Stilkunde der englischen Sprache, *The Elements of Style*.

E.B. White, der beim *New Yorker* auch mit James Thurber zusammenarbeitete, zeichnet sich in seinem umfangreichen Werk durch ebenso präzise wie geistreiche Formulierung aus. Über den rein literarischen Bereich hinaus setzte er sich für Menschenrechte und Umweltschutz ein. Er wurde mehrfach mit angesehenen literarischen Auszeichnungen bedacht und erhielt 1978 einen Pulitzer-Preis in Würdigung seines Gesamtwerks.



### Zum Tod Kurt Baums

Im Alter von 88 Jahren ist in Alexandria (Virginia) nach langer Krankheit der aus Berlin stammende Anwalt und Wissenschaftler Dr. Kurt Baum gestorben. Als Anwalt spezialisierte er sich auf dem Gebiet des Arbeitsrechts, dem er sein Leben lang treu blieb. In der Hitlerzeit trat er mit Uner-schrockenheit für verhaftete Juden ein. Sein starkes jüdisches Bewusstsein war ein wich-tiger Bestandteil seines Wesens. Baum ge-hörte dem Hauptvorstand des Centralvereins und der Leitung des Kartellkonvents jüdi-scher Verbindungen an.

Nach seiner Auswanderung in die USA lehrte er an einer Anzahl von Universitäten und gehörte lange dem Brookings Institute an. Er war Verfasser von elf Büchern und zahlreicher juristischer Artikel. Seit Ausbruch des Krieges war er für die US-Regierung tätig, erst als Konsulent im War Department, dann im CIA und schliesslich im Department of Labor, wo er Abteilungs-leiter wurde. In seiner amtlichen Eigenschaft war er u.a. für den Wiederaufbau der Be-ziehungen zu Deutschland tätig. Für seine Förderung gegenseitigen Verstehens verlieh ihm die Bundesregierung das Grosse Ver-dienstkreuz, auch für seine lange Tätigkeit als Washingtoner Korrespondent der Bundes-vereinigung deutscher Arbeitgeberverbände. Kurt Baum hinterlässt seine Frau Helene, eine Tochter und Enkel.



Pelayo, der 1933 Schüler Hellers in Madrid gewesen ist, und der Heller als Epigonen des liberalen Konstitutionalismus betrachtet hatte.<sup>74</sup> Nachdem er fünfundzwanzig Jahre in Südamerika als Professor tätig war, kehrte er nach Spanien zurück, um sich dem konstituierenden Prozeß anzuschließen. Seine Rückkehr konnte nicht stattfinden, ohne daß Heller wieder im Vordergrund der Betrachtungen über Staat und Politik erschien:

"Die Formulierung der Idee vom sozialen Staat oder konkreter, vom sozialen Rechtsstaat, verdanken wir Hermann Heller, der seine Mitgliedschaft bei der SPD mit der Eigenschaft verband, einer der bedeutendsten Staatsrechtler in den zwanziger und dreißiger Jahren zu sein. Heller setzt sich mit dem konkreten Problem der Krise der Demokratie und des Rechtsstaats auseinander, den man nach seinen Überlegungen nicht nur vor der faschistischen Diktatur retten muß, sondern auch vor der Degeneration, zu der ihn der juristische Positivismus und die Interessen der herrschenden Schichten geführt haben, die ihn in eine Idee verwandelt haben, die entweder nichts bedeutet oder unfähig ist, gegen die zwei Fronten zu kämpfen, die die Irrationalität entfaltet: auf der einen Seite die Irrationalität des kapitalistischen Systems, das einen neuen ökonomischen Feudalismus erzeugt, den der formale Rechtsstaat deckt. Auf der anderen Seite die faschistische Irrationalität. Die Lösung besteht nicht darin, auf den Rechtsstaat zu verzichten, sondern ihm einen ökonomischen und sozialen Inhalt zu geben, innerhalb seines Rahmens eine neue Arbeitsordnung und ein System der Vermögensverteilung zu verwirklichen: nur der soziale Rechtsstaat kann eine gültige Alternative gegenüber der ökonomischen Anarchie und der faschistischen Diktatur sein, und daher kann nur er den politischen Weg darstellen, um die Werte der Zivilisation zu retten".<sup>75</sup>

### Epilog

30

Bis hierher ist unsere Überlegung dem ideologischen Gesichtspunkt gefolgt. Wir haben versucht, drei in politischer Hinsicht verschiedene ideologische Gruppen bei der Heller-Rezeption herauszuarbeiten: die Republikaner, die franquistisch national-katholische Bourgeoisie und die Vertreter eines 'Katheders-Liberalismus'.

Es gibt noch eine weitere Ebene der Analyse, die die ideologische vertiefen und nuancieren sollte, die wir aber hier aus Raumgründen nur kurz umreißen können, um sie bei anderer Gelegenheit genauer zu entwickeln: ich meine die Beziehung zwischen Ideologie und Sozialklasse. Auf dem Hintergrund der Heller-Rezeption durch die verschiedenen Gruppen zeichnet sich über die ideologischen Unterschiede hinaus die Sozialklasse ab. In der Heller-Rezeption brechen sich wie in einem Prisma die sozialen Spannungen als Ideologie.

<sup>74</sup>Vgl. Manuel Garcá Pelayo, aaO.

<sup>75</sup>S. Manuel Garcá Pelayo, aaO.



Der ideologische Diskurs erfüllt die Funktion einer Signifikante. In einer tiefergehenden Analyse erweist sich das bisher Gesagte als eine unbewußte Idealisierung oder eine bewußte Verschleierung der realen Interessen oder Triebkräfte. Als gemeinsamer Hintergrund erscheinen verschiedene und gelegent-

5 lich antagonistische Konzeptionen der Beziehung zwischen Staat und Gesellschaft und ... der Klassenkampf. Die wirklichen Beweggründe, die sich häufig unter dem barocken - zuweilen formal brillianten - Diskurs der spanischen Wissenschaftler verstecken, werden durch eine solche Analyse ans Licht gebracht.

10 Bei Francisco Javier Conde überrascht das Maß an serviler Schmeichelei gegenüber den Machthabern. Alle seine Zeitgenossen bezeugen bei ihm den Eifer eines Emporkömmlings; und obwohl ihm niemand sein Wissen, seine fachliche Kompetenz und seine Sensibilität streitig machen würde, so hat doch kein Zweifel daran bestanden, daß er seine Ideen mit mehr oder weniger Erfolg zu verkaufen

15 versuchte. Dem Wort 'caudillaje' (Führungskraft) z.B. hat er im rechten Augenblick seinen charismatischen Inhalt gegeben und damit den Begriff zum Symbol erhoben. Auch hat er sich vorgenommen,

20 "der gegenwärtig einzigartig dastehenden Form von Herrschaft ihre immanente Begründung und begriffliche Genauigkeit zu geben".

Im Dienste dieses Vorhabens verläuft sein Gedankengang folgendermaßen:

25 "Das Ziel und die Natur der Beziehung zwischen Führer und Geführten machen den 'caudillaje' zu einer spezifischen legitimen Art zu herrschen. Die erste Eigenschaft, die den 'caudillaje' definiert, ist die Legitimität. Führen heißt vor allem anderen, legitim herrschen. 'Caudillaje' ist kein Synonym, sondern ein Kontrapunkt zur Diktatur... Die Logik der Konstruktion verpflichtet dazu,

30 als souveräne Diktatur zu interpretieren, die nicht an eine zeitliche Begrenzung, an die Bewältigung einer Ausnahmesituation oder an die Erlangung objektiver Ziele gebunden ist. Der 'caudillaje' ist eine revolutionäre Diktatur, die sich auf die konstituierende Gewalt des Volkes stützt, deren Willen sich im Rückgriff auf die Waffen, d.h. im Cäsarismus manifestiert. Die Legitimität

35 des 'caudillaje' ist demokratische Legitimität. Führen heißt mit Charisma herrschen. Der 'caudillaje' stellt genaugenommen die Verbindung der charismatischen Welt mit der Tradition dar. Die dritte Eigenschaft des 'caudillaje' ist der persönliche Charakter der Herrschaft; führen heißt persönlich herrschen. Die Proklamation des Charismas erfüllt eine konstituierende Funktion.

40 Die persönliche Beziehung zwischen Führer und Geführten ist nicht Ursprung von Knechtschaft, sondern von Freiheit... Franco, der höchste Wächter, Souverän, der die Wertegemeinschaft, die die spanische Tradition in sich birgt, zu neuem Leben erweckt ... der große Traum spanischen Ursprungs - den modernen Leviathan zu besiegen - scheint sich ganz und gar erfüllt zu haben, denn der

45 'caudillaje' ist ein sicheres Vorzeichen seiner Überwältigung."

Man würde aber wohl in der Bewertung des Voluntarismus bei Conde zu weit gehen, wenn man diesen allein auf den Eifer des Emporkömmlings zurückführte.

<sup>76</sup> S. Francisco Javier Conde, Espejo del Caudillaje, aaO.



Dazu erscheint er mir als Ausdruck des Macht-Ästhetizismus, der sein Denken gefangennahm:

"...wenn sich der Unterschied zwischen Staat und Gesellschaft verwischt, werden auch die Begriffe problematisch, die sich auf diesen Dualismus stützen. Die freie Sphäre, das Soziale, das, was nicht der Staat ist, wird Staat. Der Staat nimmt den ganzen Bereich der Gesellschaft, Wirtschaft, Kultur, der Ausbildung usw. ein. Der Staat wird ... total ... erst das Aufbrechen der nationalen Idee und des revolutionären Prinzips auf der historischen Bühne haben zum ersten Mal die Möglichkeit geschaffen, daß eine Gruppe von Menschen sich so in sich selbst zusammenschließt, daß sie fähig ist, allen die Stirn zu bieten. Erst diese haben die Möglichkeit der totalen Mobilisierung der Seelen und der Menschen geschaffen, die das einzigartige Wesen der Großmacht begründet... Der totalitäre Staat ist die Organisationsart der Großmacht in seiner Fülle...er ist die eigene Organisationsart des modernen Staates in seiner qualitativ differenzierten Phase als Großmacht ... Der totalitäre Staat, wie der moderne Staat in allen seinen Etappen - ... ist auch wert-neutral."<sup>77</sup>

Bei einer genaueren Lektüre von Fraga sind es Ständedenken, Elitegeist, Unsicherheit und Faszination durch die persönliche Macht, die als unterliegende Dimension Gestalt gewinnen:

"...so solide Teilstücke der alten Ordnung wie das Eigentum, die Erbschaft, die Familie bilden - im Begriff sich in ihrem traditionellen Aspekt aufzulösen - keine Grundlagen mehr...Vertreibung der traditionellen Führungsschichten ... Unmöglichkeit eines Konkubinats zwischen Tradition und Revolution ... Die Revolution fegte die Stände hinweg ... Das soziologische Erbe des Ancien Régime zerbrach ... das ganze Gerüst des Sozial-Körpers lag am Boden ... Inmitten vom Fortschritt sah man von Tag zu Tag ein der westlichen Zivilisation fremdes Element sich ausbreiten, das moderne Proletariat, voll von Drohungen ... Es vollzog sich eine schnelle Proletarisierung unserer Gesellschaften ... gegenüber der wachsenden Zunahme an bürgerlichen und politischen Rechten wurde die Sicherheit in jeder Hinsicht immer geringer ... Unter allen Gesellschaftsschichten gab es einen latenten Krieg, der bei der ersten Gelegenheit zum erklärten Krieg werden sollte ... die Führerschaft des außergewöhnlichen Menschen ist immer unvermeidlich."<sup>78</sup>

Bei Corts Grau schließlich erscheint hinter seiner geistigen Verklärung das Gefühl der Angst, sowie die Tendenz, Unsicherheit in Mythifizierung umzusetzen:

"Die menschliche Gleichheit - im Sinne der Demokratie-Theoretiker - ein reines Produkt des Ressentiments ... hat eine steuerlose Nation unterminiert ... Der Liberalismus war der Hauptfaktor beim Vermassungsprozeß in Spanien ... Korrosion der Einheit und hierarchischen Ordnung, Abgleiten der Vernunft zum Instinkt, des Willens zu bloßen Gelüsten... und als Begleiterscheinung einer solchen Auflösung wird uns die Gewalt als logische Explosion der Unordnung überkommen".

<sup>77</sup>Vgl. Francisco Javier Conde, aaO.

<sup>78</sup>S. Manuel Fraga Iribarne, La Crisis del Estado, aaO.



In diesem Zusammenhang und zur Verdeutlichung unserer These fügt Corts Grau in seinen 'Randbemerkungen eines Befreiten' zur Ausschmückung den Hinweis hinzu, daß er

5 "während des glorreichen Nationalen Kreuzzuges in Valencia der Verfolgung ausgesetzt war."<sup>79</sup> -

Dieser Diskurs entspricht in sozialer Hinsicht der vermögenden Bourgeoisie, die in ihrem Verständnis vom Eigentum als Zinsbasis in stärkstem Widerspruch  
10 zu dem Modell der kapitalistischen Entwicklung im Spanien der dreißiger und vierziger Jahre steht. Da diese Bourgeoisie unfähig ist, sich eine andere Organisationsform vorzustellen, als die auf das Eigentum fixierte, fühlt sie sich in ihrer Existenz bedroht, sobald sie bemerkt, daß ihr Eigentum in Gefahr ist. Der ganze Diskurs über das Chaos, die Gewalt, den Zusammenbruch des  
15 Staates, die Auflösung der Ordnung usw. ist auf die Befürchtung zurückzuführen, daß eine historische Phase zu Ende gehen könnte, in der das Eigentum den Knotenpunkt aller sozialen Beziehungen bildete. Was dieser Diskurs letzten Endes durchscheinen läßt, ist die Ideologie der vermögenden Großbourgeoisie, die klar in der Hegemonie der Großbourgeoisie der Latifundien zum Ausdruck  
20 kommt. Er spiegelt die Spannungen wider, die durch die Struktur des Landbesitzes und die Beziehung zwischen Eigentum und Arbeit verursacht werden. Der ganze gedankliche Aufbau von Wissenschaftlern wie Conde, Fraga, Corts Grau usw. ist letztlich nur eine rhetorische Verschleierung der wirklichen Ursachen des Bürgerkrieges - vorweggenommen durch die Gedanken, die von Donoso Cortés<sup>80</sup>

<sup>79</sup>S. José Corts Grau, Motivos de la España Eterna, aaO.

<sup>80</sup>Die Ortsbestimmung von Donoso Cortés ist mit den Ereignissen von 1848 und dem konterrevolutionären Denken eng verbunden. Der deutsche Wissenschaftler ist im allgemeinen mit dem Namen von Donoso Cortés durch die Verbreitung seines Denkens seitens Carl Schmitt vertraut, vgl. Schmitt, Zur Staatsphilosophie der Gegenrevolution, 1922; ders., Donoso Cortés in Berlin, 1927, Hochland; ders., Der unbekannte Donoso Cortés, 1929; ders., Donoso Cortés in gesamteuropäischer Interpretation, Madrid 1944, Academia de Jurisprudencia y Legislación. Ebenso Edmund Schramm, Donoso Cortés, Leben und Werk eines spanischen Antiliberalen, Hamburg 1935, Iberoamerikanisches Institut; Dietmar Westemayer, O.F.M., Donoso Cortés, Staatsmann und Theologe, Paderborn 1940. Was in Deutschland und in Spanien selbst vielleicht weniger bekannt ist, ist das beträchtliche Ausmaß, in dem die Verbreitung des Denkens von Donoso Cortés im Spanien der dreißiger und vierziger Jahre und seine enge Verbindung zu der Ortsbestimmung von Hermann Heller in der spanischen ideologischen Auseinandersetzung, mit dem Apostolat von Carl Schmitt im Zusammenhang steht. Francisco Ayala weist auf dieses Phänomen hin in Donoso Cortés, Energumeno portentoso (Los Políticos), aaO.; Eustaquio Galán und Carlos Ollero (aaO.) kommen später auf das gleiche Thema ausführlich zu sprechen. Dabei scheint es interessant, die Dürftigkeit der Werkausgaben von Donoso Cortés zwischen 1948 und 1922 (nur 1851, 1854, 1880, 1904) zu verifizieren. Nach der Verbreitung seiner Gedanken durch Schmitt erscheinen nach kurzer Zeit Ausgaben seiner ausgewählten Werke (1930 und 1933) und 1934 seine 'Pensamientos' in dem angesehenen Verlag Es-

(Fortsetzung Fußnote)



und Cánovas<sup>81</sup> zu der Acción Española<sup>82</sup> führen, und gefördert durch die Auseinandersetzung in der Weimarer Republik selbst.

Dagegen ist der liberale Diskurs - von Ayala und de los Ríos zu Murillo, Ollero, Galán und García Pelayo - in allen seinen Schattierungen der Diskurs der Mittelschicht, dem der vermögenden Bourgeoisie entgegengesetzt. Diese Wissenschaftler sehen sich nicht genötigt - wie die Franquisten -, Heller zu mißbrauchen, ihn zu manipulieren oder für sich zu beschlagnahmen. Ihnen genügt es, seine Gedanken zu reproduzieren, gerade weil sie in Spanien in sozialer Hinsicht die gleiche geistige Richtung vertreten, in der der Sozial-Liberalismus von Hermann Heller entstanden ist. Die gebildete spanische Mittelschicht paßt sich dem Lauf der ökonomischen und sozialen Entwicklung an; die gebildete Mittelschicht setzt auf den Übergang von einem juristischen zu einem sozialen Liberalismus, in dem der Staat als der große Vermittler zwischen allen sozialen Schichten auftritt. Wenn der Staat bei der vermögenden Bourgeoisie und in den unterliegenden Dimensionen des franquistischen Diskurses dem Diktat des Eigentums unterworfen ist, so ist es in der Vorstellung der Mittelschicht die Gesellschaft, die sich als dem Staat als höhere Instanz unterworfen betrachten muß.

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Innerhalb der Mittelschicht kann ein politischer Reformismus angestrebt werden - wie bei Carlos Ollero -, kann ein sozialer Reformismus sein Recht fordern - wie bei Francisco Murillo -, kann auch ambivalent mit den Ideen und dem Recht als einer Ware, die der persönlichen Bereicherung dient, spekuliert werden, wie es in gewissen freiberuflichen Kreisen der Fall ist. Aber in allen diesen Haltungen erscheint der Staat als vermittelnde Instanz<sup>83</sup>, und alle stellen das

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pasa-Calpe. Die Arbeit von Edmund Schramm (aaO.) wird unverzüglich in der Zeitschrift der extrem rechten 'Acción Española' kommentiert, und zwar von einer Persönlichkeit von Rang und Namen eines Alfonso García Valdecasas. Kurz darauf erscheint die Übersetzung jener Arbeit ins Spanische. Während des Bürgerkriegs und der Diktatur dient das Denken von Donoso Cortés als Angriffswaffe und ideologische Deckung, wobei die Ausgaben seiner Werke bis zu seinem 100. Todestag aufeinander folgen: 1938, 1941, 1942, 1944, 1946, 1954. Ebenso erscheinen zahlreiche Glossen von Donoso Cortés, dessen Ideen - zumindest teilweise - die Werke von Francisco Javier Conde, Manuel Fraga Iribarne, José Cortés Grau, Luis Díez del Corral, Luis Sánchez Agesta inspirieren. Die Verdammung des Hellerschen Denkens als heterodox von solchen Positionen aus versucht, sich dokumentarisch durch die Ideen von Donoso Cortés und Carl Schmitt abzusichern.

<sup>81</sup>Über Cánovas, s. z.B. Luis Díez del Corral, El Liberalismo Doctrinario, Madrid 1945, Instituto de Estudios Políticos; ebenso Luis Sánchez Agesta, Historia del Constitucionalismo Español, aaO.

<sup>82</sup>Vgl. Raul Morodo, Orígenes ideológicos del Franquismo. Acción Española, Madrid 1980, Tucur Ediciones.

<sup>83</sup>Für eine Verifizierung des Ausmaßes, in dem dieses Problem den konstituierenden Prozeß der parlamentarischen Monarchie bestimmte, vgl. Antonio López (Fortsetzung Fußnote)



Eigentum als wichtigsten Bezugspunkt des politischen Prozesses in Frage.

Fassen wir zusammen: die geistige Überlebenskraft<sup>84</sup> von Heller ist um so bemerkenswerter, als die spanische Geschichte in den letzten fünfzig Jahren 5 zweifellos weniger gradlinig verlaufen ist als im übrigen Westen. Die spanische Gesellschaft und die spanische Kultur haben einen traumatisierenden Prozeß von Verstümmelung, Repression und einer späten und mühsamen neuerlichen Emanzipation durchgemacht. Hellers Botschaft hat nicht nur eine bis zum Bürgerkrieg führende ideologische Polarisierung überdauert, sondern auch die 10 Diaspora, die Unterbrechung des Dialogs, die Getto-Situation der intellektuellen Auseinandersetzung sowohl in der 'España peregrina' (unter den Emigranten) als auch in der 'España cautiva' (dem gefangenen Spanien), und schließlich die allmähliche Wiederaufnahme des Dialogs und der Kommunikation seit Beginn der fünfziger Jahre. Die Botschaft Hellers übergreift kulturelle 15 Wendepunkte, die für sich beanspruchen, die vorangehenden historischen Phasen auszulöschen - die Konterrevolution gegenüber dem Demo-Liberalismus, den demokratischen Aufbruch gegenüber der Diktatur -, wobei ein so bedeutsamer Wechsel der Regierungsformen stattfindet wie konstitutionelle Monarchie, Republik, Diktatur und parlamentarische Monarchie. Die Botschaft Hellers überdauert auch 20 den historischen Moment, in dem sich das spanische kulturelle Interesse von dem germanischen Kulturkreis abwendet und sich auf eine Interpretation der reichen ideologischen Quellen des 'Siglo de Oro' im Dienste der Diktatur zurückzieht. Sie überdauert die Abhängigkeit von der nordamerikanischen Hegemonie und reicht bis zum gegenwärtigen Streben nach kultureller Autonomie im Zusammenhang mit einer Annäherung an Westeuropa. 25

Die Bezugnahme auf Heller ist bei den spanischen Wissenschaftlern nicht auf konventionellem Wege erfolgt. Dies war auch kaum möglich: Wie sollte man den Hellerschen Denkansatz auf der Ebene der rein akademischen Lehre vom Staats- 30 recht gerecht werden können? So unterscheidet sich die Bezugnahme auf Heller

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 Pina, The Shaping of the Constitution, in Spain at the Polls, ed. Howard Pen-  
niman, Washington D.C. 1983, American E. Institute, La España Democrática y  
 Europa, Edición de Antonio López Pina, Madrid 1977, Editorial Cambio 16; La  
 Constitución de la Monarquía Parlamentaria, edición de Antonio López Pina,  
 Madrid 1983, Fondo de Cultura Económica. Ebenso, Alfonso Ortí, El Significado  
 del Desencanto (Desencanto popular y transición postfranquista), in Revista  
 "Canto General", Madrid/Mexico 1981, no. 1, Enero-Febrero 1982.

<sup>84</sup> Acht Auflagen mit insgesamt 45.000 Exemplaren. Mit dieser Zahl rangiert  
Hellers "Staatslehre" vor folgenden wichtigen Werken, die in der gleichen  
 Reihe herausgegeben wurden: La Democracia en América, A. de Tocqueville; El  
 Federalista, Hamilton, Madison, Jay; La Imaginación sociológica, C.W. Mills;  
 El Ser y el Tiempo, M. Heidegger; La Fenomenología del Espíritu, G.W.F. Hegel,  
Carl J. Friedrich, Teoría y Realidad de la Organización constitucional  
 democrática; schließlich, La Revolución de la Esperanza, E. Fromm.



beträchtlich von den schöngeistigen Zitaten eines Max Webers, eines Diltheys, eines Alfred Webers, eines Jellineks. Die geistige Präsenz und Vermittlung von Heller hat sich offensichtlich dadurch verstärkt, daß sie sich auf den historischen Hintergrund des Zusammenbruchs des deutschen Liberalismus und des  
5 Kampfes gegen den Faschismus im Bürgerkrieg und im Zweiten Weltkrieg projiziert sah. Nach der langen franquistischen Diktatur und beim Anbruch eines neuen konstituierenden Prozesses - 1973 - dient die Bezugnahme auf Heller der politischen Reform in ihrem Vorhaben, die Herrschaft des Rechts auf erneuerten Grundlagen wiederherzustellen.

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All das wäre nicht möglich gewesen ohne das Zusammentreffen einer Reihe von besonderen Phänomenen: die engen kulturellen Beziehungen zu Deutschland; die sozial-liberale Position von Heller in den für die Weimarer wie für die spanische Republik kritischen Momenten, und das Gewicht, das seinen persönlichen  
15 Kontakten zukommt - die geistigen Vermittler der Heller-Rezeption stehen im Vordergrund, wenn es darum geht, eine politische Verpflichtung mit der Republik einzugehen oder einen Kompromiß mit dem Militärputsch, dessen Sieg der Diktatur den Weg geebnet hat, zu schließen. Dazu ist seine Rolle bei der Legitimation gewisser Thesen der franquistischen Intelligentsia zu erwähnen,  
20 sowie schließlich die Verlagerung der Auseinandersetzung zwischen Heller, Kelsen und Schmitt in der Weimarer Republik - durch Reisen, Kontakte und Publikationen, schon seit 1922 - auf den spanischen Schauplatz.<sup>85</sup>

Einer der wichtigsten Gründe für die Wirkungskraft Hellers besteht in der in-  
25 nerspanischen Grenzsituation während der Diktatur: bei aller Größe von Marx haben die materiell-ökonomischen Bedingungen dazu geführt, daß nicht er es war, sondern Heller, der der gebildeten Mittelschicht ideologisch geholfen hat, sich zu retten. Das Abgleiten in den Faschismus oder das Sich-Einmauern in den 'Katheders-Liberalismus' hängen davon ab, welchen Gebrauch man vom Hellerschen  
30 Denken gemacht hat.

Der Geist Hellers hat in Spanien das Schicksal von Freiheit und Vernunft auf seinem unheilvollen Weg durch ein halbes Jahrhundert hindurch begleitet. Da sich am Ende die soziale Klasse als entscheidender Faktor für die Heller-Re-  
35 zeption erwiesen hat, wird ihre Zukunft - unabhängig von den Persönlichkeiten, über die wir in diesem Zusammenhang referiert haben - davon abhängig sein, inwieweit die soziale Klasse in den Spannungen und im inneren Verlauf der spanischen Gesellschaft und Kultur ihre tragende Bedeutung behält.

<sup>85</sup>Vgl. Hugo Kehrer, Deutschland in Spanien. Beziehung, Einfluß und Abhängigkeit. München 1953, D.W. Callweg Verlag.



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überleben, auf die Dauer in eine politisch agierende demokratische Partei gemäß dem im Grundgesetz angezeigten Spielregeln verwandeln müssen. Der augenblickliche Trend<sup>70</sup> zur bürgerlich-konservativen Mittelstands- Vertriebenen- und Bauernpartei könnte diese Entwicklung fördern, solange die Interessen dieser Gruppen nicht dem nationalen Gemeinwohl identifiziert und verwechselt werden. Dies wäre meiner Auffassung eine echte Chance der vielbeschworenen Bewältigung der Vergangenheit.

<sup>70</sup> Vgl. R. Kühnl: »Die NPD, Analyse rechtsradikaler Entwicklungen in der Bundesrepublik«, in: Frankfurter Hefte, 22. Jg., Heft 1, Januar 1967, der gerade diesen Aspekt verfolgt. Auf der anderen Seite gilt es zu bedenken, daß ein verhältnismäßig hohes Potential autoritärer Haltungen und autoritätsbedürftiger Persönlichkeiten in der Gesellschaft der Bundesrepublik vorhanden ist. Vgl. dazu J. Habermas: u. a.: Student und Politik, Neuwied 1961, (ferner R. Dabendorff: Gesellschaft und Demokratie in Deutschland, München 1965, S. 367 ff.) Habermas ermittelte unter westdeutschen Studenten ein »definitiv autoritäres Potential« von 16 Prozent (S. 232).

HERMANN HELLER

Eine biographische Skizze \*

Von Klaus Meyer

I.

Gegenwartsbedeutung

Im Alter von 42 Jahren, wenige Monate nach der Machtergreifung Hitlers, die ihn aus Deutschland vertrieb, starb Hermann Heller in Madrid. Trotz seines kurzen Lebens hinterließ er ein umfangreiches Werk. Neben einer Fülle von Schriften und Aufsätzen zur Volksbildungsarbeit, zu politischen Tagesfragen und zu staatsrechtlichen und staatsrechtlichen Problemen steht als glänzende Leistung die Staatslehre, die Gerhart Niemeyer nach Hellers Tod 1934 bei Sijthoff in Leiden herausgab und in der Heller die wesentlichen Positionen seines Denkens zusammenfaßte.

Während des Dritten Reiches wurde sein Werk totgeschwiegen; und in der Nachkriegszeit schien es zunächst vergessen zu sein. Die Politische Wissenschaft in Deutschland erkennt aber, daß Hellers Arbeiten eine tragfähige Basis für die gegenwärtige Diskussion bedeuten. Es wird einem größeren Kreis klar, was bisher nur einige Freunde wußten: diese Theorie ist heute »so modern, wie sie vor dreißig Jahren war«<sup>1</sup>. Das inzwischen weitverbreitete Lexikon »Staat und Politik«, das als Zwischenbilanz der Politischen Wissenschaft in Deutschland angesehen werden kann, konzipiert »Anlage und Durchführung« im »Anschluß« an Hermann Heller<sup>2</sup>. Sein großer »Versuch einer systematischen Behandlung der Wissenschaft von der Politik«<sup>3</sup> läßt ihn geradezu als »Vater der modernen Politikwissenschaft«<sup>4</sup> in Deutschland erscheinen. Sein Werk wird heute neu entdeckt.

Am 17. Juli 1966 wäre Hermann Heller 75 Jahre alt geworden. Dieser Tag ist ohne eine öffentliche Würdigung seines Werkes verstrichen. Das mindert nicht dessen Belang. Die Politische Wissenschaft in Deutschland erkennt mehr und mehr, daß sie Heller wesentliche und entscheidende Impulse verdankt. Jüngere Wissenschaftler bemühen sich um Interpretation und Analyse seiner Schriften; in Kürze werden in Deutschland mehrere Studien über Hermann Heller erscheinen. Die Professoren Martin Drath, Otto Stammer, Gerhart Niemeyer und Fritz Borker geben, unterstützt von der Deutschen Forschungsgemeinschaft, sein zum Teil unzugängliches, zum Teil unbekanntes Werk neu heraus. Mit der Durchführung dieser Editionsarbeiten ist Christoph Müller betraut. Die Redaktion dankt ihm für Anregung und Mithilfe bei der Veröffentlichung der beiden nachfolgenden Beiträge, die den Zugang zu Heller erleichtern sollen (d. Red.).

\* Für freundliche Hinweise und überlassene Materialien ist der Autor Herrn Prof. Dr. Manfred Friedrich, Frankfurt/Lüneburg, sowie Herrn Dr. Hans Rädle, Heidelberg, zu Dank verpflichtet.

<sup>1</sup> Martin Drath: »Dem Gedenken Hermann Hellers«, in: Geist und Tat, 19 (1964), S. 54.

<sup>2</sup> Ernst Fraenkel und Karl Dietrich Bracher (Hrsg.): Staat und Politik, Fischer Lexikon Bd. 2, Frankfurt 1957, S. 11.

<sup>3</sup> Ebd.

<sup>4</sup> Hans Mommsen: »Zum Verhältnis von Politischer Wissenschaft und Geschichtswissenschaft in Deutschland«, in: Vierteljahreshefte für Zeitgeschichte, 10 (1962), S. 350.



Rechtspositivismus auseinandersetzte, »schockierte« viele politische Freunde, die in dieser Schrift eine reaktionäre Verabsolutierung des Staates sahen<sup>86</sup>.

Würdigung fand die wissenschaftliche Leistung *Hellers* mit der Ernennung zum außerordentlichen Professor für öffentliches Recht an der Juristischen Fakultät der Berliner Universität durch den preußischen Minister für Wissenschaft, Kunst und Volksbildung *Carl Heinrich Becker* am 1. 10. 1928. Vor wenigen Jahren hat *Rudolf Smend* diese Berufung *Hellers*, wie die *Carl Schmitts* 1933, als »politische Ernennung« abgewertet. *Carl Schmitt* weist diesen Vorwurf als »schweres Unrecht« gegen *Heller* zurück und meint, hier spreche wohl das »Kapitel der inneren Lage der deutschen Staatsrechtswissenschaft von 1922/33« mit<sup>87</sup>.

Tatsächlich wirft es ein deutliches Licht auf die konservativen Berufungspraktiken der juristischen Fakultäten, wenn es erst einer Intervention des Kultusministeriums bedurfte haben sollte, um einem Mann vom Range *Hellers*, der neben *Rudolf Smend* und *Carl Schmitt* ein hervorragender Exponent der »Neuen Schule« der Staatsrechtslehre war, eine akademische Wirkungsmöglichkeit zu schaffen. Es kennzeichnet den Geist der deutschen Universität, daß unter der Verfassung von Weimar einer der wenigen Staatsrechtler, die sich zu dieser Verfassung bekannten, acht Jahre auf eine außerordentliche Professur warten mußte.

### VIII.

#### *Die Auseinandersetzung mit dem Faschismus*

Unter den Studenten fand *Heller* auch in Berlin schnell wieder einen großen Anhang. Die sozialistischen Studenten bemühten sich häufig, ihn als Diskussionssteilnehmer oder Referenten für politische Veranstaltungen zu gewinnen.

Im Mittelpunkt der Auseinandersetzungen in den folgenden Jahren stand der Kampf gegen den Faschismus. *Heller* engagierte sich in diesem Kampf auch als akademischer Lehrer. Dazu gehörte die Auseinandersetzung mit *Carl Schmitt*, zu dem eine Zeit lang ein recht enger, freundschaftlicher Kontakt bestanden hatte. In keiner Vorlesung unterließ er es, darauf hinzuweisen, daß *Schmitt* »durch seine Lehren dem Faschismus Tür und Tor« öffne<sup>88</sup>. Im Jahre 1928 unternahm *Heller* eine sechsmonatige Reise nach Italien. Sein bald danach erschienenes Buch »Europa und der Faschismus«<sup>89</sup> war eine der ersten

<sup>86</sup> Brief von *Gerhart Niemeyer* an den Verfasser vom 23. 4. 1964. Es mag sein, daß die »Souveränität« auch zur Trübung des Verhältnisses zwischen *Heller* und *Radbruch* beigetragen hat, zu dessen relativistischer Position sich *Heller* im völligen Gegensatz befand. Zumindest scheint es *Heller* sehr getroffen zu haben, daß *Radbruch* zu diesem Werk nicht Stellung nahm. Was sonst die Beziehungen zwischen *Radbruch* und *Heller* »so völlig zerstört« haben könnte (*Heller*), ob es die politischen Gegensätze waren – *Heller* hat *Radbruchs* Tätigkeit »öfters kritisiert« –, oder die ausgeprägten persönlichen Verschiedenheiten, läßt sich wohl kaum entscheiden (vgl. Brief *Hellers* an *Radbruch* vom 6. 3. 1932).

<sup>87</sup> *Rudolf Smend*: »Zur Geschichte der Berliner Juristenfakultät im 20. Jahrhundert«, in: *Leusink, Neumann und Kotowski* (Hrsg.): *Studium Berolinense*, Berlin 1960, S. 124.

<sup>88</sup> Brief *Carl Schmitts* an den Verfasser vom 7. 12. 1963.

<sup>89</sup> Brief von *Friedrich Wehner* an den Verfasser vom 27. 4. 1964.

<sup>90</sup> *Heller*: *Europa und der Faschismus*, 1. Aufl., Berlin 1929.

gründlichen Auseinandersetzungen mit dem Faschismus überhaupt. Diesem Werk folgte eine Reihe von Aufsätzen und Vorträgen mit der gleichen Zielrichtung. Neben dem wissenschaftlichen Interesse am Faschismus wird *Hellers* politischer Wirkungswille deutlich. *Heller* ist überzeugt, daß der Kampf gegen den Faschismus nur durch ein klares militantes Bekenntnis zu einer sozialen Demokratie und durch entsprechende Aktionen zu bestehen sei. Das »Reichsbanner Schwarz-Rot-Gold« mit seiner national betonten kämpferischen Treue zur Republik von Weimar, dem sich die Hofgeismarer »gesinnungs- und zielverwandte« fühlten<sup>91</sup>, fand in dieser Zeit *Hellers* Unterstützung durch Vorträge auf Tagungen und Mitarbeit in der Bundeszeitung.

Daneben setzte *Heller* seine Bemühungen um eine »Modernisierung« der Sozialdemokratischen Partei fort. Besonders die ersten großen Erfolge der Nationalsozialisten bei den Reichstagswahlen von 1930 und die Erfahrungen in Italien zeigten ihm, daß die SPD ohne gründliche Reformen alle politische Macht verliere. Er gehörte zu dem Gründungskreis der NEUEN BLÄTTER FÜR DEN SOZIALISMUS, in dem er sich neben *Paul Tillich*, *Fritz Klatt*, *August Rathmann*, *Eduard Heimann*, *Theodor Haubach* u. a. um eine Neubesinnung der sozialistischen Politik bemühte. Allerdings machten *Hellers* Ungeduld und Eigenwilligkeit die Zusammenarbeit mit ihm sehr schwierig, so daß er schließlich, obwohl er den Anstoß zur Gründung dieser Zeitschrift gegeben hatte, nicht als Mitherausgeber auftrat<sup>92</sup>. Erst 1932 kam es durch Vermittlung von *Hellers* Freund *Hans Simon* wieder zu einem engeren Kontakt *Hellers* mit dem Kreis der »Neuen Blätter«<sup>93</sup>.

Die politische Erregung dieser Zeit, die physische und psychische Anspannung, der sich der Wissenschaftler und engagierte Politiker *Heller*, der »vor Temperament geradezu barst«<sup>94</sup>, aussetzte, führte im Sommer 1931 zum ersten Ausbruch des längst überwunden geglaubten Herzleidens, das seine letzten Lebensjahre überschattete. Erst im Winter 1931/32 scheint *Heller* wieder intensiver an seiner Staatslehre gearbeitet zu haben. In diesem Semester ließ er sich von der Universität beurlauben und zog nach auf das kleine Dorf Kaputh bei Potsdam zurück. Hier hatte *Heller* auch Kontakt mit *Albert Einstein*, der in Kaputh ein Landhaus besaß.

### IX.

#### *Frankfurt 1932*

Am 15. März 1932 wurde *Heller* von dem Preußischen Minister für Wissenschaft, Kunst und Unterricht zum ordentlichen Professor für öffentliches Recht an der Universität Frankfurt/Main ernannt. Eine Mehrheit der Fakultätsangehörigen hatte sich zunächst mit dem Hinweis auf *Hellers* politisches Engagement gegen ihn ausgesprochen und statt seiner *Carl Schmitt* vorgeschlagen. Dagegen setzten sich *Sinzheimer* und

<sup>91</sup> *Franz Osterroth*: »Der Hofgeismar-Kreis«, a.a.O., S. 566.

<sup>92</sup> Brief von *Eduard Heimann* an *Fritz Klatt* vom 29. Mai 1929.

<sup>93</sup> Mitteilung von *August Rathmann* an den Verfasser vom 14. 3. 1966.

<sup>94</sup> Bemerkung von *Hans Freyer*, nach Mitteilung von *Fritz Borinski* an den Verfasser.



de Bor aktiv für eine Berufung ein. Auch der Dekan der Fakultät, Franz Beyers, befürwortete eine Berufung Hellers für eine »kernhaft der allgemeinen Staatslehre geltenden Professur, falls Carl Schmitt »nicht erreichbar« wäre<sup>95</sup>.

Aus gesundheitlichen Gründen zog sich Heller zwar zunächst aus dem direkten politischen Tageskampf etwas zurück; um so aufregender und dramatischer war jedes sein letztes Eingreifen in die Politik auf deutschem Boden. Im Juli 1932 setzte die Regierung Papen die Preußische Landesregierung unter Braun und Severing ab. In dem darauf vor dem Staatsgerichtshof in Leipzig durchgeführten Prozeß »Preußen contra Reich«<sup>96</sup> trat Heller als Prozeßvertreter für die Landtagsfraktion der Sozialdemokratischen Partei auf. Als früherer Referent der Abteilung Schweiz im »Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht« verfügte er über besondere Sachkenntnis in Fragen der Bundesexekution in föderativen Verfassungen. Neben die sachliche Diskussion von Rechtsfragen trat aber ein starkes politisches Element, als sich Heller über die Hintergründe des Preußenschlags mit den Vertretern der Gegenseite, vor allem Carl Schmitt, leidenschaftlich auseinandersetzte. Mit dieser Leidenschaftlichkeit handelte sich Heller eine ganze Reihe von Ordnungsrufen des Reichsgerichtspräsidenten Erwin Bumke ein.

Es reicht nicht aus, Hellers Verhalten mit seiner temperamentvollen Unbeherrschtheit allein zu erklären. Denn es ist auch ein Zeichen für das Bewußtsein, daß der Prozeß längst nicht mehr im Gerichtssaal stattfand, und daß es nicht mehr um akademische Rechtsfragen ging, sondern um Sein oder Nichtsein der Republik. Vor allem zeigt sich auch eine heute gut verständliche Erbitterung über »das Verhältnis gewisser Staatsrechtler zur gegenwärtigen Reichsverfassung«; er hatte sicher Recht, wenn er sagte, man habe Böcke zu Gärtnern gemacht<sup>97</sup>.

## X.

### Emigration

Die nationalsozialistische Machtergreifung bedeutete für Heller als Juden und als bekannten Gegner des Faschismus nicht nur die Vernichtung seiner beruflichen Existenz, sondern auch Gefahr für sein Leben. Im März 1933 hielt er sich in England auf, um an der *London School of Economics* und an der Universität Oxford Gastvorträge zu halten. Es wurde bekannt, daß Heller hier bespitzelt wurde; und da er sich in seiner Beurteilung des Nationalsozialismus, speziell auch Hitlers, keinerlei Zurückhaltung auferlegte, rieten ihm Freunde und Kollegen dringend, nicht nach Deutschland zurückzukehren.

Kurz bevor Heller nach England ging, hatte er durch den spanischen Kultusminister de los Rios eine Einladung als Gastprofessor an das *Instituto de Estudios Internacionales y Económicos* in Madrid erhalten. Die Initiative ging von Antonio de Luna

<sup>95</sup> Personalakten, a.a.O., Bl. 3 ff.

<sup>96</sup> Preußen contra Reich vor dem Staatsgerichtshof, Berlin 1933.

<sup>97</sup> A.a.O., S. 470.

Diese Einladung erfolgte im Rahmen einer internationalen Aktion, um deutsche Intellektuelle vor der nationalsozialistischen Verfolgung zu retten. Zu den Eingeladenen zählten außer Heller auch Rudolf Laun, Leo Gross, Hans Morgenthau, Gerhart Niemeyer, Werner Goldschmidt und Herbert Block, die zum Teil bis zum Beginn des spanischen Bürgerkrieges im Institut tätig waren<sup>98</sup>. Heller nahm die Einladung, die er wegen der Vorträge in London zunächst ausgeschlagen hatte, nun sofort an. Er bemühte sich, die spanische Sprache zu erlernen und hielt während des Sommers an der *Universidad Internacional* in Santander eine Vorlesung in Spanisch. Im April war seine Familie aus Deutschland nachgekommen. Es gelang auch, seine Möbel und seine Privatbibliothek nach Spanien zu bringen<sup>99</sup>.

Neben der Verbindung mit mehreren deutschen und spanischen Professoren – darunter Ortega y Gasset – hatte Heller sehr engen Kontakt zu Harold Laski, mit dessen Unterstützung er wohl auf längere Sicht in England ein neues Wirkungsfeld zu finden hoffte. Einen Ruf, den Heller in dieser Zeit von der *New School for Social Sciences* in New York erhielt, lehnte er u. a. deswegen ab, weil sie sich *University in Exile* nannte. »Akademische Lehrtätigkeit und Vaterland waren für ihn untrennbar verbunden«<sup>100</sup>. Nur eine Lehrtätigkeit an der hebräischen Universität in Jerusalem erschien ihm noch sinnvoll.

Sowohl die neuen Kollegen der Universität Madrid sehr hilfsbereit waren und sich bemühten, Heller die Emigration erträglicher zu machen, war er mit großen finanziellen Sorgen belastet. Sein Gehalt in Santander und Madrid war gering, und die für spanische Professoren üblichen Nebenbeschäftigungen waren für ihn als Ausländer schwer zu erhalten. Kurz vor seinem Tode konnte er einer befreundeten Familie in einem Rechtsfall helfen, was ihm eine größere Summe einbrachte und ihn zum erstenmal für einige Zeit von finanziellen Sorgen befreite<sup>101</sup>.

Die Meldungen über die politische Entwicklung in Deutschland waren sehr entmutigend. In privaten Gesprächen hatte Heller in den ersten Wochen nach der Machtergreifung noch die Hoffnung geäußert, die deutschen Sozialisten könnten zusammen mit »rechtsstehenden Kreisen« – er sprach von der Möglichkeit einer gemeinsamen Aktion von Reichsbanner und Stahlhelm – die Herrschaft der Nationalsozialisten zu verhindern<sup>102</sup>. Doch das NS-Regime konsolidierte sich sehr schnell, und die »rechtsstehenden Kreise« halfen mit. Ein bezeichnendes Ereignis: Hellers Kontrahent vor dem Staatsgerichtshof, Carl Schmitt, wurde zum Preußischen Staatsrat ernannt. Sar-

<sup>98</sup> Brief von Antonio de Luna an Manfred Friedrich vom 16. 9. 1966.

<sup>99</sup> Nach dem Tod Hellers übernahm die Universität seine Bibliothek und mußte dafür dem deutschen NS-Regime später eine Abfindung von 20 000 RM zahlen, Personalakten, a.a.O., Bl. 345.

<sup>100</sup> Brief von Gerhart Niemeyer an den Verfasser vom 13. 3. 1964. – Hans Mühlestein hat in einem Roman, der in dem Spanien vor Ausbruch des Bürgerkriegs spielt (Aurora oder das Antlitz der kommenden Dinge, Zürich 1935) seinem Helden Haller einige Züge Hellers geliehen. Mühlestein war 1932 Dozent für Vorgeschichte an der Universität Frankfurt/M. und hatte mit Heller lebhaften Kontakt. Da es sich jedoch nicht um einen Schlüsselroman handelt, können keine direkten Schlüsse auf Hellers Leben in Spanien gezogen werden.

<sup>101</sup> Brief von Gerhart Niemeyer an den Verfasser vom 13. 3. 1964.

<sup>102</sup> Brief von A. Elkin an den Verfasser vom 14. 12. 1965.



kastisch schreibt ihm *Heller* aus Santander eine Postkarte: »Zu der so überaus wohl verdienten Ehrung durch Herrn Minister Göring beglückwünscht Sie Hermann Heller.«<sup>103</sup>

Über seine eigenen Aussichten in Deutschland konnte *Heller* sich jetzt keine Illusionen mehr machen. Zwar hatte er noch am 8. April 1933 von Madrid aus um Urlaub für das Sommersemester 1933 und für das Wintersemester 1933/34 nachgesucht, um sich vor dem Vorwurf zu schützen, seine Lehraufgaben in Frankfurt zu vernachlässigen, wie er überhaupt versuchte, nicht den Eindruck entstehen zu lassen, als sei er aus Deutschland geflohen. In einem Gesuch an das Kuratorium setzten sich auch einige Kollegen der Fakultät in Frankfurt dafür ein, daß ihm die Kolleggeldgarantie erhalten bliebe<sup>104</sup>. Doch am 7. April 1933 wurde der Willkürakt mit dem zynischen Titel »Gesetz zur Wiederherstellung des Berufsbeamtentums« erlassen, auf Grund dessen *Heller* am 11. September 1933 aus dem Staatsdienst entfernt wurde.

Die Sorgen und die Anstrengungen dieser Zeit hatten *Hellers* Gesundheitszustand gefährlich verschlechtert. Mindestens viermal erlitt er Herzanfalle, die jedesmal sein Leben bedrohten. Einer seiner damaligen Studenten gibt ein lebendiges Bild der letzten Vorlesungsstunde in Madrid:

»Die Gestalt Hermann Hellers ist in Spanien nicht eben unbekannt. An der Universität Madrid begann er 1933 einen Kurs in Politischer Wissenschaft, dessen tragischer Epilog der Tod war. Wir waren kaum ein Dutzend Studenten. Er hielt seine Vorlesung am Nachmittag, wie ich mich zu erinnern glaube. Heller las langsam, aber »mit Knall«, ein barbarisch ausgesprochenes und gerade gelerntes Spanisch. Eines Nachmittags schien sein Gesicht etwas mehr verfärbt als gewöhnlich. Er hatte im Gesicht einen seltsamen bläulichen Schimmer. Während der Vorlesung jenes Tages hob sich die Hand beharrlich zur Herbeigegend. Plötzlich unterbrach er seine interessante Vorlesung, entschuldigte sich mit einer freundlichen Geste vor den Hörern und ging hinaus. Die Assistenten begleiteten ihn zum Seminario Gonzáles Posada, wo sie ihm die erste Hilfe leisteten, die sein Gesundheitszustand erforderte. Nachdem er sich etwas erholt und lebhaft geplaudert hatte, zog er sich nach Hause zurück. Aber Heller kam in die Universität nicht mehr zurück.«<sup>105</sup>

Trotz der anstrengenden letzten Lebensmonate, in denen *Heller* »Übermenschliches« leistete, haben ihn Mut und Hoffnung nie verlassen<sup>106</sup>. Er arbeitete bis zum letzten Tag an seiner Staatslehre und versprach sich von ihrem Abschluß neue politische Wirkung. Alle Aktivität der letzten Lebensmonate war auf Deutschland gerichtet, auf das Land, an dem er hing, das aber »seiner und seiner Arbeit nicht mehr zu bedürfen schien«<sup>107</sup>.

Nach einem neuen, schweren Herzanfall starb er am 5. November 1933 in Madrid. Am Nachmittag hatte er noch mit drei spanischen Kollegen ein ihn sehr beglückendes Gespräch über die »Rechtfertigung des Staates« – ein Kapitel aus seiner Staats-

<sup>103</sup> Vom 17. 7. 1933, Mitteilung von *Carl Schmitt*.

<sup>104</sup> Personalakten, a.a.O., Bl. 12.

<sup>105</sup> *E. Galán y Gutiérrez*: »La concepción estatal de Heller«, in: *Revista General de Legislación y Jurisprudencia*, Teil I, Bd. 178 (1945), S. 231 f. Die Übersetzung verdanke ich Herrn Dr. *Rädle*.

<sup>106</sup> Brief von *Gertrud Heller* an den Verfasser vom 16. 10. 1963.

<sup>107</sup> *Martin Drath*: »Zum Gedenken an Hermann Heller«, a.a.O., S. 52.

lehre<sup>108</sup>. Er starb mitten in der Arbeit, das ihm erreichbar scheinende Ziel vor Augen, die Staatslehre abzuschließen.

Ein großer Kontrahent, *Carl Schmitt*, hat wohl den kämpferischen Charakter *Hellers* erkannt und dem leidenschaftlichen Gegner Respekt bezeugen wollen, indem er ihn als Mann charakterisierte »mit klarer, anständiger Unterscheidung von Freund und Feind«<sup>109</sup>. Aber welcher Abgrund liegt zwischen dieser Bemerkung und dem verworfenen Bemühen *Hellers*, die Basis für einen politischen Konsensus zu suchen, der die Lösung der politischen Krise auf dem Weg der parlamentarischen Selbstregierung des Volkes, statt auf dem Wege des Bürgerkrieges und der Diktatur hätte möglich machen können.

Ein ganzes Leben als theoretischer Wissenschaftler, als aktiver Politiker und als praktischer Pädagoge hat er für dieses Ziel eingesetzt. Zwar hat »der Mensch Heller es seinen Freunden manchmal sehr schwer, seinen Gegnern oft leicht gemacht«<sup>110</sup>. Aber Großes wird nicht ohne Leidenschaft bewirkt. Im Rückblick erscheint es, trotz aller Unvollkommenheit, als schlechthin vorbildlich, wie sein Denken sich aus den Problemen des praktischen Handelns befruchten ließ und mit welcher Klarheit er aus der Theorie Konsequenzen für die Praxis zog. Es ist deshalb ein sehr schönes Urteil, wenn *Martin Drath* von *Heller* sagt: »Mir ist noch kein Mensch begegnet, der in solcher Konkordanz lebte und dachte.«<sup>111</sup>

<sup>108</sup> Brief von *Gertrud Heller* an den Verfasser vom 16. 10. 1963.

<sup>109</sup> Brief von *Carl Schmitt* an den Verfasser vom 7. 12. 1963.

<sup>110</sup> *Martin Drath*, a.a.O., S. 54.

<sup>111</sup> Bemerkung in einer Seminar-Sitzung an der Freien Universität Berlin.



Master-Kurse im anglo-amerikanischen Raum richten sich – von speziellen Ausnahmen abgesehen – im allgemeinen unterschiedslos an Graduierte inländischer wie ausländischer Universitäten<sup>8</sup>. Wenn speziell in Großbritannien ausländische Studenten in solchen Kursen besonders willkommen sind, liegt dies, sofern sie nicht aus Staaten der Europäischen Gemeinschaft kommen, nicht an der Struktur oder der Zielrichtung der Kurse, sondern an den einschlägigen Gebührenregelungen, die für echte, d.h. nicht aus der EG kommende overseas-postgraduate-students extrem hohe Studiengebühren vorsehen und die daher häufig eine bedeutende Rolle bei der Finanzierung der betreffenden Universitätsabteilungen spielen. Die Einbeziehung ausländischer Studenten erfolgt in den Master-Kursen auf dem Niveau einer bereits abgeschlossenen juristischen Grundausbildung. Von ausländischen Studenten wird erwartet, daß sie die Wissenslücken gegenüber ihren inländischen Kommilitonen durch zusätzliche eigene Vorbereitung schließen. Eine Teilnahme an LL.M.-Kursen ohne Grundkenntnisse in den betreffenden Rechtsgebieten ist, zumindest wenn es um nationales Recht geht, kaum möglich und wenig sinnvoll. Da die Master-Kurse nicht im eigentlichen Sinne als Forschungstätigkeit angesehen werden, liegt der Schwerpunkt der Arbeit auf den Unterrichtsveranstaltungen, selbst wenn, wie in der Regel in den USA, ein umfangreicheres „paper“ anzufertigen ist, das wissenschaftlichen Ansprüchen genügen soll.

Die deutschen Studienangebote in den Magisterkursen sind demgegenüber spezifisch an ausländische Studenten gerichtet. Zwei unterschiedliche Zielgruppen stehen dabei im Vordergrund. Zum einen handelt es sich hier um die Gruppe der wissenschaftlich interessierten akademischen Nachwuchsjuristen, die ihre berufliche Weiterbildung im Heimatland nicht für eine längere Zeit als ein Jahr unterbrechen können oder wollen oder längere Auslandsaufenthalte nicht finanzieren können, andererseits aber für ihre weitere wissenschaftliche Arbeit Grundkenntnisse im deutschen Recht erwerben wollen und gegebenenfalls mit ihrer Magisterarbeit Vorarbeit für eine Veröffentlichung leisten wollen. Zum anderen handelt es sich um die Gruppe der angehenden Praktiker, die sich in Stand setzen wollen, über rechtliche Grundbegriffe des deutschen Rechts so gut Bescheid zu wissen, daß sie in ihrer späteren anwaltlichen Praxis deutschen Korrespondenzanwälten die relevanten rechtlichen Fragestellungen möglichst kompetent vermitteln können. Den Interessen dieser zweiten Gruppe kommt es gewiß entgegen, wenn – wie in Trier und Gießen – der rezeptive Studienabschnitt klar von der anschließenden Forschungsphase getrennt wird. Für wissenschaftlich interessierte Studenten lassen demgegenüber Kiel und Tübingen die Möglichkeit einer individuellen Schwerpunktsetzung eher offen, da die Arbeit an der Magisterarbeit parallel zur Absolvierung des Unterrichtsprogramms erfolgen soll.

Master-Kurse im anglo-amerikanischen Raum werden Jahr für Jahr mit weitgehend vorhersehbarem Unterrichtsprogramm angeboten. Daß es bei den deutschen Magisterkursen nicht möglich ist, schon zum Zeitpunkt der Bewerbung für den Magisterstudiengang den genauen Forschungsschwerpunkt festzulegen, mag manchen wissenschaftlich Interessierten von einer Bewerbung abhalten. Dieser Nachteil wird teilweise jedoch dadurch aufgewogen, daß die Studenten durch die Teilnahme an den Grundkursen für Anfänger vielleicht in stärkerem Maße sachliche Anregungen für rechtsvergleichende Überlegungen bekommen, und sich so ein Ideenreservoir erarbeiten können, das reicher ist, als wenn sie sich von Beginn ihres Aufenthaltes an gleich mit speziellen Rechtsproblemen befassen und eine breitere Vertiefung nur gelegentlich einzelner Fragestellungen erfolgt. Diese Anregungen können von den Studenten vor allem deshalb besonders wirkungsvoll aufgegriffen werden, weil ihnen die sachlichen Regelungsprobleme, und die es in den Vorlesungen geht (Vertragsschluß, Schlechterfüllung, Unerlaubte Handlung; oder Gewaltenteilung, Demokratie, Wahlen), schon aus ihrer eigenen Rechtsordnung bekannt sind, wengleich auch nicht immer unter entsprechend übersetzbaren Überschriften.

So sinnvoll die Einbettung des Unterrichts für die Magisterkurse in die normalen Anfänger-Lehrveranstaltungen unter diesem Aspekt betrachtet auch sein mag, so wenig darf auf der anderen Seite eine damit verbundene Gefahr unterschätzt werden: In einer Anfängervorlesung, wie sie in Deutschland in großen Hörsälen mit 300 bis 500 Studenten üblich sind, drohen die ausländischen Studenten schlicht unterzugehen. Die Studienbedingungen im anglo-amerikanischen Bereich sind so grundlegend verschieden von dem „Massenbetrieb“ der

<sup>8</sup> Zum Studium deutscher Studenten in den USA vgl. *Martinek, Michael*, Der Rechtskulturschock, JuS 1984, S. 92 ff. (m.w.N.).

juristischen Grundausbildung in der Bundesrepublik, daß es zu einem der Hauptprobleme der Beratungstätigkeit deutscher Lecturer im Ausland gehört, an Studien in Deutschland interessierte Undergraduates auf diesen Kontrast vorzubereiten. Die vielfach immer noch gewährleistete und geförderte Selbständigkeit der Studienplanung, die relativ lange und flexible Gesamtstudiendauer sowie vor allem die große Zahl mehr oder minder unkooperativer Kommilitonen sind Erscheinungen, die etwa einem britischen Jurastudenten nur schwer zu vermitteln sind. Im anglo-amerikanischen Bereich gibt es im Grundstudium diese Zumutung selbständigen Studierens kaum. Die Curricula sind – bis hinein in die wöchentlichen reading-assignments – weitgehend durchgeplant, jeweils im Sommer wird der Unterrichtsstoff des betreffenden akademischen Jahres geprüft, wengleich danach auch häufig vergessen; in Tutorials, kleinen Übungsgruppen, werden die Studenten gezielt auf die Prüfungen vorbereitet; auch werden regelmäßig Essays (kürzere Übungsaufsätze) geschrieben; Lecturer (akad. Mittelbau) und Professoren widmen einen großen Teil ihrer Zeit der Betreuung der Studenten<sup>9</sup>.

Bezogen auf die „akademische Freiheit“ in der deutschen Juristenausbildung wäre es nun einfach zu sagen, die ausländischen Studenten sollten doch nach Möglichkeit in der Bundesrepublik alternative Studiererfahrungen machen und vielleicht etwas von dem Humboldtischen Geist, der durch deutsche Universitäten weht, mit nach Hause nehmen. Es fragt sich freilich, ob die angesprochenen Erscheinungen der Juristenausbildung der Gegenwart wirklich so positiv zu beurteilen sind.

## V. Fazit

Der internationale Vergleich macht vielleicht deutlich, daß die Magisterkurse ihre Aufgabe „der Verstärkung des internationalen wissenschaftlichen Austausches und der Vermittlung von Kenntnissen des deutschen Rechts- und Verfassungssystems im Ausland“ nur dann wirkungsvoll erfüllen können, wenn die betreffenden Fakultäten die ausländischen Magisterstudenten nicht bloß einfach zusammen mit deutschen Studienanfängern „durchschleusen“. Die Fakultäten müssen sich vielmehr bemühen, das allgemeine Lehrangebot durch spezielle, über die Betreuung der Magisterarbeit hinausgehende Förderung der ausländischen Studenten zu ergänzen; und sei es einfach durch zusätzliche Zeit, die jenen in persönlichen Gesprächen gewidmet wird. Die Magisterkurse sind eine gute Sache, sofern die Fakultäten sie mit demselben Engagement in die Praxis umsetzen, das von deutscher Seite bei ausländischen Studenten so begrüßt wird, wenn sie Interesse an der Bundesrepublik Deutschland zeigen.

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<sup>9</sup> Vgl. als einen der ersten Berichte aus den USA: *Fikentscher, Wolfgang*, Juristenerziehung in den USA, JZ 1955, S. 45. f.; aus neuerer Zeit siehe auch *Graf Vitzthum*, Die Euteuropäisierung Amerikas, Universitas 39 (1984), S. 1381 ff.

## Nachruf

### Ernst E. Hirsch †

Wenige Tage, nachdem die türkische Fassung seiner Lebenserinnerungen erschienen war (siehe die Besprechung der deutschen Fassung durch *Kegel* in NJW 1983, S. 1414) und die Universität Istanbul ihm mitteilte, man habe nach ihm als dem Vater des türkischen HGB und UrhG einen Hörsaal benannt, ist *Ernst E. Hirsch* im Alter von 83 Jahren am 29. 3. 1985 einer schweren Krankheit erlegen. Er durfte auf seinen Wunsch in seinem schönen Heim in Königfeld (Schwarzw.) sterben, in das er sich nach seiner Emeritierung von der Freien Universität Berlin zurückgezogen hatte und in dem er bis in die jüngste Zeit hinein, nach dem Tode seiner Frau allerdings vereinsamt, forschend tätig war. *Günter Püttner* hat erst vor kurzem, in seinem Glückwunsch zum 80. Geburtstag in dieser Zeitschrift, auf einige seiner Publikationen aus der letzten Zeit hingewiesen (JZ 1982, 77). Dazu bleibt die Gutachtensammlung: Türkisches Recht vor deutschen Gerichten, Berlin 1981, nachzutragen (Besprechung durch *Hilmar Krüger* in ZVglRWiss. 80, 1981, S. 264–268) sowie neben vielen kleineren Arbeiten die große Abhandlung über die türkische Verfas-



sung von 1982 im Jahrbuch für das öffentliche Recht der Gegenwart 1983, S. 507–623, und vor allem die Sammlung seiner neueren Aufsätze zur Rechtssoziologie: Rechtssoziologie für Juristen, Berlin 1984.

„Ein Leuchtturm im Jahrhundert der Gemeinheiten“ könnte man Ernst Hirschs Lebensweg nennen (Kegel). Als Richter und Hochschullehrer aus Frankfurt a. M. im Jahre 1933 vertrieben, wurde er Rechtslehrer an den Universitäten Istanbul und Ankara sowie Berater der türkischen Regierung in Gesetzgebungstragen. Die Ehrenstaatsbürgerschaft im Jahre 1943, zwei türkische Festschriften sowie die Ehrendoktorwürde der Universität Istanbul waren die Anerkennung für seinen unermüdlichen Einsatz für die türkische Gesetzgebung im Wirtschaftsrecht sowie den türkischen Rechtsunterricht. Vor die Aufgabe gestellt, den türkischen Rechtsapparat auf die Anwendung des importierten europäischen Normenmaterials umzuerziehen, entdeckte er – der Dogmatiker des internationalen Handels- und Wechselrechts – für sich und sozusagen von neuem die Rechtssoziologie, die er dann nach seiner von Ernst Reuter angeregten Rückkehr nach Deutschland an der Freien Universität Berlin in Forschung und Lehre

als eigenständiges Universitätsfach so tatkräftig vertreten und gefördert hat, daß er als ihr Wiederbegründer im Deutschland der Nachkriegszeit bezeichnet werden muß (dazu näher *meinen* Artikel: Ernst E. Hirsch, in *Bernsdorf/Knospe: Internationales Soziologenlexikon* Bd. 2, 2. Aufl. 1984, S. 360 f.). Die von ihm herausgegebene und wesentlich durch ihn und seine Schüler getragene Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung (Duncker & Humblot, Berlin) umfaßt heute 56 Bände, von denen eine stattliche Zahl wissenschaftliche Preise im In- und Ausland erhalten hat. Seine letzten Arbeiten (Aufsatz und Buchbesprechungen in den Bd. 98 und 99 der UFITA) galten dem Urheberrecht, das er vor allem auch durch seine Mitarbeit im Münchner Institut für Urheber- und Medienrecht sowie durch die Ausbildung zahlreicher Schüler maßgeblich gefördert hat (dazu UFITA Bd. 92, 1982, S. VII ff.). Nicht nur seinen Kindern, sondern auch diesen seinen Schülern, die heute buchstäblich um die Welt herum verstreut leben, wird der hoca nunmehr schmerzlich fehlen.

Manfred Rehbinder, Zürich/Freiburg (Br.)

## Literatur

**Handbuch des Staats- und Verwaltungsrechts des Kantons Basel-Stadt.** Hrsg. von K. Eichenberger, K. Jenny, R. A. Rhinow, A. Ruch, G. Schmid, L. Wildhaber. Basel, Frankfurt/M.: Verlag Helbing und Lichtenhahn, 1984. 765 S., 94,-, sfr. 78,-.

1. Lebende Bundesstaatlichkeit äußert sich nicht nur in variationenreichen gliedstaatlichen Verfassungen wie in den Schweizer Kantonen und deutschen Ländern nach 1945, sie zeigt sich nicht allein in letztlich kulturell fundierter Eigenstaatlichkeit und „eigenwilliger“ Politik der Gliedstaaten, sie manifestiert sich vielmehr auch in dem, was Verfassungsrechtsprechung und -wissenschaft in den Gliedstaaten leisten. Die spezifisch bundesstaatlich strukturierte offene Gesellschaft der Verfassungsinterpreten hat ihre eigenen Beteiligten, Verfahren und inhaltlichen Gegenstände (etwa die Erarbeitung „gemeinen Rechts“), und die politische und Rechtskultur eines Landes lebt auch aus dem, was die Staatsrechtslehre als Wissenschaft in den Einzelstaaten leistet. In den drei deutschsprachigen Bundesstaaten ist hier vieles im Gange: die föderale Vielfalt wird von den Einzelstaaten her wissenschaftlich zunehmend belebt und verstärkt. Das zeigt sich in Österreich auch verfassungspolitisch in der fruchtbaren Arbeit des Innsbrucker Instituts für Föderalismusforschung (verdeckt z. B. in Gestalt der neuen Präambel von Tirol 1980, offen in mancher Neuerung: z. B. der Verfassung Burgenland, 1981), in der BR Deutschland in einem Grundlagenwerk wie dem von C. Starck und K. Stern herausgegebenen dreibändigen Werk „Landesverfassungsgerichtsbarkeit“ (1983). In der Schweiz wendet sich das verfassungspolitische und -wissenschaftliche Interesse derzeit besonders intensiv den Kantonsverfassungen zu. Erinnerung sei an die eben durchgeführten Totalrevisionen von Basel-Landschaft und Uri (1984) sowie an die entsprechenden Pläne für und in Glarus, Thurgau und Solothurn. Dem waren 1968 und 1965 die in manchem pionierhaften Totalrevisionen in Obwalden und Nidwalden vorausgegangen, 1977 der eigenwillige Kanton Jura, 1980 die (weitgehend K. Eichenberger zu verdankende) Verfassung Aargau. Wenn jetzt speziell für Basel-Stadt ein „Handbuch“ aus der Feder renommierter Wissenschaftler und Praktiker veröffentlicht wird, so ist dies ein „Ereignis“: nicht nur für die innerschweizer Verfassungsrechtswissenschaft, sondern auch für die deutschsprachige Bundesstaatslehre. Bislang existiert zwar ein hervorragender Kommentar zum Entwurf (!) der Verfassung des Kantons Glarus (von R. J. Schweizer, Bd. 1 und 2, 1981) – er ist als Literaturgattung ein Unikat –, auch liegen größere Abhandlungen von T. Fleiner, R. A. Rhinow und K. Eichenberger zu Fragen der Kantonsverfassungen im ganzen vor<sup>1</sup>, doch ist Basel-Stadt mit diesem Handbuch in Sachen Kantonsverfassung wissenschaftlicher Spitzenreiter geworden. Damit schließt es in vieler Hinsicht zu den Diskussionen auf, die auf Bundesebene in der Schweiz seit längerem auf einem Niveau geführt werden, auf das Österreich und die BR Deutschland nur neidvoll

blicken können: Gemeint ist die Debatte um die Totalrevision der Schweizer Bundesverfassung (Entwurf 1977)<sup>2</sup>, die in dem Privatentwurf Kötz/Müller (1. und 2. Aufl. 1984) einen weiteren Höhepunkt hervorgebracht hat. In Basel scheint verfassungspolitisch ein genius loci von besonderem Rang wirksam zu sein: hat doch M. Imboden schon 1959 einen Entwurf erarbeitet: „Die Bundesverfassung – wie sie sein könnte“ (1959)<sup>3</sup> – er gab ein Signal bei den Bemühungen um die Totalrevision der Bundesverfassung –, und war es doch derselbe Imboden, der die „Basler Wiedervereinigung als staatsrechtliches Problem“ formulierte (1959)<sup>4</sup>, Bemühungen, die in einem bemerkenswerten (freilich 1969 gescheiterten) Entwurf des wiedervereinigten Kanton Basel gipfelten (1968). Wenn jetzt ein Handbuch für den Kanton Basel-Stadt erscheint, so kann es auf dieser hohen Rechts- bzw. Wissenschaftskultur und Tradition aufbauen<sup>5</sup>.

2. Das Werk setzt sich aus 24 „thematisch geschlossenen“ Beiträgen zusammen. Geschrieben sind sie von namhaften Professoren und Praktikern, wobei anzumerken ist, daß in der Schweiz jeder Öffentlichrechtler den vielzitierten „Praxisbezug“ hat und haben muß: die Gutachtentätigkeit für Kantone und den Bund gilt als „nobile officium“, ganz abgesehen davon, daß ein gesundes Maß an Pragmatik seit langem ein Kennzeichen der Schweizer Staatsrechtslehre ist<sup>6</sup>.

Eine Detailwürdigung der Beiträge ist hier nicht möglich. Sie arbeiten durchweg auf hohem fachlichem Standard und sind selten so „speziell“, daß sie nur für den Kanton Basel-Stadt ergiebig bleiben. Vielmehr liefern sie oft Bausteine für etwaiges „allgemeines“ Staats- und Verwaltungsrecht der Kantone und in manchem könnten sie selbst die Wissenschaft des Öffentlichen Rechts des Bundes beeinflussen. Das gilt für den Grundsatzartikel von K. Eichenberger („Die Lage des Staats- und Verwaltungsrechts des Kantons Basel-Stadt“, S. 1–43), insoweit er „zeitgebundene Allgemeinerscheinungen von staatsprägender Bedeutung“ erarbeitet (nämlich Pluralismus, Rationalismus, Säkularismus, Perfektionismus, Emotionalismus und Massenmediengebilde, S. 9 ff.); auch seine Erörterung der Rechtsquellenprobleme des kantonalen Verfassungsrechts (S. 21 ff.) dürfte Richtpunkte für die weitere innerschweizer Diskussion setzen. Ebenfalls grundsätzlich ist der Beitrag von L. Wildhaber/S. Breitenmoser (S. 45–88) angelegt. Die Konzeption der „Aufgabennormen im allgemeinen“, auch in ihrer Verbindung mit den Grundrechten („Grundrechte als Aufgabennormen“, „Sozialrechte als Aufgabennormen“, S. 56 ff.) arbeitet, übrigens im Gespräch mit der deutschen Diskussion, ihr Thema so auf, daß die

<sup>2</sup> Dazu Bericht der Expertenkommission, 1977. Aus der Lit.: P. Saladin, Verfassungsreform und Verfassungsverständnis, AöR 104 (1979), S. 345 ff.; L. Wildhaber, Das Projekt einer Totalrevision der schweizerischen Bundesverfassung, JöR 26 (1977), S. 239 ff.; P. Häberle, Verfassungsinterpretation und Verfassungsgebung, ZSR 97 (1978), S. 1 ff.

<sup>3</sup> Jetzt in *ders.*, Staat und Recht, 1971, S. 219 ff.

<sup>4</sup> Ebd. S. 199 ff.

<sup>5</sup> Vgl. auch das „von den politischen Gegebenheiten“ ausgehende, parallel konzipierte Werk: Das politische System Basel-Stadt: Geschichte, Strukturen, Institutionen, Politikbereiche, hrsg. von L. Burckhardt u. a., 1984.

<sup>6</sup> Dazu D. Schindler jun., Die Staatslehre in der Schweiz, JöR 25 (1976), S. 255 ff.

<sup>1</sup> T. Fleiner, Kantonale Verfassungsprobleme, in: Stiftung für eidgenössische Zusammenarbeit, 1970; R. A. Rhinow, Die Totalrevision der Kantonsverfassung, Festgabe zum Schweizerischen Juristentag 1973, S. 113 ff.; K. Eichenberger, Von der Bedeutung und von den Hauptfunktionen der Kantonsverfassung, in: (zweite) FS H. Huber, 1981, S. 155 ff.



Edmund Husserl 1859 - 1938

Zum 50. Todestag des Freiburger Philosophen

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Gedenkfeier

der Albert-Ludwigs-Universität  
und des Husserl-Archivs an der Universität  
Freiburg im Breisgau



Der Rektor der Albert-Ludwigs-Universität  
und der Direktor des Husserl-Archivs an  
der Universität Freiburg geben sich die Ehre,  
Sie zu der am Mittwoch, dem 27. April 1988, um  
18 Uhr c.t. in der Aula der Universität statt-  
findenden Gedenkfeier und dem sich anschließen-  
den Empfang in der Prometheushalle herzlich  
einzuladen.

Prof. Dr. Christoph Rüchardt  
Rektor

Prof. em. DDr. Werner Marx  
Direktor des Husserl-Archivs an der  
Universität Freiburg

### Programmfolge

Einführende Worte des Direktors des Husserl-Archivs  
an der Universität Freiburg,  
Prof. em. DDr. Werner Marx

### Eröffnung

Prof. Dr. Christoph Rüchardt, Rektor

### Ansprachen

Prof. Dr. Helmut Engler,  
Minister für Wissenschaft und Kunst  
Baden-Württemberg,

Dr. Rolf Böhme,  
Oberbürgermeister der Stadt Freiburg,

Prof. Dr. Gerold Prauss,  
Dekan der Philosophischen Fakultät I

### Vortrag

Prof. Dr. Elisabeth Ströker,  
Direktorin des Husserl-Archivs Köln,

**"Edmund Husserls Phänomenologie:  
Philosophia Perennis in der Krise der  
europäischen Kultur"**



Gerhard Möbus-Institut für Schlesienforschung e.V.  
an der Universität Würzburg  
Eugen Rosenstock-Huessy-Gesellschaft e.V., Bielefeld  
Lehrstuhl für Soziologie I  
Lehrstuhl für Sonderpädagogik I  
der Universität Würzburg  
in Verbindung mit der  
Stiftung Kulturwerk Schlesien, Würzburg  
und der Historischen Kommission für Schlesien, Mainz



## Symposion

**Eugen Rosenstock-Huessy 1888—1988**

vom 6. bis 9. Juli 1988  
an der Universität Würzburg

Wissenschaftliche Leitung:  
Prof. Dr. Lothar Bossle und Prof. Dr. Andreas Möchel



# Programm

*Mittwoch, 6. Juli 1988*

- 20.00 Uhr Begrüßung und Eröffnung  
Grußwort des Präsidenten der Universität Würzburg,  
Prof. Dr. Dr. h. c. Theodor Berchem  
Vortrag  
Dr. Wolfgang Ullmann, Berlin (DDR)  
»Sprache, Gesellschaft, Geschichte – Eugen Rosenstock-Huessy  
als Wissenschaftler der nachakademischen Epoche«

*Donnerstag 7. Juli 1988*

- 9.00 Uhr Plenumsveranstaltung  
Prof. Dr. Hans Thieme, Freiburg  
»Eugen Rosenstock-Huessy als Rechtshistoriker«  
Dr. Eckart Wilkens, Köln  
»Eugen Rosenstock-Huessy und Franz Rosenzweig –  
der Ton der zweiten Stimme«  
Prof. Dr. Erik von Kuehnelt-Leddihn, Lans/Tirol  
»Eugen Rosenstock-Huessy und die Dritte Revolution«

*Aussprache*

- 14.30 Uhr Prof. Dr. Lothar Bossle, Würzburg  
»Eugen Rosenstock-Huessy als Soziologe«  
Prof. Dr. Dietmar Kamper, Berlin  
»Eugen Rosenstock-Huessy und die Überholung  
der Postmoderne«  
Prof. Dr. Jindrich Filipiec, Prag  
»Eugen Rosenstock-Huessy und die gegenwärtige  
europäische Alltagskultur«

*Aussprache*

- 20.00 Uhr Konzert im Toscana-Saal der Residenz

*Freitag, 8. Juli 1988*

- 9.00 Uhr Plenumsveranstaltung  
Prof. Dr. Gertrud Weismantel, Jugenheim  
»Begegnungen: Eugen Rosenstock-Huessy und Leo Weismantel«  
Prof. Dr. Werner Licharz, Frankfurt/M.  
»Eugen Rosenstock-Huessy und Martin Buber«  
Prof. Dr. Louis Helbig, Indiana/USA  
»Amerika im Sprach- und Kulturdenken Eugen Rosenstock-Huessys«

*Aussprache*



14.30 Uhr *Veranstaltung in Sektionen*

*Sektion I.*

*Gesellschaft und Friedensdienst*

mit Beiträgen von

Drs. Wim Leenman, Haarlem/Niederlande

»Das Eugen Rosenstock-Huessy Huis«

Dr. Franz von Hammerstein, Berlin

»Die Aktion Sühnezeichen«

Prof. Dr. Konrad von Moltke, Hanover, N. H., USA

»Camp William James«

*Aussprache*

*Sektion II.*

*Die Heilkraft der Sprache*

mit Beiträgen von

Drs. Gerti Rohrmoser, Amsterdam

»Eva oder die Folgen der Arbeitsteilung«

Michael Gormann-Thelen, Hannover

»'The Linguistic Turn' vor Eugen Rosenstock-Huessy –

Eugen Rosenstock-Huessys unerhörte Wi(e)derwart:

Geheißene unserer Scham«

Prof. Dr. Andreas Möckel, Würzburg

»Die Bedeutung der Höheren Grammatik für die Heilpädagogik«

*Aussprache*

20.00 Uhr *Geselliges Beisammensein –  
Erinnerungen, Erfahrungen, Erlebnisse*

*Samstag, 9. Juli 1988*

9.00 Uhr *Plenumsveranstaltung*

Prof. Dr. Georg Kretschmar, München

»Eugen Rosenstock-Huessy und die Alte Kirche«

*Aussprache*

Bas Leenman, Doorwerth/Niederlande

»Eugen Rosenstock-Huessy – die Notwendigkeit des Gedenkens«

*Abschluß des Symposions*



**Organisatorische Leitung:**

Wiss. Assistent Dipl.-Theol. Viktor Beyfuß

**Anmeldung:**

bis spätestens 25. Juni 1988 an Frau Haug oder Frau Weber, Universität Würzburg,  
Lehrstuhl für Sonderpädagogik I, Wittelsbacherplatz 1, 8700 Würzburg, Telefon 09 31/7 60 56

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Residenz-Gaststätten am Residenzplatz

Die Teilnahmegebühr bitten wir, auf das Konto »Kongreß« von Herrn Prof. Dr. A. Möckel  
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**Mittagessen:**

Das Mittagessen findet jeweils um 13.00 Uhr in der Mensa der Universität am Hubland statt.



Breitenbacher Hof  
DÜSSELDORF

Datum 8.9.88

Uhrzeit 19.45

Andreas

Bilke H. Schreck

Zurückrufen.

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300 Hannover Str

Bojar Weg 5  
Donaus

Aufgenommen von

Hr. / Fr.





Gerhard Möbus-Institut für Schlesienforschung e.V.  
an der Universität Würzburg  
Eugen Rosenstock-Huessy-Gesellschaft e.V., Bielefeld  
Lehrstuhl für Soziologie I  
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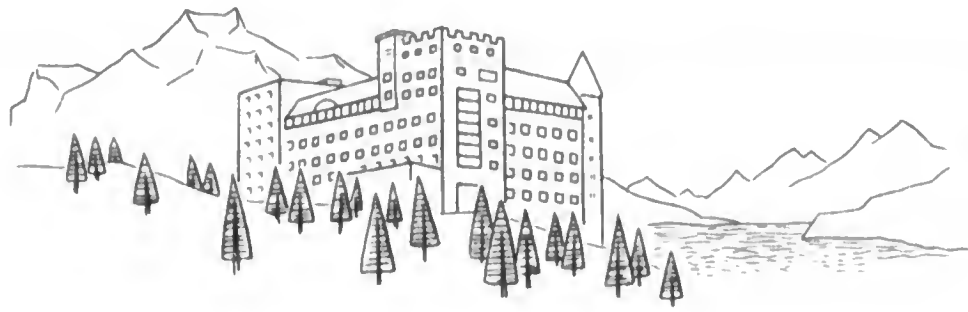
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Maria

HOTEL WALDHAUS · CH-7514 SILS-MARIA (ENGADIN)

TELEFON 082 - 4 53 31 · TELEX 74444 · TELEGR TX 74444 · WALDHAUS SILS/SEGL-MARIA

8. 8. 88

Sehr geehrter Herr Kollege -  
ich bedanke Ihnen herzlich für  
Ihre Bemerkung: = leben. Mein Reaktor  
hat sich lt. Anlage verändert. Zögern  
Sie nicht mich vor 9<sup>00</sup> oder während des  
Abendessen anzurufen.

Die Juli-Rosentock-theory  
Symposium war sicher ein grosser  
Erfolg. Rosentock's "Kleine Benz  
werkzeitung" ist allerdings wiederholt  
zitiert in "Kleine-Benz-Buch"  
Gross v. Nördlingen - 1987, früher  
schon in JZ 1973 S. 430

Mit freundlichen Grüßen  
E. J. Schuster



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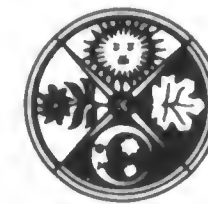
Zürich (01) 251 34 34  
Basel (061) 22 54 80  
Bern (031) 22 95 11  
St. Gallen (071) 23 68 23

Lugano (091) 23 63 31  
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Lausanne (021) 20 50 11  
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Message-Nachricht

Prof. Herru Stiefel  
No 168



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Für For Pour	Prof. Stiefel	Zimmer Nr. Room No. Chambre no.	628
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Herr/Frau Mr./Mrs. M./Mme.	Schreck	<input checked="" type="checkbox"/> Hat Sie angerufen Has phoned you Vous a téléphoné	<input checked="" type="checkbox"/> Erbittet Ihren Rückruf Return call requested Vous demande de rappeler
Datum Date Date	28.06.88	<input type="checkbox"/> Ruft wieder an Will phone again Va rappeler	<input type="checkbox"/> Wichtig Urgent Important
Uhrzeit Time Heure	23 <sup>20</sup>	<input type="checkbox"/> War hier Came to see you Etait ici	<input type="checkbox"/> Möchte Sie treffen Wants to see you Voudrait vous rencontrer
Telefon Nr. Phone No. Telephone	0521 1 870363		
Nachricht Message Message	Herr Schreck ist bis 24 <sup>00h</sup> erreichbar.		

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Andreas Schreck - z.Zt. Rechtsreferendar -  
Donarweg 5  
3000 Hannover 51

01. Juni 1988

Herrn Rechtsanwalt Prof. Dr. E. Stiefel  
Freilinggrathstr. 1  
4000 Düsseldorf 30

Betr.: Jhr Aufsatz " Die deutsche juristische Emigration in den U.S.A.",  
in: Juristenzeitung 1988, Heft 9 vom 6. Mai 1988, S. 421 - 426

Sehr geehrter Herr Professor !

Mit großem Interesse nahm ich Ihre Ausführungen zu den Schicksalen deutscher Juristen nach der Suspendierung des Rechts ab 1933 zur Kenntnis. Angesichts der von Ihnen geschilderten Quellenlage ist eine Darstellung dieses Themas in besonderem Maße auf persönliche Zeugnisse wie auch Berichte und Erzählungen Dritter unterschiedlicher Zuverlässigkeit angewiesen. Erlauben Sie mir daher - insbesondere im Hinblick auf die von Ihnen gemeinsam mit Herrn Prof. Mecklenburg geplante Buchpublikation - auf einige wenige Ungenauigkeiten wie auch Irrtümer innerhalb Ihrer Abhandlung hinzuweisen.

1. Alfred O p p l e r (S. 424) dürfte am Preußischen Obergericht gearbeitet haben.
2. Nicht "die Familie" Bonhoeffer ist von "Freisler und seiner Rotte" (S. 424) umgebracht worden.

Es erscheint mir zunächst fragwürdig, ob die Institution des "Volksgerichtshofs", an der immerhin insgesamt über 520 Juristen und Justizbedienstete tätig gewesen sind, mit der von Ihnen gewählten Formulierung angemessen erfaßt werden kann.

Zutreffend ist, daß Sabine Bonhoeffer - sie lebt in Göttingen - mit Gerhard Leibholz verheiratet gewesen ist. Richtig ist weiterhin, daß ihr Bruder Klaus (Justitiar der Lufthansa) vom "Volksgerichtshof" zum Tode verurteilt worden ist. Der Bruder Dietrich ist hingegen am 9. April 1945 im Rahmen einer summarischen Verurteilung durch ein Standgericht verurteilt und erschossen worden. Seine Inhaftierung beruhte auf einem reichskriegsgerichtlichen Verfahren, nicht jedoch auf einem solchen vor dem "Volksgerichtshof". Aufgrund der häufig anzutreffenden Gleichsetzung (und Beschränkung) der Unrechtsjustiz mit der Tätigkeit der "Volksgerichtshofs" - die durchaus auch Freisprüche gekannt hat - erscheint mir eine Differenzierung erforderlich, damit die häufig ähnlich menschenverachtende Spruchpraxis der übrigen Gerichte einschließlich des Reichsgerichts in Zivilsachen (bereits 1935 "bürger-

lichrechtliche Fürtoterklärung" eines jüdischen Filmregisseurs) nicht aus dem Blick gerät.

3. Leider ist die Darstellung der Person und des Lebensweges von Eugen Rosenstock-Huessy (S. 423) fast gänzlich mißglückt. Wie Sie zum Abschluß Ihres Beitrags (S. 426) ausführen, seien lediglich die Professoren Rabel, Nußbaum, Rheinstein und Kessler in die Reihen amerikanischer Rechtsprofessoren aufgenommen worden. Rosenstock-Huessy lehrte in Harvard nicht Staatsrecht, sondern "Deutsche Geschichte und Literatur (german studies)", dies übrigens als weiterhin von Preußen besoldeter deutscher Professor. Den Weg in die Vereinigten Staaten nahm Rosenstock-Huessy unmittelbar nach dem 30. Januar 1933 aus eigenem Entschluß, da er sofort erkannt hatte, daß es eine Fortführung juristischer Lehrtätigkeit für ihn wie für die gesamte juristische Professorenschaft nicht geben könnte (Sein Aufruf an sämtliche juristischen Fakultäten, die Arbeit niederzulegen, fand keinen Widerhall). Ab 1934 lehrte er in Dartmouth College "social philosophy".

Unzutreffend ist die Bezeichnung Rosenstock-Huessys als "Staatsrechtler" auch in Anbetracht seiner akademischen Karriere in Deutschland (Breslau). Er hatte sich als Rechtshistoriker habilitiert und lehrte insbesondere Verfassungsgeschichte, Handelsrecht und Arbeitsrecht (Nachfolger auf seinem Lehrstuhl wurde übrigens Prof. Dr. Hans Thieme, später Freiburg).

Von einer Tätigkeit als "hervorragender Offizier" im Ersten Weltkrieg kann jedenfalls dem Rang nach kaum gesprochen werden, da Rosenstock-Huessy am Ende des Krieges den Rang eines Leutnants innegehabt hat.

Zutreffend ist die Angabe der Herausgeberschaft der Werkszeitung bei Daimler-Benz. Ganz wichtig für die weitere Biographie Rosenstock-Huessys sind die von ihm in den Jahren 1928 bis 1931 in Löwenberg/Schlesien eingerichteten freiwilligen Arbeitslager (vgl. Camp William James in den U.S.A.). An diesen Arbeitslagern haben mehrere Mitglieder des sich ab 1940 bildenden Kreisauer Kreises teilgenommen. Graf v. Moltke war ein Schüler Rosenstock-Huessys. Anstelle einer von den U.S.A. aus ohnehin unmöglichen Teilhaberschaft am Kreisauer Kreis ist die Rolle Rosenstock-Huessys als diejenige eines wesentlichen Inspirators dieses Kreises bzw. einzelner Angehöriger zu sehen.

Die von Ihnen berichtete "nette Marotte" (S. 423 Fußnote 3) wirft für mich die Frage auf, auf welche Weise derart entstellte Überlieferungen zustandekommen können. Es trifft zwar zu, daß Rosenstock-Huessy Pferde liebte und, wenn auch nicht nebenberuflich, als Züchter tätig gewesen ist. Die Geschichte mit dem "Stall in Cambridge" ist jedoch ein Märchen - Pferde konnte er erst nach seiner Harvardzeit in Dartmouth halten. Grotesk schließlich ist die Nachricht von der Einführung der Lippizaner in Frankfurt. An ihr stimmt nichts.



Verständlicherweise sind angesichts der unzureichenden Quellenlage und der Vielzahl der von Ihnen erwähnten Personen Ungenauigkeiten und Irrtümer nicht ganz auszuschließen. Ich wäre Ihnen allerdings zu außerordentlichem Dank verpflichtet, wenn Sie mir mitteilen könnten, auf welchen bzw. wessen Überlieferungen Ihre Angaben zur Person Rosenstock-Huessys beruhen.

Sollte Ihnen an Quellenbelegen für die von mir gegebenen Hinweise gelegen sein, so werde ich Ihnen diese jederzeit gern zukommen lassen. Zudem steht das Archiv der Eugen Rosenstock-Huessy Gesellschaft e.V. Bielefeld, c/o Gottfried Hofmann, Apfelstr. 209, D-4800 Bielefeld 1, Tel. (0521) 81493, mit weiteren Informationen bereit (auch, was die Schilderung zutreffender "netter Marotten" angeht).

Dieser Brief geht auf eine gemeinsame Erörterung Ihrer Abhandlung mit Freya Gräfin v. Moltke, der Witwe des erwähnten Helmuth James Graf v. Moltke, zurück. Sie hat von 1960 bis 1973 im Hause Eugen Rosenstock-Huessys in Vermont gelebt.

Zur Abrundung des Bildes von der Persönlichkeit Rosenstock-Huessys und seiner Nachwirkungen darf ich Ihnen in der Anlagedie Programme zweier Tagungen anlässlich seines 100. Geburtstages in Würzburg bzw. Dartmouth College, Hanover, N. H., U.S.A., übersenden.

Über eine Nachricht Ihrerseits würde ich mich freuen.

Mit freundlichem Gruß

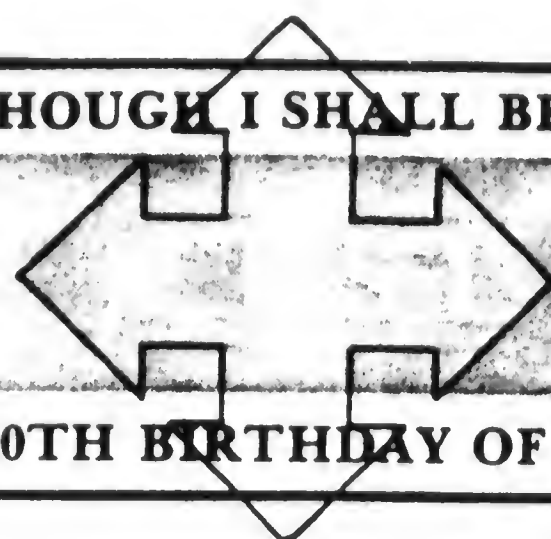
Andreas Lurck

2 Anlagen

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I RESPOND ALTHOUGH I SHALL BE CHANGED

RESPONSE



CONTRIBUTION

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A CONFERENCE MARKING THE 100TH BIRTHDAY OF EUGEN ROSENSTOCK-HUESSY

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## TENTATIVE PROGRAM

January 31, 1988

### MONDAY, AUGUST 15

- 12-7pm            Registration
- 5pm                Reception  
6pm                Dinner
- 7:30pm            Opening of the Conference  
"Law and History After the World Wars"  
Harold Berman, Woodruff Professor of Law, Emory University

### TUESDAY, AUGUST 16

- 7-8am             Breakfast
- 8:30-11am        Morning sessions: Law and History  
*Contributions from:* Darrol M. Bryant, Philip Chamberlin, Richard Feringer,  
Wolfgang Jakob, Edward F. Little, Karen Schulz  
Mark Murphy Scott
- 11:30-12:30      Plenary Review
- 12:30             Lunch
- 2-5pm             Afternoon sessions: *To be announced at the Conference*
- 6:30pm            Dinner
- 8pm                "Revolution, Speech and the Spirit: Jewish and Christian  
Responses"  
Marshall Meyer, Rabbi, Congregation B'nai Jeshurun, New York  
Richard Shaull, Academic Director, Istituto Pastoral Hispano, New York  
Harold Stahmer, Professor of Religion, University of Florida

### WEDNESDAY, AUGUST 17

- 7-8am             Breakfast
- 8:30-11am        Morning sessions: Revolution, Speech and the Spirit  
*Contributions from:* William Farmer, Clinton Gardner, Heinrich Huebschmann,  
Stephan Steinlein, Wolfgang Ullmann,



11:30-12:30 Plenary Review  
12:30 Lunch  
2:30-5pm Afternoon sessions: *To be announced at the Conference*  
6:30pm Dinner  
8pm "Beyond Wage Labor",  
Hans Achterhuis, Vrije Universiteit, Amsterdam  
"Voluntary Service: Society's "Third Sector",  
Frank Davidson, Macro-Engineering Research Group, MIT

**THURSDAY, AUGUST 18**

7-8am Breakfast  
8:30-11am Morning sessions: Work and Society  
*Contributions from:* Donald Eberly, James Fraser, Franz von Hammerstein,  
Michael Wells  
11:30-12:30 Plenary Review  
12:30 Lunch  
2:30-5pm Afternoon sessions: *To be announced at the Conference*  
6:30pm Dinner  
8pm "Learning Too Soon, Teaching Too Late: Reflections on American Education"  
Page Smith, Co-director, William James Association, Santa Cruz, CA

**FRIDAY, AUGUST 19**

7-8am Breakfast  
8:30-11am Morning sessions: Education  
*Contributions from:* Wolfram Buerger, Robert Castle, W. Thomas Duncanson,  
Norman Fiering, Hans R. Huessy, Dietmar Kamper,  
Kathleen McConnell, Andreas Möckel, Gottfried Paasche,  
Wayne C. Richards, Eugene Tate, Ko Vos  
11:30-12:30 Plenary Review  
12:30 Lunch  
2:30-5pm Afternoon sessions: *To be announced at the Conference*  
7pm Dinner  
Close of Conference

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## SUPPLEMENTARY INFORMATION

- Morning Sessions:** Contributors listed in the program are preparing papers which will be duplicated and circulated to all participants in advance; these papers will be considered to have been read before the sessions which will focus on the links between these and the topics outlined by the previous evening's program. Additional contributions are expected.
- Afternoon Sessions:** Afternoon sessions will not be scheduled by the Conference organizers; facilities will be available to allow both previously scheduled and spontaneous events. The Conference organizers are currently aware of several individual presentations, musical events, a symposium on Eugen Rosenstock and Franz Rosenzweig, and a meeting of former students of Eugen Rosenstock. Special events, possibly to take place in Tunbridge, VT, will focus on Camp William James. An initial listing of events will be included in the Conference packet mailed to participants in July.

## LIST OF PAPERS\*

- |  |  |
|--|--|
| Darrol Bryant<br>University of Waterloo            | "The Twelve Tones of the Spirit"   |
| Wolfram Buerger<br>Sprachenkonvikt, Berlin (DDR)   | "Sprachenkrankheit in Ansehung der Auseinandersetzung Eugen Rosenstock-Huessys mit der Deutschen Universitat" |
| Robert Castle                                      | "History in Reverse: Eugen Rosenstock-Huessy, Harold Pinter and Marcel Proust"                                 |
| Philip Chamberlin                                  | "Correspondence with Philip Chamberlin: The World View of Eugen Rosenstock-Huessy" (with Richard Feringer)     |
| Thomas Duncanson<br>University of Illinois/Urbana  | "System Subversion and Crisis: Eugen Rosenstock-Huessy and the Sociology of Higher Learning"                   |
| William R. Farmer<br>Southern Methodist University | "The Gospels as the Lips of Jesus"   |
| Richard Feringer<br>U. of Western Washington       | "Correspondence with Philip Chamberlin: The World View of Eugen Rosenstock-Huessy" (with Philip Chamberlin)    |
| Norman Fiering<br>Brown University                 | "Eugen Rosenstock-Huessy as a Teacher: A Reminiscence"   |
| James Fraser<br>Fraser Management Associates       | "How do we Control the Accelerating Speed of the Global Economy in an Age of Continuous Change?"               |
| Clinton R. Gardner                                 | "Christianity in the Third Millenium: As Foreseen by Eugen Rosenstock-Huessy and Nicolas Berdyaev"             |



- F. von Hammerstein "Friedensdienste in Europa nach dem 2. Weltkrieg auf dem Hintergrund von 'Dienst auf dem Planeten'"
- H. Huebschmann "Dialog als Therapie"
- Hans R. Huessy "Eugen Rosenstock-Huessy and Primary Education"
- Dietmar Kamper "Die Stimme hinter dem Spiegel: Chancen der Wandlung des Subjekts heute (Lacan und Rosenstock-Huessy)"  
Freie Universität Berlin
- Wolfgang Jakob "Die Vollzahl der Zeiten und die Medizin. Historische Dimensionen der Medizin und ihre Gültigkeit als Gegenwart"  
Universität Heidelberg
- Edward F. Little "On the History of Ancient Philosophy"
- Kathleen McConnell "'Glasnost': Restoring Health to Academic Discussion: Eugen Rosenstock-Huessy and V.N. Volosinov" (with Eugene Tate)  
St. Thomas More College
- Andreas Möckel "Die Höhere Grammatik als Grundlage der Heilpädagogik"  
Universität Würzburg
- Gottfried Paasche "Reflections on Teaching Sociology: Undergraduate Texts and Rosenstock-Huessy's Sociology"  
York University
- Wayne C. Richards "Recent Developments of the Grammatical Method"  
Medford United Methodist Church
- Karen Schulz "Geschwindigkeit ist (k)eine Hexerei--von Wegen ins 3. Jahrtausend"  
Freie Universität Berlin
- Mark Murphy Scott "The Promise of Law and the Law of Promise in Rosenstock-Huessy's American Revolution"  
Rutgers University
- Stephan Steinlein "Das Volkstum der Reformatoren und die Volksbildung"  
Sprachenkonvikt, Berlin (DDR)
- Eugene Tate "'Glasnost': Restoring Health to Academic Discussion: Eugen Rosenstock-Huessy and V.N. Volosinov" (with Kathleen McConnell)  
St. Thomas More College
- Wolfgang Ullmann "Rosenstock's Opposition Against Linguistic Agnosticism--Some Necessary Conclusions from 'A Horse Block'"  
Sprachenkonvikt, Berlin (DDR)
- Ko Vos "De werkwijze van de wetenschap en het onderwijs"
- Michael Wells "Work Service"  
Spring Lake Ranch

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\* These papers will be copied and sent to participants before the Conference



stellv. Generalkommandant  
er gewachsene Selbstbewußtsein  
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eim; es erschien als unwürdig,  
Tisch säßen. Doch der Verlauf  
gebracht ...

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ng im Lande und die eingeleitete

rken an den Kaiser über den Verlauf  
en Folgerungen vom 6. 2. 1918. Zitiert  
nfolgende Zitat ebenda.

isters und Obermilitärbefehlshaber  
Auswirkungen des Streiks von

n Joachim Petzold, Deutschland  
S. 135 ff., bes. 162 ff.

in den Marken vom 1. 2. 1918 über  
betrieben. In: Leo Stern (Hg.), Die  
Oktoberrevolution auf Deutschland

des III. AK an das stellv. Gener  
chnung der aus Anlaß des Streiks  
Abgedruckt in: Wilhelm Deist (Hrsg.),  
1914-1918, Zweiter Teil, Düsseldorf

die Besprechung im preußischen  
lv. Generalkommandos betr. Straß  
da, Dok. Nr. 445, S. 1184 ff.

änzend zum Konfliktverhalten  
irtschaft und Arbeiterbewegung  
0 ff., 364 f.

1935 (= Anm. 7), S. 11.

schichte der Deutschen Revolution  
Novemberrevolution 1918 und der  
im Frühjahr 1919 in Württemberg  
mber 1918, Die Revolution in Würt  
Zwischen Weltkrieg und Revolution  
temberg 1914-1920, Köln und Wien

Anm. 19), S. 386; vgl. auch Schöch  
S. 221 ff.

2: Der bewaffnete Aufstand in seiner  
tischen Situation während des Kapp-  
, S. 261 ff.

amts Stuttgart 1921 ff., Staatsarchiv

berge an von Kaulla vom 6. 5. 1919

ürtürkheim, in: Daimler-Werksnach  
amts Stuttgart 1922/23, Staatsarchiv

ntlassenen Betriebsrats nicht dem  
unseres Werkes in Untertürkheim  
etrieb, Frankfurt/M. und New York

25), S. 41.

früheren Betriebsrats auf die Daim  
25), S. 55.

, S. 16.

seiner Aufzeichnung über die Ge  
AG durch die Deutsche Bank AG  
Arbeiterradikalismus als Hauptpro

Die Hauptschwierigkeit lag aber im Radikalismus der Gelörschaft ... Um  
Zuständen entgegenzuwirken, entschloß sie sich schließlich, die ganze  
schaft zu entlassen und nur diejenigen wieder einzustellen, die ihr genehm  
(S. 3).

StA Bremen, Best. IV.27, Bd. 1-2; zum Gesamtzusammenhang auch  
Höck, Arbeitslosigkeit und Rationalisierung, Die Lage der Arbeiter und die  
istische Gewerkschaftspolitik 1920-1928, Frankfurt und New York 1977.  
erste Ankündigung erfolgte schon 1919, vgl. Richard Lang, Gruppenfa  
in: Daimler-Werkzeitung, 1, 1919, Nr. 4; in Untertürkheim zogen sie  
1921 bis 1923 hin. Vgl. DBAG-Archiv, Bestand DMG 11, Ausbildung 10.  
Rundgang durch die Daimler-Werke in Untertürkheim, 20. 5. 1925, S. 3.  
Archiv, Best. DMG 11.

egen Rosenstock, Die Leistung der Psychotechnik, in: Daimler-Werkzei  
1920, Nr. 274, S. 38.

Max Sailer, Eine Lehrlings-Aufnahmeprüfung, ebenda, S. 42 ff.

ebenda, S. 51 f.

Paul Schmitthenner, Die deutsche Volkswohnung, ebenda, 1, 1919/20, Nr. 15/  
246.

E. Heidebroek, Die künftigen Führer der Arbeit, ebenda, Nr. 11, S. 185;  
Rosenstock, Arbeitsgemeinschaft, ebenda, 2, 1920, Nr. 7, S. 87 ff.

Dr.-Ing. Riebensahm, Die industrielle Psychotechnik, ebenda, 2, 1920, Nr. 2/  
27. Das Zitat entstammt einem Aufsatz des Berliner Arbeitswissenschaftlers  
Schlesinger, den die Daimler-Werkzeitung im Anschluß an Riebensahms Beitrag  
Faksimile abdruckte (ebenda, S. 28 f.).

#### 4 Von der Sanierungsfusion zur Weltwirtschaftskrise (1924-1932)

Vgl. DBAG-Archiv, PD 15, PD 19 (Protokolle der Aufsichtsrats- und Vor  
sitzungen 1924-1926).

Hierzu vor allem Klaus W. Busch, Strukturwandlungen der westdeutschen  
Automobilindustrie, Berlin 1966, S. 24 ff.; Werner Link, Die amerikanische Stabili  
sierungspolitik in Deutschland 1921-1932, Düsseldorf 1970, S. 377 ff.

Niederschrift über die Vorstandssitzung in Gaggenau am 19. November 1924.  
DBAG-Archiv, PD 100 I/70.

Hierzu DBAG-Archiv, PD 100 I/70 (Protokolle der Interessengemeinschaft  
1925), PD 100 II, PD 102.

Im Inneren mag er den Glauben bewahrt haben, es könne bald wieder Krieg  
Magazin der Wirtschaft, 4, 1928, Nr. 4, v. 11. 10. 1928, S. 1594.

Protokoll der Sitzung des Verwaltungsausschusses am 18. 10. 1926 in Berlin.  
DBAG-Archiv, Best. Kissel I/1, 41.

ebenda.

Typisch die Darstellung bei Max Kruk und Gerold Lingnau, Daimler-Benz -  
Unternehmen, Mainz 1986, S. 87 ff.; 128 ff.

Nach Seidenzahl wurde der Aktienbesitz Schapiros bei der DMG sogar schon  
auf 42 Prozent geschätzt. Vgl. Fritz Seidenzahl, 100 Jahre Deutsche Bank  
1970, Frankfurt/M. 1970, S. 282.

Vgl. Schreiben Schapiros an v. Stauß vom 1. 11. 1924. DBAG-Archiv, PD 16.

Vgl. Protokoll der Vertreterbesprechung am 3. 8. 1925 in Untertürkheim.  
DBAG-Archiv, PD 100 I/70.

Das Schreiben Schapiros wurde der Presse zugespielt. Vgl. Daimler-Benz AG,  
Allgemeine Zeitung, Nr. 931 v. 15. 12. 1926; Die Situation bei Daimler-Benz, Selt  
Ausführungen eines Aufsichtsratsmitglieds, Deutsche Allgemeine Zeitung,  
1926, Nr. 884 v. 16. 12. 1926.

Hierzu Horst Mönlich, Vor der Schallmauer, BMW - Eine Jahrhundertge  
schichte, Bd. 1, Düsseldorf und Wien 1983, S. 151 ff.

Daimler-Benz AG, Frankfurter Zeitung, Nr. 247 v. 31. 3. 1928.

Vgl. Kruk und Lingnau (= Anm. 8), S. 108.

Mit Begleitunterlagen im DBAG-Archiv, Best. PD o.N.

Vgl. DBAG-Archiv, Bestände Gaggenau, PD 15, Sindelfingen.

Vgl. die Geschäftsberichte der Benz & Cie. AG und der DMG 1924 und 1925.

Vgl. die Sitzungsberichte vom Mai 1925. DBAG-Archiv, PD 100/II, 47 (Pro  
koll der I.G. 1924-1925).

Friedrich Nallinger auf der Vorstandssitzung in Gaggenau am 19. 11. 1924.  
DBAG-Archiv, PD 100 I/70.

DBAG-Archiv, PD o.N.; PD 20, 51.

Vgl. Geschäftsbericht der Daimler-Benz AG für 1926. Ergänzend DBAG-  
Archiv, Presse 16.

Vgl. Die Reorganisation Daimler-Benz, Frankfurter Zeitung, Nr. 142 v.

23. 2. 1927; Zur Finanzierung der Daimler-Benz AG, Magazin der Wirtschaft,  
Nr. 9 v. 3. 3. 1927.

<sup>24</sup> Vgl. DBAG-Archiv, Best. Kissel I/1, 41-44.

<sup>25</sup> Protokoll der Sitzung des Verwaltungsausschusses am 18. 10. 1926 in Berlin.  
DBAG-Archiv, Bestand Kissel I/1, 41.

<sup>26</sup> Vgl. Hans Sonntag, Werk Sindelfingen 1915-1935, S. 15. DBAG-Archiv,  
Bestand Sindelfingen 1.

<sup>27</sup> Vgl. die Schilderung der Umstellungen im Jahresbericht der Gewerbeaufsicht,  
1927 II, S. 72 ff.; ergänzend: Aus deutschen Karosseriewerkstätten, Das Karosserie  
werk Sindelfingen der Daimler-Benz AG, in: Motor, Sept. 1927.

<sup>28</sup> Die Rationalisierung bei Daimler-Benz Sindelfingen, Süddeutsche Arbeiter  
Zeitung, Nr. 261 v. 7. 11. 1928.

<sup>29</sup> Vgl. Protokoll Nr. 4 der Sitzung des Arbeitsausschusses am 28. 12. 1926 in  
Berlin. DBAG-Archiv, Best. Kissel I/1, Nr. 44.

<sup>30</sup> Protokoll der Besprechung vom 4. Oktober 1928, Betr.: Neues Fabrikations  
programm für Werk Untertürkheim. DBAG-Archiv, Bestand Kissel I/2, Nr. 15.

<sup>31</sup> So die Geschäftsberichte seit 1926. Zum tatsächlichen Stand vgl. die Werksbe  
schreibungen in: DBAG-Archiv, Bestand Ausbildung 10.

<sup>32</sup> Den genauesten Überblick über den Rationalisierungsstand zu Beginn der  
dreißiger Jahre bietet Heinz Ludwig, Die Arbeitslosigkeit in der deutschen Auto  
mobilindustrie, in: Manuel Saitzew (Hg.), Die Arbeitslosigkeit der Gegenwart,  
München und Leipzig 1932, S. 121 ff.; ergänzend Vorstand des Deutschen Metall  
arbeiter-Verbands, Die deutsche Automobilindustrie Ende 1929, Stuttgart 1930.

<sup>33</sup> Vgl. die übereinstimmenden Einschätzungen in Presse und Publizistik Ende  
der zwanziger Jahre: HWWA, Firmenarchiv, Daimler-Benz AG 1928/29.

<sup>34</sup> Vgl. Manfred Barthel und Gerold Lingnau, Daimler-Benz, Die Technik,  
Mainz 1986, S. 95 ff.; Chronik Mercedes-Benz Fahrzeuge und Motoren, Stuttgart-  
Untertürkheim 1978, S. 144 ff.

<sup>35</sup> Protokoll Nr. 17 der Gesamtvorstandssitzung vom 16. 8. 1928 in Untertürk  
heim. DBAG-Archiv, PD 20, 51. Die folgenden Zitate ebenda.

<sup>36</sup> Ebenda.

<sup>37</sup> Zum folgenden DBAG-Archiv, PD 16-20; HWWA-Firmenarchiv, Presse  
sammlung Daimler-Benz AG 1926-1929; HSG, Best. W.10. Deutsche Bank 4.  
Ergänzend Andreas Mulzer, Das Zusammenschlußproblem in der deutschen Auto  
mobilindustrie, Nürnberg 1931.

<sup>38</sup> Vgl. dagegen die Darstellungen bei Kruk und Lingnau (= Anm. 8), Mönlich  
(= Anm. 13) und Seidenzahl (= Anm. 9).

<sup>39</sup> Die neue Daimler-Option, in: Magazin der Wirtschaft, Nr. 42 v.  
18. 10. 1928. Das folgende Zitat ebenda.

<sup>40</sup> Anlässlich eines Gesprächs mit Repräsentanten der Nutzfahrzeugindustrie  
äußerte Stauß 1928, das Daimler-Benz-Vorstandsmitglied Lohrmann habe ihm  
mitgeteilt, man müsse »mit dieser Firma Geduld haben, die werde ich abmurksen«.  
Niederschrift Kapplers über die Aussprache bei der Deutschen Bank in Berlin am  
13. 11. 1928. DBAG-Archiv, Best. Gaggenau 19.

<sup>41</sup> Vgl. Protokoll der Aufsichtsratsitzung von Daimler und Benz am 1. 6. 1926  
in Mannheim. DBAG-Archiv, Best. Kissel I/1, Nr. 41.

<sup>42</sup> Niederschrift Schliepers, Chefcabinet, vom 28. 4. 1928. Zit. nach Seidenzahl  
(= Anm. 9), S. 285.

<sup>43</sup> Vgl. Mönlich (= Anm. 13), S. 132 f., 146 f.

<sup>44</sup> Schreiben Oscar Wassermanns an v. Stauß vom 11. 7. 1928. HSG, Bestand  
W.10. Deutsche Bank 4.

<sup>45</sup> Schreiben des v. Stauß an Wassermann vom 16. 7. 1928. Ebenda.

<sup>46</sup> Zum Hintergrund des Szenarios der Fusionsverhandlungen zwischen den  
führenden Großbanken OMGUS, Ermittlungen gegen die Dresdner Bank, Nörd  
lingen 1986, S. XVII f.

<sup>47</sup> Heinrich Hauser, Opel - Ein deutsches Tor zur Welt, Frankfurt/M. 1937,  
S. 185 f.

<sup>48</sup> Schreiben des v. Stauß vom 12. 1. 1929. HSG, Best. W.10. Deutsche Bank 4.

<sup>49</sup> Vgl. Niederschrift Kapplers über die gepflogene Aussprache bei der Deut  
schen Bank in Berlin am 13. November 1928. DBAG-Archiv, Best. Gaggenau 19.

<sup>50</sup> Protokoll Nr. 220 über die Direktionssitzung am 17. Dezember 1929 in  
Gaggenau. DBAG-Archiv, Best. Kissel I/2 a.

<sup>51</sup> Aktennotiz über den Besuch bei Herrn Dr. von der Porten in Berlin,  
19. 11. 1930. DBAG-Archiv, Bestand Kissel I/3.

<sup>52</sup> Schreiben der Hansa-Lloyd und Goliath-Werke Borgward & Tecklenburg  
vom 21. 3. 1932 an Kommerzienrat Dr. R. Allmers. DBAG-Archiv, Bestand V/27,  
2, Nr. 32. Das Schreiben wurde von RDA-Chef Allmers an Kissel weitergeleitet.

<sup>53</sup> Aktennotiz Kissels über die Besprechung zwischen den Herren Hagemeier,  
Kissel, Stauß und von Oertzen am 17. 6. 1931. DBAG-Archiv, Best. Kissel I/3.

<sup>54</sup> Schreiben der Zentrale Untertürkheim vom 20. 11. 1928, Betr. Vorgänge in  
der Automobilindustrie. DBAG-Archiv, Best. Gaggenau 19.

#### ANMERKUNGEN



# Das DAIMLER-BENZ-BUCH

Ein Rüstungskonzern  
im ›Tausendjährigen Reich‹

Herausgegeben von der Hamburger  
Stiftung für Sozialgeschichte  
des 20. Jahrhunderts

1987

DELPHI Politik  
Verlegt bei Franz GRENO  
Nördlingen



721953

Dr. Borrmann (Hannover) ausschließlich mit Verwaltungs- (Personenschlüssel, Verbeamtung des Geschäftsstellenpersonals, ...)

Präs. Dr. G. Müller, Frankfurt). Daneben wurden an beiden Tagen insgesamt sieben Kurzreferate gehalten, die teilweise zu einer besonders lebhaften Aussprache führten.

Zum 80. Geburtstag Max Friedländers

Am Juni 1953 ist Rechtsanwalt Dr. Max Friedländer achtzig geworden. Die Ereignisse haben es mit sich gebracht, daß wir die Zeiten vor 1933 Seite an Seite mit ihm im Vor...

dem typisch anwaltlichen Denken Max Friedländers gewesen! Und ich bin überzeugt, daß er mit der Schärfe seines Geistes, mit der Klarheit seines Ausdrucks sich ganz auf unsere Seite gestellt und für die künftige Rechtsanwaltsordnung die volle Unabhängigkeit der Anwaltschaft gefordert...

RA Prof. Dr. Walther FISCHER, Hamburg, Vorsitzender der Arbeitsgemeinschaft der Anwaltskammervorstände im Bundesgebiet

Zum 65. Geburtstag von Eugen Rosenstock-Hüssy

„Ich habe immer bar gelebt“. Dieses Wort des siebzigjährigen bezeichnet auch Kräftehaushalt und Lebensrhythmus des ...

beitsplatz die Entfaltung seiner menschlichen Kräfte ermöglicht werden? Heute, angesichts einer hochentwickelten betrieblichen Sozialarbeit, wissen wir die Bedeutung dieser Pionierleistung des Jubilars zu würdigen.

1953







gegen zu Recht vergebens. Das Wörterverzeichnis dient schließlich einem Selbstzweck, der lupenrein seine eigenen Regeln zu entfalten hat und daher keine organischen Zusammenhänge duldet. Nach allem schließt das Werk eine echte Lücke. Man kann nur wünschen, Autor und Verlag möchten weiterhin genügend freie Arbeitskraft für das „gänzlich unpathetische und äußerst mühevoll unterfangen“ (Vorwort) haben, baldmöglichst entsprechende Verzeichnisse zum

BGB und zum StGB sowie zu sonstigen wichtigen Gesetzen folgen zu lassen. Sicherlich zeigt bereits das hier besprochene Büchlein, daß der Verlag finanzielle Risiken nicht einzugehen braucht. Der Kreis juristischer Bibliotheken, welche unkritisch ohnehin jedes Buch kaufen, dessen Titel juristischen Inhalt verspricht, dürfte groß genug sein, um auch derartig wichtigen Büchern einen gehörigen Absatz zu sichern.

Gunther SCHWERDTFEGER, Hamburg

## Nachrufe

### Wolfgang Lauterbach †

Mit Wolfgang Lauterbach hat uns am 13. März 1973 eine beeindruckende Persönlichkeit verlassen, die auf vielen Gebieten das deutsche Rechtsleben der letzten Jahrzehnte mit geprägt hat. Seine Kommentierungen des Familienrechts und Internationalen Privatrechts im Palandt'schen Kommentar sowie der ZPO und der Kostengesetze in Fortführung der von Baumbach begründeten Kommentarform sind wohl jedem deutschen Juristen geläufig. Aber solche fruchtbare und die Praxis nachhaltig beeinflussende schriftstellerische Tätigkeit war dem Verstorbenen nur aufgrund seiner Neigung möglich, zum Nutzen der Praxis tiefer in die wissenschaftlichen Grundlagen des Rechts einzudringen.

Aus einer schlesischen Gutsbesitzerfamilie stammend, führte ihn sein Weg nach Militärdienst im ersten Weltkrieg, Studium in Breslau und mehrjähriger Justiztätigkeit in den preußischen Justizdienst. Er fand daneben Zeit, am bekannten Sammelwerk von Leske-Loewenfeld, Die Rechtsverfolgung im Internationalen Verkehr, mitzuarbeiten, wovon er eine Neuauflage des Ehrengerechtes in den letzten Jahren herausgebracht hat. Als Richter am Kammergericht hatte er Gelegenheit, in einem Spezialsenat weiter ins internationale und ausländische Privatrecht einzudringen und die Rechtsprechung in diesen Fragen wesentlich zu beeinflussen. Nach dem Krieg wirkte er bis 1950 im Zentraljustizamt für die britische Zone in Hamburg, dann als Richter und Senatspräsident am dortigen Oberlandesgericht, wo er außer mit seinen bisherigen Fachgebieten wesentlich mit Wettbewerbssachen zu tun hatte. Der Abschluß seiner richterlichen Laufbahn führte zu einer Intensivierung seiner sonstigen Tätigkeiten: zahlreiche wissenschaftlich fundierte, der Praxis und ihrer Reform dienende Veröffentlichungen legen davon Zeugnis ab. Als Vorsitzender einer Kommission des Deutschen Rates für Internationales Privatrecht hat er mehr als ein Jahrzehnt die Diskussion um die Reform, namentlich im familienrechtlichen Bereich, geleitet und die einschlägigen Arbeiten seiner Kommission herausgegeben. Von der Hamburger Rechtsfakultät durch Verleihung einer Honorarprofessur geehrt, hat er aus der Fülle seiner Kenntnisse und Erfahrungen heraus der Jugend lebendige Anschauungen vom Recht vermittelt. Bis zu seinem Tode im 80. Lebensjahr hat er an seinen Büchern weitergearbeitet. Insgesamt eine imponierende Lebensarbeit, die der gelehrte Praktiker und lebensfrohe Mann nur leisten konnte dank Entspannung durch weltweite Reisen, manchen guten Tropfen Wein, Musik und dank der Hilfe einer besonders sein letztes Lebensjahrzehnt betreuenden verständnisvollen Frau. Wer das Glück hatte, ihm persönlich zu begegnen, mit ihm zusammen zu arbeiten und zu genießen, wird ihn nicht so leicht vergessen.

Prof. Dr. Dr. h. c. Günther BEITZKE, Bonn

### Eugen Rosenstock-Huessy †

Kurz nach der Mitternacht des 23. zum 24. 2. 1973 verstarb in Norwich/Vermont, USA, im 85. Lebensjahr Eugen Rosenstock-Huessy (geb. 6. 7. 1888 in Berlin), Forscher und Lehrer der „Sozialwissenschaften“ in dem universalen Sinn moderner Einheit: Geschichte, Recht, Wirtschaft, Soziologie, Sprache, Philosophie, Religion...

Die Frage, die er, selbst 39 Jahre alt, uns Erstsemestern in der „Einführung in die Rechtswissenschaft“ stellte, ob wir uns in nega-

tiver Selektion zum Rechtsstudium entschlossen hätten oder in positiver, war eine eigene: er hatte Geschichte studieren wollen, und sein Lehrer hatte ihm geraten, er solle immerhin erst das Leben studieren und das Recht. Rechtsgeschichtlich waren die Dissertation „Herzogsgewalt und Friedensschutz“, 1910, die Leipziger Habilitationsschrift — des damals jüngsten deutschen Privatdozenten — „Ostfalens Rechtsliteratur unter Friedrich II“, 1912, sowie das vielbeachtete Hauptwerk „Königshaus und Stämme in Deutschland zwischen 911 und 1250“, 1914. Krieg und Zusammenbruch 1914—1918 erlebte er als mehrfach wegen Tapferkeit ausgezeichnetem Soldat der Westfront in so tiefer Erschütterung, daß er glaubte, mit allen Bisherigen brechen zu sollen: er trat als Arbeiter bei Daimler-Benz ein, wo er übrigens 1919/1921 die Werkzeitung leitete. Mit Ernst Michel gründete er in Frankfurt die Akademie der Arbeit. Aus diesen Erfahrungen schrieb er 1922 „Werkstattaussiedlung“ — ein heute wieder besonders aktuelles Thema der Industrieorganisation 1923 erreichte ihn der Ruf auf eine Professur für deutsches bürgerliches, Arbeits- und Handelsrecht sowie Rechtsgeschichte an der Universität Breslau, die später auf Soziologie ausgedehnt wurde. In rascher Folge erschienen nun 1925 „Soziologie I“, 1926 „Vom Industrierecht“<sup>1</sup> sowie „Lebensarbeit in der Industrie“, 1927, zusammen mit Joseph Wittig, „Das Alter der Kirche“, 1931 „Die europäischen Revolutionen“. Ein literarischer Niederschlag immer wieder seiner sozialreformerischen Gedanken mit der Frage des Woher und Wohin, denen er gleichzeitig durch die Tat Ausdruck gab. Die Lebensordnung des Staates müsse, so glaubte er, in gemeinsamem freiwilligem Dienst der großen führenden Gruppen der jungen Männer des Volkes gefunden werden, Arbeiter, Bauern, Studenten. Mit diesen Lagern im Zusammenhang haben die Freunde des späteren Kreisauer Kreises vom 20. 7. 1944 gestanden. — In der Kampfschrift Arbeitsdienst — Heeresdienst (1932) setzte Rosenstock-Huessy die Idee des freiwilligen Arbeitsdienstes scharf gegen die des befohlenen ab. — Zusammen mit Picht plante und förderte er ferner die Erwachsenenbildung; 1929 wurde er Präsident des Weltbundes für Erwachsenenbildung in London.

1933 emigrierte Rosenstock-Huessy nach den USA, wo er zunächst an der Harvard-Universität lehrte; später am Dartmouth-College während er gleichzeitig auf dem ihm vom Staat überlassenen Landbesitz Pferde hielt, züchtete und zuritt. Nach 1950 erwarb er sich bei Gastvorlesungen in Deutschland einen Kreis neuer Freunde. Berühmt geworden ist sein großer Göttinger Vortrag „Das Geheimnis der Universität“<sup>2</sup>. Sein Eindruck vom deutschen Wiederaufbau spiegelt sich wider in der Studie „Der unbezahlbare Mensch“, 1955.

Das deutsche Schicksal seit 1914 hat Rosenstocks Weg geprägt und überschattet. Nimmt man allein seine praktischen Aktivitäten in Schlesien neben den vollen Lasten einer damaligen Professur und starker literarischer Produktion, so fragt man sich, wieviele Stunden sein Arbeitstag gezählt haben mag. Vollendetes steht neben vielen Unvollendetem. Für den Irgendwer, der ihm als Student begegnet bleibt der Eindruck einer mitreißenden Ursprünglichkeit, ob er ne bei der Quellenexegese (1929) im Blitz der Einsicht den tragenden Gedanken zeichnete oder im Frankfurter Turnier 1950 die Vorführung der Lipizzaner ekstatisch bewunderte.

<sup>1</sup> Eine eingehende Würdigung (in dem Aufsatz „Recht, Gesetz, Richteranspruch“ anlässlich seines 70. Geburtstages) in JZ 1958, 385.

<sup>2</sup> Gleichzeitig der Name einer Aufsatzsammlung, Kohlhammer 1958.

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Schröder, Jochen: Internationale Zuständigkeit. Entwurf eines Systems von Zuständigkeitsinteressen im zwischenstaatlichen Privatverfahrensrecht aufgrund rechtshistorischer, rechtsvergleichender und rechtspolitischer Betrachtungen. Opladen: Westdeutscher Verlag, 1971. 852 S. Lw. 120.—

Wenn innerhalb kurzer Zeit zwei Habilitationsschriften zum glei-

chen Themenkreis veröffentlicht werden<sup>1</sup>, bedarf seine Aktualität kaum einführender Erläuterungen. Zieht man noch die Fülle der literarischen Äußerungen zum einen oder anderen Aspekt hinzu

<sup>1</sup> Heldrich, Internationale Zuständigkeit und anwendbares Recht, Beiträge zum ausländischen und internationalen Privatrecht, Bd. 36, erschienen 1969.



ten die Geeignetsten für die von Benz und Daimler mit dem entsprechenden Kriegsgerät belieferten Kraftfahr- und Fliegertruppen auszuwählen. Mit den Worten der Daimler-Werkszeitung:

»Es mußten mit dem geringsten Zeitverlust möglichst unparteiisch und ohne jede Einzelkenntnis aus Hunderttausenden von Menschen ohne Ansehen der Person, aus sogenanntem »Menschenmaterial«, die Sonderwaffen versorgt werden.«<sup>39</sup>

Dieses Verfahren wurde nun von dem Oberingenieur Max Sailer auf die Lehrlingsauswahl übertragen.<sup>40</sup> Die vorgefaßten Auswahlprinzipien erhielten so den Schein der »Objektivität«. Ein Fragebogen wurde vorgelegt, standardisierte Rechenaufgaben wurden gestellt, eine ärztliche Untersuchung organisiert, Sinnesprüfungen an vier Aufgaben durchgeführt, und das technische Verständnis getestet. Daraus wurde zusammen mit einer Durchschnittsziffer für das Schulzeugnis eine Gesamtwertziffer auf einer zehnstufigen Skala errechnet – und dann wieder beiseitegelegt. Denn tatsächlich beurteilt wurde nach anderen Kriterien. Abgewiesen wurden alle Jugendlichen, »die das Lernen hinausgeschoben haben, um erst in der Kriegsgelegenheit Geld zu verdienen« – ein Teil der revolutionären Arbeiter der letzten Jahre; die Arbeiterschaft sollte sich diese »Verwahrlosung der Berufserlernung« wieder abgewöhnen. Nicht zugelassen wurden auch die, »die einen überweiten Weg zur Fabrik haben würden«. Hingegen nahm man auch die schlechtesten Probanden an, wenn Väter oder Verwandte die Auswahlverfahren vom September heil überstanden hatten und wieder bei der Daimler-Motoren-Gesellschaft beschäftigt waren:

»Es geschieht eben einem Vater ein großer Dienst, wenn er durch seine eigene treue Arbeit auch seinem Sohn die Arbeitsstelle sichern kann... Da sind Väter und Brüder, die von jeher bei der D. M. G. arbeiten, da ist ein Onkel oder Pate, der zur D. M. G. gehört... und der vielleicht

einen besonders günstigen Einfluß übt... Da ist der Ehrgeiz, bei »Daimler« lernen zu dürfen. Diese Kräfte üben eine mächtige Wirkung auf den noch weichen Kern des Lehrlings. Darf man sie mutwillig ausschalten?«<sup>41</sup>

Nein, man »berücksichtigte« sie nicht nur, man »züchtete« sie. Die Scheinobjektivität der Testergebnisse, die man dann »schweren Herzens« verwarf, übte eine gewaltige disziplinierende Wirkung auf die damit konfrontierten Väter, Onkel, Paten und zuletzt die Lehrlinge selbst aus.

So wurde im Herbst 1920 ein Anfang gemacht. Daß es nur ein erster Schritt war, darüber waren sich alle Verantwortlichen einig. Es mußte noch viel mehr geschehen. Zum Programm der künftigen »betrieblichen Sozialpolitik« gehörten werksnahe Siedlungen mit einer genau durchkonstruierten »deutschen Volkswohnung« und entsprechend nach Geschlechtern organisierter Arbeitsteilung, um den schwärenden »Krebschaden an der körperlichen und sittlichen Gesundheit unseres Volkes« wieder auszubrennen.<sup>42</sup> Dazu zählten aber auch neue »Arbeitsführer«, die sich für die Aufgabe verzehrten, als Kern einer »neu beginnenden Volksordnung« eine echte »Werkgemeinschaft« aufzubauen.<sup>43</sup> All diese Konzepte wurden in den frühen Nachkriegsjahrgängen der Daimler-Werkszeitung vorgestellt. Ein erstaunliches Aufgebot von Philosophen, Betriebswissenschaftlern, Ärzten und rechtsextremistischen Politikern erhob neben den Ingenieuren und Abteilungsleitern seine Stimme. Es war, als sollte von der Leitung der Daimler-Motoren-Gesellschaft allein »die hochwertige Menschenmasse erschaffen werden, aus der uns der ersehnte Führer dereinst erstehen wird.«<sup>44</sup>

Aber der Arbeiterwiderstand blieb erstaunlich zäh. Auf die Durchsetzung ihrer neuen Herrschafts-utopie mußten die Strategen des Daimler-Faschismus noch über ein Jahrzehnt lang warten.

## 4. Vom Sanierungs-schluß zur Weltwirtschaftskrise (1924–1932)

Ende 1923 beendete der neuernannte Reichspräsident Hjalmar Schacht durch die Einführung der Rentenmark die Ära der extremen Inflation. Monate später fand die deutsche Volkswirtschaft durch die Hilfe der Anleihen des Dawes-Plans wieder ein Anschluß an den internationalen Wirtschaftszusammenhang. Die für den Kurs der Benz & Cie. bzw. der Daimler-Motoren-Gesellschaft Verantwortlichen konnten eine durchaus günstige Bilanz ziehen. Es war gelungen, die riesigen Überkapazitäten aus der Periode der Kriegsproduktion über die Nachkriegsperiode und Inflationen hinaus zu erhalten. Die abhängigen waren auf eine neue Stammarbeiterschicht zurückgestützt und politisch so geschüchtert, daß sie durchaus als Ausgangskern für die spätere Wiederinbetriebnahme der eingestellten Großmotoren- und Rüstungsabteilungen galten konnten. Währenddessen blieb das Know-how in den Flugzeug-, Panzer- und Schiffsmotorenkonstruktionen in den Versuchsabteilungen eingefroren, gegenwärtig nur einige kommerziell nutzbare Nebenprodukte für die LKW-Entwicklung und für den Luxuswagenmarkt der Kriegs- und Inflationen abwarf.

Jedoch zeigte sich bald, daß dieser politische Kurs keineswegs mit den betriebswirtschaftlichen Interessen übereinstimmte. Der ungeheure Mittelaufwand für die Instandhaltung der eingefrorenen Anlagen und Produktionskapazitäten nötig war, ließ bald nicht mehr aus den Reserven und den Verkaufserlösen der Nutz- und Personenwagenproduktion bestreiten. Die Bankschulden stiegen in beiden Unternehmen sprunghaft an, und sie wurden akut, das Ende der Hyperinflation den regionalen Berliner Banken die Möglichkeit entzog, das wachsende Risiko mit Hilfe riesiger Neuemissionen von Stammaktien (Daimler-Motoren-Gesellschaft) zu decken.



„angemessener Frist“ zurücknehmen oder einschränken können. Was als angemessen gilt, sagt das Urteil nicht.

Mehrere Minderheitsvoten weisen darauf hin, daß in nicht wenigen Fällen in den letzten Jahren Staaten sich ausdrücklich bei der Annahme der Fakultativklausel vorbehalten haben, hiervon jederzeit mit sofortiger Wirkung zurückzutreten, ohne daß dies von irgendjemand als unzulässig beanstandet worden wäre. Das dissenting vote des japanischen Richters *Oda* enthält eine besonders gründliche und meines Erachtens überzeugende Widerlegung des Standpunkts der Mehrheit.

Der japanische Richter *Oda* weist aber auch darauf hin, daß nunmehr wohl alle Staaten, die eine Unterwerfungserklärung unter die Fakultativklausel abgegeben haben, ihre Erklärungen daraufhin überprüfen werden, ob sie nicht Gefahr laufen, gegebenenfalls an ihrer Unterwerfung unter die Zuständigkeit des Gerichts ausgerechnet von solchen Staaten festgehalten zu werden, die aufgrund einer geschickteren Formulierung ihrer Annahme der Fakultativklausel günstiger dastehen. Und wenn eine Regierung befürchten muß, daß die in ihrer Erklärung enthaltenen rabulistischen Einschränkungen der Annahme der Fakultativklausel<sup>5</sup> doch nichts helfen, wenn eine Mehrheit der Richter auf eine Entscheidung in der Sache zustrebt, so wird künftig die Zahl der Unterwerfungen unter die Fakultativklausel noch kleiner sein, als sie es gegenwärtig schon ist. Die Förderung der Fakultativklausel zugunsten Nicaraguas in dem jetzt anhängigen Streitfall durch die Mehrheit der Richter kann sich also möglicherweise als der Tod dieser Institution zur Begründung der obligatorischen Gerichtsbarkeit in Völkerrechtssachen auswirken.

Mit der Mitte Januar 1985 von der Regierung der Vereinigten Staaten dem *Gerichtshof* gegenüber ausgesprochenen Weigerung, an dem weiteren Verfahren teilzunehmen, gehen die Vereinigten Staaten einen Weg, der in den letzten Jahren mehrfach von anderen vor dem *Gerichtshof* verklagten Staaten beschritten worden ist. Die Verfahrensordnung des Gerichts sieht kein Versäumnisurteil unter Zugrundelegung des Tatsachenvorbringens des klagenden Staates vor, aber auch keine von Amts wegen zu betreibende Erforschung des Sachverhalts durch das Gericht selbst. Nach Ablauf der von den Parteien gesetzten Fristen zur Einreichung weiterer Schriftsätze wird der *Internationale Gerichtshof* sich im Sommer wieder mit der Sache befassen. Offen ist es noch, ob man anderen zentralamerikanischen Staaten erlauben wird, als Nebenintervenienten aufzutreten, was für das bisherige Verfahren verneint worden ist.

5) Inwieweit die sogenannte *Vandenberg*-Klausel in der Unterwerfungserklärung der Vereinigten Staaten verhindert, daß ein Mehrparteienvertrag, und damit auch insbesondere die Charta der Vereinten Nationen, vom Gericht als Prüfungsmaßstab verwendet werden kann, wenn nicht alle Signatäre des Vertrages Parteien im Verfahren sind, ist in dem anhängigen Verfahren noch offen geblieben.

## Mitteilungen

### Professor Dr. Dr. h. c. Ernst Eduard Hirsch †

Am 29. 3. 1985 verstarb nach schwerer Krankheit im Alter von 83 Jahren Prof. Dr. Ernst E. Hirsch, emeritierter Ordinarius für Bürgerliches Recht, Handelsrecht und Rechtssoziologie an der Freien Universität Berlin. Hirsch, 1902 in Friedberg (Hessen) geboren und dort aufgewachsen, hatte sich nach glänzendem Assessor-Examen in Berlin nahe seiner Heimat an der Universität Frankfurt 1930 habilitiert und dort seine Lehrtätigkeit begonnen. Zu Beginn des Jahres 1933 mußte er diese Tätigkeit und die von ihm ebenso geschätzte Richtertätigkeit aus den bekannten rassistischen Gründen aufgeben. Über Holland wich er in die Türkei aus, wo ihm zuerst in Istanbul und dann in Ankara eine äußerst wirkungsvolle akademische Lehrbetätigung ermöglicht wurde. Hirsch hat dort Generationen von Studenten geprägt; noch heute gehören seine auf Türkisch verfaßten Werke, insbesondere das Lehrbuch des Handelsrechts, zur juristischen Standard-Literatur in der Türkei.

Doch trotz aller Ehrungen in der Türkei, der Ehrenstaatsbürgerschaft 1943, später zweier Festschriften und der Ehrendoktorwürde, zog es den „Vater des türkischen Handelsrechts“ 1950 zurück nach

Deutschland, ein wenig gedrängt von *Ernst Reuter*, der ebenfalls Emigrant in der Türkei war. Hirsch wurde 1952 Ordinarius und bald darauf Rektor der Freien Universität Berlin; er lehrte dort bis zu seiner Emeritierung im Jahre 1967. Neben dem Handels-, Gesellschafts- und Urheberrecht galt seine Liebe der in Deutschland bis heute vernachlässigten Rechtssoziologie. Die Schriftenreihe des von ihm an der Freien Universität begründeten Instituts für Rechtssoziologie und Rechtstatsachenforschung umfaßt inzwischen 56 Bände, davon viele aus der Feder der zahlreichen Schüler Hirschs. Hirsch selbst entfaltete auch nach seiner Emeritierung eine lebhaft schriftstellerische Tätigkeit; die Publikationen reichen von deutschen Ausgaben der Türkischen Verfassung über urheberrechtliche Aufsätze bis zu einer Monographie über die juristische Dimension des Gewissens. Seine „großen“ Werke sind freilich nur in türkischer Sprache erschienen; den deutschen Studenten widmete Hirsch mehrere Fall-Sammlungen und Leitfäden des Bürgerlichen und des Handelsrechts, aber kein ausführliches Lehrbuch mehr.

Hirschs Schüler allerdings brauchen eine derartige Gedächtnisstütze nicht, um sich des Meisters zu erinnern. Sie vergessen nie seine gewaltige Stimme, die das Auditorium Maximum ausfüllte, auch nicht (soweit sie Doktoranden wurden) die frohe Sonntagsrunde am häuslichen Tisch. Die von Hirsch vor einigen Jahren herausgegebene Selbstbiographie hält das Andenken wach an einen engagierten Gelehrten und großen Menschen, der sich in schwieriger Zeit und unter dem Druck schwerer Belastungen um Rechtswissenschaft und Recht verdient gemacht hat.

Professor Dr. Günter Püttner, Tübingen

### Auslandsinvestitionen – Rechtsschutz und Rechtsverfolgung

Im Gegensatz zu früheren Jahren, in denen auch wirtschaftliche Fragen im Mittelpunkt standen, konzentrierte sich die diesjährige Tagung der Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen am 3. 12. 1984 in Stuttgart auf Fragen des Rechtsschutzes und der Rechtsverfolgung.

Die besondere Bedeutung der Vertragsgestaltung für die Rechtssicherheit in langfristigen Kooperationen betonten Prof. Dr. Böckstiegel, Köln und Dr. Dr. Glossner, Kronberg, wobei sie unterschiedlicher Meinung über das zu erreichende Maß der Sicherheit waren. Glossner versuchte, in einem Vertrag ein „Aequilibrium“ zwischen Stabilität und Anpassungsfähigkeit zu erreichen. Zu diesem Zweck ist bereits bei Form und Formulierung des Vertrages auf Genauigkeit zu achten. Für die Abwicklung des Vertrages sind „conflict streaming devices“, etwa besondere Kontrollgremien, zu installieren und Vereinbarungen über mögliche Neuverhandlungen zu treffen. Wesentlich sind auch Abmachungen über die Beendigung des Vertragsverhältnisses und über die Streitbeilegung. In einer Schiedsklausel sind insbesondere das anwendbare materielle Recht und die anzuwendenden Verfahrensregeln festzulegen. Obwohl es wünschenswert ist, ist häufig jedoch keine Einigung auf die Anwendung eines der Rechte der beiden Heimatländer zu erzielen. Dann sollte nach Böckstiegel zumindest versucht werden, sich auf das Recht eines Drittstaates, auf völkerrechtliche Grundsätze oder auf allgemeine Rechtsgrundsätze zu einigen. Eine Einigung auf „ex aequo et bono-Grundsätze“ wollte Glossner nur akzeptieren, wenn deren Befolgung in einem gesicherten Verfahren gewährleistet ist.

Dazu empfiehlt sich grundsätzlich ein Schiedsverfahren, wie Böckstiegel erläuterte. Neben den Gründen, die auch im nationalen Bereich für Schiedsklauseln sprechen, ist bei internationalen Streitigkeiten die bessere Vollstreckungsmöglichkeit nach dem New Yorker Vollstreckungsübereinkommen von 1958 und die geringere Einflußmöglichkeit staatlicher Stellen hervorzuheben. Wie die Praxis zeigt, werden die Schiedssprüche zumeist auch von der unterlegenen Partei akzeptiert. Dazu ist bei Verträgen mit Staaten schon bei Vertragsabschluß anzustreben, daß sie sowohl hinsichtlich des Verfahrens als auch hinsichtlich der Vollstreckung auf ihre Immunität verzichten. Möglichst sollte die Anwendung einer Schiedsordnung vereinbart werden, gleichgültig ob es diejenige der UNCITRAL, der Internationalen Handelskammer (ICC), oder des International Center for Settlement of Investment Disputes (ICSID) ist. Die Bedeutung der letztgenannten Schiedsordnung für Investitionen in Entwicklungsländern erläuterte der ehemalige Generalsekretär des ICSID Aron Broches. Im Rah-



men der Weltbank ist im Jahre 1965 eine Schiedsordnung erarbeitet worden, die auch für diese Länder akzeptabel ist, sodaß sie mittlerweile von 87 Staaten ratifiziert worden ist. In jüngster Zeit ist sie auch in Verträgen mit China vereinbart worden. Lediglich in Süd-Amerika ist sie noch nicht verbreitet. Ein Verweis auf die Schiedsordnung der ICSID soll auch in den Mustervertrag der Bundesrepublik Deutschland für bilaterale Investitionsschutzabkommen aufgenommen werden. Dies ist derzeit nach den Worten von Ministerialrat Dr. Burkhardt vom Bundeswirtschaftsministerium besonders problematisch, weil die Bundesrepublik in Zukunft Investitionsschutzabkommen mit den Ländern Lateinamerikas abschließen will, die die ICSID-Schiedsordnung ablehnen. Mit 55 Investitionsschutzabkommen hat die Bundesrepublik weltweit die meisten Abkommen. Bei Neuabschluß von Abkommen stehen immer wieder die gleichen Probleme an. Zunächst sind die Gesellschaften und die Gebiete zu definieren, die von Abkommen erfaßt werden sollen. Diskutiert wird in jüngster Zeit die Einbeziehung des Festlandsockels außerhalb der Hoheitsgewässer in den Anwendungsbereich der Verträge. In den Einzelfällen sind Vereinbarungen über die Gleichbehandlung mit Inländern, Entschädigungen bei Enteignungen oder Unruhen sowie der Kapitaltransfer zu klären.

Diese bilateralen Staatsverträge stellen neben den privaten Investitionsverträgen wesentliche Schutzinstrumente für Auslandsinvestitionen dar. In Zukunft wird versucht werden, auch zu multilateralen Abmachungen zu kommen wie sie in euro-arabischen Verhandlungen angestrebt werden. Ein solches multilaterales Instrument besteht bereits zwischen den arabischen Staaten untereinander, das *Giuma Said Giuma* vorstellte, der stellvertretende Generaldirektor der Inter-Arab Investment Guarantee Corporation, Kuwait.

Jürgen Reifarth, Marl

## 22. Kongreß der Internationalen Vereinigung Junger Rechtsanwälte (AIJA)

Zu ihrem 22. Jahreskongreß kehrte die Internationale Vereinigung Junger Rechtsanwälte (Association Internationale des Jeunes Avocats) in ihre Geburtsland Frankreich zurück. Knapp 600 Rechtsanwälte aus 36 Ländern waren der Einladung nach Bordeaux gefolgt, wo die französischen Kollegen unter der Leitung von *Jean-David Boerner* und *Bernard Cahen* alle Vorbereitungen für eine erfolgreiche, interessante und nicht weniger kulinarische Begegnung getroffen hatten.

Vier Arbeitskommissionen beschäftigten sich in ihren Sitzungen mit den folgenden Themen. Mit einer Analyse der gegenwärtigen Situation in verschiedenen Ländern begann die Arbeitskommission, die sich mit dem Problem der Rechtsschutzversicherungen und des allgemeinen Rechtsschutzes befaßte. Unter der Leitung der französischen Rechtsanwältin *Paule Winzelberg-Rubin* und des deutschen Kollegen *Manfred Krämer* aus Köln beschäftigten sich die Teilnehmer unter Mitwirkung von Versicherungsexperten vorwiegend mit Problemen und speziellen Fragen zu Voraussetzungen und allgemeinen Grundsätzen für Verfahren unter Beteiligung von Rechtsschutzversicherungen. Rechtsanwalt *Dr. Alfred Meili* diskutierte mit den Teilnehmern der Kommission, die sich mit internationaler Wirtschaftskriminalität befaßte, verschiedene Formen der Wirtschaftskriminalität vor dem Hintergrund der zivilrechtlichen und strafrechtlichen Verantwortlichkeit. Die Bedeutsamkeit und Wichtigkeit dieses Themas wird deutlich, wenn man sich vor Augen führt, daß allein durch die Wirtschaftskriminalität mehr Schaden angerichtet wird, als durch alle anderen Delikte zusammen. Unter dem Thema „Warenzeichenrecht“ trug die dritte Kommission unter Leitung des Schweizer Kollegen *Jean-Daniel Théraulax* und des britischen Kollegen *Anthony Seddon* dem Gastland des Kongresses und vor allem der Tagungsstadt Bordeaux Rechnung. Vorwiegend Markenzeichen und zulässige Benennung der überwiegend französischen Weine und Spirituosen waren das zentrale Thema dieser Kommission.

Reges Interesse konnte die Kommission über internationale Schiedsgerichtsbarkeit verzeichnen. Der spanische Professor und Rechtsanwalt *Francisco Ramos Mendez* präsentierte zunächst eine vergleichende Gegenüberstellung der Schiedsgerichtsbarkeit in den verschiedenen Ländern. Am Beispiel der französischen Regeln für das Schiedsgerichtsverfahren, das in der Praxis ausgezeichnete Resultate verzeichnen kann, wurde die Möglichkeit eines Rechtsinstituts aufge-

zeigt, das in der Ausbildung nach wie vor stiefmütterlich behandelt wird, in der Praxis jedoch immer mehr an Bedeutung gewinnt.

In der abschließenden Generalversammlung übernahm der Schweizer Rechtsanwalt *Dr. Jean-Daniel Théraulax* für das nächste Jahr das Amt des Präsidenten der AIJA von dem italienischen Kollegen *Giovanni de Berti* aus Mailand.

Rechtsanwältin Dr. Gabriele Kötschau, Flensburg

## Jahrestagung 1984 der Deutsch-Niederländischen Juristenkonferenz

Die nun schon 36. Arbeitstagung der seit 1949 bestehenden Deutsch-Niederländischen Juristenkonferenz fand vom 5. bis 7. 10. 1984 in Haarlem und Zandvoort statt. In dem historischen Gebäude der Holländischen Gesellschaft der Wissenschaften in Haarlem konnte Mr. *W. L. Haardt*, Radsheer am Hoge Raad der Nederlanden a. D. und Vorsitzender des niederländischen Arbeitsausschusses der Juristenkonferenz, rund 220 Teilnehmer der Tagung begrüßen. Das erste Hauptreferat von Prof. *Dr. M. Kloepfer* (Trier) widmete sich „Rechtsproblemen des internationalen Umweltschutzes“. Schon mit den einführenden Bemerkungen des Referenten wurden die ungewöhnliche Brisanz und Aktualität des Themas deutlich. Grenzüberschreitende Luftverschmutzung, Kernkraftwerke, Flugplätze und andere umweltbelastende Anlagen in grenznahen Regionen sowie der internationale Mülltourismus geraten unweigerlich in das rechtliche Spannungsfeld von nationaler Souveränität des Verursacherstaats und nationaler Integrität des betroffenen Nachbarstaats. Eine nationale, mit finanziellen Opfern erkaufte Luftreinhaltepolitik kann von einem weniger umweltfreundlichen Nachbarstaat weitgehend unterlaufen werden, der zudem noch wegen einer Kostenverzerrung zu seinen Gunsten Vorteile im internationalen Handelswettbewerb gewinnen kann. Der Referent sah hier die Notwendigkeit für eine spezielle Umweltaußenpolitik, die für die Durchsetzung des Prinzips Sorge tragen müsse, daß nicht mehr Umweltbelastung an den Nachbarstaat abgegeben wie von diesem aufgenommen werde. Das Internationale Privatrecht, das mit einem in Jahrhunderten gewachsenen Instrumentarium von rechtlichen Regeln grenz- und rechtsüberschneidende Interessen zu ordnen verstehe, sei im Bereich des internationalen Umweltrechts überfordert, weil dieses vom öffentlichen Recht überlagert werde. Das Umweltrecht gehöre zu 1/3 dem öffentlichen Recht an. So sei die zunehmend akute Frage, ob beispielsweise ein durch Umweltbelastung geschädigter niederländischer Landwirt im Schadensersatzprozeß gegen eine französische Verursacherfirma (Einführung von Schadstoffen in den Rhein) die von einer französischen Behörde erteilte Genehmigung zur Verursachung der Umweltbelastung sich mit rechtfertigender Wirkung entgegenhalten lassen müssen, obwohl er an dem Verfahren zur Erteilung der Genehmigung nicht beteiligt gewesen sei, nur mit den Mitteln des öffentlichen Rechts zu lösen. Die wissenschaftliche Diskussion zum internationalen Umweltschutzrecht warnte *Kloepfer* vor der unzulässigen Methode, umweltpolitische Wünschbarkeiten, seien diese auch noch so berechtigt, kurzerhand zu geltendem Recht zu erklären. Die Völkerrechtsfreundlichkeit des Grundgesetzes (Art. 25) sei allein keine Rechtsquelle für im Völkerrecht (noch) nicht abgesicherte Rechtssätze zum Umweltschutz. Die Frage, ob ein deutsches Verwaltungsgericht die Klage eines im Ausland wohnenden Klägers gegen eine von deutschem Boden ausgehende Umweltbelastung zulassen müsse, könne nur mittels Auslegung des einzelnen, in Betracht kommenden einfachen Gesetzes entschieden werden. Der Referent ließ – insbesondere in der Diskussion – keinen Zweifel an seiner Ansicht, eine solche Auslegung des § 42 II VwGO führe zu dem Ergebnis, daß eine grenzüberschreitende Klagebefugnis in Deutschland bisher nicht statuiert worden sei. Die völkerrechtliche Subjektivität des einzelnen Staatsbürgers sei – ohne Vermittlung durch das nationalstaatliche Recht – (noch) nicht anerkannt und könne ebensowenig wie grundrechtliche Positionen eine ausländische Klagebefugnis tragfähig begründen. Desgleichen meine nach Sinn und Zweck § 5 BImSchG mit dem Merkmal „Nachbarschaft“ nur die nationale und nicht die internationale. Dagegen beziehe § 1 III ROG in einem gewissen Umfang internationale Belange in den gesetzlichen Schutzbereich mit ein. Aus Art. 14 GG sei nicht die Verpflichtung der deutschen Staatsgewalt abzuleiten,





Chaim HERZOG

Foto Sven Simon

## Will überbrücken

Israels sechster Präsident Chaim Herzog ist eine der bekanntesten Persönlichkeiten im öffentlichen Leben hier: nicht nur als Politiker, sondern auch als Soldat, als Diplomat, als Wirtschaftsmanager, als Jurist, als Journalist. Am eindringlichsten wohl hat er sich eingepreßt im Bewußtsein des Volkes durch seine Rundfunkkommentare während des Sechs-Tage-Krieges 1967 und des Jom-Kippur-Krieges 1973. Er ist eine der prägenden Figuren des jüdischen Staates.

Chaim Herzog wurde am 17. September 1918 in Belfast geboren. Sein Vater war der Oberrabbiner Irlands und später des Landes Israel. Herzog schloß sich einer zionistischen Jugendorganisation an, besuchte das Wesley College in Dublin, dann die Thora-Hochschule in Hebron. Er studierte in Cambridge und nach Ausbruch des Zweiten Weltkrieges auf der Militärakademie in Sandhurst. Hobbys damals: Boxen, Segeln, Fliegen. Herzog kämpfte in der britischen Armee in Arnheim, war unter den ersten Briten, die den Rhein überquerten, wurde in Bremen verwundet und war einer der Verhöroffiziere des SS-Führers Himmler. Herzog war damals Leiter des militärischen Geheimdienstes für Norddeutschland.

Nach seiner Einwanderung nach Palästina kämpfte Herzog, der in der britischen Armee den Rang eines Majors erworben hatte, im Unabhängigkeitskrieg in den erbitterten Gefechten von Latrun. Im Alter von 30 Jahren wurde er der erste Chef des israelischen militärischen Geheimdienstes von 1948 bis 1950. Auf diesen Posten kehrte er von 1959 bis 1962 zurück, nachdem er zwischendurch Militärattaché in Washington, Kommandant des Jerusalemer Distrikts und Oberbefehlshaber Süd-Israels war. Nach dem Sechs-Tage-Krieg wurde er der erste Militärgouverneur des eroberten Westjordanlandes. In den Jahren davor hatte der inzwischen zum General ernannte Herzog sich einen Namen als Industriemanager gemacht und wurde Senior-Partner in einer angesehenen Rechtsanwaltspraxis für Wirtschaftsrecht. Außerdem betätigte er sich publizistisch. Nach dem Jom-Kippur-Krieg 1973 schrieb er ein Standardwerk über diesen Konflikt. 1975 bis 1978 war er Botschafter bei den Vereinten Nationen. Seit 1981 ist er ein Abgeordneter der oppositionellen Arbeiterpartei in der Knesset.

Chaim Herzog ist zwar ein loyaler Repräsentant der Arbeiterpartei, gilt aber dennoch nicht als parteiisch. So willigte er im letzten Sommer ein, als ihn die Regierung Begin bat, in Skandinavien, in Großbritannien und in den Vereinigten Staaten für Israel zu sprechen. Herzog ist sicherlich über die Grenzen seiner eigenen Partei hinaus populär. Er hat versprochen, den offenen Stil, den der scheidende Präsident Navon einführte, fortzusetzen. Navon war in jeden Winkel Israels gereist, um die Leute in ihrem Wohn- und Arbeitsort aufzusuchen. Nun will Herzog, der weitgereiste Soldat, Diplomat, Politiker und Geschäftsmann, den Amtssitz des israelischen Staatspräsidenten zu einem „internationalen jüdischen Brennpunkt“ werden lassen. Herzog will sein Amt vor allem nutzen, um wie Präsident Navon die Gegensätze in der israelischen Gesellschaft zu überbrücken. Den schwerwiegendsten, den ethnischen Gegensatz hat Herzog in der eigenen Familie überbrückt. Sie besteht in bunter Mischung aus europäisch- und orientalisches-stämmigen Juden; über seine Frau ist er verwandt mit dem ehemaligen Außenminister Abba Eban. Auch in der Auseinandersetzung zwischen religiösen und nichtreligiösen Juden in Israel hat Herzog keinen schlechten Stand, stammt er doch aus einer prominenten Rabbinerfamilie und absolvierte religiöse Studien.

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So bewirkt, dass Du zu ihm kommen wirst!

FREITAG, 1. April 1988

ISRAEL NACHRICHT

# DR. REUBEN HECHT, TRÄGER DES ISRAEL-PREISES 1988

UNTERNEHMER, KUNSTSAMMLER, MAEZEN

Von H. W. GOLDSTEIN

Es gehört zur Tradition, anlässlich des Unabhängigkeitstages Persönlichkeiten mit dem „Israel Preis“ zu ehren, der höchsten Auszeichnung des Staates. Es werden entweder bestimmte Leistungen hervorgehoben oder ein Lebenswerk. Eine der Gruppen der Preisträger erhält in diesem Jahre Anerkennung für „Dienste für das Land und die Gesellschaft“. Einer der Preisträger ist Dr. Reuben Hecht. Im Lande bekannt ist er als Erbauer eines der Wahrzeichen Haifas, des Getreidesilos in der Unterstadt mit dem 69 Meter hohen Turm. Es war Dr. Hecht, der im Jahre 1951 die Gesellschaft „Dagon“ gründete und sie seit 1955, dem Beginn der Arbeit, leitet. Aber Reuben Hecht ist mehr als nur ein erfolgreicher Unternehmer. In Gesprächen mit ihm ist man von der Persönlichkeit beeindruckt, seinem weitgefächerten Wissen und der — man möchte fast sagen — jugendlichen Begeisterung für Aufgaben und Ziele, die er sich setzt. —

Man kann über Reuben Hecht als Kaufmann berichten, als Träger politischer Ideen, seine politischen und zionistischen Aktivitäten, über seine kulturellen Leistungen, angefangen von den in jungen Jahren geschriebenen Gedichten, seiner Sammeltätigkeit, was zur Gründung zweier Museen führte, über die Beiträge für wissenschaftliche Institute. Aus der langen Liste soll nur einiges erwähnt werden. Dem Israelmuseum in Jerusalem hat er Objekte überlassen. 1970 gehörte er zu den Gründern der Universität Haifa, an der er 1974 den „Reuben Hecht Lehrstuhl für Zionismus“ errichtete. Er ist Mitglied des internationalen Rates des Weizmann Institutes, Rechowoth, sitzt im Kuratorium des Technions, Haifa, und seit 1972 im Aufsichtsrat des „Israel Festivals“.

Die Familie Hecht lebte in Gondelheim, Süddeutschland. Der Vater, Jakob, gründete 1908, zusammen mit dem Onkel Hermann, in Mannheim die „Rhenania Schiffahrtsgesellschaft“, die sich auf den Getreidetransport zwischen den Städten am Rhein, Main und Neckar spezialisierte, angefangen von Holland und Belgien über die deutschen Hafenplätze bis nach Basel. Im Jahre 1920 folgte die in Basel beheimatete „Neptun Transport und Schiffahrt A.G.“, die 1946 die Rhenania übernahm, die von den Nazis „arisiert“ war und die Reuben Hecht nach harten Verhandlungen mit den Alliierten für die Familie zurück erwerben konnte. Nach dem Tod des Gründers war er bis 1970 Direktor des Verwaltungsrats, dann trennte er sich von dem Familienbetrieb, der verkauft wurde, um sich ganz den Aufgaben im Lande zu widmen. —

Rudolf Hecht wurde 1909 in Antwerpen geboren. 1919 übersiedelte die Familie nach Basel, wo er die Schulausbildung vollendete und „Zionist“ wurde, Mitglied des „Blau-Weiss“. Die Studien begann er 1928 in München, dann kam Heidelberg und Berlin. Seine gewählten Hauptfächer waren Politische Wissenschaften und Nationalökonomie, aber er belegte auch Kurse der Rechtswissenschaften, Archäologie, Kunstgeschichte, alte Geschichte, Theater- und Zeitungswissenschaften. 1931 machte er sein Diplom als Volkswirt, und 1933 das Doktorat für politische Wissenschaften, Dr. rer. pol.

Als Student wird er Mitglied des „Kartells Jüdischer Verbindungen“, KJV, gleichzeitig schliesst er sich revisionistischen Gruppen an, die eine schnellere Besiedlung des Landes propagieren. Im Rahmen einer Reise des KJV kommt er 1931 nach Eretz Israel, bleibt, um hier zu arbeiten, dann wieder ist er im Familienbetrieb, macht gleichzeitig sein Doktorat, um dann für ein Jahr nach Paris zu gehen, wo er im Büro Jabotinskys tätig wird. 1936 wandert er ein, ist in einigen Firmen tätig und arbeitet einen Plan für Siloanlagen in dem damals neuen Tiefseehafen von Haifa aus, den er 1937 durch die Jewish Agency den Mandatsbehörden überreichen lässt. Der Plan wird — wahrscheinlich ungelesen — abgelehnt. Die Mandatsbehörden wollten nichts davon wissen, schon um keiner jüdischen Gruppe eine Konzession zu geben. Er nimmt Kontakt mit den revisionistischen Gruppen im Lande auf. Der damalige Leiter des „Irgun“, der Untergrundbewegung, David Raziel, beordert ihn im Januar 1939 nach Europa, um „illegale Transporte“ zusammenzustellen, da man in diesen Kreisen den Schatten der Katastrophe nahen sieht. Hecht eröffnet ein „Emigrationsbüro“ in Zürich. In den folgenden zwei Jahren reist er durch Frankreich, Italien, die Balkan-Länder, um sein Ziel zu erreichen. In Jugoslawien findet er die Frau seines Lebens, heiratet in Belgrad. Das junge Paar erlebt auf der Hochzeits-/Dienstreise in Zagreb eine wenig angenehme Überraschung, den Einmarsch der deutschen Truppen in Jugoslawien, Ostern 1941. Nur der Umstand, dass sie in dem Hotel

wohnen, das der deutsche Kommandeur, Generalfeldmarschall von Lietz, bezicht, ermöglicht es ihnen, unbemerkt zu verschwinden, da die Wachen annehmen, dass sie zum „Stab“ gehören. Nach abenteuerlichen Wanderungen durch Italien erreichen sie die Schweiz. Damals stand sein Name sicherlich der einzige — auf den „Schwarzen Listen“ sowohl Deutschlands als auch der Briten, die ihn der Organisation des Sakkaria-Transportes, der 2400 „Illegale“ brachte, beschuldigten. Er muss in der Schweiz bleiben bis zur Errichtung des Staates Israel 1948.

In Israel konzentriert er sich auf das Ziel, das ihm von seinem ersten Besuch an vorschwebt, moderne Anlagen für die Ladung und Löschung von Schüttgut zu errichten, verbunden mit einem Silo, Lagerräumen, in denen das Getreide gereinigt, gewogen und verteilt werden kann, das bis dahin in den Schiffen umständlich in Säcke gefüllt wurde. Seine wirtschaftspolitischen Vorstellungen waren so ganz anders als die in den Anfangsjahren des Staates gängigen, wo man alles durch die Regierung, oder vielleicht noch durch eine der Gewerkschaft zugehörige Gruppe machen wollte. Der damalige Verkehrsminister, David Remes, dem der Hafen unterstand, wurde von dem Plan beeindruckt, in den die Regierung keine Mittel zu investieren brauchte: In Israel gab es keine Fachleute mit Erfahrungen in der Behandlung von Getreideschiffen. Hecht erhielt die erste vom Staate erteilte Konzession, 1950, die es ihm ermöglichte, die „Israel Dagon Silo Ltd.“ zu gründen, und 190 Shareholders, Aktienzeichner, im In — wie Ausland zu gewinnen. Wobei der Name Dagon sich auf das hebräische Wort Dagan, Getreide, bezieht, vielleicht auch auf den in der Bibel erwähnten Gott der Philister, Dagon.

Im Jahre 1952 kann mit den Bauarbeiten begonnen werden, und 1955 wird der Betrieb aufgenommen. Die Fassungskraft wurde zweimal vergrössert, so dass 100 000 Tonnen Getreide gelagert werden können. Am Kai arbeiten zwei pneumatische Kräne wie ein von den Ingenieuren der Gesellschaft entwickelter mechanischer, um die Körner aus den Laderäumen der Schiffe auf eine Brücke zu bringen, über die sie in den Silo geführt werden. Im Jahre 1981 wurde der Gruppe die Konzession für den Hafen von Aschdod zugesprochen, wo die Anlagen seit 1985 arbeiten. Die Konzession in Haifa läuft bis zum Jahre 2003, die in Aschdod bis 2015, denn gehen die Anlagen entschädigungslos an die Regierung über.

In Haifa, einem Betrieb, der in all den langen Jahren keine Streiks noch Sanktionen kannte, arbeiten 120 Menschen in Aschdod, von Haifa aus verwaltet, nur sechs. Dr. Hecht weist darauf hin, dass die Anlagen zu den modernsten der Welt gehören, mit einer Umschlagkapazität, die über der der anderen liegt. So wurden in einigen Jahren 2 Mill. Tonnen Körner, die zwanzigfache Fassungskraft, behandelt. Die Leistung der erwähnten drei Kräne beträgt 700 Tonnen pro Stunde, so dass ein Schiff in verhältnismässig wenigen Arbeitsstunden gelöscht wird, was dem Importeur, in diesem Falle dem Staat, Liegegeländer (demurrage) erspart. Interessant und einmalig im Lande ist auch der „recessive Tarif“, der sich bei vergrössertem Umschlag verkleinert.

Es war Hecht, der den schönen Brauch einführte, an den Abenden des Schabbat und an Feiertagen die Anlagen zu illuminieren, etwas, was einige der Industrieanlagen der Stadt übernommen haben. Während der Regierungszeit Beginns diente er dem Ministerpräsidenten als persönlicher Berater, der bei vielen der politischen Berechnungen und Reisen anwesend war.

Dr. Hecht hat immer versucht, weitgehende Interessen zu verbinden, Themen und Dinge, die selten zusammen mit erfolgreichen Unternehmern genannt werden. Das zeigt sich schon mit der Vielzahl der von ihm belegten Vorlesungen als Student, zu denen auch Archäologie wie Kunstgeschichte gehörte. Heute zählt er zu den Gründern zweier Museen in Haifa, die vielleicht beide einmalig in ihrer Art sind. Im Jahre 1956 errichtet er im Unterstock des Bürohauses der Dagon-Gesellschaft ein archäologisches Museum, das dem Getreide, seiner Bearbeitung und Lagerung in dem geographischen Raum, in dem Israel liegt, gewidmet ist, und das 1966 internationale Anerkennung als wissenschaftliches Museum erhielt. In Israel ist es das einzige Betriebsmuseum. Es ist dem Staat überschrieben, mit der Auflage, es in den Räumen und unter den von Dr. Hecht eingeführten Bedingungen, dass einmal täglich eine Führung für Einzelbesucher und Gruppen stattfindet, weiterzuführen.

Auf dem Gelände der Haifaer Universität, die ihm 1964 das Ehrendoktorat verlieh,

Dr. phil. h. c., wurde im gleichen Jahr das „Reuben und Edith Hecht-Museum“ eingeweiht, dem „Volk Israel in Eretz Israel“ gewidmet, mit einer grösseren archäologischen Abteilung und einem Kunstmuseum. Später sollen die Bilder seiner Privat-Sammlung hier hängen. Ein dritter Flügel, der plastischen Kunst gewidmet, ist im Bau, und soll noch in diesem Jahre eröffnet werden. Das Museum ist Eigentum der Universität, die es im Sinne des Spenders führen soll, mit täglichen Öffnungszeiten und eintrittsfrei, um jedem, insbesondere der Jugend, der Besuch zu ermöglichen. —

Die biographischen Angaben zeigen, dass Reuben Hecht immer auf zwei Gleisen aktiv gewesen ist. Er setzt seine persönliche Tradition

fort, Akademiker wie auch praktischer Verwalter, grosser Unternehmen zu sein, von den elterlichen Betrieben bis Dagon, und verbindet politische Tätigkeit mit kulturellen Interessen. Von jungen Jahren an war er Sammler archäologischer Funde und von Kunstwerken, die den Grundstock für die Museen ergaben. Die Liste der Ehrungen und Anerkennungen, die ihm zugesprochen wurden, ist lang. Um nur einige zu erwähnen: 1960 der Kaplan-Preis für erfolgreiche Arbeitsleistung, 1970 Ehrenbürger Haifas, in Zürich der „Dawid Preis 1983 für Wahrheit und Gerechtigkeit“, 1987 die Medaille der Histadrut. Es war eine fast zu erwartende Entscheidung, ihn anlässlich des vierzigjährigen Bestehens des Staates mit dem „Israel-Preis für Dienste für den Staat und die Gesellschaft“ zu ehren. —



## nd Weltschau

## Prolog zu Novalis»

gehörigen aufzudecken. In ausführlichen Rückenden lässt sie ihn Schlüsselszenen seines bisherigen Lebens virtuos inszenieren: die heimliche Erlaubnis mit Sophie, ihren Geburtstag auf dem Hof von Rockenthien, eine Bibelstunde mit dem pietistischen Vater, Gespräche mit Sophies Vater über die Französische Revolution, Erfahrungen mit Fichte, Friedrich Schlegel, Hölderlin. Dann wieder, etwa in der Unterhaltung mit der Danscour, der Gesellschaftsdame auf dem Hof von Rockenthien, wechselt die Erzählperspektive, wir treten einen Schritt zurück und erleben den Dichter als distanzierte Beobachter. Und doch ist es gerade in solchen Momenten, dass die geistige Aufbruchsstimmung, in der sich die gebildete Gesellschaft am Übergang zum 19. Jahrhundert befand, spürbar wird. Der Dialog als Lebensform, diese Mischung von philosophischer Spekulation und höflicher Causerie, setzte den Rahmen, innerhalb dessen Welt erfahren wurde. Dass dazu auch die Liebe gehörte, wird in diesem Buch Gisela Krafts deutlich, wenn sie authentische Texte des Dichters, Gedichtstrophen, Tagebuchauszüge und Briefe, die letztlich immer auf ein Du ausgerichtet sind, mit einbezieht.

Die Autorin verfügt über eine profunde Kenntnis von Novalis' philosophisch-naturwissenschaftlicher Gedankenwelt. Wenn sie sein Ringen mit dem Selbstmord (er spricht von ihm nur als von dem «Entschluss»), seine grenzenlose Verweilung schonungslos aufzeigt, ohne ins Sentimentale abzugleiten, macht sie die subjektive

Innenschau als Ursprung der schöpferischen Einbildungskraft erkennbar. Sie stützt sich dabei auf Hardenbergs Journal, ein intimes Tagebuch, in dem er diese Wochen der Auseinandersetzung mit dem Tod zu verarbeiten suchte. Zu jedem Datum fügte er jeweils eine Zahl hinzu, die zeigte, der wievielte Tag es nach Sophies Tod war.

Dem von sexuellen Phantasien geplagten Hardenberg gerät das Bettzeug zum «sonnigen Flachsfield», in einem Schmetterling glaubt er den toten Bruder Erasmus wiederzufinden, belebt scheint ihm jedes Ding. Das Ich darf sich absolut setzen, im Dialog mit der Schöpfung zielt es auf Anverwandlung der Elemente. Gisela Kraft akzentuiert in ihrer Erzählung den Diskurscharakter von Hardenbergs assoziativer, der Fichteschen Wissenschaftslehre verpflichteten Geisteshaltung. «Ich denke nach dem Reiz der Natur. Mein Denken ist Reflex. Die Natur denkt selbst. Andersherum: Mein Denken ist höchster Blütenstand der Natur, in dem sie an ihr Ende kommt. Soll sie fortgepflanzt werden, bedarf sie des Befruchtungsaktes, der in der Blüte stattfindet.» So lässt die Erzählerin den fiktiven Hardenberg in ihrem Text reflektieren. In seinen Fragmenten, deren erste Sammlung unter dem Titel «Blütenstaub» in der Zeitschrift «Athenäum» veröffentlicht wurde, wird der Dichter Novalis später schreiben: «Poesie ist die grosse Kunst der Konstruktion der transzendentalen Gesundheit. Der Poet ist also der transzendente Arzt.»

Die ostdeutsche Autorin Gisela Kraft hat die Grundbefindlichkeiten eines werdenden Dichters erkundet.

Barbara Meyer

Gisela Kraft Prolog zu Novalis. Aufbau-Verlag, Berlin 1990.

## Ein fast vergessener deutscher Staatsrechtslehrer

## Zum 100. Geburtstag von Hermann Heller

Am 17. Juli 1891 wurde im habsburgischen Teschen Hermann Heller geboren, einer der wenigen republikanisch gesinnten Staatsrechtler der Weimarer Republik. Fast wäre sein Werk ganz vergessen worden. Er starb bereits mit 42 Jahren, am 4. November 1933, in Madrid, wo er vor der Verfolgung durch die Hitler-Diktatur Zuflucht gefunden hatte. Sein Gegenspieler Carl Schmitt konnte ein halbes Jahrhundert länger sein Werk ausarbeiten; Hellers Werk dagegen ist Fragment geblieben. Immerhin konnte Gerhart Niemeyer 1934 in den Niederlanden die nicht ganz abgeschlossene «Staatslehre» noch herausgeben. Aber in Deutschland war dieses Buch verboten; nur wenige Exemplare, unter dem Ladentisch einiger mutiger Buchhändler, fanden den Weg zurück in das Land, das ihn vertrieben hatte.

1971 gelang es jedoch, seine «Gesammelten Schriften» bei Sijthoff in Leiden herauszugeben. Es sind immerhin drei gewichtige Bände geworden. Diese erste Auflage ist seit Jahren vergriffen. Mohr (Siebeck) in Tübingen bereitet nun eine Neuaufgabe vor. Hier ist auch die «Staatslehre» wieder in einer schönen separaten Ausgabe erschienen, die allmählich ihre Leser findet.

Mit dem Zusammenbruch der Weimarer Republik ist das Lebenswerk Hermann Hellers gescheitert, das in dem Versuch bestand, diese Republik zu retten und Auswege aus ihren Krisen zu finden. Obwohl nun im nachhinein sein Werk zunehmend beachtet wird, ist es doch bis heute nur ein kleiner Kreis von verfassungsrechtlich, historisch und politisch Interessierten, der von ihm weiss.

## Wirkung im Ausland

Während Heller in Deutschland nur wenig gilt, hat er in einigen anderen Ländern eine beachtliche Wirkung entfalten können. So bringt der Verlag *Fondo de Cultura Económico* in Mexiko seine «Staatslehre», von Luis Tobio ins Spanische übersetzt, seit 1942 nun schon im 12. Nachdruck heraus. Sie gehört mit etwa 70 000 verkauften Exemplaren zu den besonders erfolgreichen Veröffentlichungen dieses Verlags. Man kann in Lateinamerika immer wieder ältere und jüngere Wissenschaftler treffen, die in die Politische Theorie mit Hellers «Staatslehre» eingeführt worden sind. Im Jahre 1965 ist in Mexiko auch «Die Souveränität» von 1926 in der Übersetzung von Mario de la Cueva erschienen. 1985 schliesslich hat Antonio López Pina bei Alianza Universidad in Madrid einen Band mit «Escritos políticos» Hellers herausgebracht.

Damit ist ein Grossteil seines Werks der hispanischen Welt bekannt. Auch in Italien beginnt eine Heller-Rezeption. So ist unter anderem 1987 «Die Souveränität» bei Giuffrè, übersetzt von Pasquale Pasquino, zusammen mit einigen wichtigen Aufsätzen erschienen. Besonders eindrucksvoll ist die Wirkung Hellers in Japan. Erste Kontakte kamen bereits zu Hellers Lebzeiten zustande. Aber nachdem 1945 die Meiji-Verfassung zusammengebrochen war, die dem Modell des preussisch-deutschen Obrigkeitsstaates nachgebildet war, machten selbstkritische Japaner, namentlich Hajime Akinaga und dann Toshio Yamaguchi, Heller in Japan weiteren Kreisen bekannt. Mit der Übersetzung der «Staatslehre» und der «Politischen Ideenkreise» durch Seishu Yasu sowie einiger Aufsätze durch Hiromichi Imai stellt das Werk Hellers heute eine Art von Variante zur grossen japanischen Max-Weber-Rezeption dar, indem es hilft, die Probleme der Demokratisierung Japans radikaler zu erfassen.

## Lebensgang

Heller entstammte einer jüdischen Familie, war Sohn eines Rechtsanwalts und mütterlicherseits

verwandt mit Josef Redlich; er studierte in Wien, Innsbruck und Graz Rechtswissenschaft. 1914 zog er als Freiwilliger der österreichischen Armee in den Krieg. Nach dessen Ende ging er über Leipzig nach Kiel, habilitierte sich dort 1919, gefördert von Gustav Radbruch, mit dem ihn dann eine enge Freundschaft verband. In seiner Habilitationsschrift über «Hegel und der nationale Machtstaatsgedanke» setzt er sich kritisch und gründlich mit den alten preussisch-deutschen Traditionen des Primats der Aussenpolitik auseinander. Während weite Kreise immer noch mit Erich Kaufmann ihr soziales Ideal im erfolgreichen Krieg sehen wollten, kämpfte Heller um eine Weiterentwicklung des Liberalen zu einem sozialen Rechtsstaat.

Die Universität stand einem sozialdemokratischen Aussenseiter nicht gerade offen. Er musste acht Jahre auf ein Extraordinariat warten. Diese Zeit überbrückte er, indem er sich der Volksbildung und speziell der Arbeiterbildung zuwandte. Von 1920 bis 1926 war er Leiter eines neugeschaffenen Volksbildungsamts in Leipzig und entwickelte hier eine über die Grenzen Sachsens hinaus beachtete Arbeit. Hier begann er auch mit grosser Leidenschaft, um eine Neuorientierung der sozialistischen Jugend zu kämpfen. Ein sich als «Orthodoxie» verstehender Marxismus, wie er durch Namen wie Max Adler und Arkadij Gurland gekennzeichnet werden kann, lehnte nicht nur die bürgerliche Republik ab, sondern «verneinte» auch die Organisation Staat als solche.

Heller dagegen forderte die Arbeiterschaft auf, sich in die Republik hineinzukämpfen, und zwar mit ihren spezifischen Wertvorstellungen. Seit langem hatte die Sozialdemokratie von einem «Volksstaat» und von «sozialer Demokratie» gesprochen. Aber die Begriffsprägung Hellers von einem «sozialen» oder, wie er auch formulierte, einem «sozialistischen Rechtsstaat» dagegen war damals neu. Dieses Konzept beruhte unter anderem auf einer neuen und gründlichen Verarbeitung des Staatsbegriffs, die Heinrich Cunow zu verdanken war, auf den sich auch Karl Renner und Hans Kelsen stützten.

1926 kehrte Heller in eine akademische Tätigkeit zurück. Der Leiter des Kaiser-Wilhelm-Instituts für ausländisches öffentliches Recht und Völkerrecht, Victor Bruns, rief ihn nach Berlin. 1927 trat er mit einer demokratietheoretisch orientierten bemerkenswerten Arbeit über den «Begriff des Gesetzes in der Reichsverfassung» hervor.

Aber die Politik liess ihn nicht los. Hatte er 1920 zusammen mit Gustav Radbruch am Generalstreik gegen den Putschversuch von Wolfgang Kapp teilgenommen, so veröffentlichte er 1928 nun eine gründliche Studie über den italienischen Faschismus, den er dank seinen Sprachkenntnissen vor Ort studieren konnte. Diese Arbeit gehört bis heute zu den interessantesten zeitgenössischen Versuchen, dieses neuartige Phänomen theoretisch zu erfassen. In Berlin wirkte Heller auch an der neu gegründeten Hochschule für Politik. In scharfem Kontrast zu Hans Kelsen, der eine rein juristische Staatstheorie schaffen wollte, war Staatslehre für Heller der theoretische Teil einer empirischen politischen Wissenschaft.

Gegen den Widerstand der Fakultät, auch von Rudolf Smend, berief 1928 das preussische Ministerium Heller zum Extraordinarius für öffentliches Recht an die Berliner Juristenfakultät. Nachdem Bismarck die sozialdemokratische Partei zu «Reichsfeinden» erklärt hatte, konnte man sich in konservativen Kreisen einen sozialdemokratischen Verfassungsrechtler einfach nicht vor-

## Slevogt und Mozart

## Ausstellung in Deutschland

n. dg. Slevogt und Mozart – das ist ein Festkapitel des deutschen Impressionismus. Das Mozart-Jahr 1956 hat es aufgegriffen, das laufende Jubiläumsjahr des Komponisten führt es erneut vor Augen, und zwar zunächst in der «Villa Ludwigshöhe» im pfälzischen Edenkoben (bis zum 28. Juli), dann (vom 8. September bis zum 31. Oktober) im Landesmuseum Mainz. Max Slevogt (1868–1932), der ein so hochbegabter Sänger war, dass ihm seine Lehrer die Opernlaufbahn empfahlen, hatte sich so leidenschaftlich und anhaltend wie kaum ein anderer bildender Künstler mit Mozart auseinandergesetzt – was er als Maler, Zeichner, Graphiker und Illustrator aus der Inspi-



Max Slevogt: Francisco d'Andrade als Don Giovanni in der Friedhofsszene; Federzeichnung, 1912. Archiv Neukastel.

ration durch Mozartsche Musik hervorgebracht hat, gehört zum Schönsten in seinem Werk. Das wurde schon zu seinen Lebzeiten erkannt, die Besten vom Fach haben sich dazu geäussert, so Karl Scheffler, Kurt Glaser, Hildebrand Gurlitt oder Emil Waldmann.

Eine Schlüsselrolle zu Slevogts auf Mozart gestimmten Arbeiten spielte der portugiesische Sänger Francisco d'Andrade (1856–1921); das «geborene Operngenie» hat den deutschen Künstler seit seinem ersten Auftritt – in der Rolle des Don Giovanni 1894 in München – begeistert. Aus der Begegnung entwickelte sich nicht nur eine lebenslange Freundschaft, sondern resultierte auch ein Werksegment ganz im Zeichen von Mozarts Don Giovanni und seinem damals unvergleichlichen Sänger – grösste Berühmtheit hat das Bildnis «Der Weisse d'Andrade», heute in der Staatsgalerie Stuttgart, erlangt. Die Ausstellung zeigt das gesamte Material zu den Bühnenbildentwürfen der Dresdner Don-Giovanni-Aufführung von 1924 und den 1921 erschienenen Don-Giovanni-Zyklus von seinen Vorstudien bis zu den Holzstichen.

Ebenso intensive Anregungen empfing Slevogt von der «Zauberflöte»; im Auftrag des Verlegers Paul Cassirer entwarf er als XVIII. Werk der Pan-Presse (1920) die «Randzeichnungen zu Mozarts Handschrift»; die Radierungen sind durchweht vom Geist des schönen Augenblicks, tatsächlich sind sie das Resultat einer langen Entwicklung über viele Zeichnungen und Aquarelle; auf Einladung der Staatsoper Berlin übernahm der Künstler 1928 die Gesamtausstattung der «Zauberflöte». Gleichsam eine Zusammenfassung seiner Begeisterung für die Musik und die Welt der Oper hat Slevogt in den Wanddekorationen seines Landsitzes Neukastel gemalt – nach seinen eigenen Worten «ein Opernbilderbogen im Grosse, Zauberflöte, Don Juan, Siegfried und Faust sind die Figuren.» – Die Ausstellung findet ihren Niederschlag in dem von Hans-Jürgen Imiela und Berthold Roland bearbeiteten Katalog «Slevogt und Mozart» aus dem Verlag Philipp von Zabern, Mainz.

stellen. 1932 wurde er zum Ordinarius an die Universität Frankfurt berufen, wobei ein Teil der Fakultät Carl Schmitt favorisierte. Aber die kontinuierliche Arbeit, die nun vor ihm zu liegen schienen, blieb ihm versagt.

Bereits 1929 hatte Heller in der *Neuen Rundschau*, einem Organ der demokratischen Öffentlichkeit, in einem Aufsatz über «Rechtsstaat oder Diktatur?» vor dem politischen und kulturellen Abbruch gewarnt, den es bedeuten würde, wenn die Hitler-Diktatur an die Macht käme. Mit grosser Schärfe verurteilt er die «nationalistischen Professoren und Literaten» als Verräter am europäischen Geist. Gegenüber dem «verantwortungslosen Geschwätz blutloser Rationalisten und blutiger Irrationalisten» appelliert er nur noch an das «Gefühl des unüberwindlichen Ekels», der alle Beteiligten packen müsste, «und die Entscheidung zwischen faschistischer Diktatur und sozialem Rechtsstaat wäre gefallen». Aber alle Warnungen waren vergeblich.

Im Sommer 1932 vertrat Heller im Prozess «Preussen gegen Reich» vor dem Reichsgerichts-



hof in Leipzig die sozialdemokratische Landtagsfraktion. Mit Leidenschaft wandte er sich gegen den «Preussenschlag» Franz v. Papens. Als Kenner des schweizerischen Bundesstaatsrechts brachte er gewichtige Argumente gegen die Behauptung vor, die Voraussetzungen einer «Reichsexekution» seien erfüllt. Aber er hielt sich nicht an die unterkühlte Prozesstaktik. Er sprach offen aus, dass die juristischen Begründungen nur vorgeschoben waren und es lediglich darum ging, die sozialdemokratische Regierung Preussens auszuschalten, um die Aufnahme Hitlers in das Reichskabinett möglich zu machen. Auch wenn das Reichsgericht in Nebenpunkten der abgesetzten preussischen Landesregierung Recht gab, blieb es in der Hauptsache bei der Machtverschiebung zugunsten der Reichsregierung. Unter seinem Präsidenten Erwin Bumke hatte damit das Reichsgericht die letzte Barriere beseitigt, die der Machtübernahme der NSDAP noch im Wege gestanden hatte. Alle Befürchtungen Hellers wurden nun wahr. Seine Kritik an dem Verhältnis gewisser Staatsrechtslehrer zur Reichsverfassung zielte besonders auf Carl Schmitt, mit dem nach seinen Worten ein Bock zum Gärtner gemacht worden war.

In den kritischen Wochen des Jahres 1933 hielt sich Heller auf Einladung von Harold Laski zu Vorträgen an der *London School of Economics* auf. Er wurde dort bespitzelt und war unmittelbar gefährdet. Auf Rat von Freunden kehrte er nicht mehr nach Deutschland zurück und nahm eine Einladung der Spanischen Republik an. Durch das ominöse «Gesetz zur Wiederherstellung des Berufsbeamtentums» wurde er aus der Universität Frankfurt entfernt. Aus Spanien schrieb Heller eine lakonische Postkarte an Carl Schmitt, in der er ihm «zur verdienten Ernennung zum Staatsrat durch Minister Göring» gratulierte. Er arbeitete nun fieberhaft daran, seine «Staatslehre» fertigzustellen. Aber ein Herzleiden, das er sich als Soldat im Krieg zugezogen hatte, verschlimmerte sich wieder. Er war den Belastungen nicht mehr gewachsen. Wenige Monate nachdem er sich vor

dem Terror Hitlers hatte in Sicherheit bringen können, verglühte sein Leben.

#### Folgen und Probleme

Sein Werk ist für uns heute ein wichtiger Schlüssel zum Verständnis der Schwierigkeiten und des Scheiterns der Weimarer Republik. Aber es ist nicht nur von historischem Interesse. Der eigentliche Grund für die neue Beschäftigung mit Heller liegt darin, dass die in seinem Werk thematisierten Probleme, wie Ingeborg Maus feststellt, in der Bundesrepublik bis zur Stunde ungelöst sind. Dieses neue Interesse an Heller kam in einem internationalen Symposium zum Ausdruck, das aus Anlass seines 50. Todestages im November 1983 an der Freien Universität Berlin stattfand, dessen Ergebnisse unter dem Titel «Der soziale Rechtsstaat» bei Nomos in Baden-Baden veröffentlicht worden sind und ein breites Spektrum der heutigen Heller-Forschung zeigen. Von den Monographien möchte ich nur auf die bei Nomos erschienenen Arbeiten von Wolfgang Schluchter und Gerhard Robbers verweisen sowie auf die bei Helbing & Lichtenhahn veröffentlichte Studie von Ruedi Waser.

Deutschland ist nicht gerade reich an demokratischen Traditionen. Auf den Analytiker und Mahner aus der Ersten Republik kann die Zweite Republik nicht verzichten. Wir brauchen den Beitrag Hellers auch zur Bewältigung der schwierigen Zukunftsaufgaben. Nach dem Zusammenbruch eines nichtlebensfähigen Systems von sozialistischer Kommandowirtschaft wächst die Bereitschaft im linken Spektrum der Bundesrepublik, insbesondere in den neuen Ländern, auch auf Hellers Marx-Kritik zu hören.

Vom 11. bis zum 13. Juli hat an der Humboldt-Universität zu Berlin ein Symposium stattgefunden, das seinem Gedenken gewidmet war. An seinem Geburtstag, am 17. Juli, veranstaltet die Friedrich-Ebert-Stiftung Leipzig ein Heller-Forum. So kommt langsam, mit grosser Verspätung, eine Diskussion wieder in Gang, die er in der Agonie der Weimarer Republik angestossen hatte.

Christoph Müller

## Briefe und Träume

### Zwei Bücher über Rahel Levin Varnhagen

Seitdem die legendäre «Sammlung Varnhagen», einst im Besitz der Königlich Preussischen Staatsbibliothek zu Berlin, 1941 aus der bombengefährdeten deutschen Hauptstadt ausgelagert und zeitweise im schlesischen Kloster Grüssau deponiert, in der Biblioteka Jagiellońska Krakau wieder zugänglich ist, erfreut sie sich reger wissenschaftlicher Benutzung. Die Briefe und Manuskripte der geistigen Elite des 19. Jahrhunderts, vom ehemaligen preussischen Diplomaten, Publizisten und Schriftsteller Karl August Varnhagen von Ense (1785–1858) mit Eifer gesammelt und vorbildlich archiviert, ziehen seit Anfang der achtziger Jahre Forscher aus aller Herren Ländern in die polnische Universitätsstadt. Was sie dort erwartet, sind Unmengen unveröffentlichter Handschriften, die vielfältige Aspekte des politischen, wissenschaftlichen und kulturellen Lebens in der ersten Hälfte des 19. Jahrhunderts in bemerkenswerter Weise beleuchten.

Einen besonderen Platz in der Sammlung und im Interesse der Literaturwissenschaftler nehmen die fast 6000 Briefe ein, die Varnhagens Gattin Rahel Levin Varnhagen (1771–1833) mit nahezu 300 Korrespondenten gewechselt hat. Der bereits mehrfach – unter anderem von ihrem Gatten und von Hannah Arendt – Porträtierten widmet die

Berliner Literaturwissenschaftlerin *Barbara Hahn* jetzt zwei lesenswerte, wenngleich höchst unterschiedliche Bücher.

Ihre monographische Studie über «Rahel Levin Varnhagens Briefwechsel» nähert sich in subtiler Auseinandersetzung mit den schwer lesbaren Handschriften der Frau und Jüdin, der Berliner Salonière der Goethezeit und der Romantikerin. Rahel Varnhagen gilt Barbara Hahn als eine grosse Schriftstellerin, «allerdings eine ohne Werk». Dabei gebührt der Verfasserin das Verdienst, die Wege der bisherigen publizistisch-editorischen Überlieferung, die bereits zu Rahels Lebzeiten von ihrem Gatten angelegt wurden, voll zu durchschreiten und doch zu verlassen. So räumt sie mit mancher Legende um Rahel auf, rettet aber auch Varnhagens Ehre als durchaus verlässlicher Herausgeber und erhellt manches im Druck der Briefwechsel bisher ausgesparte Detail. Hierzu zählt etwa die erotische Dimension in der Korrespondenz Rahels oder die Existenz eines unehelichen Kindes Karl August Varnhagens mit Minna Spazier.

Barbara Hahn plädiert lebhaft für die Herausgabe geschlossener Briefwechsel, die jeweils beide Partner gleichberechtigt zu Wort kommen lässt. Aus der Fülle der vorliegenden Korrespondenzen demonstriert sie an sechs unterschiedlichen Beispielen die Vorzüge einer solchen Betrachtungs- und Editionsweise. Dabei machen ihre Kapitel über die Briefwechsel Rahel Varnhagens mit Friedrich Gentz, Pauline Wiesel, Karl August Varnhagen, Alexander von der Marwitz, Auguste Brede und Minna von Zielinski sowohl das inhaltliche, emotionale und formale Spektrum von Rahel Varnhagens Korrespondenz als auch ihre wechselnde Position in diesen Briefpartnerschaften deutlich. Sind der Verfasserin die biographischen Differenzen zwischen Rahel und Friedrich Gentz wesentliche Ursache für das Verfehlen, das diesen Briefwechsel prägt, gilt ihr bei Rahel und Karl August Varnhagen das gemeinsame Schreiben gleichsam als konstitutives Element ihrer Freundschaft, Liebe und Ehe.

Der Band «Im Schlaf bin ich wacher», für den Barbara Hahn als Herausgeberin verantwortlich zeichnet, versammelt kommentierende Essays, fiktive Geschichten und Collagen von sieben Autorinnen, denen schriftlich überlieferte Träume Rahels als Anregung und Ausgangspunkt dienten. Dabei treten höchst unterschiedliche Handschriften und Deutungen zutage, die sich Rahel Varnhagen reflektierend annähern oder sich auch, von ihr inspiriert, weit entfernen. Geschlossenheit wird nicht angestrebt. Anders als in Barbara Hahns monographischer Studie bleibt das Bild Rahel Varnhagens hier jedoch merkwürdig diffus, die Texte geraten oft zu Selbstreflexionen der Autorinnen. Aber auch dies vermittelt Lesevergnügen und mancherlei interessante Einsicht. Und nicht zuletzt: Alle Autorinnen erweisen der kaum 1,50 Meter grossen «kleinen Levi», die so einzig war «als die grösste Erscheinung dieser Erde», ihre Reverenz.

Werner Greiling

Barbara Hahn: Antworten Sie mir! Rahel Levin Varnhagens Briefwechsel. Stroemfeld/Roter Stern, Basel 1990.

Barbara Hahn (Hg.): Im Schlaf bin ich wacher. Die Träume der Rahel Levin Varnhagen. Luchterhand-Literaturverlag GmbH (Sammlung Luchterhand 896), Frankfurt am Main 1990.

## Optimistischer Entwurf

### Hans Titze: «Sein und Sinn»

In Anlehnung an Heideggers Hauptwerk «Sein und Zeit» nennt Hans Titze seine Arbeit «Sein und Sinn», mit der er einen «Schlussstein» unter seine geistige Entwicklung setzen möchte – wohl wissend, dass der eigentliche philosophische Weg niemals zu Ende ist, sondern immer wieder von neuem beschritten werden muss.

Gestützt auf Erkenntnisse der Naturwissenschaften thematisiert Titze – er wurde 1903 in Leipzig geboren und hat sich neben seiner Ingenieurarbeit intensiv mit Philosophie befasst – die Frage nach dem Sinn des Lebens, den er als ein «Über-sich-hinaussein-Wollen» interpretiert.

Der Verfasser beginnt mit Definitionen und Erläuterungen wichtiger Begriffe, die die Beziehung von Sein und Sinn berühren, und weist darauf hin, dass es ausser Zufällen auch Gesetzmässigkeiten im aussermenschlichen Sein und menschlichen Dasein gibt. Inbegriff und Grund alles Seienden sei das Sein. Man erkenne es als «Werden in Freiheit».

Der Autor fragt ferner nach dem Sinn der Evolution, dem Sinn der Technik und dem Sinn der Geschichte. Dieser, so glaubt er optimistisch, gehe in «Richtung zur Überwindung von Gewaltmassnahmen und zur Durchsetzung des kategorischen Imperativs» und habe seinen letzten Grund im Fortbilden der geistig-seelischen Fähigkeiten.

«Sein hat Sinn als Werden», schreibt Titze abschliessend, «menschliches Dasein hat Sinn, dies zu verstehen und bei sich zu vollziehen. Ohne Sinn des Werdens hat Sein keinen Sinn. Dies gilt für alles in der Welt.»

Ursula Homann

Hans Titze: Sein und Sinn. Verlag Rolf Kugler, Oberwil bei Zug 1990.

Barbara Vine

## Liebes

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Er musterte sie so zweifelnd, so misstrauisch betroffen, dass sie lachen musste. «Komm, Paul, was denkst du dir jetzt schon wieder?» Lachen klang fröhlich, unbeschwert, gar nicht als läge Schlimmes vor ihr. «Hinten sitzt man es doch viel einfacher. Ich bin diese kleinen Autos eben nicht gewohnt.»

Dann sassen sie nebeneinander, und sie nahm seine Hände. «Es ist nicht so schlimm, wie du denkst, wirklich nicht. Natürlich habe ich Angst gehabt, aber es war nicht mehr so arg. Ralph ist der Paranoiker, er hatte mich angesteckt. Gewiss, ich bin ihm auch dankbar, aber ich glaube, nicht einmal du kannst ermassen, mit welcher Ausschliesslichkeit er an Gefahren und Bedrohungen denkt. Es ist sein Leben, irgendwie meint er wohl das Leben sei nur dann lebenswert, wenn man alles getan hat, um Gefährdungen auszuschalten. Ich war nur ein Vorwand. Für so einen Mann muss ich das reinste Gottesgeschenk gewesen sein: eine nervöse, eine bald schon von massiven Ängsten geplagte Frau, die sich bedingungslos in seine Hand gab und mit all diesen grotesken Verkünderungen einverstanden war: Stahltüren im Salon, nächtliche Festbeleuchtung, ein Leibwächter.» Sie drückte ihm die Hand, lockerte den Griff, hob seine Hand an die Lippen. «Ach, Paul, wie viele Männer wären überglücklich, wenn sie sich ein Dornröschen im Dornwald halter dürften...»

«Was werden sie mit dir machen?» fragte er.

«Es wird wohl nicht allzu arg werden. Ich hätte der Sache vor Jahren ein Ende machen sollen, und das hätte ich auch gekonnt. Es sah ja so aus, als sei ich davongekommen, und ich war natürlich heilfroh darüber. Die Forderungen hörten auf, ich konnte aufatmen, hatte endlich Ruhe. Nachdem ich Ralph kennengelernt hatte, war es zu spät, und als dann letztes Jahr ein Brief kam und noch einer, war die Angst wieder da. Vielleicht ist es aber eine grundlose Angst, vielleicht beunruhige ich mich völlig umsonst. Sie haben ihr die Haare abgeschnitten, sagst du?»

Er nickte.

«Daran bin ich schuld. Und deshalb tue ich es, nicht nur wegen Jessica: Um ein für allemal einen Schlussstrich zu ziehen. Eigentlich hätte ich das schon längst tun müssen.»

«Je näher es rückt», sagte er, «desto unsicherer werde ich. Kann ich dir das überhaupt zumuten?»

«Du kannst mich nicht daran hindern.»

«Ich könnte zur Polizei fahren. Zusammen mit dir würde ich es wohl fertigbringen. Alles sieht anders aus, Nina, wenn man einen Verbündeten hat, einen Menschen, der hinter einem steht.»

Sie wandte das Gesicht ab. «Das darfst du nicht.»

«Aber du sagst, dass deine Angst vielleicht grundlos ist, dass es nicht allzu arg kommen dürfte. Heisst das nicht, dass ich nicht um Jessica zu fürchten brauche?»

«Du würdest sie gegen dich aufbringen. Alexander vielleicht nicht einmal so sehr. Ich habe dir wohl gar nicht gesagt, wie er heisst, der junge Mann, der so wütend wurde, als sie daran gingen, mir die Nägel abzuschneiden... Er wird mir nichts tun. Aber die anderen, die Italiener... ihre Namen habe ich nie gehört... ich habe kein gutes Gefühl, wenn Jessica in ihren Händen ist. Solange man ihnen zu Willen ist... mach nicht so ein Gesicht, Paul... wenn du tust, was sie verlangen, wollte ich sagen, wird ihr nichts geschehen. Mich wollen sie, das weisst du ja.»

Sie kletterte über den Sitz nach vorn, während er ausstieg und um den Wagen herumging. Sie hatte Jeans an und eine Karobluse. Erst jetzt fiel ihm auf, dass sie ungeschminkt war und keinen Schmuck trug. Warum sie nichts mitgenommen habe, wollte er wissen, nicht einmal eine Handtasche.

«Mir ist nichts eingefallen. Bis auf einen Schirm. Einen Schirm habe ich mitgebracht.»

Der Regen machte alle Fenster blind, sie sassen wie zwischen Wasserwänden. Er nahm Nina in die Arme und küsste sie. Dann liess er den Motor an, schaltete die Scheibenwischer ein und folgte den Hinweisschildern nach Stowmarket. Eine Weile sagte Nina gar nichts. Es regnete so heftig, dass man kaum die Hand vor Augen sehen konnte und an manchen Stellen Wasserglätte die Fahrt behinderte. Nördlich von Kettlebaston bog er auf die B 1115 ein und fuhr eine Weile über eine gerade Strecke ohne Nebenstrassen, so dass er sich schon fragte, ob er versehentlich an Great Finborough vorbeigefahren war, ohne es zu merken. Dann war er plötzlich mitten im Ort, dessen geringe Grösse dem hochtrabenden Namen Hohn sprach, musste wenden und wieder zurückfahren.

Von hier aus war der Abzweig mit dem Hinweisschild auf nie gehörte Dörfer deutlich zu sehen. Der Regen hatte etwas nachgelassen. Er bot auf einen schmalen Weg zwischen hohen, üppig-sommerlich belaubten Hecken ein, die vor Nässe glänzten und triefen. Heckenrosen mit flachen, hellrosa Gesichtern schimmerten vor dem feuchten Laub. Kein Haus, kein Gehöft weit und breit. Ein schmales Strässchen, das sich bergauf



# Ein demokratischer Fundamentalist

Zum hundertsten Geburtstag des Carl-Schmitt-Antipoden Hermann Heller

Wie die Weimarer Republik blieb auch Hellers Werk Fragment. Der Demokratie und seinem Leben fehlte die Zeit zur Reife. Wenige Monate nach Beginn der Diktatur starb Heller, erst 42 Jahre alt. Es blieben literarisch glanzvolle Bruchstücke einer großen Konfession für mehr Gerechtigkeit im Recht, für mehr Menschlichkeit in den Staatszwecken. Am Ende war Heller zum größten Gegenspieler Carl Schmitts geworden. Doch dessen Strahlkraft als Provokateur erreichte er nicht.

War er zu arbeiterfreundlich, zu links, zu kompliziert und zu entlarvend, als man in der Ära Adenauer für die neue Demokratie nach geistiger Patenschaft Ausschau hielt? Erst seit Beginn der sechziger Jahre gilt Hermann Heller als „der Vater der Politischen Wissenschaft in Deutschland“ (Hans Mommsen). Seit Beginn der siebziger Jahre zählt er unbestritten zu den Großen der Theorie des sozialen Rechtsstaats.

Die große dreibändige Edition der Gesammelten Schriften (1971), die „Staatslehre“ Hellers in der Edition Gerhart Niemeyer schlug dennoch nur eine schmale Bresche in die Mauer eigentümlicher Fremdheit, die Heller bis heute umgibt. Liegt dies an unserer Beschämung durch Hellers Glauben, der Mensch könne durch Bildung und Wissenschaft gesittet und zur Politik geadelt werden? Oder durch Hellers Verheißung, die Deutschen könnten im heftigsten Streiten um das Gute, das der Staat dem Menschen schuldet, friedensfähig werden?

Der Jurist, Politologe und sozialdemokratische Politiker wurde 1891 im österreichischen Teschen geboren, jüdischen Glaubens, später konfessionslos, der Vater war Rechtsanwalt. Er studierte Rechts- und Staatswissenschaften in Wien, Graz, Innsbruck und Kiel. Während des Militärdienstes legte er 1915 in Graz eine „Kriegspromotion“ ab und wurde im militärgerichtlichen Dienst verwendet, nachdem er sich als Kanonier an der galizischen Front schwere Gesundheitsschäden zugezogen hatte. Seine Herzkrankheit führte 1933 zum frühen Tod.

1919 kam Heller nach Kiel zu Gustav Radbruch, mit dem er die Arbeiterbildung organisierte. Zwischen beiden Männern erwuchs aus der gemeinsamen Haft bei meuternden Marinesoldaten eine Freundschaft. In Kiel trat Heller der Sozialdemokratischen Partei bei. An der Universität lehrte er bis 1922 als Privatdozent. Anschließend wirkte er in Leipzig als Leiter des Volkshochschulwerkes und des Volkshochschulwerkes. Heller suchte den Arbeitern durch staatsbürgerliche Bildung politische Urteilsfähigkeit zu vermitteln, allerdings nicht im Sinne einer sozialistischen Kadernschulung. Vielmehr setzte er, geleitet von seinem Traum einer Versöhnung von Nation und Sozialismus, auf wissenschaftliche Bildung.

1926 wurde Hermann Heller nach Berlin an das Kaiser-Wilhelm-Institut für Ausländisches Öffentliches Recht und Völkerrecht berufen und 1928 zum außerordentlichen Professor für Öffentliches Recht an der Berliner Universität ernannt. Das Institut stellt ihn im selben Jahr frei für einen sechsmonatigen Aufenthalt in Italien. Er wollte dort den Faschismus in seiner Herrschaftspraxis studieren. Seine Erfahrungen faßte er in seinem hellsichtigen Buch „Europa und der Faschismus“ zusammen, durchdrungen vom Abscheu gegen die Arroganz der Macht und die totalitären Kontrolltechniken im Namen der Demokratie.

Im März 1932 erhielt Heller, wohl auf Empfehlung Hugo Sinzheimer, ein Ordinariat für Öffentliches Recht an der Universität Frankfurt am Main. Während eines Besuches der London School of Economics erreichte ihn die Nachricht von Hitlers Bestellung zum Reichskanzler am 30. Januar 1933. Ohne nach Frankfurt zurückzu-

kehren, nahm Heller das Angebot einer Gastprofessur in Spanien an und lehrte in Madrid. Dort erlag er nach einem Kolleg am 5. November seinem alten Herzleiden.

Ein Jahr zuvor war Heller in Deutschland bekannt geworden durch seine glanzvolle Rolle als Vertreter der preußischen SPD-Landtagsfraktion vor dem Leipziger Reichsgericht im Prozeß um die Rechtmäßigkeit von Papens Preußenschlag vom 20. Juli 1932. Prozeßvertreter der Reichsregierung war Carl Schmitt. Schmitt verkörperte für Heller jene rückwärtsgewandten Primat-Lehren der Staatsgewalt, die sich

gegenüber Gesellschaft und Individuen absolut setzen. Eine Rechtswissenschaft, die nicht Arbeit für die Gerechtigkeit sein wollte, sondern der Erforschung des Staatswillens galt, lehnte Heller entschieden ab: „Nur ein Recht, das mit Erfolg den Anspruch erhebt, der Gerechtigkeit zu dienen, vermag auch die Herrschenden selbst zu jenen Leistungen zu verpflichten, durch welche die Staatsmacht konstituiert wird.“

Der Staat, sagt Heller in seiner Staatslehre, sei nicht objektiver Geist, und wer den Versuch mache, „ihn seiner psycho-physischen Menschensubstanz gegenüber zu objektivieren, behält ein Nichts in der Hand. Denn der Staat ist nichts anderes als eine

stimmte Heller die Politische Wissenschaft als Wissenschaft für die Demokratie.

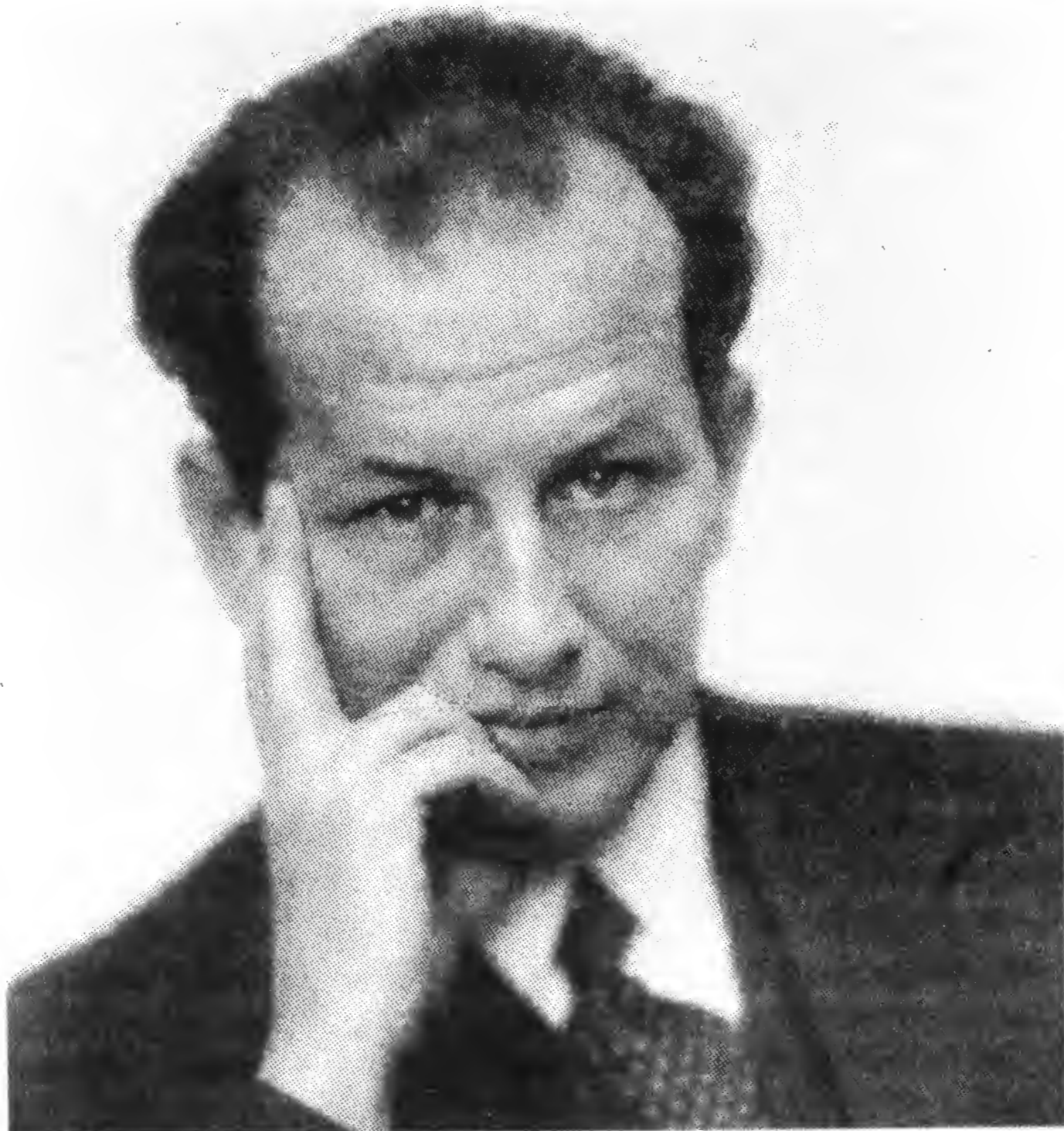
Das Organisations- und Sinngefüge des Staates sollte nicht von oben gestaltet und von außen interpretiert, sondern von unten aufgebaut werden. Der Wissenschaftler sollte über die Waffengleichheit zwischen Staat, Gesellschaft und Individuum wachen und dafür sorgen, daß eine solche Gemeinschaft nicht unter die Diktatur eines Interpretationsmonopols gerät und damit ihre Zukunftsoffenheit verliert: „Da die Menschheit kein anderes Dasein hat als dieses, welches im steten Entwicklungskampfe, räumlich und zeitlich begriffen, in unserer Geschichte vorliegt, so entbehrt eine Darstellung des Staates, welche sich der historischen Grundlagen entäußert, aller ernststen Belehrung und gehört den Phantasiespielen an.“ Die Politik müsse, um lehrreich zu sein, ihre Aufgaben nicht wählen, sondern empfangen, „wie sie im Drange von Raum und Zeit hervorgehen aus jener tiefen Verschlingung der gesunden Kräfte der Menschheit mit all dem krankhaften Wesen, welches in der physischen Welt Übel, in der moralischen Böses heißt. Die Politik ist Gesundheitslehre, nicht weil sie Gesundheit geben, sondern weil sie die Ursachen der Krankheit entdecken und oft vermindern kann.“

Dieses Sprachbild übernahm Heller aus der „Politik“ von Friedrich Christoph Dahlmann, den er als streitbaren politischen Historiker sehr schätzte und der fast hundert Jahre vor Hellers Staatslehre die Selbstverpflichtung des Wissenschaftlers formuliert hatte: „Schweigend der Zerstörung aller menschlichen Ordnung zuzusehen, nur zu beten und zu seufzen, wo noch gesetzliche Mittel bleiben, oder zu sagen wie ein Beamter des Landes: ‚Ich unterschreibe alles, Hunde sind wir ja doch!‘, halte ich des Mannes für unwürdig... Ich kann keine Revolution hervorbringen, und wenn ich's könnte, täte ich's nicht; allein ich kann ein Zeugnis für Wahrheit und Recht ablegen gegen ein System der Lüge und Gewalttätigkeit, und so tu' ich.“

Heller konnte die Gefahren, die der Weimarer Republik drohten, in kritischer Schärfe darstellen, doch blieb er gegen die Selbstgefährdung, die der Demokratie als Staatsform eigen ist, eigentümlich blind. So bedurfte es für ihn keines Reichspräsidenten oder Verfassungsgerichts als Verfassungshüter, denn Verfassungshüter waren für ihn alle gesitteten Demokraten. Hellers demokratischer Fundamentalismus ließ ihn, wie er sagte, „an die Arbeiterschaft als sittliches Prinzip der Zukunft“ ebenso glauben wie an eine je nach nationaler Bedarfslage einvernehmliche Gestaltung der Eigentums- und Produktionsverhältnisse. Die Idee einer Synthese von Sozialismus und Nation bezeugt eine demokratische Leidenschaft des Herzens, die sich offenkundig von der Leidenschaft des Intellekts nicht disziplinieren lassen wollte. Daß der freiheitliche Staat, wie es Ernst Wolfgang Böckenförde formuliert hat, von Voraussetzungen lebt, die er selbst nicht garantieren kann, war ihm ein fremder Gedanke.

Heller hat allzu naiv an die demokratische Bewährung, „an die volkslegislative Gesittung“, wie er sagte, der Massen in Grenzsituationen geglaubt. Sein Begriff der Politischen Wissenschaft muß deshalb um den Imperativ der „militant democracy“ (Karl Loewenstein, 1937) erweitert werden. Die Freiheit der Wissenschaft hat die Freiheit der Gesellschaft zur Voraussetzung und begründet ein unauflösliches Verhältnis wechselseitiger Verantwortung. Hellers Radikalität der Erkenntnisuche in einer Zeit, in der Haß-Utopien gegen die Vernunft und gegen die christliche Gesittung emporwucherten, machte seinen Weg einsam. Sie bezeugt seine geistige Würde noch im politischen Scheitern.

MANFRED FUNKE



Hermann Heller

Foto Archiv

gegenüber Gesellschaft und Individuen absolut setzen. Eine Rechtswissenschaft, die nicht Arbeit für die Gerechtigkeit sein wollte, sondern der Erforschung des Staatswillens galt, lehnte Heller entschieden ab: „Nur ein Recht, das mit Erfolg den Anspruch erhebt, der Gerechtigkeit zu dienen, vermag auch die Herrschenden selbst zu jenen Leistungen zu verpflichten, durch welche die Staatsmacht konstituiert wird.“

Mit der Weimarer Reichsverfassung, die von der Freiheit der Menschen und der Mäßigung der Staatsgewalt ausging, war die religiöse, geistige und politische Werthaftigkeit des Individuums zur Grundlage der europäischen Kulturentwicklung gemacht worden. Alle dagegen aufgebotenen Staatsphilosophien wies Heller in seiner „Staatslehre“ zurück. So ist sein Werk Traditionskritik an den Lehrgebäuden von Hegel bis Kelsen, an den positivistischen Sinnlosigkeiten entpersönlichter Daseinsdeutung.

Vor allem bekämpfte Heller die Fiktion der Staatsgewalt als „pouvoir neutre“, die etwa nach Hans Kelsen in ihren rechtsetzenden Akten ebensowenig Unrecht begehen kann, wie die Sünde bei Gott ist. Für Heller war der Staat nicht unbewegter Bewegter, und deshalb wollte er den modernen Staatsbegriff aus Mythologie und Metaphysik herauslösen und ihn befreien zur Politik als dem „höchsten, weil universalen Tätigkeitsfeld menschlicher Vernunft“. Der

menschlich-gesellschaftliche Lebensform, das heißt Leben in Form und Form aus Leben.“ Staat als Emanation des Volksgeistes sei Phrase. Staat, Volk als politische Vielheit, existiere weder vor noch über dem Volk als Vielheit, auch nicht als Reflex einer naturgesetzlichen oder verfügten ideellen Ordnung. Die Erscheinungsvielfalt des Staates erlaube keinen dezisionistischen Staatsbegriff.

Jede echte Frage, so Heller, habe ihren Ursprung in der „Fragwürdigkeit des von uns faktisch mitgelebten Lebens“. Darin sah er keine schmerzliche Begrenzung, sondern den Aufruf zur konkreten Ausgestaltung demokratischer Tugenden. Sie sollten sich auf die Entwicklung eines sozialen Rechtsstaates in Deutschland ausrichten und von einer nach zeitlosen Gesetzen geordneten Seinsvorstellung in der Attitüde der Wissenschaft ablassen.

Seine Politische Wissenschaft richtete keinen neuen Prototyp des demokratischen Verfassungsstaates auf, sondern nahm eine kritische Prüfung des Überkommenen vor, das er auf Grund und Maß der gegebenen Zustände zurückführte. Seine Politische Wissenschaft ist geprägt vom Kampf gegen alle Monopole politischer Sinnstiftung, ob es sich um von der konkreten Gesellschaft abgelöste Rechts- oder Staatslehren handelt oder um die Diktaturen des Bolschewismus und Faschismus. Um sie abzuwehren, be-



# Wenn die Weltreise zur Stadtrundfahrt wird

Ein Festival mit Fehlanzeigen: „Theater der Welt“ 1991 in Essen

Die Theaterreise um die Welt hat achtzehn Tage gedauert. In der ersten Woche ist sie nicht über Europa hinausgelangt. Sechs Begegnungen mit Thomas Bernhard haben stattgefunden, allein vier Stunden waren wir mit so wunderbaren Schauspielern wie Anneliese Römer, Wolfgang Gasser und Marianne Hoppe auf dem „Heldenplatz“ in Wien zusammen, die diesen Schandfleck der österreichischen Geschichte zu einer Sehenswürdigkeit herausgeputzt haben. Und fast genauso lang haben uns die Titeldarsteller von „Ritter, Dene, Voss“ mit ihrer Familienhölle vertraut gemacht, bis es uns fast wohliger dabei geworden ist. Mit der Hommage an Thomas Bernhard war dem Festival „Theater der Welt“ in Essen ein vielversprechender Auftakt garantiert: Claus Peymann und dem Burgtheater sei Dank.

Dazwischen sind wir dreimal zu einer Art Stierkampfarena gepilgert, um uns von dem Pariser „Théâtre du Soleil“ der Ariane Mnouchkine und seinem großangelegten Antikenprojekt in das Griechenland des Euripides und Aischylos entführen zu lassen. Im Zusammenspiel von indischem Tempeltanz und indonesischer Schlagwerkmusik, japanischer Kabuki-Strengung und arabischem Zungenschlag entsteht ein theatralisches Welt-Wunder: die Wiedergeburt der Tragödie aus dem Geist des Tanzes – schmerzhaft, schaulustvoll und schrecklich-schön.

Aber diese Ausflüge nach Wien und nach Berlin, zum Burgtheater und zum „Théâtre du Soleil“ waren auch schon die aufregendsten; keiner der anderen war, auch wenn er in entlegene Erdteile führte, mit so großen Abenteuern und so atemraubenden Aussichten verbunden, keiner wartete mit so intensiven und spannenden Erlebnissen auf, keiner hat so sehr die Sinne gereizt und die Herzen gerührt, keiner soviel zu sehen und zu staunen gegeben. Dabei ging die Reise kreuz und quer über die Erde: nach Sibirien und Südamerika, nach Kanada und Kuba, nach Asien und Australien führte sie: In Windeseile konnte der Zuschauer von einem Weltende zum anderen wechseln. Zu Luftsprüngen aber hatte er kaum einmal Anlaß.

Zwei Blitzbesuche wurden Jugoslawien abgestattet: In Ljubljana hat uns das Theatre „Mladinsko“/Red Pilot just zum Kriegsbeginn in einen Güterwaggon gepfercht, um uns „Zenit“, eine freie Adaption von T. S. Eliots „Mord im Dom“, als diabolisch-dröhnendes Polit-Grusical zwi-

schen Schwulst und Schock, Gebet und Grimm nahezubringen; und in Skopje nahm das Albanische Drama-Theater, eine Bühne der Bevölkerungsminderheit, ein paar Kurzgeschichten des kroatischen Dichters Nikola Sop zur Vorlage und zum Vorwand für eine surrealistische Collage und unbeholfene Multi-Media-Show, die sich gemäß dem Titel „Furka e Mistershme“ (Der geheimnisumwobene Zirkel) ebenso eigenwillig wie eklektisch im Kreise drehte.

Die beschwerlichste Expedition haben wir nach Sibirien, zum „Staatlichen Drama Theater“ nach Omsk unternommen, wo Dostojewski einst vier qualvolle Jahre verbracht hat. Die aktualisierende Dramatisierung, die hier seinem Roman „Die Erniedrigten und die Beleidigten“ zuteil wird, tilgt viele Rührseligkeiten und strafft die Verflechtung der beiden Fabelstränge: die Sterbensgeschichte des frühreifen Waisenmädchens Nelly und die Liebesgeschichte der verarmten Adels-tochter Natascha mit dem weltfremden Fürstensohn Aljoscha, die von dessen Vater hintertrieben wird. Der polnische Regisseur Henryk Baranowski reichert die Figuren mit Zügen anderer Romanhelden Dostojewskis an, zieht politische Verbindungslinien in die jüngste Vergangenheit, montiert Zitate von Lenin bis Solschenizyn und entwickelt, aus einer perspektivreichen Simultanbühne heraus, eine kafkaeske Phantasie und Symbolsprache für das Stück, ohne ihm auch formal Schärfe und Spannung sichern zu können: Langwierig ergeht sich seine Inszenierung in ambitionierten Bildern und altmodischen Schönheiten.

Gleich vier Reiseziele lagen in Lateinamerika, das damit – von einem Symposium flankiert – als Schwerpunktthema ausgewiesen war. Zweimal wurden wir in die Praxis des Schauspielers, Autors und Psychoanalytikers Eduardo Pavlovsky in Buenos Aires gebeten, der in seiner Sado-Schlammschlacht „Paso de Dos“ (Pas de deux) einmal mehr die Analogie zwischen Faschismus und Machismo, staatlicher und sexueller Gewalt illustriert, und in „Potestad“ (Macht) den politischen Umständen und psychologischen Folgen einer Kindesentführung während der Militärdiktatur nachgeht – wortreich-outrierte (und vor Ort sicher wichtige) Fast-Monologe, doch szenisch wenig ergiebig.

Das vorrevolutionäre Kuba nimmt sich die Familiensaga „Las perlas de tu boca“ (Die Perlen deines Mundes) zum Schau-

platz, die das „Teatro Buendia“ in übertrieben-aufgeregten Szenen abspult. Die Technik der Rückblende dient da lediglich als Passepartout für ein konventionelles Erzähltheater, dem auch die „Grupo Theja“ – zudem noch mit Bühnentechnischen Schwierigkeiten belastet – in „Autorretrato de artista con barba y pumpa“ (Selbstbildnis eines Künstlers mit Bart und Zylinder) von José Ignacio Cabrujas unreflektiert vertraut. So führten die Versuche, durch die Verschränkung von Realismus und Phantastik mehr als die gegenständliche Wirklichkeit zu erfassen, immer wieder in eine vordergründige Vagheit.

Doch auch Denise Stoklos aus Brasilien haben wir kennengelernt, die sich auf leerer Bühne – und englisch sprechend, stammelnd, sprudelnd – als „Mary Stuart“ vorstellte – und schon im nächsten Moment Elisabeth I. war. Schriell und beklemmend verinnerlicht sie das Duell der beiden Königinnen zum Seelenkampf und läßt es zugleich körperliche Dringlichkeit gewinnen, sprechmaskenvirtuos und wandlungsvital springt sie zwischen den Rollen hin und her und liefert auch noch den Kommentar dazu: Ein Energiebündel, eine Körpersprachkünstlerin, eine szenische Slalommeisterin – Südamerikas Antwort auf Dario Fo.

Und nicht nur Explosives und Exotisches, Adrettes und Aufregendes, sondern auch Nettes und Neckisches bot das Festival, wie das „Stuffed Puppet Theatre“ des vielseitig-gewitzten Puppenspielers Neville Tranter aus Australien oder die Koproduktion „Terre Promise“ alias „Terra Promessa“, in der das „Théâtre de la Marmaille“ aus Montreal und das „Teatro dell'Angelo“ aus Turin die Menschheitsgeschichte zum wortlos-suggestiven Bilderstreifentheater poetisieren. Die Vertreibung aus dem „Garten der Lüste“, die uns der bulgarische Regisseur Ivan Stanev in seiner deutschsprachigen Produktion „Hermaphroditus“ zumutete, führte dagegen geradewegs auf die Müllhalde: eine hochgestochene Peinlichkeit, die symbolhubernde Kulturkritik verquast und verquält zum pubertären Manierismus veramscht.

Danach nahm sich der durch Klassik und Krimimusk aufgedonnerte Zugriff auf „Macbeth“, den die japanische Gruppe „Daisan Erotica“ in „Ein Mann namens Macbeth“ betreibt, mit seinen kampfsportlichen Trivialisierungen und videoclipästhetischen Effekten besonders

stürmisch aus: ein Abstecher mit Shakespeare in Nippons mafiosofinstere Unterwelt. Von den Deklassierten der Oberwelt, dem Leben der koreanischen Einwanderer in Japan, erzählt „Die Legende der Meerjungfrau“ der Gruppe „Shinjuku Ryozanpaku“: ein Melodram, voller Budenzauber und rasanter Boxszenen, das so piffig und pittoresk – und feuchtfrohlich, wenn es in den Wassergraben geht – über die Bretter trubelt, als hätte das Berliner „Grips“-Theater, das mit „Auf der Mauer auf der Lauer“ nach Essen eingeladen war, Entwicklungshilfe geleistet.

Was sich der weitgereiste Festivalleiter Börries von Liebermann mit seiner insgesamt konturlos und epigonal wirkenden Programmauswahl gedacht haben mag, muß sich auch Hansgünther Heyme als sein mitverantwortlicher Kodirektor fragen lassen. Qualitätsgespür und Entdeckerehrgeiz hat er nicht entwickelt, Experimente, Innovationen und Avanciertheiten blieben – vollmundig inserierte

Fehlanzeigen. Sinn für Dramaturgie aber hat von Liebermann bekundet, als er die Gruppe „Goripae“ aus Korea mit ihrem unsäglichen „Ohgu – Ritual des Todes“ den Schlußpunkt setzen ließ: Die Aufführung, die kritisch, auch spöttisch auf kultische Traditionen des dörflichen Lebens Bezug nimmt, setzt deren Kenntnis voraus und muß ohne sie ein vakuumverpacktes Exotikum bleiben – aussagelos und unfreiwillig komisch. Da hatte sich das unnötig hochtrabende Motto „Wege in die Zukunft“ längst als Leerformel erwiesen: Das Theater aus aller Welt tendierte zum Allerweltschauspiel, und das Welttheater kam aus Europa.

Mehr als vom Welttheater aber hat der Festivalgast diese Stadt, zerrissen in einen grünen Süden und einen grauen Norden, mit ihrer brutalistisch-gesichtslosen City erfahren. Denn nicht nur in dem elegant geschwungenen Parkett der neuen Aalto-Oper und dem modernen Werkstatt-Interieur des alten Grillo-Theaters, nicht nur in der stickigen Casa Nova und in den vollklimatisierten Kammerspielen im Erdgeschoß des höchsten und wahrscheinlich häßlichsten Rathauses der Republik sind wir gesessen, sondern auch auf dem Markt der idyllischen Gartenstadt Margarethenhöhe, wo die französische Gruppe „Royal de Luxe“ ihren Knallfrosch „La véritable histoire de France“ zündete, und in der Folkwang-Aula im Stadtteil Werden. Auf dem gespenstischen Güterbahnhof Nord und auf

In Trauer und Verehrung nehmen wir Abschied von

## Axel Eggebrecht

Ehrensator der Universität Hamburg

Sein beharrliches Eintreten für den Auftrag der Vernunft, die Aufrichtigkeit, mit der er seine Überzeugungen vertrat, und der Optimismus, den er sich bewahrte, sind für uns beispielhaft.

Wir haben einen kritischen Freund und Berater verloren, der sich stets für die Jugend engagierte und sie begeistern konnte. Ihm gelten unser Respekt und unsere Dankbarkeit.

Jürgen Lüthje  
Präsident

Wir trauern um

## Herrn Matthias M

Er war ein enger Freund unseres Hausverwaltungsrats. Sein guter Rat wird uns fehlen. Wir werden sein Andenken in Ehren halten.

## Smith, 67, Died in Texas

Smith, an astronomer at the University of Texas's observatory, in the Davis West Texas, died on Friday at the Houston Medical Center. He was 67 years old and

had cancer, his family

was a member of the observatory. His retirement in 1985 was one of the university's largest. He worked in the department for 15 years. He helped develop a radio telescope, which when it began operation in recent years, he helped build the 8.5-meter spectrograph, which is expected to be the largest.

He was involved with discovery of quasars, the first evidence of the existence of black holes and dwarf Cephe-

ids. He had a public interest in developing the "Storrs" series that won the New York

award of Wheeling, West Virginia, an undergraduate degree at Har-

vard. His wife, Joan, has three children, Nathan, of San Antonio, Theodore, of Austin, and Nath, of Newark,

## Richard Flamson, 62, Security Pacific Chief

Richard J. Flamson 3d, who led the Security Pacific Corporation during its aggressive expansion as one of the nation's largest banking companies, died on Thursday at Hoag Hospital in Newport Beach, Calif. He was 62 years old and lived in Corona Del Mar, Calif.

Mr. Flamson died of leukemia, his family said.

Security Pacific's assets quadrupled and its rank rose from 11th to fifth nationally during the 12 years Mr. Flamson served as chief executive. During that period he also held the titles of president and chairman. He resigned as chief executive last year but remained a board member and executive committee chairman.

This year, hurt by some bad loans, the company agreed to a \$4.7 billion purchase by the BankAmerica Corporation in a merger that will form the nation's second largest bank. Security Pacific reported a \$508 million loss in the third quarter and reserved \$1.2 billion for troubled loans.

He began his 36-year career at Security Pacific as a reposessor of automobiles. A native of Los Angeles, he graduated from Claremont McKenna College and the Pacific Coast Banking School at the University of Washington in Seattle. He served in the United States Army in Korea.

He is survived by his wife, Arden, and four children, Leslie Flamson Moore, Scott A. and Michael J., all of Newport Beach, and Richard J. 4th, of Mammoth, Calif.

## Hans Harnik, 73, Dies; A Lawyer for Austria

Hans Harnik, who left Austria to escape the Nazis and who, as an American lawyer, represented that country's new government after the war for nearly half a century, died on Friday at New York Hospital in Manhattan, where he lived. He was 73 years old.

Mr. Harnik died of a heart attack, his family said.

Born in Vienna, Mr. Harnik fled to the United States in 1938 and worked his way through Brooklyn College and Brooklyn Law School. He joined the Manhattan law firm of Wachtell, Manheim & Grouf, which represented Austrian government agencies until World War II. During the war the firm helped many Jewish refugees escape Austria.

After the war, with the firm resuming its work with Austria, Mr. Harnik represented the country's consulate, trade mission and United Nations mission, among other agencies. When the 103-year-old firm dissolved this year, he was the senior partner. He then joined his son, Stephen, and others in a new firm, Goldberg Gelman & Harnik.

In 1976, the Austrian Government awarded Mr. Harnik a medal for extraordinary service and in 1980 paid for his return visit as one of 400 "great sons" honored for their accomplishments abroad.

Mr. Harnik was a former president of the Consular Law Society, for specialists in diplomatic law, and wrote articles on international arbitration.

He is survived by his wife, the former Edith Bettelheim; his sons, Peter, of Arlington, Va., and Stephen, of New York City, and two grandchildren.



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SIDNEY B. JACOBY  
3709 S. GEORGE MASON DR. APT. 811 E  
FALLS CHURCH, VA. 22041

November 8, 1982

Ernst C. Stiefel, Attorney-at-Law  
200 Park Avenue  
New York, N.Y. 10017

Dear Mr. Stiefel,

My brother, Gustav Jacoby of New York, has written to me and transmitted your request to inform you of my recent publications of American law reviews in the field of comparative law. Perhaps the most recent strictly comparative law article of mine was "Federal Tort Claims Act and French Law of Governmental Liability: A Comparative Study:" 7 Vanderbilt Law Review 246 (1954). I mentioned comparative law in my articles on "Absolute Liability under the Federal Tort Claims Act", 24 Federal Bar Journal 139 (1964) and 26 Federal Bar Journal 5(1966).

You will find a list of my publications in the Summer 1977 issue of the Case Western Reserve Law Review which was dedicated to me, with laudatory comments by Dean Cowen, Trial Judge David Schwartz, Chief Judge David Bazelon, Professor Milton D. Green, and Professor Walter Gellhorn.

I quote the last paragraphs of Judge Bazelon's and Professor Gellhorn's articles

(Gellhorn):

"In short, Professor Jacoby has been and is still an outstanding member of this country's legal profession. The ill wind that blew through Germany in his youth did indeed, in this instance, bring some good to America. I salute Sidney Jacoby for his past achievements and look forward with confidence to his continuing successes."

Very sincerely and best regards,

*Sidney B. Jacoby*



SIDNEY B. JACOBY  
3709 S. GEORGE MASON DR. APT. 811 E  
FALLS CHURCH, VA. 22041

27 Case Western Reserve Law Review 816(1977)  
(Bazelon)†

"We are all, as Franklin D. Roosevelt said, immigrants, and many of us have been refugees. But many immigrants receive shelter, comfort, and well-being, and give back only their personal virtues. Sidney Jacoby, driven from his homeland by Adolf Hitler who said "I am the supreme law in Germany," gave to the country of his adoption himself and his rich gifts of mind and heart, in the service of expounding of law in the interest of civilization".

27 Case Western Reserve Law Review 819 (1977)  
(Gellhorn)‡

"In short, Professor Jacoby has been and is still an outstanding member of this country's legal profession. The ill wind that blew through Germany in his youth did indeed, in this instance, bring some good to America. I salute Sidney Jacoby for his past achievements and look forward with confidence to his continuing successes."

Very sincerely and best regards,

*Sidney B. Jacoby*



mer 1933 bei Aufenthalt in Berlin aus dem Dienst entlassen, Okt. 1933 Emigr. USA mit Einwanderervisum. 1934 Gastprof. New York Univ., anschl. Assist. Prof. für Philosophie Carleton Coll., Northfield/Minn., 1937-49 Assist. Prof. für Politologie New York Univ., ab 1940 Ltr. Seminar on Post-War Reconstruction. Gastprofessuren, u.a. 1943 Puerto Rico; 1944-45 Berater Foreign Econ. Admin., Washington/D.C.; 1950-52 Vortragsreisen in Deutschland für HICOOG, insbes. zu Themen des Schuman-Plans u. der europ. Einigung, Gastvorlesungen Univ. Marburg u. Gießen. Sept. 1952 Wiedereintritt in dt. Auswärtigen Dienst als Vortragender Legationsrat u. Ref. für Technische Unionen in Europa. 1955-59 Botschafter in Kuba, 1960-62 GenKonsul in Amsterdam. Lebte 1978 in Freiburg/Br. - *Ausz.*: 1956 Ehrenmitgl. *Sociedad Cubana de Filosofia*, 1961 Gr. BVK.

*W*: u.a. Zur Objektivitätsfrage des Wertes (Diss.). 1926; Problems of Post-War Reconstruction (Hg. u. Mitverf.). Washington 1942; Foreign Governments (Mitverf.). New York 1949, 1952; Beitr. in Sammelwerken u. Zs. *Qu*: Fb. Hand. Publ. - IfZ.

**Jordan, Rudolf Julius Adolf**, Dr. jur., Rechtsanwalt, Unternehmensleiter; geb. 1. Dez. 1905 Mannheim; ev.; *V*: Dr. jur. Ludwig J. (geb. 1862 Mannheim, gest. 1942 Kapstadt), jüd., Diss., RA, März 1939 Emigr. S-Afrika; *M*: Milly, geb. Neukirch (geb. 1877 Frankfurt/M., gest. 1947 Kapstadt), jüd., Diss., Emigr. mit Ehemann; *G*: Dr. rer. pol. Elisabeth J. (geb. 1900 Mannheim, gest. 1950 New York), Emigr. USA; ∞ 1934 Charlotte Kirchhoff (geb. 1912 Johannesburg), ev., B.A., A: Johannesburg; *K*: Edward Carl Ludwig (geb. 1935 Johannesburg); Roland Hendrik (geb. 1937 Johannesburg); Elizabeth Angela Heinz (geb. 1939 Johannesburg); Veronica Juliet Laros (geb. 1944 Johannesburg); *StA*: deutsch; S-Afrika; deutsch. *Weg*: 1933 GB, S-Afrika.

1923-26 Stud. Berlin, München, Heidelberg, 1927 Prom., Mitgl. von Sportvereinen. 1926 Referendar in Baden, 1929 Gerichtsassessor, anschl. RA u. Syndikus der Konkursverw. von FAVAG in Frankfurt/M. u. Berlin; 1. Apr. 1933 Berufsverbot. Juni 1933 Emigr. GB, engl. Sprachstud., Okt. 1933 Südafrika, bis Sept. 1934 Hilfsbuchhalter, 1934-46 bei F. Kirchhoff & Co. (Pty) Ltd. Im 2. WK MilDienst, 1939-40 bei der Rand Light Infantry, 1942-45 South African Engineers. Anschl. Stud. Botanik Witwatersrand Univ., 1946-55 Farmer in Paarl. Ab 1955 Dir., später Vors. der Kirchhoff-Unternehmen. 1972 Mitgl. Wirtschaftskammer Johannesburg, geschäftsf. VorstMitgl. Südafrikan. Ausschuß der internat. Handelskammer, Präs. *Internat. Vereinigung für Saathandel*, zeitw. Präs. *Rotary-Club Johannesburg/North Central*, Kuratoriumsmitgl. Witwatersrand Coll. for Advanced Techn. Education, Mitgl. *Gesellschaft der Freunde Mannheims, South African PEN Club*. Lebte 1978 in Johannesburg/S-Afrika.

*W*: Volkmar-Heinsheimer, Zivilprozeßordnung und Nebengesetze (Mithg.). 1930; The New Perspective. 1951; Bridges to the Unknown. 1958; Beiträge in *Deutsche Juristen Zeitung* sowie wiss. u. lit. Zs. in S-Afrika. *Qu*: Fb. - RFJI.

**Joseph, Asher Otto**, Regierungsbeamter; geb. 14. Juli 1922 Gelnhausen/Hessen; *V*: Sigmund J. (geb. 1878 Gauersheim/Pfalz, gest. 1931), jüd., höhere Schule, Kaufm.; *M*: Bertha Stern (geb. 1890 Meerholz/Hessen, 1942 umgek. im Holocaust), jüd., Geschäftsfrau; ∞ 1946 Hannelore David (geb. 1925 Ettlingen/Baden), 1937 Emigr. GB, 1937 London School of Pitman's for Girls, Stenotypistin, 1945 Pal., Sekr. in Jerusalem; *K*: Jocheved Metzger (geb. 1947 Haifa), Stud. Coll. for Women Teachers, Lehrerin; Pnina Schaul (geb. 1949 Haifa), Krankenschwester; Pinchas (geb. 1953 Haifa), Stud. Yeshiva Coll.; *StA*: deutsch, Pal./IL. *Weg*: 1938 GB, 1940 AUS, 1942 Pal.

1931-35 Gymn. Gelnhausen, 1935-38 Samson Raphael Hirsch-Realschule Frankfurt/M.; 1938 Emigr. GB mit StudVisum, 1938-39 Stud. Enfield Grammar School London, 1939-40 Laborassistent. in chem. Betrieb in London; Juni 1940 In-

ternierung, Juli 1940-Juli 1942 Internierung in Australien. 1942 nach Palästina, 1942-45 Stud. Yeshiva Coll. Jerusalem, 1942-47 Fernstud. am Brit. Inst., versch. Diplome. 1945-48 Laborassistent. u. Mitarb. Budgetplanung bei Fruitarom Chem. Haifa, 1948-49 IDF-Dienst, 1949-52 techn. Zeichner; 1953 Gr. u. Ltr. Abt. Publikationen des Customs and Excise Dept. im Finanzmin., Red. *Isr. Tax Legislation, Isr. Tariff and Fees, Customs Regulations*, Beteiligung an Ausarb. v. Steuersystemen, Red. u. Übers. v. Broschüren u. Büchern über Zolltarife u. Finanzprobleme. Ps. AJO. Ab 1962 Mitgl. Nat. Council, ab 1968 ehrenamtl. Sekr. *Isr. Soc. of Editors of Periodicals* Jerusalem, 1967-68 Vors. Einwandererkommission der *Jew. Agency*. 1968-75 Stud. Hebr. Univ., B.A., M.A. in VerwWesen. Mitgl. *Assn. of Senior Government Officials*. Lebte 1977 in Jerusalem.

*W*: Israel Customs Tariff. 1968; Joseph and David Family Tree. 1973; Milon leMunahim beMadaei haHevrah vahaRuah (Begriffslexikon der Sozial- u. Geisteswissenschaften). 1974; Israel's Temple Mount. The Jews' Magnificent Sanctuary (Mitverf.). 1975. *D*: Hebr. Univ.; Nat. Library Jerusalem; New York Public Library. *Qu*: Fb. Hand. - RFJI.

**Joseph, Curt**, Chemiker, Fabrikant; geb. 1899 Berlin, gest. 24. Dez. 1963 Heswall/GB; jüd.; *V*: Apotheker in Berlin, Inh. Kopp & Joseph; *G*: Max; ∞ I. gesch.; II. 1940 Ilse; *K*: 1 S, 1 T, umgek. im Holocaust; *StA*: deutsch; brit. *Weg*: 1939 NL, GB.

1914 freiw. Krankenträger des *Roten Kreuzes*, 1917-18 MilDienst bei Armee u. Luftwaffe an der Westfront; Ende 1918 Freikorps, Ausschluß aufgrund jüd. Herkunft, 1919 Teiln. an Niederschlagung kommunist. Aufstandsversuche. 1918-38 Dir. Kopp & Joseph (chem. Fabrik u. Vertrieb); Nov. 1938 KL Sachsenhausen, Zwangsverkauf des Unternehmens; 1939 Emigr. GB über die Niederlande, Laborant Pilkington Brothers; 1940 Internierung, danach Luftschutzwart bei der Home Guard, anschl. Rückkehr zu Pilkington Brothers, 1944 Geschäftsf., später wiss. Chemiker. Später Mitarb. Fibreglass Ltd. Birkenhead/GB.

*D*: No Homesickness (unveröffentl. ABiogr.), LBI New York. *Qu*: ABiogr. EGL. Hand. - RFJI.

**Joseph, Franz M.**, Dr. jur., Rechtsanwalt, Ministerialbeamter; geb. 24. März 1905 Landau/Rheinpfalz; o.K.; *V*: Emil J. (geb. 1873 Ingelheim/Rheinpfalz, umgek. 1944 KL Theresienstadt), jüd., Inh. eines Weinguts, Vors. IHK Rheinpfalz, Vors. Ortsgruppe *B'nai B'rith*; *M*: Anna, geb. Hockenheimer (geb. 1879 Bruchsal, umgek. 1945 KL Auschwitz), jüd.; *G*: Elisabeth Kett (geb. 1908 Landau), Emigr. GB, USA, Kunstgewerblerin; ∞ 1964 Sakoto Motoyoshi (geb. 1929 Bombay/IND), o.K., Stud. Tokio; *StA*: deutsch, 1943 USA. *Weg*: 1935 USA.

1923-28 Stud. München, Paris, Frankfurt/M., Genf, Berlin, Heidelberg, Assist. bei H. Sinzheimer u. G. Anschütz; Mitgl. *Wandervogel, Republikanischer Studentenbund*. 1928 Prom., 1928-30 Referendar, 1931-33 RegAssessor u. Assist. bei J. Popitz, Mitarb. an der I. Fassung eines Vertrages zur Vermeidung internat. Doppelbesteuerungen, der vom Finanzausschuß des Völkerbundes angenommen wurde; 1933 Entlassung. Nov. 1935 Emigr. USA mit Besuchervisum, später Umwandlung in Einwanderervisum; Doz. Univ. Chicago, gleichz. Stud., 1938 J.D., 1938-40 Berater für Internat. Telephone and Telegraph Co. N.Y., 1940 Berater beim US-Schatzamt (Kontrolle ausländ. Vermögens), 1940 Berater für internat. Steuerfragen, Devisenbestimmungen u. Vermögen feindl. Ausländer im US-Finanzmin., 1944 Berater für Nachkriegsplanung im US-Außenmin., ab 1945 RA in New York; 1944-52 Prof. des französ. Institute de Droit Comparé New York, 1945 Rechtsberater der UN-Konf. San Francisco/Calif., Korr. für *Internat. Bar Assn.* u. *Internat. Fiscal Assn.* 1948-60 Justitiar am Council on NATO, 1955-78 Am.-Europe Foundation, 1960-73 Mitgl. am Atlantik-Rat. Vorträge an dt. Univ., Berater des dt. Finanzmin. für internat. Steuerrecht; Mitgl. *Internat. Bar Assn.* (1954 Vors. Konfiszierungs- u. Nationalisierungsausschuß),



*Am. Bar Assn.* (Tätigkeit in versch. Ausschüssen für internat. Steuerrechtsfragen), *Bar Assn. of the City of New York, Am. Soc. of Internat. Law Foreign Law Assn.* u.a. Lebte 1977 in Lausanne/Schweiz.

*W:* Discretionary Trust. 1951; Organizing International Businesses. 1952; Elements of Proper Estate Planning. 1953; Income Tax Treaties. 1954; International Aspects of Nationalization. 1954; Death Tax Treaties. 1955; As Others See Us: The United States through Foreign Eyes. (Hg.) 1959; Beiträge in Fachzs. *Qu:* Fb. Hand. Z. - RFJI.

**Josephthal, Giora** (urspr. George), Dr. jur., Verbandsfunktionär, Politiker; geb. 9. Aug. 1912 Nürnberg, gest. 22. Aug. 1962 Luzern/CH; *V:* Paul J. (geb. 1869 Nürnberg, gest. 1943 Tel Aviv), Kaufm., Major im I. WK, 1939 Emigr. Pal.; *M:* Emma, geb. Schnabel (geb. 1875 Nürnberg, gest. 1943 Tel Aviv), 1939 Emigr. Pal.; *G:* Hans (geb. 1907), Emigr. ČSR, USA, Kaufm.; Rolf (geb. 1910), Emigr. USA, Kaufm.; ∞ 1936 Senta Punfud (→ Senta Josephthal); *StA:* deutsch; IL. *Weg:* 1938 Pal.

1930-33 Stud. Rechtswiss. Berlin, Heidelberg, München, 1933 Dr. jur. Basel, da in Deutschland keine Zulassung zur Prom. Ab 1933 Jugendlitr. *Jüdischer Jugendbund* Nürnberg (später Zuschluß mit J.P.D. u. *Habonim*); Mitarb. Abt. für Sozialhilfe jüd. Gde. München, Ausarb. eines Umschulungsprogramms für jüd. Jugendliche als Vorbereitung auf Emigr. nach Palästina; 1933 Ltr. Jugendabt. des *Verbands der Bayerischen Israelitischen Gemeinden*, bis 1938 Mitgl. geschäftsf. Ausschuß der ZVfD, 1934-38 Ltr. *Hechaluz*-Bewegung in Deutschland, deshalb Verhaftung während des Prozesses gegen → David Shaltiel, Paßenzug. 1938 landwirtschaftl. Umschulung in Ellguth/Schlesien, Emigr. Palästina mit Ehefrau mit A I-Zertifikat. Mit einer Hachscharah-Gruppe Gr. Kibb. Givat-Hayyim, u.a. Arbeit in der Bäckerei; im Auftr. der *Jew. Agency* nach GB, nach Nov. 1938 Unterstützung der jüd. Emigr. aus Deutschland, Org. der Fahrt des Flüchtlingsschiffes *Dora* nach Pal.; 1939 Rückkehr Kibb. Givat-Hayyim. Zus. mit 40 Mitgl. von *Habonim* Mitgr. Kibb. Garin Raananah (ab 1945 Kibb. Galed), Finanzverw.; 1941-43 im Auftrag der *Jew. Agency* in Europa u. Arbeit im Internierungslager Atlit/Pal., ab 1943 brit. Armee, Dienst in Mobilisierungszentrale Haifa der brit. Armee u. der *Jew. Agency*; Interviews für brit. Nachrichtendienst in dt. Kriegsgefangenenlagern in Ägypten, Mitarb. am Programm *Reeducation to Democracy*, Dienst im Pionier-Korps, 1945 Entlassung auf Ersuchen der *Jew. Agency*. Ab 1945 bei Abt. für Einwanderer- u. Integrationsprobleme der *Jew. Agency*, 1948-52 Ltr. Abt. Integration, 1952 Deleg. bei Wiedergutmachungsverhandlungen mit Deutschland (BRD), ab 1953 Finanzdir. der *Jew. Agency*. Ab 1956 Mitgl. Zentralkomitee der *Mapai*, 1956-59 GenSekr.; Mitgl. Hauptvorst. des *Histadrut*. Ab 1959 M.K., 1960 Min. für Arbeit, 1961 Min. für Wohnungsbau u. Entwicklung (insbes. Förderung der Einwandererintegration durch Wohnungsbauten, techn. Ausbildungsprogramme u. Arbeitsvermittlung).

*W:* Immigration during Israel's Second Year of Statehood. 1950; *Sikumim veKavei Peulah* (Tätigkeitsbericht u. Programmpunkte). 1960; Giora Josephthal (ABiogr., hg. von Shalom Wurm). 1963. *L:* Halpern, Ben/Wurm, Shalom, *The Responsible Attitude. Life and Opinions of Giora Josephthal*. 1966; Laufban, Yeşeskel, Ish Yoze el Ehav (Die Geschichte der Einwanderer-Integration in Israel). 1967. *Qu:* ABiogr. Fb. Hand. Z. - RFJI.

**Josephthal, Senta**, geb. Punfud, Politikerin, Gewerkschaftsfunktionärin; geb. 5. Dez. 1912 Fürth/Bayern; *V:* Jakob Punfud (geb. Frankenwinheim b. Bamberg, gest. 1951 Ramat Gan/IL), jüd., Kaufm., KL Dachau, 1939 Emigr. Pal. mit A I-Zertifikat; *M:* Hedwig, geb. Schild (geb. 1884 Würzburg), 1939 Emigr. Pal.; ∞ 1936 → Giora Josephthal; *StA:* deutsch, IL. *Weg:* 1938 Pal.

1932-33 Stud. Wirtschafts- u. Rechtswiss. Erlangen; Mitgl. *Jüdischer Kulturbund, Habonim*, 1933 Gr. *Hechaluz*-Zentrale München. 1934-38 Lehrerin bei *Jugend-Alijah* u. Mitarb. *Hechaluz*-Zentrale; Jugendlitr. u. Ltr. Hachscharah für Mädchen;

1938 landwirtschaftl. Umschulung in Ellguth/Schlesien, Emigr. Palästina mit A I-Zertifikat, 1938 mit einer Hachscharah-Gruppe Aufbauarb. Kibb. Givat-Hayyim, 1939 Kibb. Garin Raananah (ab 1945 Kibb. Galed) zus. mit 40 Mitgl. von *Habonim*; 1947-51 Arbeit im Kibb. Ab 1953 ltr. *Mapai* bei *Ihud haKevuzot vekaKibbuzim* (Kibbuz-Verband), 1963-65 u. 1967-70 Mitgl. des GenSekretariats. Ab 1963 (3. Knesset); 1956-60 Mitgl. Zentralkomitee des *Mapai*, verantwortl. für die Planung neuer Siedlungen, 1960 Wirtschaftsabt.; 1960 Mitgl. Zentralkomitee u. Sekretariat *Mapai*, 1963-65 u. 1967-70 Mitgl. PV; 1965-67 wirtsch. u. 1970-72 Ltr. Kibb. Galed. Ab 1970 AR-Mitgl. (Arbeiter-Verlagsanstalt), ab 1972 AR-Vors. Mekorot (Wasserversorgung), ab 1974 Ltr. Wirtschaftsabt. der *Mapai* zentral; 1976-Mai 1977 M.K. Lebte 1977 im Kibb. Galed/Israel.

*Qu:* Fb. Hand. - RFJI.

**Jospe, Alfred**, Dr. phil., Rabbiner; geb. 31. März 1907, V: Josef J. (geb. 1878 Roggow/Pommern, gest. 1939 Berlin), Stud. Lehrerseminar, Kantor; *M:* Rosa, geb. (geb. 1883 Gombin/Prov. Posen, umgek. 1943 KL Aachen), G: Erwin (geb. 1907 Breslau), Stud. Hochschule für Musik, Berlin, Musikdir., 1938 Emigr. USA, Pal.; ∞ 1935 Eva (geb. 1913 Opatowitz/Schlesien), jüd., 1932-33 Stud. Frankfurt/M. u. Breslau, 1939 Emigr. GB, USA, 1973 Doz. für Theol. Georgetown u. George Washington Univ., 1975 Hg. u. Übers. von *Moses Mendelssohn's Writings*; *K:* Susanne Greenberg (geb. 1913, Emigr. USA, M.A.; Naomi Pissetzky (geb. 1942), M.A., in IL; Raphael Jospe (geb. 1947), Doz. in den USA, deutsch, 1946 USA. *Weg:* 1939 GB, USA.

1928-34 Stud. Jüd.-Theol. Seminar Breslau, 1935 Examen, gleichz. 1928-32 Stud. Univ. Breslau, 1933 tätig im K.J.V.; 1934-36 BezRabbiner für die Provinz Westpreußen in Schneidemühl, 1936-39 Rabbiner jüd. Gde. Berlin, Mitgl. ZVfD; Nov. 1938 KL Opatowitz, März 1939 Emigr. GB mit Visum für 1 Jahr durch den brit. Oberrabbiner; Juni 1939 in die USA mit Non-Quota-Visum, 1939 Rabbiner in Cleveland/Ohio bei der Tree of Life Congr. in Morgantown/West-Virginia, 1940-44 Dir. *B'nai B'rith Hillel Foundation* an der Va., 1944-49 Dir. *B'nai B'rith Hillel Foundation* in Indiana, 1949-71 nat. Dir. Programs and Resources *B'nai B'rith Hillel Foundations* in Washington/D.C., gl. allg. Beratungsausschuß der *Intercollegiate Zion*. 1971-74 internat. Dir. *Hillel Foundations*; 1975 Seit 1975 Vortragstätigkeit u. Publizist. Ausschuß für *Univ. Serv.*, CCAR, *Inst. for Jew. Life, New York Branches, B'nai B'rith Hillel Commission* LBI, Mitgl. *Acad. of Relig.*, *Washington Board of Rabbies*. Ltr. Washington/D.C. - *Ausz.:* 1935 Joel-Preis, 1970 Outstanding Jew. and Civil Leadership der *Jewish Community* Washington/D.C., 1972 D.D.h.c. des H.U.C.-J. New York.

*W:* Die Unterscheidung von Religion und Mythos, Hermann Cohen und Ernst Cassirer in ihrer Bedeutung für die jüdische Religionsphilosophie (Diss.). 1932; Erziehung und Schule, Festschrift. 1938; *The B'nai B'rith Hillel Foundation. An Orientation Manual*. 1951; *College Guide for Jewish Youth*. 1955, 5. Aufl. 1968; *The Jewish Heritage and the Student. A Reader in Jewish Life and Thought*. Clearing House. Hillel Little Books Series (Hg., 5 Bde.), Library Series (Hg., 8 Bde.); *Hillel Program for Jewish Education in the University Community*. 1963; *Israel: A Jewish Experience*. (Hg.) 1963; *The Legacy of Moses Mendelssohn's Jerusalem and Writings*. (Hg. u. Übers. der Einleitung) 1969; *Contemporary Experience. Essays in Jewish Thought*. (Hg.) 1970; *Bridges to a Holy Time. New Worship and Prayer*. (Mithg.) 1973; *Jewish Thought* (Übers. von engl. i.A. des LBI). 1978. *Qu:* Arch. Fb. Hand. Z. - RFJI.



In Landau zu

Besuch

R. 108 - DIE RHEINPFALZ 11. 5. 89



Gebürtiger Landauer mit Weltkarriere: Franz M. Joseph, hier beim Gespräch im Hotel Brenner. Joseph lebt heute im Ruhestand in Lausanne Foto: Thüring

Gespräch im Hotel Brenner

## Gebürtiger Landauer mit Weltkarriere: Franz Joseph

Er hat juristische Weltkarriere gemacht, der am 24. März 1905 in Landau geborene Professor Dr. Franz M. Joseph, Sohn des Inhabers eines Weingeschäfts und eines Weinguts. Sein Arbeitsfeld ist das internationale Recht geworden und mit Größen aus Wirtschaft und Politik hat er oft genug Schulter an Schulter gestanden. Selbst bei einem Besuch im Vatikan lag einmal auf einem für den Abkömmling einer deutsch-jüdischen Familie reservierten Stuhl ein Kärtchen mit dem Hinweis bereit: „Amicus papae“, Freund des Papstes.

Professor Joseph lebt seit 16 Jahren in Lausanne. In Abständen kommt er immer wieder aber nach Landau. Begleitet auch diesmal von seiner Frau, die er 1958 geheiratet hat, wohnt er für ein paar Tage im Hotel Brenner – ein Mann, der einmal an entscheidenden Entwicklungen mitgewirkt hat, seit er in den zwanziger Jahren hinausgezogen war und als noch junger Assessor mit seinen Ideen zur Vermeidung internationaler Doppelbesteuerung die Experten des Völkerbunds in Genf beeindruckte.

Sein Elternhaus war das Anwesen Ost-ring 12, in dem, älteren Landauern wahrscheinlich noch gut geläufig, die Weinhandelsfirma Marx und Joseph residierte. Sein Vater, Mitbegründer des Musikvereins, hatte daneben noch ein Weingut in Büdesheim bei Bingen inne und spielte eine Rolle im Vorstandsgremium der Oper in Wiesbaden. So gehört es zu Josephs Kindheitserinnerungen, daß die Familie des Komponisten Richard Strauss einmal zu einem Ferientaufenthalt der Josephs in Pontresina eingeladen war.

Die Volksschule und das Gymnasium hat er in Landau besucht, das Abitur 1923 gemacht, und einer der Söhne des unter Pen-nälern noch heute legendären Mathematiklehrers Peter Wahl gehört zu seinen Landauer Bekannten. Zum juristischen Studium kam Joseph nach München, wo er eines Tags die Verhaftung von Hitler und Ludendorff am Marienplatz miterlebte.

Sein Berufsziel war der Professor für internationales Recht, und zur Fortsetzung seines Studiums ging er schon wegen der heimatlichen Nähe nach Heidelberg. Von Geburt her war er aber nun einmal bayerischer Staatsbürger und brauchte erst eine

Sonderanerkennung als badischer Referendar. Er wurde es beim Amtsgericht in Heidelberg, sollte dann ans dortige Bezirksamt berufen werden, gelangte aber wegen einer plötzlich auftretenden Lücke als stellvertretender Bezirksamtmann nach Neustadt im Schwarzwald und von da als Assistent ins Reichsfinanzministerium nach Berlin. In dieser Eigenschaft legte er der Genfer Völkerbundsrunde seine Vorschläge vor, die vermeiden sollten, daß ein Gut mehrfach besteuert wird, wenn es von Land zu Land wandert – Grundlage eines späteren internationalen Abkommens, das Joseph den Ruf des „Vaters eines neuen Rechtsgebiets“ verschaffte.

Wie auch schon zuvor, bahnten sich für Joseph stets zur rechten Zeit die richtigen Verbindungen an, so durch Vermittlung der Witwe des einstigen US-Präsidenten Wilson die zur Rockefeller Foundation, der er Übersetzungen seiner Vorträge vorlegte mit dem Erfolg, daß ihm eine Professur in Chicago angeboten wurde. Joseph verließ dadurch Europa noch rechtzeitig, ehe sich über seinen Glaubensgenossen die nationalsozialistische Falle schloß, der auch seine Eltern zum Opfer fallen sollten.

Joseph lehrte an verschiedenen amerikanischen Universitäten und wurde juristischer Berater bei der Wirtschaftskonferenz von Bretton Woods, die die Grundlagen einer künftigen Weltwährungsordnung schuf. Er hat Albert Einstein kennengelernt, und er war bei der Gründung der Vereinten Nationen in San Francisco dabei, nachdem er noch im Sommer 1944, auf Umwegen in die Schweiz eingeschleust, in Luzern an einer Bankierskonferenz teilgenommen hatte.

Später betrieb Joseph eine erfolgreiche Anwaltsfirma in New York und übte beratende Tätigkeiten aus, die wiederum Auswirkungen ins politische Umfeld hinein hatten. 17 Bücher hat Franz Joseph geschrieben, darunter ein einziges nicht-juristisches: „As Others See Us – The United States through Foreign Eyes“. Sein Ruhestand in der Schweiz ist relativ, sein Rat noch immer gefragt. Und seine Beziehung zu Landau ist trotz allen zeitlichen und geographischen Abstandes noch immer lebendig.

HERBERT DÄHLING



KARL W. JACOBY  
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Personal Data

**Born:** May 23, 1888, at Frankfurt am Main, Germany.  
**Married:** With Alice, née Strauss (1923), address above.  
**Children:** Gabriele and Irene, twin daughters, born 1926, address above.  
**Citizenship:** First US citizenship papers since November 28, 1941.  
**Education:** 1898-1908 Dorotheenstaedtisches Realgymnasium, Berlin.  
1908-1911 University Berlin. Study of Private and Public Law  
1911-1917 Service Training in Law and Government Administration  
1928 Académie de Droit International, The Hague.  
1942 Research Seminary in International Relations at the colleges in Bryn Mawr and Haverford, Pa. and American Government at the State University of Maine, in Orono, Maine.  
**Degrees:** LLB (Berlin, 1911). State Diploma in Law (Berlin 1917), qualifying for positions as Judge, Member of the Bar, and Public Prosecutor.  
**Positions:** 1914-1917 Junior Administrative Assistant, Berlin. Working with the German Red Cross.  
1918-1923 Assistant to the Prussian State Attorneys in Frankfurt a.O., Potsdam, Berlin.  
Functions: Special referee for Post-War Economy e.g. Price-fixing, Price-control, Rationing.  
1923-1931 State District Attorney, Berlin.  
Functions: Special referee in the field of Tax and Tariff Law.  
1931-1933 Special referee in the Foreign Exchange Division of the Prussian Attorney General, Berlin.  
Functions: Supervising the public prosecution of the violation of Foreign Currency and Foreign Exchange Law and Regulation.  
1933 Dismissed with pension, when Hitler came to power.  
1934-1941: Executor of an American Estate, located near Berlin (Fuerstenwalde).  
Functions: Administration and liquidation of this estate and transfer of the assets to U.S.A.  
1941 July, 9, immigrated to the States.  
1942 Colleges in Bryn Mawr, Haverford, Pa. and University of Maine in Orono (see above under education).  
1943 until now: Working with Office of Strategic Services Washington, D.C. as research-analyst in the Central European Section of the Interdepartmental Committee, since June 1945 until present on detail for the Office of US Chief of Counsel c/o Hon. Justice Robt. Jackson.  
**References:** Dr. Arthur Hauck, President of the State University of Maine in Orono, Me.  
Dr. George M. Wudnderlich, member of the General Counsel of Foreign Economic Administration, Washington, D.C.  
Dr. Robert M.W. Kempner, staff member, Institute of Local and State Government, University of Pennsylvania. 34 Blanchard Hall, Philadelphia, Pa.



CHARLES W. JACOBY  
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Personal Data.

I was born May 23, 1888, at Frankfort-on-Main (Germany). My primary and secondary education were obtained at the Dorotheenstaedtisches Realgymnasium in Berlin and terminated by my passing the Examination for University Admission on April 1, 1908. I then studied law at the "Friedrich Wilhelms Universitaet" of Berlin and became "Referendar" in 1911. During the war of 1914-1918 I worked with the Red Cross and in 1917 I passed the Government examination for "Assessor" (assistant judge). I was subsequently employed in the Office of the District Attorney at Frankfort, Potsdam and Berlin. In 1923 I was appointed "Staatsanwaltschaftsrat" (District Attorney) in Berlin and retained this position until April 1, 1933.

From 1918 to 1923, during the German inflation, I acquired special experience in suppressing profiteering (Preistreiberei-Delikte) and was appointed by the Government for this particular work on special "Trade Regulation Tribunals" (Markt- and Wuchergerichte), which were established to cope with these crimes.

Following successful work, I became Public Prosecutor (Dezernent) for offenses involving tax and tariff laws and regulations. On July 15, 1931, I was commissioned by the Generalstaatsanwalt in Berlin to organize the first Criminal Division in reference to crimes against the Foreign Exchange Law. Until April 1, 1933, I conducted "with great success and to the complete satisfaction" of the Attorney General the whole Criminal Division dealing with the Foreign Exchange Law within Greater Berlin.

In this capacity I gathered much practical experience in fighting illegal price raising and illegal transactions in foreign exchange. This experience was extremely valuable in disclosing secret relations between home and foreign corporations, and in finding displaced capital and investments in order to make it useful to the Government.

In this connection, I was repeatedly consulted by the German Ministry of Justice (Reichsjustizministerium) and the German Ministry of Economics (Reichswirtschaftsministerium) in an advisory capacity in framing legislative amendments.

After



- 1) In 1921, short after the First World War, I was commissioned to the Office of the Attorney General in Berlin, to trace and seize several hundred bars of silver bullion in the port of Stettin which were in flight to Sweden.  
They were brought back into the gold deposit room of the German Reichsbank; there I prepared their legal confiscation which was confirmed by Berlin Court (Landgericht I, Berlin).
- 2) In 1923, when German inflation was at its peak, it was my job as a public prosecutor in the Office of the Attorney General, Berlin, to trace flight capital, assets and other evidences of ownership in financial or business enterprises to facilitate their ultimate seizure and confiscation as well as the punishment of the culprit by a public indictment which I had to prepare and to plead in public trial.
- 3) In July 1931, after the collapse of the German stock market and banking business, the German Foreign Exchange Law was enacted and I was commissioned with the first investigations and public prosecutions of fraudulent violations of that new finance control system. My job was to uncover and prevent illegal transfers of currency, securities, art objects, patents, etc. in other countries and to seize and confiscate flight capital.- In this capacity I served until Hitler came to power (April 1933), when I was dismissed with pension.
- 4) From 1937 to 1941, I served as chief executor of an American estate, located near Berlin, which I had to administer and liquidate. I succeeded in distributing the assets by transferring a part of the estate in U S. dollars to the heirs in New York with permission of the Reichsdevisenstelle and the German Reichsbank. This was done with the cooperation of Frederick Wirth jr., legal adviser of USA Consulate General in Berlin and of the USA State Department.
- 5) In July 1941, we immigrated to this country. Since September 1943, I am working with the US. Government (O.S.S.), where I am still employed as research analyst and consultant on German economic intelligence. *On 29 November 1941 I received my First U.S. CITIZENSHIP PAPER.*



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1937-38 Expert of Central European and  
International Law at London,  
1939-1940 at Buenos Aires  
Adh. Member of the  
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Corr. Member of the  
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Draft of a Restoration Law for former occupied countries  
The validity of foreign transfer decrees  
Opinion on the Argentine Plan of Financial Reconstruction  
Opinion on the Argentine Tax Drafts  
International Corporation Law in times of war (Lectures at the University of Buenos Aires)  
Abuses of Press, Radio & Cinema  
(Paper presented to the 2nd Conference for Comparative Law, The Hague)  
Influence of money fluctuations on regular and sporadic transactions  
and others.



# Mit franziskanischer Gebärde

## Wider die Tollheit des Nihilismus: Zum Tode des Philosophen Hans Jonas

Hans Jonas ist erst spät berühmt geworden und gegen die Regeln der Zeit. Als sein Buch über das Prinzip Verantwortung Ende der siebziger Jahre erschien, war er schon selbst hoch in den Siebzigern. Jonas zog mit diesem Buch die Summe aus dem, was ihn sein Leben lang beschäftigt hatte, der Religionsphilosophie, deren Fragen er ganz unbefangenen auf die Probleme der Zeit anwandte. Er tat das in einem abwägenden, weit ausholenden Stil, den er selbst als „altfränkisch“ bezeichnet hat. Schon die Tonlage gab zu erkennen, daß der Autor keine einfachen Wahrheiten zu verkünden hatte. Ihr ruhiger Klang unterschied sich demonstrativ von der wilden Apokalyptik, in der manche Bultprediger der Moderne die Welt erfassen wollen. Letztlich ging es um den Versuch, den kategorischen Imperativ zeitgemäß umzuwandeln, ihn nachträglich um eine Dimension zu erweitern, von der Kant noch nichts wissen konnte, weil sie erst durch die Eingriffsmöglichkeiten der modernen Technik sichtbar geworden war: die geschichtliche. Die anderen, vor deren Urteil die eigenen Grundsätze Bestand haben mußten, waren für Jonas die kommenden Generationen. Er verlängerte die Ethik Kants in die Zukunft.

Das war zwar ein anspruchsvolles Programm; vorgetragen wurde es aber mit einer asketischen, gleichsam franziskanischen Geste. Jonas war frei von Eitelkeit, aber unerträglich in den Konsequenzen: Tollheit blieb für ihn Tollheit, und er nannte sie auch so. Die wilde Sprache und die gewaltverliebten Tagträume der Utopisten waren ihm nicht nur der Sache nach, sondern schon vom Stil her zuwider. Daß sein „Prinzip Verantwortung“ als Gegenentwurf zu den Phantasmagorien Ernst Blochs zu verstehen war, hat er selbst bestätigt, schon der Titel gab die Antwort auf das maßlose Prinzip Hoffnung. Blochs engere und weitere Gefolgschaft hat diese Herausforderung nicht vergessen und sie dem Autor nachgetragen. Der akademische Streit, der darüber entstand, war, ist inzwischen durch die Ereignisse im Osten erledigt worden: Was Bloch als Hoffnung ausgegeben hatte, ist unter horrenden Kosten gescheitert.

Der Gegensatz zu Jonas war tief und nur durch Sieg oder Niederlage aus der Welt zu schaffen. Der Phantasie der Progressiven, die in technisch oder ideologisch inspirierten Utopien schwelgten, setzte Jonas das entgegen, was er eine „Heuristik der Furcht“ nannte. Im Zweifel sollte die ungünstige Prognose mehr wiegen als die günstige, das Unterlassen also im Vergleich zum Handeln aufgewertet werden. Schon die Möglichkeit des schlimmen Ausgangs mußte genügen, um das Experiment zu ächten. Auch hier war Jonas konsequent, denn anders als die erbarungslosen Weltverbesserer, die jeden Preis gezahlt hätten, um am Ende recht zu behalten, bekannte er sich als ehrenwerter Pessimist zu dem Wunsch, durch die Ereignisse widerlegt zu werden. Wie Jacob Burckhardt erschien auch ihm Optimismus nur als eine Form von Pflichtvergessenheit.

Jonas war nicht der erste, der vor den Verheerungen der Technik erschrak und an der Moderne zu zweifeln begann. Im Unterschied zu Günther Anders, der die Gefahr mit gewaltigem, im letzten aber doch ganz unbestimmtem Pathos beschwor, war Jonas zunächst jedoch ein guter Philosoph. Er kannte die Geschichte und war vor der Überschätzung dessen, was er selbst zu sagen hatte, ziemlich gefeit. Der bloße Appell galt ihm nichts, solange er nicht wohlbe-gründet war. Er hatte den Glauben und den Ehrgeiz, im Blick auf das Vorhandene das Richtige zu erkennen, das Gebotene aus dem Gegebenen herzuleiten. Am überzeugendsten ist ihm dieser Versuch in seinem Buch über die Macht oder Ohnmacht der Subjektivität geglückt, das im selben Jahr wie das Prinzip Verantwortung erschienen ist.

Seine Anfänge lagen bei der Gnosis, einer spätantiken oder frühchristlichen Glaubensrichtung, die lehrte, daß der Mensch und die Welt schlecht sei. Sie bot damit ein frühes Beispiel für den radikalen Dualismus. Das scheint sie für Hans Jonas fesseln gemacht zu haben und irritierend zugleich. Denn die Gnosis mochte ihm als der früheste, noch unvollkommene Ausdruck einer Mentalität erscheinen, die erst neuerdings zu voller Blüte gekommen ist, des Nihilismus. Die moderne Naturwissenschaft, deren Gang er später aufmerksam und mit wachsender Kritik begleitete, schien ihm dasselbe Denken ungleich gründlicher zu pflegen. Auch sie betrachtet die Welt nicht mehr als eine Macht mit eigenem Recht und eigener Würde, sondern als ein willenloses Objekt. So erschien ihm die Naturwissenschaft als das vorläufige Endprodukt eines auf Machbarkeit versessenen Geistes, der, gleichgültig gegen sein Ziel, die Dinge um ihrer selbst willen vorantreibt. Und das empfand Jonas als nihilistisch.

Das Credo der Moderne, die durch und durch naturwissenschaftliche Erklärung des Menschen, lief darauf hinaus, ihm seiner menschlichen Eigenschaften zu entkleiden. Pawlows legendärer Ausruf: „Wie ähnlich einem Hund!“ – er hatte das Verhalten einiger Versuchspersonen studiert – faßt das gesamte Forschungsprogramm in einem Satz zusammen. Seine Anhänger waren oder sind davon überzeugt, daß im Denken und Fühlen nichts anderes zum Vorschein kommt als die Folgen materieller Vorgänge, die materiell zu erklären sind.

Jonas schlug die umgekehrte Richtung ein. Er ging vom Empfinden der Subjektivität aus und fragte, wie denn diese genuin menschliche Erbe aus der Natur hergeleitet werden sollte, ohne ihr das entsprechende Potential von Anfang an zuzubilligen. Eine Natur, die am Ende ihrer Geschichte so etwas wie Subjektivität hervorgebracht hatte, konnte als rein physikalisches Gebilde nicht verstanden werden. Jonas erinnerte daran, daß Gefühl und Wille, Absicht und Entschluß zu den unmittelbarsten und sichersten aller menschlichen Erfahrungen zählen, „daß die Anwesenheit von Subjektivem selber eine objektive Tatsache ist“. Die ganze Innenwelt auf äußere Gegebenheiten zu

verkürzen schien ihm absurd; und wer der Natur das Absurde andichte, der habe eben nicht ihr, sondern sich selbst das Urteil gesprochen, sagte er. Statt die Menschen nach Analogien aus dem Tierreich zu erklären, wollte Jonas die Natur nach dem Muster dessen deuten, was allen Menschen unmittelbar gewiß ist. Und er wollte das nicht nur, sondern entfaltete auch, vorsichtig, wie das seine Art war, die Gründe, die für seine Sicht der Dinge zu sprechen schienen.

In alldem zeigt sich eine tiefe, aber welt-zugewandte Frömmigkeit. Jonas war religiös, doch ohne alle Spuren von Transzendenz. Das trennte ihn, bei aller sachlicher Nähe, vom rein utilitaristisch geprägten Naturschutz einerseits, von der christlichen Schöpfungsmetaphysik auf der anderen Seite. Er selbst hat den Gegensatz zwischen der jüdischen Religion, die den Heilsplan nur innerweltlich denken konnte, und dem Christentum deutlich empfunden. Für einen Christen, der das wahre Heil vom Jenseits erwarte, sei die Welt weitgehend der Teufels und ein Gegenstand des Mißtrauens, meinte er bei der Entgegennahme des Leopold-Lucas-Preises. „Aber für den Juden, der im Diesseits den Ort der göttlichen Schöpfung, Gerechtigkeit und Erlösung sieht, ist Gott eminent der Herr der Geschichte.“

Im nächsten Satz erwähnte er dann Auschwitz. Jonas tat das nicht oft. Daß seine Mutter in Auschwitz ermordet worden war, hat er nur selten gesagt und meistens nur, um zu begründen, warum er, der von der deutschen Kultur so tief Geprägte, auf Dauer nicht mehr nach Deutschland zurückkehren wollte. Den weltnüchternen Anspruch überließ er denen, die in Auschwitz einen Gegenstand der vergleichenden Analyse, einen Topos für die Beherrschung oder einen Anlaß für weitreichende Schuld-sprüche fanden. Jonas begriff Auschwitz als eine unerhörte Herausforderung an die herkömmliche Religiosität. Und er gab ein ebenso unerhörte Antwort: von den durch Tradition geheiligten Attributen Gottes, der Allmacht und der Allgüte, strich er das erste. Er tat das nicht leichtfertig, sondern nur, um an der zweiten Eigenschaft um so energischer festzuhalten. Um gut und mächtig zugleich zu erscheinen, müsse Gott menschenfremd, verborgen und unversteherbar gedacht werden, meinte Jonas; zu diesem intellektuellen Opfer war er aber nicht bereit. Der *deus absconditus* der Mystiker war ihm genauso fremd wie die banalen Zivilisationsgötter der Neuzeit, die sich im Wachstum und im Wohlstand offenbaren.

Konservativ war er insofern, als er die Opfer, die der Fortschritt forderte, für unvermeidbar hielt. Der Natur gegenüber bewies er geradezu altmodischen Respekt; er bestand auf dem Eigenrecht aller Lebendigen und erkannte schon im Organischen einen ursprünglich vorhandenen, nicht erst vom Menschen zugesprochenen „Daseinszweck“. Der Vorwurf, Teleologie zu betreiben, konnte da nicht ausbleiben; Jonas hat ihn nicht leichtgenommen, sondern geduldig beantwortet und erklärt. Immer



Hans Jonas 1987 nach der Verleihung des Friedenspreises

Foto Barbara Klemm

wieder hat er Beispiele dafür gebracht, wie das Sein ins Sollen übertritt, hat dargestellt, wie aus Fakten Pflichten entstehen, am eindrucksvollsten in seiner Begründung des genuin menschlichen Verantwortungsgefühls. „Der Mensch ist das einzige Wesen, das Verantwortung haben kann“, stellte er fest und fuhr dann fort: „Indem er sie haben kann, hat er sie.“

Von der Fähigkeit der Menschen, die ihnen zugewandene Aufgabe zu erfüllen, hatte er keine hohe Meinung. Zumal in seinen letzten Jahren hat Jonas sich zunehmend besorgt geäußert über die Nebenfolgen verarmten Fortschritts mit sich brachte. Der rücksichtslose Optimismus der anderen, der Zukunftsplaner und der Wachstumsingenieure, wurde zur Folie, vor der seine eigene Haltung immer skeptischer erschien. Als Friedenspreisträger des Deutschen Buchhandels hat er daran erinnert, daß gerade bei den riskantesten Verfahren, der Kernkraftnutzung und der Genmanipulation,

der ersuchte Vorteil untrennbar mit Gefahren ganz neuerart, weil irreversibler Natur verbunden ist. Die Pflugschar selber drohte nun zum Schwert zu werden, mit dem die Natur Rache nahm für die Übergriffe, die sich der Mensch gegen sie erlaubt hatte. Statt der jäh stand eine schlechende Apokalypse bevor, ein „Pandämonium der Technik“.

Der Predigerton lag ihm nicht. Aber mit seiner leisen, beharrlichen Stimme hat Jonas mehr bewegt als andere mit ihrem Bühnendonner. Er pflegte sich erst spät zu äußern und sich noch später zu entscheiden; dann aber für die richtige Seite. Als er nach seiner Flucht vor dem braunen Terror am Ende des Krieges nach Deutschland zurückkehrte, trug er die Uniform der Sieger. Das war, wie er selbst versichert hat, für ihn ein entscheidendes Erlebnis. Vielleicht steht dem in Mönchengladbach geborenen und am Freitag mit 89 Jahren in New York gestorbenen jüdischen Gelehrten die große Zeit noch bevor. KONRAD ADAM

# Die Speerspitze

Er spreche wie eine Schreibmaschine, soll Mitterrand einmal von Jacques Chirac gesagt haben. Der Chef der Neogaullisten hat in der Tat nicht das Profil eines *homme de lettres* und pflegt auf seinen Reisen nicht Saint-Simon zu lesen. Beim Stichwort Kultur nannten Politiker des bürgerlichen Lagers bisher nur reflexartig den Namen Malraux und fielen danach meist wieder in verlegenes Schweigen. In Erwartung des ihnen winkenden Wahlsiegs im März machen sie sich nun aber zusehends Gedanken, wie man denn am besten das Erbe Jack Langs antrete. Beim Treffen der Oppositionsparteien RPR und UDF kam das Wort Kultur zwar noch nicht vor. Die neogaullistische RPR lud nun aber ein paar Intellektuelle zum vertraulichen Gespräch, die die möglichen Anwärter für die frei werdenden Salons des Kulturministeriums melden sich zaghaft zu Wort. Das Offensichtliche wagt indessen niemand zu leugnen: Von der üblichen Wahlkampfrhetorik, die das Werk der Vorgänger nur schlecht macht, bleibt der Kulturbereich einseitig verschont. Manche Oppositionspolitiker geben sogar offen zu, daß der Nachfolger Jack Langs es nicht leicht haben werde. Die provozierende Anregung, das Kulturministerium kurzerhand abzuschaffen, die der ehemalige Lang-Mitarbeiter Michel Schneider in seinem polemischen Buch „La Comédie de la culture“ in die Runde warf, findet jedenfalls bei der Opposition kein Gehör, im Gegenteil. Das Ansehen dieses Ministeriums und der erreichte Ein-Prozent-Anteil des Kulturhaushalts im Gesamtbudget solle beibehalten werden, fordern die Oppositionspolitiker im Chor. Sie suchen die Abgrenzung zum bisherigen Kurs eher in der allgemeinen Tendenz und sagen noch einmal, was seit geraumer Zeit alle Spatzen von den Dächern pfeifen: daß die Jahre der Glitzerkultur nun vorbei seien und daß es endlich wieder um das Echte und Wahre gehen müsse. Förderung von Literatur und Theater gegenüber der elektronischen Bilderflut, Förderung der Kunsterziehung in der Schule, Verbreitung der französischen Kultur im Ausland – so umschreibt Alain Carignon, der eigenwillige Bürgermeister von Grenoble, den manche schon als Lang-Nachfolger sehen, sein Programm: Frankreich brauche eine starke staatliche Kulturpolitik, um sich exemplarisch gegen das Konsummodell in der Kultur abzugrenzen, das vor allem aus Nordamerika komme und nur buntes Veletriil aneinanderreihet. Wer die Botschaft noch nicht verstanden haben sollte, dem half Jacques Chirac auf die Sprünge: Frankreich müsse „die Speerspitze eines kulturellen Europas“ werden. Da ist sie wieder, jene selbstbewußte Selbstlosigkeit, deren Weltblick gar keine Grenzen kennt und die den Wortführern der französischen Kultur so gut steht. Keine Angst, Frankreich bleibt auch nach dem Machtwechsel weitgehend so, wie es war. Der Fahnenträger der Superlative wechselt nur das Standbein. han.

### Heute außerdem

Unaufdringliche Perfektion – Zum Tod von Joseph Mankiewicz: Seite 29

Blutige Anarchie – Ein Dichter beschreibt die Lage Somalia: Seite 30

# Im Schatten

## Analphabetismus in Deutschland

Es ist kaum zu fassen. Auf drei Millionen schätzte die Unesco schon 1986 die Zahl der sekundären Analphabeten in der Bundesrepublik, und mit den neuen Ländern dem ehemaligen „LeseLand DDR“ – sollen es sogar vier Millionen sein, die Ausländer nicht mitgerechnet. Sekundäre (oder funktionale) Analphabeten heißt: Menschen über fünfzehn Jahren, die zwar eine Schule besucht, aber nicht richtig lesen und schreiben gelernt oder – häufiger noch – es wieder verlernt haben. Ein Problem, das viele auf die Länder der Dritten Welt begrenzt wähen, schwelt unter unserem hochentwickelten Bildungssystem.

Die Schätzungen besagen, daß zwischen 0,75 und fünf Prozent der erwachsenen Bevölkerung schreibunkundig sind, einige Experten gehen von einer noch höheren und steigenden Quote aus. Eine exakte empirische, auf Lese- und Schreibtests basierende Studie liegt bisher nicht vor. Aber es gibt Erhebungen, wie sie etwa in den Niederlanden oder unter amerikanischen Rekruten durchgeführt wurden, die sich vorsichtig übertragen lassen, sowie zahlreiche Einzeluntersuchungen zu Biographien und „Profilen“ von Analphabeten. Vor allem aber lieferten die Flut von Anrufen und die Welle von Anmeldungen, die eine Fernseh-kampagne für Alphabetisierungskurse in Nordrhein-Westfalen auslöste, zuverlässige Indikatoren. Aufschlußreich ist schließlich, daß der Anteil der Jugendlichen, die ohne Abschluß der Hauptschule verlassen, gegenwärtig bei sieben bis acht Prozent liegt – Tendenz steigend.

Das Problem ist akut. Die Initiative, es zu enttabuisieren und zu bekämpfen, geht von der „Stiftung Lesen“ (Mainz) aus. In Bonn, wo sie zur Pressekonferenz lud, wurde ihr Vorstoß zur Chefsache erklärt. Bundestagspräsidentin Rita Süssmuth verließ für eine halbe Stunde das Hohe Haus, um zum Deutschen Kulturrat zu eilen und hier gemeinsam mit Hilmar Hoffmann, dem Geschäftsführer der Stiftung, und mehreren Experten die Alarmglocken zu läuten. In ihrer Eigenschaft als Präsidentin des Deutschen Volkshochschulverbandes zog sie eine Bilanz dessen, was bisher – und zwar seit 1978 – getan wurde: Über dreihundert Volkshochschulen bieten heute Alphabetisierungskurse an, die von zehn- bis zwölf-tausend Teilnehmern besucht werden und mithin nur einen kleinen Bruchteil der Zielgruppe erreichen.

Die Schwellenangst ist beträchtlich. Die Hauptschwierigkeit ist, an die Analphabeten heranzukommen, von denen viele ihre Not mit Raffinesse und Einfallsreichtum zu verbergen verstehen. Die „Stiftung Lesen“

ist vor allem in der Vorsorge aktiv: In ihren fast dreihundert Leseclubs versucht sie, Kinder und Jugendliche von der Straße zu holen und zum Lesen zu motivieren. Auch setzt sie zunehmend auf die Kooperation mit dem Fernsehen, wo die Programm-macher längst erkannt haben, daß der geübte Leser auch der aufmerksamere Zuschauer ist: So wurde gemeinsam mit ÖRF und Bayerischem Rundfunk die Serie „Fortsetzung folgt nicht“ entwickelt, die Geschichten in Spielfilmausschnitten anreißt, um an der spannendsten Stelle abzubrechen und auf das Buch zu verweisen.

Die Erwachsenenarbeit ist ungleich mühsamer. Sozial zurückgesetzt oder ausgegrenzt, finden die Betroffenen nur schwer Zugang zu den traditionellen Bildungsinstituten, den Uninformiertheit und Hemmungen meist zusätzlich blockieren. Einen relativ erfolgreichen Weg zeigt der „Lese- und Schreibservice“ in Frankfurt am Main auf, an den Schriftlose von den Behörden verwiesen werden: Über die Alltagshilfe wird der Kontakt zum „Klienten“ und oft schon genug Vertrauen hergestellt, um ihm die Angst vor dem Alphabetisierungskurs zu nehmen. Die aus einer Lehrkooperative hervorgegangene Einrichtung sollte, wie ihr Leiter Bernhard Pöter darlegte, als Modell dienen und über den Deutschen Städtetag bekannt gemacht werden: Auch in der Beratung von Migranten, für die speziell der „Sprachverband Deutsch für ausländische Arbeitnehmer“ (Mainz) Kurse anbietet, hat sie sich bewährt.

Rita Süssmuth hat in Bonn dazu aufge-rufen, die elementare Bildung für alle Mitbürger zu sichern. Doch die Stimmung an der Basis ist, so Peter Hubertus, Vorstandsmitglied der „Schreibwerkstatt für neue Leser und Schreiber“ (Münster), alles andere als hoffnungsfroh: Es fehlt eine zentrale Einrichtung und eine Selbsthilfeorganisation der Schreibunkundigen, dazu an Stellen, Geld und Fortbildungsangeboten für die meist freiberuflich tätigen Dozenten. Ein erster Versuch, die einzelnen Initiativen zu bündeln, soll Mitte Oktober in der Evangelischen Akademie Bad Boll unter-nommen werden. Auch hat sich bisher nur der Verlag Ernst Klett in Stuttgart engagiert und eine Broschüre zum Lese-Einstieg aufgelegt.

Die bildungs- und gesellschaftspolitische Herausforderung des Analphabetismus ist noch kaum ins öffentliche Bewußtsein getreten, obwohl er auch volkswirtschaftlich zu Buche schlägt. Denn zu sehen ist nur die Spitze des Eisbergs. Das Problem ist bislang kaum zu fassen.

ANDREAS ROSSMANN

# Häschen in der Hamlet-Grube

## Kants Kaninchen: Jan Fabres „Wer spricht meinen Gedanken“ im Frankfurter „Theater am Turm“

Das große weiße Kaninchen in einer schwarzlackierten Ecke des Frankfurter „Theaters am Turm“ hat Jan Fabres Text „Wer spricht meinen Gedanken“ zu sprechen. Dieser verlangt von ihm nichts weiter, als auf Herzrhythmus, das Rauschen seines Blutes, den Rhythmus seines Atems zu lauschen. Des Hasen dringlichste Beschäftigung wäre die endlose Wiederholung der Erkenntnis, daß jeder, der in sich hineinhorcht, sich in jemanden, der horcht und in jemanden, der behorcht wird, spaltet: in ein „Ich“ und ein „Dich“. Natürlich passen die beiden nicht zusammen, genauso wenig, wie der Gedanke, daß etwas pocht und rauscht, zum Gefühl paßt, daß etwas pocht und rauscht. Auch hat ein Wort wie „pochen“ bekanntlich mit der Erfahrung des Pochens nichts zu tun. „Herz“ und Herz sind zweierlei. Die Welt ist etwas anderes als die Worte, die man sich von der Welt macht. Das ist eine Banalität, mit der man leben kann. Man kann aber auch Literatur daraus machen. Dann wird aus der Banalität Verzweiflung.

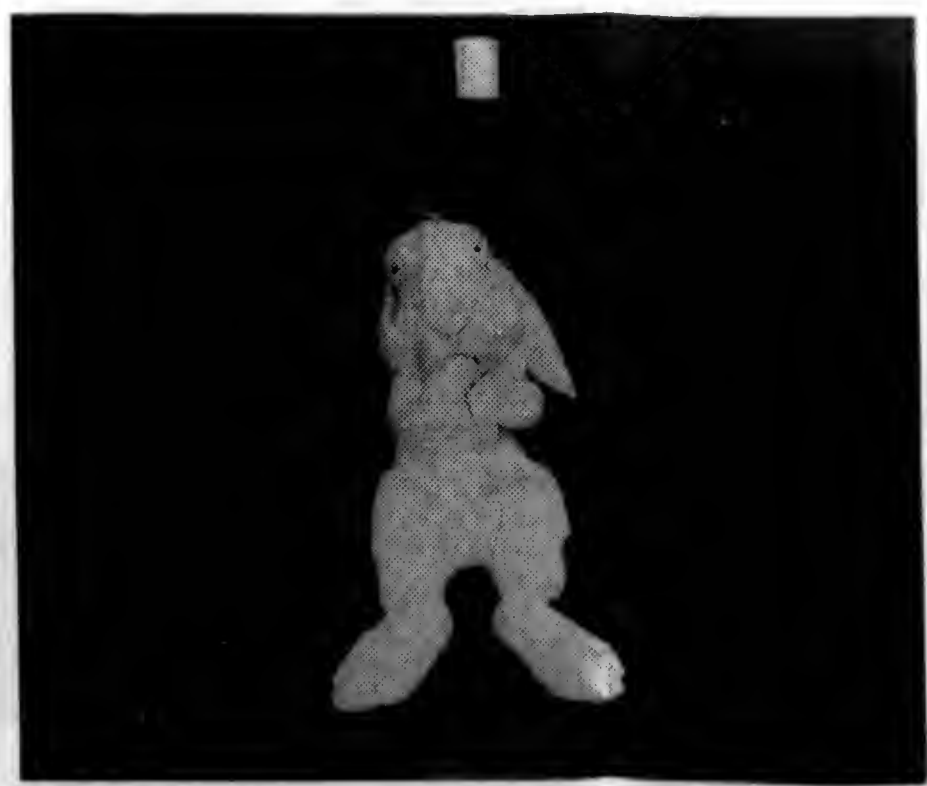
Das Kaninchen wäre die tierische Variante der guten alten Kant-Krise, die einst dem armen Dichter Kleist mit der Erkenntnis allein ließ, daß er mit seiner Welt-Erkennnis ohne die Welt dastehe, woran sich dann später unter anderen Beckett und Baudrillard, vor allem aber das „Theater am Turm“ angehängt haben. Mitten in Frankfurt am Main haben wir den Ort, wo in allen Produktionen und Gastspielen die Philosophie zu Theater wird, daß es Bedeutungen nicht mehr ge-

ben könne. Daß man sich mit den Zeichen begnügen müsse, die sich langsam und ir-gendwie erhaben in ihrer geheimnisvollen Geheimnislosigkeit nur um sich selber drehen dürfen: Keine Referenz!

Das in sich hineinmurmelnde Kant-Kaninchen wäre sozusagen der ideale Star-Gast des „Theaters am Turm“. Zumal es von Jan Fabre stammt, dem vier-unddreißigjährigen bildenden Künstler und Theatermacher, dem Antwerpener Guru der blauen leeren Räume, die er in seinen Produktionen sonst immer mit referenzlosen Eulen, nichts sagenden Rollstuhl-Zwillingen, mit seiner bedeutungslosen Lieblingsschauspielerin Els Deceukerle, aber auch mit Spielautomaten und zuckenden Bikinimädchen füllt. Worauf seine wissenschaftliche Jünger und Ausdeuter, die sich aber jede Ausdeutung streng untersagen, in einen, wie sie es selber nennen, „implodierenden Diskurs“ verfallen. Das heißt, ihre Aufsätze fallen in sich zusammen. Man könnte auch sagen: Es wird auf höchstem Niveau davon gelallt, daß es nichts zu sagen gibt.

Nun aber sitzt der Henker unter seiner spitzen schwarzen Kapuze mit den bedrohlichen Schelchiten am Eingang zum Bühnenraum des „Theaters am Turm“, der an diesem Abend auch Zuschauer-raum ist. Der Henker, unter dessen Maske niemand anderer steckt als Jan Fabre, hat die Hand am Starkstrom-Aggregat. Will er das Theater auf dem elektrischen Stuhl hinrichten oder wenigstens ein bißchen in die Luft sprengen? Das wäre als ganz unerwartete Botschaft allzu schön.

Foto Jean Pierre Sloop



Das Kaninchen als Erbe von Kant und Kleist: Marc Van Overmeier in Jan Fabres Frankfurter Inszenierung.

Aber dann kann jeder im dunklen Saal sehen, daß das Kaninchen an seiner linken Fellseite eine klaffende Wunde, daß es tränende Elefantenaugen und offenbar die Parkinsonsche Krankheit hat. Auch wird sichtbar, daß das Starkstromkabel unter Fell des Hasen läuft und auf der Brust des darin steckenden Schauspielers mit Heft-pflastern befestigt ist. Es geht dem Kant-Häschen also ans Fell, gleichgültig, ob das Tier zersprengt, ferngesteuert oder ihm nur ein Elektrokardiogramm genommen wird. Das ist als unerwartete Botschaft und welthaltige Bedeutung schon stark genug. Im „Theater am Turm“ passiert ein herrliches Malheur: Jan Fabre inszeniert den Anti-Fabre, der Guru wird zum Clown, das Kant-Kaninchen reißt aus.

Das Kaninchen schnauft heftig, zittert, legt sich auf einen Stuhl, macht verzweifelte Schwimmbewegungen, reißt sich den Kopf herunter. Und der Schauspieler Marc van Overmeier bleckt bei einem Wort wie „Herzrhythmus“ oder „Glühbirne“ oder „Rauschen“ die Zähne, starrt mit tränenden und schweißüberströmten Augen böse und mit irrem Blick ins Publikum – und rast, tobt, wütet! Er schreit mit schmerzverzerrtem Gesicht, das die edlen, wahn sinnigen Konturen eines lockigen Musketiers besitzt, der eine Entscheidung zu fällen hat, ob er nun explodieren soll oder nicht im großen, schrecklichen Kosmos. Ein Hamlet zwischen Hase-Sein und -Nichtsein.

Ein einsamer Zauderer zwischen schniefender Resignation, weinerlichem Zögern und bellender Aggression. Eine witzige, spannende, hochamüsante, in Teilen auch rührende Nummer eines sensiblen jungen Stadttheater-Recken, der eine Tragödien-Botschaft nach der anderen elegant und gaumig-rauh absondert in flämischer Sprache. „Wie sprekt mijn gedachte“ ist bei ihm die Rhapsodie eines Heldenlebens, in der Blutbahnen, Adern und Herzkranz-gefäße grausige Abenteuerlandschaften darstellen.

Das arme wunderbare Häschen hat „Theater am Turm“-widrig zwar jede Menge Referenz, aber keinerlei Resonanz. Als Marc van Overmeier sich nach fünfzig kurzweilig tragischen Minuten verbeugt hatte, als der Vorhang längst über der inszenierten Fülle gefallen war, blieb das ganz eigene TAT-Publikum, darauf trainiert, daß es nichts von Bedeutung wahrzunehmen habe, ganz lange danach still und konzentriert sitzen. So genöß es doch noch die gewohnte Leere. GERHARD STADELMAIER

# Hochhuth ohne Hochhuth

## Der Kampf um „Wessis in Weimar“

Der Stückeschreiber Rolf Hochhuth hat in ausführlichen Erklärungen anläßlich einer Talk-Show am Wochenende zweierlei begründet. Einmal, warum er dem Berliner Ensemble untersagen werde, sein Werk „Wessis in Weimar“ am 10. Februar aufzuführen: Weil in Einar Schleichs Inszenierung Chöre von neun oder mehr Schauspielern „häufig Unzusammenhängendes“ zitierten. Monologe einzelner Schauspieler fast ausschließlich Texte aus Regieanweisungen und essayistischen Einlagen bräuchten, die Aufführung „keinen einzigen Beginn und keinen einzigen Schluß meiner Szenen“ enthalte, das gleichbleibende Bühnenbild nichts über die konkreten Handlungsorte aussage und die Kostüme hauptsächlich aus Militärmanteln bestünden; außerdem kämen lange Passagen aus Goethes „Faust“, Schillers „Maria Stuart“ und „Kabale und Liebe“ vor und zu allem Überfluß Brechts Bekenntnisgedicht zur Kommunistischen Partei, welches chorisch rezitiert werde, von FDJ-Liedern und Schumann-Chorälen ganz zu schweigen.

Dies alles stört Hochhuth nun offenbar, obgleich er nach dem Besuch der Probe seines Stückes, wie der Berliner „Tagesspiegel“ und ähnlich auch die „Berliner Zeitung“ berichten, vor dem Regisseur, dem Ensemble, drei der Intendanten sowie dem Geschäftsführer des Hauses Peter Sauerbaum die Zusage gemacht haben soll, die Uraufführung zum vorgesehenen Termin stattfinden zu lassen. Dabei gab er in seiner Erklärung ein erstaunlich präzises Bild fast aller anderen Schleich-Inszenierungen, über die er sich fahrlässigerweise nie unterrichtet hat, und begründete dann zum anderen, daß es nicht leicht sei, die Uraufführung zu verbieten. Sein Theaterverlag könne allerdings verlangen, daß sein Name aus dem Programmheft zurückgezogen werde. Mit diesem Pakt wäre der Idealfall einer Hochhuth-Uraufführung ohne Hochhuth erreicht.

Heiner Müller, einer der fünf Intendanten des Berliner Ensembles, hat erklärt, er finde es eine „dumme Sache“, wenn die Uraufführung platzen würde. Schleich und Hochhuth seien so weit voneinander entfernt wie nur möglich; es sei gerade diese Entfernung gewesen, die das Haus gereizt habe, die Sache in Angriff zu nehmen. Es gebe vor jeder Uraufführungspremiere „Anfälle von Unvernunft, sowohl beim Autor als auch beim Regisseur“; man solle das „nicht so dramatisch“ sehen. F.A.Z.



Literatur

Baseball und Zionismus

Ansichten der Diaspora: Chaim Potoks Roman „Die Erwählten“

Von dem 1929 in New York geborenen Chaim Potok sind zwischen 1973 und 1977 vier Romane in deutscher Übersetzung erschienen, allerdings ohne mehr als Achtungserfolge zu erringen. Nun wagt es ein kleiner Verlag, Protokols Erstling „Die Erwählten“ (The Chosen, 1967) noch einmal und in neuer Übersetzung herauszubringen. Vielleicht ist diesem Buch (dessen Verfilmung jüngst im Fernsehen zu betrachten war) heute mehr Erfolg beschieden als vor achtzehn Jahren. Berichtet wird die Geschichte zweier Freunde aus jüdischen Familien Brooklyns. Der eine, Reuven Malter, der Erzähler, ist der Sohn eines Lehrers an einer jüdischen Schule, der als ein bedeutender Talmud-Interpret geschildert wird. Ähnlich ließe sich der Vater von Danny Saunders vorstellen, mit einem gewichtigen Unterschied allerdings: Danny Vater ist ein chassidischer Rabbi, das verehrte Oberhaupt (Zaddik) seiner Gemeinde, dem nichts verhafter sein kann als die zionistischen Ideen von Reuven Vater. Denn für den orthodoxen Juden kann es einen Judenstaat erst nach der Ankunft des Messias geben, niemals aber vorher.

Reuven und Danny lernen einander bei einem Baseballspiel kennen, das die Mannschaften ihrer Schulen austragen, ein Spiel, das von den jungen Orthodoxen mit den Schläfenlocken mit großer Hysterie ausgetragen wird und bei dem Danny seinen Gegenspieler Reuven schwer am Auge verletzt. Aber was als Konfrontation beginnt, entwickelt sich zu einer tiefen Freundschaft. Zum Bruch kommt es, als sich Reuven Vater begeistert für die Gründung des Staates Israel engagiert und damit geradezu zwangsläufig zum Feind der Chassidim werden muß. Rabbi Saunders verbietet seinem Sohn jeden Umgang mit dem Sohn des Verhaßten. Danny, dazu ansehend, einmal der Nachfolger des Vaters als Zaddik der Chassidim zu werden, gehorcht. Erst der verzweifelte Überlebenskampf des jungen Staates Israel, als ein zweiter Holocaust droht, bringt den Rabbi Saunders zum Einlenken, und er muß es am Ende akzeptieren, daß sein Sohn nicht sein Nachfolger wird, sondern sich Bart und Schläfenlocken abrasiert, um an der Columbia-Universität Psychologie zu studieren, während Reuven sich - wie übrigens auch Chaim Potok - zum Rabbi ausbildet.

Der Leser, der deutsche zumal, wird mit einer Welt konfrontiert, die ihm vor allem darum so fremd ist, weil von diesem gläubigen Judentum in Deutschland kaum etwas übriggeblieben ist. Vieles aber wird schon durch die Erzählung deutlich, und außerdem ist ein Glossar beigegeben, das die

wichtigsten Begriffe erklärt. Vor dem Hintergrund des ausgehenden Zweiten Weltkriegs - der Roman beginnt im Juni 1944 zur Zeit der alliierten Landung in der Normandie - und der ersten Nachkriegsjahre, entwickelt sich ein Stück jüdischen Lebens in den Vereinigten Staaten, zwar unbedroht, aber doch stets im Schatten der europäischen Verfolgung und später in der Sorge um die Existenz Israels.

Chaim Potok, der das Milieu Brooklyns aus eigener Anschauung kennt, hat die Geschichte dieser Jungenfreundschaft vor dem zeitlichen und religiösen Hintergrund mit größter Anschaulichkeit erzählt. Schon das erste Kapitel, das mit genauer Sachkenntnis den Ablauf des Baseballspiels zwi-

Auch Mozart hat hart gearbeitet

Kein Komponieren beim Billard: Ulrich Konrad tötet eine Legende

Mozart ist ein dankbares Objekt für Entmythologisierungen. Volkmar Braunbehrens konnte vor einigen Jahren zeigen, daß das Bild von Mozart als verarmtem und verkanntem, im Massengrab verscharrtem Komponisten keineswegs der historischen Realität entsprach. Hingegen hat sich die Vorstellung von Mozart als „Kopfkompomist“ hartnäckig gehalten: Mozart habe alle seine Kompositionen im Kopf fertig ausgeführt. Die Niederschrift sei nicht Bestandteil des Kompositionsaktes gewesen, sondern nur mehr ein mechanischer Vorgang, der auch unter widrigen Umständen, sei es während des Billardspiels oder des Kegels, durchgeführt werden konnte.

Mit dieser Vorstellung räumt nun Ulrich Konrad gründlich auf. Zu Beginn seines Buches zeichnet er fäktisch die Entstehung dieses Mythos im 19. Jahrhundert nach. Ein sachliches Indiz für den „Kopfkompomist“ Mozart scheint zu sein, daß - etwa im Vergleich zu Beethoven - nur wenige Skizzen und Entwürfe Mozarts erhalten haben. (Konrad erfaßt die erhaltenen Blätter in einem sehr differenziert ausgestalteten Katalog.) Freilich befand sich in Mozarts Nachlaß ein umfangreiches Konvolut von Fragmenten, Entwürfen und Skizzen, das aber, weil kaum kommerziell verwertbar, von der Witwe zum größten Teil vernichtet wurde. Auch dürfte bereits Mozart üblicherweise seine meisten Skizzen vernichtet haben, weil sie nach Vollendung einer Komposition keine Bedeutung mehr hatten.

Anhand der erhaltenen Skizzen analysiert Konrad Mozarts Arbeitstechnik: Mozart hat größere Zusammenhänge in meist

schon zwei jüdischen Mannschaften beschreibt, demonstriert die eigentümliche Atmosphäre jüdischen Lebens in New York; schon die Beschreibung der jungen Spieler zeigt jenen Konflikt zwischen dem jüdisch sprechenden Orthodoxen und den nur noch englischsprachigen Juden, deren Leben zwar gleichfalls von Thora und Talmud, von der Feier des Sabbats und der hohen Feiertage geprägt wird, an denen aber auch der american way of life nicht spurlos vorbeigeht. In diesem Spannungsfeld zwischen religiöser Inbrunst und wissenschaftlicher Nüchternheit, zwischen gelebter Glaubenstradition und glaubensferner Umwelt bewegt sich dieser Roman und bezieht den Leser in die Auseinandersetzung ein. Potok gelingt es, unser Interesse so sehr zu fesseln, daß wir am Ende beide Seiten gleichermaßen in unsere Sympathie einbeziehen. ECKHART KLESSMANN

Chaim Potok: „Die Erwählten“. Roman. Aus dem Amerikanischen übersetzt von Thomas Gunkel und Sabine Zwiener. Hitzeroth Verlag, Marburg 1992. 278 S., geb., 36,- DM.

einstimmigen „Verlaufsskizzen“ entworfen. In „Ausschnittsskizzen“, die sich nur auf einige Takte beziehen, versuchte er, während des Komponierens auftretende schwierige Probleme zu lösen. Dabei orientierte er sich an einer imaginierten Werkidee. Insofern repräsentieren die Skizzen ein Durchgangsstadium im Schaffensvorgang, um an angestrebte, eben noch nicht in der Endgestalt im Kopf vorhandene Kompositionsziele zu erreichen. Rückschlüsse auf die Art der Entstehung eines Werkes gestatten auch die akribischen Schriftanalysen Konrads. Die dem Buch beigegebenen Abbildungen zeigen, wie schwierig die fast stenographische Skizzenschrift Mozarts zu entziffern ist.

Die Entmythologisierung, die Konrad betreibt, bereitet ihm offenbar auch Skrupel. Mehrfach betont er, er wolle damit Mozarts Genialität nicht anzweifeln. Ein unnötiger Hinweis, da Genialität keine wissenschaftliche Kategorie ist. Solche Äußerungen erklären jedoch möglicherweise, warum Vergleiche zur Schaffensweise von Mozarts Zeitgenossen leider nur gelegentlich angestellt werden. Konrads Buch ist gleichwohl die wichtigste Neuerscheinung der letzten Jahre zu Mozart, für die Mozart-Forschung ein Standardwerk und für den Mozart-Liebhaber erhellend durch den Einblick in den Schaffensprozeß des Komponisten, den es gewährt.

MICHAEL WALTER

Ulrich Konrad: „Mozarts Schaffensweise“. Studien zu Werkautographen, Skizzen und Entwürfen. Vandenhoeck & Ruprecht, Göttingen 1992. 530 S., geb., 178,- DM.

Tagebuch

Dämmerung im Labersaal

Licht aus bei „Zeil um Zehn“ (HR)

Es hat lange gedauert, nun ist es soweit. Die Inflation der Fernseh-Talkshows, jener Nullrunden um Gott und die Welt, beginnt das Publikum nachhaltig zu verdrängen. Lange genug haben Journalisten Journalisten befragt, der Oskar den Joschka medienöffentlich Joschka genannt und vice versa, Politiker Schauspielern gelobt, deren neueste Filme mit jenen gerade erschienen Büchern talkshowmäßig konkurrieren, die von auskunftswilligen, nicht immer telegen Autoren in den aktuellen Zusammenhang von Balkankrieg und Klimakatastrophe gestellt werden. Weil das alle angeht, alle Betroffenen sind, kann auch die geladene Schauspielerin mitreden. So schließt sich der Themenkreislauf kurz. Abend für Abend, öffentlich-rechtlich wie privat.

Unterdessen werden die präsentierbaren Mediengäste rar, die noch nicht programmübergreifend mehrere Runden durchgeht, den Golfkrieg ebenso verurteilt wie den Zustand des deutschen Films beklagt haben. Sinkende Einschaltquoten drücken die Sendeanstalten, die Finanznot wächst. Und mit dem Publikum verlassen bereits genervte Teilnehmer vor laufender Kamera den unseligen Ort des Dauerquassels.

„Zeil um Zehn“, die Talkshow des Hessischen Rundfunks, geht deshalb mit gutem Beispiel voran. Im April wird sie eingestellt. Alice Schwarzer, die vor zwei Jahren, mit

Wolfgang Korruhn alternierend, die Moderation übernommen hatte - einer einzelnen Persönlichkeit traut man offenbar nur bei Sat.1 -, fiel zunächst überraschend positiv auf. Sie belebte das Ritual, indem sie ernsthaft fragte und emphatisches Interesse an Themen und Personen zeigte. Die feministische Emma-Herausgeberin entpuppte sich als streitbare Talkshow-Zivilistin jenseits der inszenierten Beliebigkeit des abgewetzten Genres. Doch in fast jeder ihrer Sendungen verhedderte sie sich am Ende doch in den Fallstricken eines heroischen Dogmatismus, dessen moralistische Eckpfeiler aus dem Leiden mit allen Opfern männlicher Gewalt gebaut sind, wo auch immer sie explodiert, im Krieg oder im Ehebett.

So auch am vergangenen Freitag. Gut vorbereitete und präzise waren ihre Fragen an Maria Schell, aufmerksam lauschte sie den Erinnerungen an eine Jugend im antifaschistischen Elternhaus, den Erzählungen von einer depressiven Krise. Maria Schell gab genau jenes Bild der starken und doch verletzlichen Frau ab, das, zum „weiblichen Rebellentum“ überhöht, längst im Klischee erstarrt ist. Weniger empfindsam ging Alice Schwarzer dann mit Tilman Zülch um, dem Bundesvorsitzenden der „Gesellschaft für bedrohte Völker“, der detailgenau Auskunft gab über den Krieg auf dem Balkan. Unklar in

der intellektuellen Zielrichtung, ressentimentgeladen, unterbrach Schwarzer ihn immer wieder, so daß sein vorhersehbarer frühzeitiger Abgang wohl nur durch seine Eitelkeit verhindert wurde.

Dann kam eine in Heidelberg praktizierende serbische Ärztin in die Runde, die allein schon dadurch Alice Schwarzer auf ihrer (Opfer-)Seite hatte, daß „Serben“ im Augenblick „nicht hoch im Kurs“ der öffentlichen Meinung stünden, wie die Moderatorin ihren Gast vorstellte. Die Ärztin ergänzte, sie sei „Friedensaktivistin“ und helfe überall dort, wo die Kriegsnot herrscht, und alle Opfer seien - ein verbelebender Gemeinplatz, dem Zülch entschieden, aber erfolglos zu widersprechen suchte, weil er genau in jenes Schema der Weltklärung paßt, das Alice Schwarzer in ihren Talkrunden immer wieder auspackt.

Denn wo Männer herrschen, sieht Schwarzer nur noch Opfer. Vor Monaten gab sie einer Irakerin Gelegenheit, aus der Opferperspektive - der irakischen Bevölkerung unter dem Embargo der Vereinten Nationen - eine ideologische Entlastungs-offensive für Saddam Hussein zu starten - unwidersprochen, denn der gewalttätige Mann in dieser Konstellation ist immer der weiße Mann, der den neokolonialistischen Westen repräsentiert. So gesehen, wird alles sehr einfach, die moralische Identifikation mit den Opfern aller Kriege und allen Elends in der „Dritten Welt“ besiegelt die Widersprüche, die eine weiße Frau vernachlässigen könnten. Doch es ist dieses selbstgerechte Gerede, das das Schweigen über vieles einschließt, die Frage etwa, die am Freitagabend im Raum stand - ob die Millionen Opfer der alliierten Bombenangriffe zwischen 1943 und 1945 irgendein Argument gegen die Befreiung vom Hitler-Faschismus sein können.

Wie schnell die angegebene Opfermoral zum bequemem Moralismus ehemaliger Täter werden kann, bewies Ex-„Stern“-Chefredakteur Rolf Winter, sein seinem Pamphlet „Ami go home“ gern geladener Talkshow-Gast und für Alice Schwarzer einer jener reuigen Sünder, die aus dem Kreislauf von Männlichkeit und Gewalt herausgefunden haben. In seinem letzten Büchlein enthielt Winter, daß er, um einen Freund zu rächen, als siebzehnjähriger Wehrmachtsoldat einen Engländer erschossen hatte. Nach langjähriger Latenzphase ergriffen ihn im Jahr 1958 tiefe Schuldgefühle, die ihn bis heute bewegen und zum radikalen Pazifisten werden ließen. Waffen weg, kein Krieg, nirgends. Ein Gedanke und ein Gefühl müssen fürs ganze Leben reichen.

Tilman Zülch hatte kein Saulus-Paulus-Erlebnis vorzuweisen, um das Denken auf immer einzustellen. Damit er die Runde der guten Menschen nicht weiter störe, kam er kaum mehr zu Wort. Alice Schwarzer aber ist eigentlich zu jung und zu klug, um für spätere Weihenprediger die Mutter Courage zu spielen.

VERENA LUEKEN



Doch zu klug für späterweckte Laienprediger: Alice Schwarzer

Foto teutopress

Gabriel García Márquez

Zwölf Geschichten aus der Fremde

Aus dem kolumbianischen Spanisch von Dagmar Ploetz und Dieter E. Zimmer

Verlag Kiepenheuer & Witsch, Köln 1993

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Verstört von dem Jubel und dem Gestank nach ranzigen Zwiebeln der vielen Familien in der Sommerhitze, hin und her gestoßen von den Trägertruppen, die mit Fäusten um das Gepäck kämpften, fühlte sie sich von dem gleichen rühmlosen Tod wie die Küken am Kai bedroht. Sie setzte sich dann auf ihre Holztruhe mit den verstärkten Ecken aus bemaltem Blech und blieb dort unbeirrt sitzen, schuf einen Bannkreis von Gebeten gegen die Versuchungen und Gefahren in heidnischen Land. So fand sie der Erste Offizier, als das Erdbeben vorüber und niemand außer ihr im geschleiften Salon zurückgeblieben war.

„Keiner darf sich jetzt hier noch aufhalten“, sagte der Offizier einigermassen freundlich zu ihr. „Kann ich Ihnen irgendwie weiterhelfen?“

„Ich muß auf den Konsul warten“, sagte sie.

So war es. Zwei Tage vor Auslaufen des Schiffes hatte ihr ältester Sohn an den Konsul in Neapel, einen Freund, telegraphiert und ihn darum gebeten, sie am Hafen abzuholen und ihr bei den Formalitäten für die Weiterreise nach Rom zu helfen. Ihr Sohn hatte den Namen des Schiffes und die Ankunftszeit durchgegeben und darauf hingewiesen, daß sie an dem Franziskanerhain zu erkennen sei,

das sie für die Ankunft anlegen werde. Sie hielt sich so strikt an ihre Vorschriften, daß der Erste Offizier ihr erlaubte, noch eine Weile zu warten, obwohl es Mittagessenzeit für die Mannschaft war, man die Stühle auf die Tische gestellt hatte und die Decks eimerweise mit Wasser saubergespült wurden. Mehrere Male mußte die Truhe weggerückt werden, damit sie nicht naß wurde, aber Frau Prudencia Linero wechselte den Platz, ohne sich aus der Fassung bringen zu lassen, ohne ihre Gebete zu unterbrechen, bis man sie aus den Aufenthaltsräumen herausholte und sie schließlich in der prallen Sonne zwischen den Rettungsbooten saß. Kurz vor zwei fand der Erste Offizier sie dort, in ihrem Büßergewand fast im Schweiß ertrinkend. Sie betete ohne Hoffnung einen Rosenkranz, denn sie war erschreckt und traurig und konnte kaum den Drang zu weinen bezähmen.

„Es ist sinnlos weiterzubeten“, sagte der Offizier, nicht mehr so freundlich wie beim ersten Mal. „Sogar Gott geht im August auf Urlaub.“

Er erklärte ihr, halb Italien sei zu dieser Zeit am Strand, vor allem sonntags. Zwar sei es wahrscheinlich, daß der Konsul wegen seiner amtlichen Aufgaben nicht in Urlaub sei, aber er öffne sein Büro sicherlich erst wieder am Montag. Das

einzig Vernünftige sei, in ein Hotel zu gehen, sich eine Nacht in aller Ruhe zu erholen und am nächsten Tag beim Konsul anzurufen; die Nummer stünde zweifellos im Telefonbuch. Frau Prudencia Linero mußte sich also mit diesem Urteil abfinden, und der Offizier half ihr bei den Einreise- und Zollformalitäten sowie beim Geldwechsel und setzte sie in ein Taxi mit dem bedenkliehen Hinweis, man solle sie in ein anständiges Hotel bringen.

Das hinfallige Taxi, das an einen Leichenwagen erinnerte, fuhr rumpelnd durch die verlassenen Straßen. Frau Prudencia Linero dachte einen Moment, der Fahrer und sie seien die einzigen Lebenden in einer Stadt von Gespenstern, die an Drähten mitten über der Straße hingen, sie dachte aber auch, daß ein so viel- und so leidenschaftlich redender Mann nicht Zeit haben konnte, einer armen einsamen Frau ein Leid zuzufügen, die, um den Papst zu sehen, die Gefahren des Ozeans herausgefordert hatte.

Am Ende des Straßenlabyrinths war das Meer wieder zu sehen. Das Taxi rumpelte weiter, an einem glühendheißen und einsamen Strand entlang, wo zahlreiche kleine grellbunte Hotels standen. Aber es hielt bei keinem, sondern fuhr direkt auf das unansehnlichste Gebäude zu, das in einer öffentlichen Grünfläche mit großen Palmen und grünen Bänken lag. Der Fahrer stellte die Truhe auf den schattigen Bürgersteig und versicherte der zweifelnden Frau Prudencia Linero, dies sei das anständigste Hotel von Neapel.

Ein schöner und freundlicher Gepäckträger wuchtete sich die Truhe auf die Schulter und nahm sich der Frau an. Er führte sie bis zu dem Aufzug aus Metallgeflecht, der behelfsmäßig in den

Treppenschacht gebaut worden war, und begann mit voller Stimme und beunruhigender Entschlossenheit eine Arie von Puccini zu schmettern. Es war ein altertümliches Gebäude mit neun renovierten Stockwerken, und in jedem befand sich eine Pension. Frau Prudencia Linero hatte plötzlich das Gefühl zu halluzinieren, als sie in einem Hühnerkäfig, umgeben von einer Treppe aus hallendem Marmor, ganz langsam hinauf fuhr und die Leute bei ihren tiefsten Zweifeln, in kaputten Unterhosen und beim sauren Aufstoßen in ihren Wohnungen aufstörte. Im dritten Stock hielt der Aufzug mit einem Ruck an, der Träger hörte nun zu singen auf, öffnete die Tür aus zusammenklappbaren Rhomben und wies Frau Prudencia Linero mit einer eleganten Verbeugung darauf hin, daß sie hier zu Hause sei.

Sie sah im Vestibül einen schmalen Jüngling hinter einer Holztheke mit farbigen Glasintarsien, daneben Schattenpflanzen in kupfernen Blumentöpfen. Ihr gefiel es sofort, denn der Angestellte hatte die gleichen Seraphimlocken wie ihr jüngster Enkel. Ihr gefiel der Name des Hotels, der in einer Messingplakette eingraviert war, ihr gefiel der Geruch nach Phenylsäure, ihr gefielen die hängenden Farne, die Stille, die goldenen Lilien auf der Tapete. Sie machte dann einen Schritt aus dem Aufzug, und ihr Herz krampfte sich zusammen. Eine Gruppe englischer Touristen in kurzen Hosen und Strandsandalen döste in einer langen Reihe Wartesessel. Es waren siebzehn, und sie saßen symmetrisch aufgereiht da, als seien sie nur ein einziger, der in einer Spiegelgalerie mehrfach erschien. Frau Prudencia Linero erfaßte sie mit einem Blick, ohne sie unterscheiden zu können, und das einzige, was sie beeindruckte, war die lange Reihe

rosiger Knie, Schweineteilen gleich, die an den Haken einer Metzgerei hingen. Sie machte keinen weiteren Schritt zur Empfangstheke, sondern wich erschreckt zurück und betrat wieder den Aufzug.

„Fahren wir in ein anderes Stockwerk“, sagte sie.

„Diese Pension ist die einzige mit Speisesaal, signora“, sagte der Träger.

„Macht nichts“, sagte sie.

Der Träger machte eine Geste des Einverständnisses und sang bis zur Pension im fünften Stockwerk den noch fehlenden Teil des Liedes. Dort wirkte alles weniger ordentlich und hell. Die Inhaberin war eine frühlingshaft Matrone, die ein schlichtes Spanisch sprach, und niemand hielt in den Sesseln des Vestibüls Siesta. Tatsächlich gab es keinen Speisesaal, doch das Hotel hatte eine Absprache mit einem nahen Eßlokal, das die Gäste zu einem Sonderpreis verpflegte. Also entschied Frau Prudencia Linero, ja, sie bleibe eine Nacht. Die Eloquenz und die Freundlichkeit der Besitzerin überzeugten sie ebenso wie die eigene Erleichterung darüber, daß hier kein Engländer mit rosigem Knie im Vestibül schlief.

Im Schlafzimmer waren die Läden um zwei Uhr mittags geschlossen, und das Dämmerlicht bewahrte die Kühle und Stille eines entlegenen Waldes und war gut zum Weinen. Kaum war sie allein, schob Frau Prudencia Linero die zwei Riegel vor und urinierte zum ersten Mal seit dem Morgen, ein schwacher und mühsamer Strahl, der sie ihre während der Reise verlorene Identität zurückgewinnen ließ. Dann zog sie die Sandalen aus und nahm die Kordel der Kutte ab und legte sich mit der Herzseite auf das Ehebett, das zu breit

und zu einsam für ihre Einsamkeit war, und ließ die andere Quelle ihrer zurückgehaltene Tränen fließen.

Es war nicht nur das erste Mal, daß sie Riohacha verlassen hatte, sondern auch einer der seltenen Fälle, daß sie das Haus verlassen hatte, seitdem ihre Kinder geheiratet hatten und ausgezogen waren und sie allein mit zwei barfüßigen Indios zurückgeblieben war, um den seelenlosen Körper ihres Mannes zu versorgen. Ihr halbes Leben verging in dem Schlafzimmer, mit dem Blick auf das, was von dem einzigen Mann übriggeblieben war, den sie geliebt hatte und der auf dem Bett ihrer jungen Liebe auf einer Matratze aus Ziegenfell fast dreißig Jahre dahindämmerte.

Im letzten Oktober hatte der Kranke in einem plötzlichen Anfall von Geistesgegenwart die Augen geöffnet, die Seinen erkannt und darum gebeten, einen Fotografen zu holen. Man holte den Alten aus dem Park mit seinem riesigen Apparat mit schwarzem Balg und Tuch und der Magnesiumplatte für die Innenaufnahmen. Der Kranke selbst leitete die Aufnahmen. „Eine für Prudencia, für die Liebe und das Glück, das sie mir im Leben geschenkt hat“, sagte er. Das Foto wurde mit dem ersten Magnesiumblitz aufgenommen. „Jetzt zwei weitere für meine angebeteten Töchter, Prudencia und Natalia“, sagte er. Sie wurden aufgenommen. „Zwei weitere für meine Söhne, mustergültig in der Familie wegen ihrer Zärtlichkeit und ihrer Vernunft“, sagte er. Und so ging es weiter, bis das Papier und das Magnesium aufgebraucht waren und der Fotograf heimgehen mußte, um sich neu einzudecken.

Fortsetzung folgt

Nicht sind die Leiden erkannt, nicht ist die Liebe gelernt, und was im Tod uns entfernt, ist nicht entscheidend. Rainer Maria Rilke, Sonette an Orpheus, XIX

Ein großer Analytiker europäischer Geistesgeschichte ist hinter den Horizont gegangen.

Rainer Gruenter

Professor Dr. phil. Dr. h. c.

\* 10. Juni 1918 † 5. Februar 1993

Wir trauern um den Vater und Freund.

Gertrud Höhler, Berlin · Abel Höhler, München

Sie versuchte, den Zeitgeist zu erfassen, die geistigen Strömungen der Epoche zu verstehen.

Wir nahmen Abschied von

Inge Edle von Graeve

verw. von Griesheim, geb. Herder

\* 18. 2. 1911 † 20. 12. 1992

Dagmar Cotta von Griesheim und 6 Enkelkinder

Inga Lançon, geb. v. Schlick

Gela Wogatzki, geb. v. Schlick

Alexa Kalmus, geb. v. Frantzius

Dagmar Cotta von Griesheim Ledererzeile 41, 8090 Wasserburg/Inn

Unerwartet verstarb am 3. Februar 1993

das Ehrenmitglied des Deutschen Beamtenbundes

Hans Wernery

im Alter von 80 Jahren.

Hans Wernery war von 1961 bis 1979 stellvertretender Bundesvorsitzender des DBB. Durch sein Engagement für den öffentlichen Dienst und durch seine faire und sachliche Art hat Hans Wernery die Berufspolitik des Deutschen Beamtenbundes entscheidend mitgestaltet.

Wir verlieren mit Hans Wernery eine unserer prägenden Persönlichkeiten.

Für die Bundesleitung des Deutschen Beamtenbundes

Werner Hagedorn

Bundesvorsitzender



Weil wir die Opfer nicht vergessen: Kriegsgräberfürsorge auch im Osten, Arbeit für den Frieden!



Volkshund Deutsche Kriegsgräberfürsorge Werner-Hilpert-Straße 2 3500 Kassel Postf. Karlruhe 40 112-759, BLZ 660 100 75 Frankfurt/Main 4300-603, BLZ 500 100 60



Faz 8. Jan 8



Immanuel JAKOBOVITS Foto dpa

### Mylord aus Königsberg

Er wurde, wie Kant, als Deutscher in Königsberg geboren und trägt auch Kants Vornamen, das hebräische „Gott mit uns“. Als ihn Königin Elisabeth II. zu Neujahr zum Peer von England kürte, so daß er nun als erstes Haupt der 400 000 britischen Juden im Oberhaus sitzen darf – eine Ehre, die dem Kardinal der Katholiken noch versagt ist –, empfanden viele Engländer Genugtuung. Nicht weil es dem Oberrabbiner des Landes eine formale Anerkennung und sich selber Toleranz angesichts unüberwundener Reste eines historischen Antisemitismus aussprechen möchte. Vielmehr, weil der neue Lord, Immanuel Jakobovits, ohne Rücksicht, ob ihn das populär macht, dem Land in klaren Worten oft jene moralische Führung bietet, die es vom anglikanischen Klerus und anderen dazu berufenen Würdenträgern heimischer Geburt immer häufiger nicht bekommt. Die „insularen“ Briten waren schon immer hellwache Kosmopoliten, wenn sie Begabte aus der Fremde gewinnen und gewinnreich assimilieren konnten – die Hitler-Flüchtlinge in führenden Positionen Englands sind Legion, die Verluste für Deutschland deutlich.

Jakobovits kam 1936 im Alter von 15 Jahren aus Berlin. Er ist der älteste Sohn eines Rabbiners. Fünf Jahre darauf war er Verweser der Londoner Synagoge, erwarb den Dr. phil. mit einer vielbeachteten Arbeit über jüdische medizinische Ethik und erreichte 1947 das Rabbinat. Wenig später wurde er „Chief Rabbi“ von Irland, und 1958 rief ihn Amerikas bedeutendste Synagoge, die in der Fifth Avenue von New York. 1967 wurde er Oberrabbiner von Großbritannien, 1979 Präsident der europäischen Rabbinerkonferenz, 1981 erhielt er die Ritterwürde. Die Stationen sagen wenig über die innere Wandlung des jungen Deutschen, der zahllose Freunde und Verwandte in den Gaskammern verlor, zum wortgewaltigen Führer des britischen Judentums – und zwar über die von orthodoxer oder liberaler Richtung gesetzten Grenzen hinweg. Sie alle nennen ihn „Chief“, obwohl er offiziell nur Sprecher der orthodoxen United Hebrew Congregations ist. Er predigt ihnen, daß Judentum, trotz Holocaust und Judenhaß, mehr als bloßes Überleben anstreben müsse: es existiere als Zeichen für die Welt. „Wir haben eine Aufgabe moralischer Pionierarbeit zu erfüllen, etwas Einmaliges und von Dauer beizutragen.“ Hart ist seine Kritik an Israel, wenn es dieses Soll verletzt.

Seine moralische Autorität bewirkte, daß wieder jedes dritte jüdische Kind in die orthodoxen Schulen geht. Vater von sechs Kindern, Großvater von bald dreißig, lehrt er die Jungen, ein hartes Leben zu erwarten: das Credo der Diaspora. Während Anglikaner zaudern und zweifeln, verdammt er eindeutig Ehebruch, Homosexualität und Sex außer der Ehe. Gegen Aids gebe es nur eine Revolution der Moral. Der Platz der Frau sei im Haus. Einwanderer müßten sich selber helfen, nicht die Hilfe Dritter erwarten. Dem Glaubenszweifler sagt er: „Du bist nicht berufen, Gott zu ändern, sondern dich selbst.“ Kritiker nennen ihn „viktorianisch“; Freunde, Margaret Thatcher darunter, sehen „common sense“. Sie rechnet mit seiner politischen Kritik im Oberhaus.

Deutsch spricht er öffentlich nicht mehr, „doch nicht aus Haß auf die von Mördern gebrauchte Sprache“, nein – Deutsch sei „entschuldet“, er aber „gehemmt“. Er werde auch nie wieder deutschen Boden betreten, noch je vergeben und vergessen. Er habe dazu nicht das Mandat der sechs Millionen Toten. ULRICH GRUDINSKI

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## Henry P. Jordan Dies in Germany; Professor at N.Y.U. in the 1940's

Dr. Henry P. Jordan, a former German diplomat and professor of government at New York University, died Thursday in Freiburg, West Germany. He was 86 years old.

A member of the German Foreign Service during the Weimar Republic, Dr. Jordan renounced his diplomatic career after Hitler came to power in 1933 and joined the faculty of Carleton College in Minnesota. Trained in philosophy, he shifted to political science, which he taught at New York University from 1939 to 1949.

During World War II, he advocated greater autonomy for Puerto Rico and urged the United States to apply its "moral power" in achieving postwar European integration.

Dr. Jordan, a descendant of French Huguenots and the son of a German Army officer, was born in Frankfurt on Sept. 4, 1897. Both father and son served in World War I.

The son studied in Bonn and Freiburg before receiving his doctorate in philosophy in 1926 at the University of Berlin and joining the German Foreign Service. He was a vice consul in New York at the time he resigned in 1933.

After his tenure at New York University, he moved to West Germany, where he lectured from 1949 to 1952.

Although he had become a naturalized American citizen, he joined the West German diplomatic corps and served as Ambassador in Cuba and in the Netherlands before retiring to Freiburg in 1962.

Dr. Jordan is survived by his wife, Irene, and two sons, Paul, a conductor and organist at the State University of New York in Binghamton, and Don, a journalist in Bonn.



1958

Dr. Henry P. Jordan

## Bob Ledbetter, 49; Coached Backfield For Giants' Offense

By FRANK LITSKY

Bob Ledbetter, the offensive backfield coach of the Giants, died Friday night at St. John's Episcopal Hospital in Smithtown, L.I. He had been hospitalized since Sept. 24, his 49th birthday, after he suffered a stroke at his home in Northport, L.I.

Mr. Ledbetter, a burly man known for his ability to motivate players, had coached for 24 years. He joined the Giants this year after six years as offensive backfield coach of the Jets. He helped make Freeman McNeil and Bruce Harper outstanding runners for the Jets.

The Giants announced that a moment of silence in memory of Mr. Ledbetter would precede the national anthem before the game today against the Philadelphia Eagles at Giants Stadium in East Rutherford, N.J.

Mr. Ledbetter, born and raised in

## Saul Orkin, College President



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Die Juristische Fakultät der Humboldt-Universität in Berlin verlieh dem in Washington lebenden **Henry Kellermann**, dem letzten jüdischen Studenten, der 1937 dort promovierte, das goldene Doktor-Diplom. In seiner Dankrede erklärte Kellermann, dass Berlin "ein Teil meiner kulturellen Wurzeln und meines Erbes" ist. Er pries die Universitäten der Weimarer Zeit für deren gute Erziehungsarbeit, bemängelte aber, dass sie den Studenten nichts über Demokratie vermittelten. Kellermann, der 1938 in die USA kam, hat dem Ankläger-Team bei den Nürnberger Prozessen angehört und war von 1945 bis 1970 im US-Außenministerium beschäftigt. Nach seiner Versetzung in den Ruhestand begann der gebürtige Berliner eine akademische Karriere bei der *Georgetown University* in Washington.

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Kempner



## Zum 90. Geburtstag von Prof. Dr. Robert M. W. Kempner

Am 17. Oktober 1989 vollendete Prof. Dr. Robert M. W. Kempner das 90. Lebensjahr. Aus diesem Anlaß gingen dem heute in der Schweiz Lebenden Glückwünsche und Ehrungen aus vielen Teilen der Welt zu.

Antifaschistisches Engagement, beeindruckendes Überzeugungsvermögen und bewundernswerte Vitalität prägen seit mehr als einem halben Jahrhundert das Wirken dieser großen Juristenpersönlichkeit. Einer Berliner Gelehrtenfamilie entstammend, wuchs Robert Kempner hier im bürgerlich-liberalen Milieu auf. Seine Eltern assistierten in jungen Jahren Robert Koch, nach dem und mit dessen Einverständnis sie ihren Erstgeborenen nannten. Nach Abschluß seiner juristischen Ausbildung und kurzfristiger Tätigkeit in der Anwaltschaft wechselte dieser am 2. Mai 1928 in das Preußische Ministerium des Innern über, wo er bald die Funktion des Justitiars der Polizeiabteilung bekleidete. Diese Tätigkeit ermöglichte ihm umfassende Einblicke in das verfassungsfeindliche Treiben der Nazipartei. Als im Sommer 1930 dem Preußischen Ministerpräsidenten Otto Braun (SPD) eine mit dem Ziel verfaßte Denkschrift vorgelegt wurde, die NSDAP als terroristische Organisation gemäß §128 des damaligen Strafgesetzbuches verbieten zu lassen, gehörte Kempner zu deren tatkräftigsten Autoren. Das Schicksal dieses Dokuments war jedoch vorgezeichnet: Die Reichsregierung unter dem Zentrumspolitiker Brüning ließ es in der Schublade verschwinden, anstatt die notwendigen Schritte bei der Oberreichsanwaltschaft zu veranlassen. Gleichwohl wurde das bald publik: Der seit 1926 auf Wunsch des späteren Nobelpreisträgers Carl von Ossietzky ehrenamtlich in der Liga für Menschenrechte tätige Robert Kempner initiierte eine öffentlichkeitswirksame Anfrage dieser Vereinigung, die den Oberreichsanwalt Karl Werner (der sich später freilich als Mitglied der Nazipartei entpuppte) empört reagieren ließ: „Was sind denn das für verdächtige Leute, die über solche Vorgänge Bescheid wissen?“ In der Tat war Kempner einer der ganz wenigen höheren Beamten der Weimarer Republik, die energische Maßnahmen gegen die Nazis forderten und daran teilhatten, die Öffentlichkeit über deren Treiben zu informieren. Als Hitler am 25. September 1930 als Zeuge vor dem 4. Senat des Reichsgerichts ungehindert drohen durfte: „Wenn wir siegen, werden bestimmt die Köpfe der anderen rollen“, kommentierte der als Prozeßbeobachter in Leipzig anwesende Justitiar Kempner: „So etwas konnte man sagen, ohne daß Hitler das Wort entzogen worden ist! Eine Aufforderung zu den schwersten Staatsverbrechen, die es gibt!“

Wie diese Verbrechen von den Naziführern (und ihren Parteijuristen) zielgerichtet vorbereitet wurden, bewies die Beschlagnahme von Geheimplänen im November 1931. Bei den „Boxheimer Dokumenten“ handelte es sich um Entwürfe von Regierungsproklamationen, die den nazistischen Mordterror schon in aller Brutalität ankündigten und die vom späteren Heydrich-Stellvertreter Werner Best, der kürzlich in der BRD (wo er übrigens nie vor Gericht gestanden hat) gestorben ist, verfaßt waren. Da die Reichsregierung selbst darauf nicht entschieden reagierte, veröffentlichte Kempner damals seine berühmte publizistische Abrechnung mit den Nazis „Justizdämmerung“, die wegen des faschistischen Mordterrors unter dem symbolischen Pseudonym Eike von Repkow erschien.

Als Hitler am 30. Januar 1933 die Regierungsgewalt übertragen erhielt und Göring wenig später als neuer Chef in das Preußische Innenministerium einzog, gehörte der Justitiar der Polizeiabteilung zu den ersten amtsentfernten preußischen Ministerialbeamten. Bevor er am 1. September 1939 in die USA entkam, war er zunächst im Berliner Columbia-Haus und später im faschistischen Italien inhaftiert.

Im Oktober 1943, als die International War Crimes Commission mit dem Ziel der Aufdeckung, Aufklärung und späteren Ahndung der nazistischen Verbrechen gegründet wurde, gehörte Robert Kempner zu deren Mitarbeitern. Nicht zuletzt dank seiner Detailkenntnisse über die deutsche Ministerialstruktur erwies er sich schnell als einer der bedeutsamsten Angehörigen des Nürnberger Anklagestabes. Auf seine lückenlose und überzeugende Beweisführung als Ankläger des Reichsinnenministers Wilhelm Frick im Nürnberger Hauptkriegsverbrecherprozeß sowie bei der Vorbereitung und Durchführung insbesondere des gegen Spitzenrepräsentanten von Nazi-Ministerien durchgeführten sog. Wilhelmstraßen-Prozesses konnten später zahlreiche nationale Gerichte zurückgreifen, so u. a. die israelische Justiz im Eichmannprozeß und das Oberste Gericht der DDR in der Hauptverhandlung gegen den damaligen BRD-Staatssekretär Hans Globke.



Prof. Robert Kempner bei einer Aussprache mit deutschen Verwaltungsbeamten im Jahre 1949

Foto: ADN-ZB

Nach Abschluß der Nürnberger Kriegsverbrecherprozesse wandte sich Kempner entschieden gegen das bald einsetzende, in der BRD regierungsoffiziell geförderte und von US-amerikanischen Stellen großzügig honorierte und von US-amerikanischen Stellen selbst zahlreichen ursprünglich in Nürnberg zum Tode Verurteilten, schließlich aber Begnadigten die Zuchthausstore öffnete. Nachdrücklich verwies der prominente Jurist dabei auf den Zusammenhang zwischen dem Rehabilitieren der Naziverbrecher und der Wiederaufrüstung in der BRD.

Nachdem er 1951 in Frankfurt Main eine Anwaltskanzlei eröffnete, erwarb er sich große Verdienste vor allem als Nebenklager in Prozessen gegen schwerbelastete Naziverbrecher – u. a. als Bevollmächtigter des Vaters von Anne Frank im Prozeß gegen den SS-Gruppenführer Wilhelm Harster. In zahlreichen Fällen initiierte er Ermittlungsverfahren, so im Zusammenhang mit dem Reichstagsbrandprozeß im Namen des Bruders des von den Nazis umgebrachten Marinus van der Lubbe. Besonders gewichtig war seine ständige Forderung, endlich auch in der BRD bzw. in Berlin (West) Richter und Staatsanwälte des Volksgerichtshofs vor Gericht zu stellen. Mit welchem Nachdruck der antifaschistische Jurist dieses Ziel verfolgte, beweist die Statistik seiner allein 1979 ergriffenen Initiativen. Nachdem frühere Vorstöße letztlich gescheitert waren, erstattete er am 18. März 1979 erneut eine Strafanzeige. Zwar stellte die Staatsanwaltschaft Berlin (West) das daraufhin eingeleitete Ermittlungsverfahren bereits am 20. Juni wieder ein, doch ging ihr schon am 24. Juli 1979 ein neues Kempnersches Verfolgungsverlangen zu, auf das freilich exakt 16 Tage später wieder ein ablehnender Bescheid folgte. Wenig später erzwang Kempner jedoch mit einer Dienstaufsichtsbeschwerde die Wiederaufnahme der Ermittlungen, die – nachdem sie von der Staatsanwaltschaft Berlin (West) zunächst wiederum zweimal eingestellt worden waren – heute noch andauern, was nunmehr der nebenklageberechtigte DDR-Bürger Gerd Fischer aus Brandenburg mit neuerlichen Beschwerden erzwang. Auch das symbolisiert sinnfällig die vielfältigen Gemeinsamkeiten, die die Justiz unseres Landes seit eh und je mit dem engagierten Antifaschisten Kempner verbinden.

Der Zentralvorstand der Vereinigung der Juristen der DDR hat dem Jubilar zu seinem 90. Geburtstag herzliche Glückwünsche übermittelt. Zugleich wurde ihm versichert, daß gerade hier – wo er in jungen Jahren jenen mutigen Kampf gegen den deutschen Faschismus aufnahm – sein Name im untrennbaren Zusammenhang mit der Ahndung der unermesslichen Naziverbrechen gewürdigt wird. Sein für jeder fortschrittlichen Juristen vorbildlicher Lebensweg, durchdrungen vom leidenschaftlichen Wirken für Wahrheit, Gerechtigkeit und Menschenwürde, sein bedeutender Beitrag in der Auseinandersetzung mit den gerade jetzt wieder verstärkter Umtrieben neonazistischer Kräfte besitzt – so heißt es im Schreiben des Zentralvorstands der Vereinigung der Juristen – in der DDR eine große Ausstrahlungskraft.

CARLOS FOTH und GÜNTHER WIELAND, Berlin



Eigentlich zwei Bücher in einem

# Von oft verwirrender Vielfalt . . .

Robert M. W. Kempner, der Ankläger von Nürnberg, hätte seine Lebenserinnerungen früher erzählen sollen / Von Hanno Kühnert

Es gibt nur wenig Bücher, zumal Lebenserinnerungen, die den Leser abwechselnd in Beklemmung, ins Lachen, in Entsetzen und in Niedergeschlagenheit treiben. Und wenn ein Buch solche Wechselbäder nicht nur wegen seines Inhalts, sondern auch wegen seiner Form verursacht, wenn der Verfasser seinem Adressaten gleichzeitig die Haare zu Berge stehen läßt und ihm Bewunderung abnötigt – dann muß das schon ein reichlich bizarres Werk sein, das er da vorlegt. In der Tat, das Buch von

Robert M. W. Kempner: „Ankläger einer Epoche, Lebenserinnerungen“. In Zusammenarbeit mit Jörg Friedrich. Verlag Ullstein, Frankfurt 1983; 480 S., 42,- DM.

ist eine groteske Mischung von eindringlichen, manchmal erschütternden Lebenserinnerungen einerseits und geschwätzigem, schlampig formuliertem, merkwürdigem Pamphlet andererseits: Zwei Bücher in einem werden da angeboten, ein wichtiges und ein skandalöses Konvolut wurden zusammengebunden.

Robert Kempner, jetzt im 85. Lebensjahr, wurde in Freiburg im Breisgau als Sohn damals berühmter Bakteriologen geboren. Er ist in Berlin aufgewachsen. Seine Mutter, Lydia Rabinowitsch-Kempner, war Frauenrechtlerin und eine der ersten Medizinprofessorinnen in Deutschland. Kempners Vater, ebenfalls Arzt und Forscher, starb früh, im Jahr 1920 an Kehlkopftuberkulose. So ist in den Lebenserinnerungen vorwiegend von der begabten und rührigen Mutter die Rede.

Robert M. W. Kempners Leben ist mit der jüngsten Geschichte Deutschlands und der Bundesrepublik auf eine Weise verwoben, wie nur das Leben eines Preußen aus der jüdischen Oberschicht mit diesen letzten achtzig Jahren Deutschlands verwoben sein kann. Zuerst studierte der Großbürger aus Berlin-Zehlendorf Jura, lernte bei dem Berliner Strafverteidiger Erich Frey die Künste der Verteidigung im Kriminalprozeß, dann verrichtete er Beamtenamt im preußischen Innenministerium, vor allem in der Polizeiverwaltung, verfaßte eine Denkschrift gegen Hitler und



Robert M. W. Kempner im Jahr 1948 . . .

den heraufziehenden Nationalsozialismus. 1933 wurde er schließlich hinausgeworfen, war zunächst Auswanderungsberater für zahlreiche Juden, unterrichtete in Florenz Exil-Kinder und floh dann 1939 weiter in die Vereinigten Staaten.

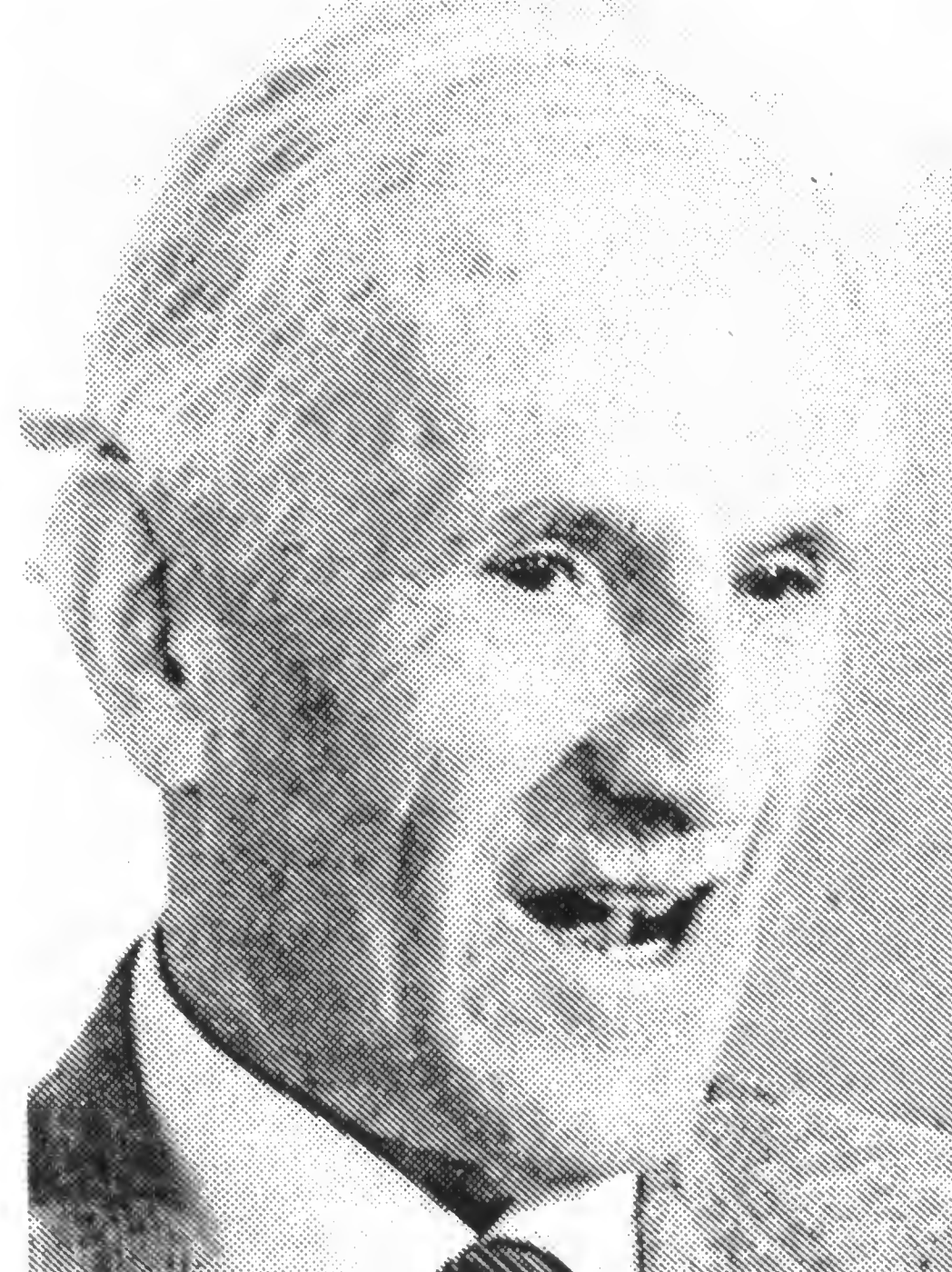
Dort beobachtete und bekämpfte Kempner das deutsche NS-Regime. Dieser zweite Lebensabschnitt war die Vorbereitung für den dritten, die Materialsammlung und Anklage gegen die noch übrigen besiegten Herren des Dritten Reiches in Nürnberg, als stellvertretender Hauptankläger, als der Kempner auch berühmt wurde.

Schließlich war Kempner einflussreicher Anwalt in Wiedergutmachungssachen, setzte sich in der Bundesrepublik unermüdlich dafür ein, daß NS-

Unrecht, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit verfaßt würden, daß die alten Nationalsozialisten nicht wieder in ihre früheren Funktionen zurückkehren könnten. Diese Konjunktive stehen dafür, daß es, ohne seine Schuld, nicht voll gelungen ist. Er, der durch seine Erfahrung, durch seine Kenntnisse aus den Nürnberger Prozessen und durch seine Wortgewalt mächtige Kämpfer gegen die Mörder und gegen den mörderischen Staat von 1933 bis 1945, erlebt jetzt immerhin, daß der Wandel der Generationen das Problem löst: Ein Buch wie seines zeigt unter anderem, wie verfehlt die amerikanische Hoffnung war, von vornherein einen von braunen Elementen freien Staat aufzubauen. Die Verfilzung und Verstrickung der neuen mit der alten Administration, der neuen mit der alten Justiz, die Unlust der Deutschen, mit den Verbrechern gerecht umzugehen – Kempners Buch macht das alles nur zu deutlich.

Kern des Buches sind die beiden Lebensabschnitte in Amerika und in Nürnberg. Von Oktober 1943 an arbeitete Kempner in der Abteilung für Kriegsverbrechen im amerikanischen Justizministerium. Er hatte Koffer voll Nazi-Material und seine intimen Kenntnisse der preußischen Verwaltung, des deutschen Rechts und der Nazi-Usancen mitgebracht und war für die Amerikaner, die früh ein Strafgericht gegen die NS-Größen planten, ein Mann von unschätzbarem Wert. Er konnte die Listen, Register und Akten des Mörderstaates verstehen und auswerten, jenes Staates, der auch noch seine Verbrechen aufs genaueste dokumentierte. Wie Nürnberg in Amerika vorbereitet wurde und wie Nürnberg dann im einzelnen übers Tribunal ging, das sind atemberaubende Kapitel in Kempners Buch. Sie sagen viel über Kempner und über die Sieger, am meisten sagen sie über die Deutschen. Sie dürften – trotz ihrer Schwammigkeit, ihrer Ungenauigkeiten und ihrer formalen Schwächen – den Zeithistorikern einige Anregung bieten.

Damit sind wir beim zweiten Buch im Buche angelangt, beim fast skandalösen Pamphlet, das auch die besten Seiten der Lebenserinnerungen im Wert mindert. Kempner, heute ein Greis, hat die-



. . . und gut drei Jahrzehnte später, als Achtziger  
Aufn.: Süddt. Verlag

ses Buch – viel zu spät – dem „Publizisten“ Jörg Friedrich erzählt, diktiert, vorgeschwätzt, müßte man sagen. Friedrich und der Verlag Ullstein tragen die Schuld daran, daß der Band die „Lesbarkeit“ bis zur Skurrilität übertreibt, daß schnodderige Sprache, verfehelter Sarkasmus, Anglizismen, Berlinismen, ein Zeitendurcheinander von oft verwirrender Vielfalt, Eitelkeiten des alten Herrn und die Ungenauigkeiten der Sprechsprache das Buch verderben.

Lebenserinnerungen eines einflussreichen und erfahrenen Mannes über ein so fatales wie wichtiges Kapitel deutscher Geschichte, eines so aktiven und kenntnisreichen Beobachters, der die Nationalsozialisten gleichzeitig von innen und von au-

ßen kannte, hätten größte Sorgfalt, hätten Mühe, Warten, Nachprüfen und Verdichten verdient. Das Thema wurde verschenkt. Vielleicht hat man ein geschwätzig-lesbares, ein verkaufbares Buch gemacht, aber dem „Anliegen“ Kempners, die Deutschen auf einiges aufmerksam zu machen, hat der Verlag nicht gedient.

Die zynisch klingende, oft gedankenlose Sprache, die unangebrachte Ironie, das hätte behutsam umgewendet gehört. Beispiel: „Einige Zeit, bevor er aus dem Amt schied, war ich mit drei Rabbimern bei Adenauer. Rabbis, die sich aus Israel koscheres Essen mitgebracht hatten und mit denen er sich eine halbe Stunde über orthodoxe Fragen unterhalten hat. Diese Rabbimern waren Entschädigungsmandanten von mir, fielen aber unter keine der maßgebenden Bestimmungen. Es waren ganz ausgefallene Fälle, die es immer gibt, das Krümste vom Krümmen, obwohl sie in Wirklichkeit das Herz der Opfer waren, der Kern derer, die umgebracht werden sollten. Na schön.“

Anderes Beispiel (über den ehemaligen Reichsbevollmächtigten für Ungarn, Edmund Veesenmayer): „Alle Vorbringungen der Anwälte hatten den Unterton, daß angesichts dieses längst begnadigten Zeugen auf der Anklagebank doch nichts als kleine Würstchen säßen. In Wirklichkeit waren das die unteren und mittleren Henker. Außerdem war diese Zeugenschar besser angezogen. Und wenn einer besser aussieht und die Hände nicht mit Blut befleckt, sondern durch eigene Memoiren weißgewaschen sind, wirkt er doch hübscher als frühere Hitler-Minister, als wenn er vor Gericht durch ein Dokument überführt mit tiefblutiger Weste steht. Denken wir bei diesen Sachen immer an die irrationalen Gründe der richterlichen Tätigkeit.“

Diese Stellen sind nicht mühsam ausgewählt, sondern sie repräsentieren den Stil des Buches, das Achtung vor der Sprache nicht kennt, geschweige denn Angemessenheit. Kempner und Friedrich mögen den *passim* geläufigen Ausdruck „der verstorbene Führer“, „der verstorbene Goebbels“ für witzig halten, sie mögen die makabre Ironie für das einzig richtige Stilmittel halten und das Gemisch von Deutsch und Amerikanisch für die angemessene Ausdrucksweise: Der Leser wird da nicht folgen können, sondern sich abgestoßen fühlen und das ganze Buch als unseriös abwerten.

Dabei schimmert die Seriosität durch, und wer genau liest, entdeckt den tiefen Ernst und die Lebensarbeit des Robert Kempner schon. Doch er hat Mühe, das ganze allzu flotte Buch, das aus einer schon sehr hohen Vogelperspektive diktiert wurde, als den wertvollen Beitrag zur Zeitgeschichte anzusehen, der von einem Robert M. W. Kempner zu erwarten war.

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habe ich soooo einen Fisch  
an der Angel.

Die Judenretter aus Deutschland

## Einen ewigen Namen

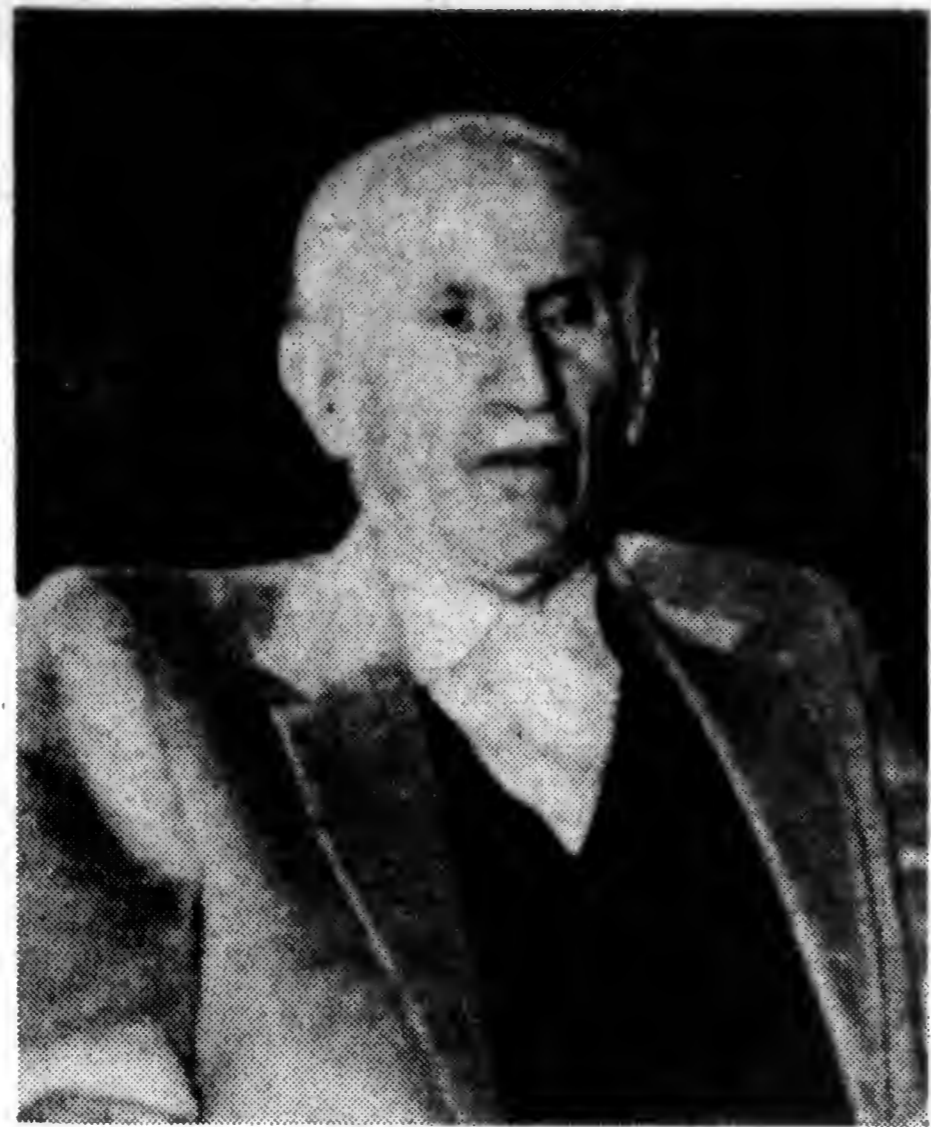
Aber manche haben wieder Angst / Von Rolf Schneider



# Beharrlicher Streiter, unbequemer Mahner

## Robert Kempner wird 85 Jahre alt

Wer ihn liest, ihm zuhört oder im Fernsehen zu beobachten Gelegenheit hat, ist immer angetan von seiner Reaktion auf aktuelle, erinnerungsreiche Vorgänge, beeindruckt auch von seiner zuverlässigen Kenntnis politischer Zusammenhänge aus der Zeit vor 1933 und danach sowie — vor allem — von seinem Mut zur Aussage. Wir sprechen von Dr. Robert M.W. Kempner, der am 17. Oktober 85 wird.



Dieser Jurist, bis Anfang 1933 als Oberregierungsrat der Justiz der Polizeiabteilung im preussischen Innenministerium in Berlin, über Italien nach Amerika emigriert, nach dem Krieg Stellvertreter des US-Hauptanklägers bei den Nürnberger Prozessen, seit 1951 Rechtsanwalt in Frankfurt am Main, ist immer ein ausgesprochen politischer Mensch gewesen. Früh auch Publizist, leidenschaftlich und streitbar, ist er keineswegs immer bequem, weil er den Finger auf wunde Stellen legt und heisse Eisen anrührt, dafür aber auch mitunter sich manchen Anfeindungen aussetzt. Das jedoch verdriest den Unbeugsamen nicht; denn es geht ihm, oft

auch als Anwalt der Hinterbliebenen von Nazi-Opfern, um Wahrheit, Gerechtigkeit und Menschenwürde. Die gute Motivation kann ihm daher nicht abgesprochen werden.

## Zum Tod Eric Goodmans

Wer während des politisch wie auch klimatisch schweren Winters 1938/39 zweimal hintereinander ins Konzentrationslager kam und dennoch die Drangsal und die Angst überstand, für den sind diese Episoden kaum ohne physische und seelische Auswirkungen geblieben. Einer von diesen besonders Betroffenen war Eric Goodman, der kürzlich, in London, seiner zweiten Heimat, kurz nach seinem 76. Geburtstag gestorben ist. Seine Rettung aus der Verfolgung verdankte er 1939 der Aufnahme in das Kitchener Camp, das Auffangs- und Durchgangslager für Tausende hart bedrängter Juden aus Deutschland und Mitteleuropa. Sein Glück und seine Ablenkung war stetige Freude an musischen Dingen, insbesondere an Musik und Dichtung, die seinen Lebenswillen stärkten, zumal seine Frau, die aus Wien stammende Sängerin Franzl Coschell, mit ihm eins darin war. Sohn des (letzten) Potsdamer Oberkantors und Lehrers Samuel Guttmann, war Eric Goodman von Jugend an mit jüdischer Liturgie vertraut. Früh erhielt er Unterricht im Klavier- und Orgelspiel, auch verstand er viel von Chormusik. In Berlin wie später zeitweise auch in London war er kaufmännischer Angestellter, doch sein Herz hing immer an der Musik. Bis 1976 leitete er ehrenamtlich den Chor der "New Liberal Jewish Congregation", der heutigen "Belsize Square Synagoge" im Nordwesten Londons, und an den Hohen Feiertagen erfüllte er mit seiner schönen Tenorstimme zuweilen auch kantonale Funktionen. 1983 wurde er Ehrenmitglied der (ursprünglich von Flüchtlingen aus Deutschland gegründeten) Gemeinde. Er ist dort nicht vergessen.

Was nicht alles hat er allein in den letzten Jahren aufgegriffen und öffentlich erörtert! Um einige Beispiele zu nennen: Papens verheerende Rolle am 20. Juli 1932, einem entscheidungsvollen Tag für Hitlers sog. Machtübernahme; den Reichstagsbrandprozess von 1933 und, damit eng verbunden, die Notwendigkeit, das Verfahren gegen van der Lubbe wiederaufzunehmen; die sog. Endlösung der Judenfrage; die Frage der Verjährung für Verbrechen gegen die Menschlichkeit; sowie letztlich das Problem der bisherigen Nichtverfolgung noch lebender, ehemaliger Richter am NS-Volksgerichtshof.

Nicht weniger mannigfaltig ist der Inhalt seiner in den vergangenen 25 Jahren erschienenen Bücher und grösseren Aufsätze, als da sind: "Eichmann und Komplizen" (1961), "SS im Kreuzverhör" (1964), "Edith Stein und Anne Frank — zwei von Hunderttausend" (1968), "Das Dritte Reich im Kreuzverhör" (1969), "Der Mord an 35.000 Berliner Juden" (1970), "Hitlers Griff nach dem Ullstein-Verlag" (1977), unter Kempners altem Pseudonym Eike von Repkow, "Der verpasste Nazi-Stopp" (1983) und, im selben Jahr, die Lebenserinnerungen unter dem Titel "Ankläger einer Epoche".

Nach wie vor sind es die Zuschriften an die Presse, durch die sich Robert Kempner, ungeachtet seines Alters, konsequent in der Öffentlichkeit bemerkbar macht, mag er sich im Taunus oder im Tessin aufhalten. Sie beweisen die unbeeinträchtigte Regsamkeit, mit der er mit den Ereignissen Schritt hält, und den Elan, mit dem er kommentiert und — fordert.

Nicht wenige Ehrungen sind diesem langjährigen Freund und Mitarbeiter des *Aufbau* zuteil geworden, so u.a., nach dem Grossen Bundesverdienstkreuz mit Stern (1969), 1970 die Ehrenbürgerwürde der Universität Jerusalem, die Wilhelm-Leuschner-Medaille (1975), die höchste hessische Auszeichnung, und 1980 die Würde eines Professors ehrenhalber durch den Berliner Senat. Schliesslich ist Dr. Kempner, wenn auch in Freiburg i.Br. zur Welt gekommen, ein Kind der Stadt Berlin, in der er aufwuchs und arbeitete und mit der er geistig eng verbunden geblieben ist.

Ernst G. Lowenthal (Berlin)

## DEWISENKURSE

	Auslandswährung in Dollar ausgedrückt		Dollar in Auslandswährung ausgedrückt	
	Stand vom 10. Okt.	Stand vom 24. Sep.	Stand vom 1. Okt.	Stand vom 24. Sep. 1984
Bundesrepublik Deutschland (Mark)	.329	.330	3.04	3.03
England (Pfund)	1.24	1.24	.806	.804
Frankreich (Franc)	.107	.108	9.34	9.28
Israel (Shekel)	.0025	.0025	408.60	398.45
Italien (Lira)	.00053	.00053	1885.00	1875.25
Japan (Yen)	.00406	.00409	246.10	244.30
Kanada (Dollar)	.768	.760	1.32	1.32
Österreich (Schilling)	.0465	.0470	21.50	21.24
Schweiz (Franc)	.399	.401	2.51	2.49

## New Yorker Stadtrat ehrt AUFBAU

Der Rat der Stadt New York hat, dem Antrag seines Mitglieds Ruth W. Messinger folgend, eine Ehrenresolution erlassen, welche die Verdienste des "Aufbau" um die Exilliteratur sowie das 50jährige Bestehen der Zeitung würdigt. Wir drucken im folgenden den Originalwortlaut der Resolution ab:

September 6, 1984

Res. No. 1101

**Resolution praising Aufbau for service to suppressed and persecuted authors on its 50th anniversary of publication.**

By Council Member Messinger; also Council Members Dryfoos and Michels

**Whereas, Aufbau, the Manhattan-based newspaper well-known to German-speaking immigrants in the United States, was founded in 1934; and**

**Whereas, The initial publishing of Aufbau coincided with the first wave of Jews fleeing from the Nazi persecution in Germany; and**

**Whereas, Aufbau has been awarded the 1984 Walter Meckauer Prize for service to suppressed and persecuted authors; and**

**Whereas, The editor of Aufbau, Hans Steinitz, accepted the award, a silver medallion, in the name of the newspaper, noting that Aufbau has been an important link to American life for German-Jewish immigrants; and**

**Whereas, Rolf Kralovitz, chairman of the Walter Meckauer Circle, which donates the award, stated that Aufbau was honored because of its efforts to keep alive the works of authors like Meckauer, who were driven from their countries or whose works were obliterated in the May 10, 1933 book burning by the Nazis; and**

**Whereas, this tribute to Aufbau is most timely, since 1984 marks the 50th Anniversary of its publication; now, therefore, be it**

**Resolved, That the Council of the City of New York praises Aufbau for service to suppressed and persecuted authors on its 50th anniversary of publication.**

Adopted.

Office of the City Clerk,  
The City of New York

## Wie wir hören

Anne Frank wurde 1929 in Frankfurt geboren. Im kommenden Jahr jährt sich ihr Todestag — Bergen-Belsen, März 1945 — zum vierzigsten Mal. Aus diesem Anlass beabsichtigt die Anne-Frank-Stiftung in Amsterdam, der Stadt, in der sich die Familie lange verborgen halten konnte, drei Ausstellungen zu veranstalten, und zwar je eine in New York, Amsterdam und Frankfurt. Die SPD und die Grünen haben schon jetzt beim Magistrat der Stadt Frankfurt beantragt, ausreichende Mittel für eine Ausstellung in der Mainstadt zu bewilligen — notfalls mit Unterstützung durch das Land Hessen und durch die Bundesregierung — und zur Erwägung gegeben, die Ausstellung auch in anderen Städten des Bundesgebiets zu zeigen.

Hamburgs Erster Bürgermeister Dr. Klaus von Dohnanyi empfing kürzlich im Rathaus der Hansestadt Mitglieder einer Delegation des "American Jewish Committee", der 1906 gegründeten Organisation zum Schutz der bürgerlichen und religiösen Rechte der Juden in aller Welt. Die Delegation befand sich auf einer Reise durch die Bundesrepublik Deutschland. In einer Ansprache verwies Dohnanyi auf die grossen Verdienste der jüdischen Gemeinde für Hamburg und erklärte, Hamburgs Geschichte sei ohne den Beitrag der jüdischen Mitbürger undenkbar: "Sie haben unsere Stadt mitgeschaffen und -geprägt".

Dem Andenken des aus Mannheim stammenden Kunsthändlers Daniel-Henry Kahnweiler, der 1979 im Alter von 94 Jahren in Paris starb, ist eine Ausstellung gewidmet, die in der Zeit vom 22. November 1984 bis zum 28. Januar 1985 im Centre George Pompidou in Paris stattfindet. Kahnweiler war ein besonderer Freund und Verehrer Picassos, eigentlich dessen grosser Mäzen. Mehr als einmal fiel der Name dieses Mannes, als vor Jahresfrist in West-Berlin die Ausstellung "Picasso-Plastiken" eröffnet wurde, ein künstlerisches Ereignis aller-

ersten Ranges. 1970 schenkte Kahnweiler seiner Geburtsstadt 20 Picasso-Graphiken. Schon 1964 war er vom Land Baden-Württemberg mit dem Professortitel ausgezeichnet worden.

Bis zum 17. Oktober ist in der Deutschen Bibliothek in Frankfurt (Zeppelin-Allee 4-8) die Ausstellung "Deutsche Emigranten in Frankreich — Französische Emigranten in Deutschland 1685-1945" zu sehen, veranstaltet von den Goethe-Instituten in Zusammenarbeit mit dem französischen Aussenministerium. Abteilung IV dieser Schau beschäftigt sich mit der Aufnahme der deutschen Emigranten (darunter viele jüdische) in Frankreich von 1933 bis 1939, mit ihren politischen und kulturellen Aktivitäten in jenen Jahren und mit ihrer Lage in der Zeit zwischen 1939 und 1945. Die Deutsche Bibliothek steuert aus den Beständen ihrer Exilliteratur-Sammlung einen Beitrag "Paris — Zentrum des deutschsprachigen Exils 1933-1939" bei, der in Wandvittrinen gezeigt wird. E.G.L.

## AUFBAU

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## Robert M.W. Kempner hält Rückschau

Robert M.W. Kempner: "Ankläger einer Epoche. Lebenserinnerungen". Ullstein-Verlag, Berlin. 476 Seiten. DM 42,00.

Bereits der Titel dieser Lebenserinnerungen des langjährigen "Aufbau"-Freunds und -Mitarbeiters Robert M.W. Kempner — "Ankläger einer Epoche" — stellt die wohl von keiner dramatischen Fiktion mehr zu überbietende Tatsache gebührend in den Vordergrund, dass mit der Person Kempners der gleiche engagierte Republikaner und Oberregierungsrat im Preussischen Innenministerium, der sofort nach der Machtergreifung von Göring in den zwangsweisen Ruhestand und schliesslich vom Regime ins italienische und dann amerikanische Exil getrieben wurde, gut ein Jahrzehnt später als amerikanischer Ankläger vor dem Nürnberger Gerichtsforum nahezu die gesamte Führungselite des NS-Regimes zur Rechenschaft ziehen sollte: Odyssee eines Mannes, dessen lebensbestimmende Berufung es wurde, in einer Epoche unvorstellbarer politischer Verbrechen unbeirrbar die Prinzipien und Masstäbe des Rechts hochzuhalten.

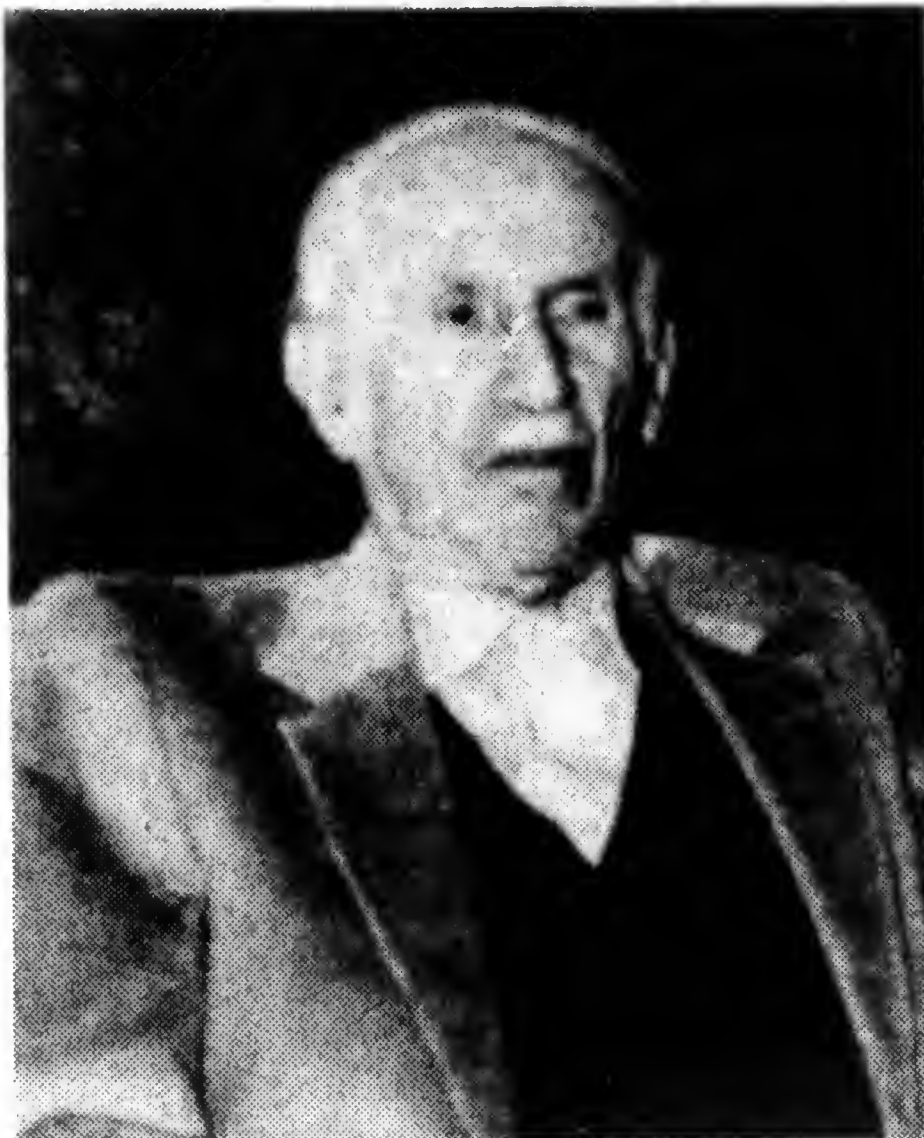
Wenn deshalb der letzte noch lebende herausragende Repräsentant des Nürnberger Gerichtshofs auf sein Leben zurückblickt in der Form von "Wortprotokollen" — überarbeiteten Tonbandmitschriften von langen autobiographischen Gesprächen, deren fehlender literarischer Ehrgeiz willkommen kompensiert wird von der den Leser wehmütig berührenden Tatsache, dass im lebendigen Erzählduktus des amerikanischen Staatsbürgers Robert M.W. Kempner unverkennbar noch die originalen Färbungen Berliner Sprachwitzes durchschlagen —, dann steht naturgemäss der Komplex "Nürnberg" in seiner ganzen vielschichtigen Dimension im Vordergrund.

Dennoch erweisen sich auch die anderen Lebensabschnitte Kempners als eine nicht minder faszinierende Lektüre, z.B. die juristische Referendarzeit bei dem legendären Berliner Strafverteidiger Frey, einer echten juristischen "Schule des Lebens", oder der anschließende Eintritt in das Innenministerium im "roten" Preussen, in welchem Kempner jene grundlegende Einführung in die juristischen und administrativen Feinheiten eines grossen Behördenapparates erhielt, die ihm später in Nürnberg so entscheidend entgegenkommen sollte.

Allein die authentische Schilderung dieser Ministerialjahre, während derer Kempner schon bald bis zum Justitiar der Polizeiteilung aufstieg, und die zahlreichen lebendigen Porträts von Vorgesetzten und Mitarbeitern können echten zeitgeschichtlichen Quellenwert beanspruchen. In dem gleichen Mass freilich, in dem sich der junge Kempner als ein entschiedener und unerschrockener Verteidiger der demokratischen Rechtsordnung des Weimarer Staates profilierte, geriet er schon bald in das Schussfeld der NSDAP.

Die Frage nach dem Unrechtscharakter des NS-Regimes sollte dann auch im Mittelpunkt von Kempners grosser Lebensaufgabe, der Anklage in den Nürnberger Prozessen stehen.

Wer heute überhaupt noch erlauben will, welch ein immenses Unternehmen das präze-



Robert Max Wassilij Kempner

denzlose Experiment des Nürnberger Gerichtsstaates in rechtlicher, organisatorischer und justizpraktischer Hinsicht war, wird an Kempners ebenso präziser wie detailreicher und anschaulicher Schilderung der Prozesse nicht vorbeigehen können. Kempner belegt überzeugend, dass trotz zahlreicher Mängel und Schwächen zu den Nürnberger Prozessen — ganz abgesehen von ihrem auch heute noch schwer zu überschätzenden zeitgeschichtlichen Dokumentationswert — keine rechtspolitisch vertretbare Alternative existiert hat. Adenauer hat durchaus gewusst, weshalb er Kempner gegenüber den Amerikanern Dank dafür bekundete, dass sie das junge Nachkriegsdeutschland von der Last dieser Verfahren befreit hätten.

Kempners Lebenserinnerungen erweisen sich letztlich als ein grosses, eindrucksvolles und zeitgeschichtlich wie rechtspolitisch weitgefächertes Plädoyer für die Nürnberger Prinzipien, nicht einfach als Prinzipien einer Siegerjustiz, sondern als konstitutionelle Grundprinzipien jeder wirklich humanen Rechtskultur.

Kempners unermüdlicher Kampf für die Verantwortlichkeit gerade auch der bürokratischen Schreibtischtäter hat seine Kraft aus dieser unbeirrbar Überzeugung gewonnen, und auch die zahlreichen Wiedergutmachungs- und Revisionsprozesse gegen NS-Unrechtsurteile, die er vor deutschen Gerichten geführt hat, sowie sein breites publizistisches und zeitgeschichtliches Schaffen stehen in der Kontinuität dieser Überzeugung, deren Wahrheit zu den unverrückbaren Grundbedingungen der demokratischen Existenz der Bundesrepublik gehört.

Die beständige Mahnung an diese fundamentale Tatsache macht den Rang und die Dignität dieser bedeutenden Lebenserinnerungen aus.

D.B.

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## Piscator im Nachkriegsdeutschland

Henry Marx (Herausgeber): "Erwin Piscator. Briefe aus Deutschland 1951-1966 an Maria Ley-Piscator". Prometh Verlag, Köln. 152 Seiten. DM 29,80.

Über Erwin Piscator (1893-1966), der in den zwanziger Jahren in Berlin das "Politische Theater" geschaffen hatte und mit seinen Inszenierungen neben Max Reinhardt und Leopold Jessner zu den drei grossen deutschen Theaterregisseuren jener Zeit zählt, ist bisher noch keine definitive Biographie geschrieben worden. Die uns vorliegenden Briefe an seine Frau Maria Ley-Piscator aus den Jahren 1951 bis zu seinem Tod 1966 bieten jedoch einen wertvollen Beitrag zu seiner Lebensgeschichte.

Piscator hatte Ende 1936 die aus wohlhabendem Haus stammende Wiener Tänzerin und Schauspielerin Maria Ley bei einem Empfang auf Max Reinhardts Schloss Leopoldskron kennengelernt und heiratete sie wenige Monate später. Zunächst lebten beide in Paris, wo Piscator aber keine Gelegenheit hatte, am Theater tätig zu sein, und aus dieser Zeit stammen die ersten Briefe dieser Ausgabe, die seine Zugehörigkeit und Liebe zu seiner Frau deutlich zum Ausdruck bringen. Nach ihrer Übersiedlung in die USA (1938) gründeten sie gemeinsam den Dramatic Workshop an der New School for Social Research (in New York) und leiteten dann eine eigene Theaterschule, deren Aufführungen im President und Rooftop Theatre stattfanden und aus der später so berühmte Schauspieler wie Marlon Brando, Harry Belafonte, Tony Curtis und Dramatiker wie Arthur Miller und Tennessee Williams hervorgingen. Noch so mancher Leser des "Aufbau" wird sich an diese ausgezeichneten und einmaligen Aufführungen erinnern.

Piscator verliess 1951 Amerika und kehrte nach Deutschland zurück, weil sein Antrag auf amerikanische Staatsbürgerschaft wegen seiner politischen Vergangenheit abgelehnt worden war — oder, nach anderer Version, weil er vor das berüchtigte Komitee des Senators McCarthy gerufen werden sollte. Aus diesen Jahren in Deutschland stammt nun der grösste Teil der Briefe an seine Frau, die zunächst die Theaterschule in New York weiterleitete und ihren Mann jährlich in den Ferien in Europa traf.

In Deutschland wurde er jedoch nicht mit offenen Armen empfangen; er musste an kleinen und mittleren Bühnen mit seinen Inszenierungen gastieren. So klagte er in einem Brief aus Tübingen über "meine immer mehr ansteigende Ungeduld mit meinem Wanderdasein, das nicht aufhören will". Hinzu kommt, dass er von der Furcht befallen wird, bei zunehmendem Alter seine schöpferischen Kräfte zu verlieren und diesem anstrengenden Leben nicht mehr gewachsen zu sein. Da er von 1951 bis 1962 nur als Gastregisseur tätig sein kann und keine feste Anstellung an einer grossen Bühne erhält, berichtet er: "Gast-Inszenierungen, ewiges Hotelleben... das wird langsam unerträglich. Die Presse ist mir nach wie vor nicht freundlich gesinnt".

Obwohl er zeitweise grossen Publikums-erfolg zu verzeichnen hat, glaubt er jedoch, dass seine Arbeit auf keinen fruchtbaren Boden in Deutschland fällt: "Trotzdem mir überall grosse Anerkennung gezollt wird, fühle ich doch, dass meine Arbeit keine besondere Bedeutung hat". Und er stellt fest: "Ich fand einen schlechten Platz in dieser Welt — wenn man bedenkt: Reinhardt konnte wenigstens 30-40 Jahre ungestört, ununterbrochen in seinen eigenen Bezirken arbeiten, ich musste mich quälend abmühen". All diese Aussagen beweisen, wie

schwer es Piscator fiel, auf der deutschen Nachkriegsbühne Fuss zu fassen. Und so spricht er von seinen "10 Jahren Emigration auch in Deutschland".

Erst 1962 wurde der fast Siebzigjährige zum Intendanten der Berliner Volksbühne in West-Berlin berufen. Hier konnte er nun wichtige Inszenierungen bieten: die Uraufführung des inzwischen berühmt gewordenen Stücks "Der Stellvertreter" von Rolf Hochhuth sowie von Heinar Kipphardts szenischem Bericht "In der Sache J. Robert Oppenheimer", der weit über Berlin hinaus ein grosser Erfolg wurde und in dem der Konflikt des Wissenschaftlers zwischen Staatsgehorsam und Gewissensnot dargestellt wird. Auch Gerhart Hauptmanns "Atriden-Tetralogie" konnte er — auf einen Abend zusammengezogen — auf die Bühne stellen.

Jedoch wird aus diesen Briefen nicht ganz ersichtlich, warum seine Frau, die in New York zunächst weiter das Theaterstudio leitete, schliesslich nicht zu ihm nach Deutschland zurückkehrt und beide nahezu die ganzen 15 Jahre getrennt leben, obwohl fast alle seine Briefe von Liebe und Sehnsucht nach ihr erfüllt sind. Während Maria in New York an einem Buch "The Piscator Experiment" arbeitet, das erst nach seinem Tod 1967 erschienen ist, bereitet er einen zweiten Band seiner Theaterschriften vor, der aber nicht mehr zustandekam. So erbittet er in seinen Briefen Material für diesen geplanten Band und fordert u.a. auch den Artikel an, den er zu Reinhardts Todestag im "Aufbau" veröffentlicht hatte.

Diese höchst persönlich gehaltenen Briefe an seine Frau zeigen die menschliche Seite Erwin Piscators, dieses grossen Theatermannes, und beweisen sein beharrliches Streben, durch das Theater zu einer besseren Welt zu gelangen.

Henry G. Proskauer

### Die Bühnen des Ruhrgebiets setzen auf engagiertes Theater

"Jubiläum" von George Tabori: Als das Licht erlosch, rührte sich keine Hand zum Applaus. Die Schauspieler haben mit ihrem Stück über die Ursachen von Antisemitismus und seine Opfer das Publikum betroffen gemacht, ein Gefühl der Solidarität zwischen Bühne und Zuschauerraum hergestellt. Die Mülheimer Theatertage, das einzige Festival für Dramatiker in der Bundesrepublik Deutschland, hat "Jubiläum" jetzt mit dem ersten Preis ausgezeichnet.

Die Spannung von Politik und Theater spürbar zu machen und das Bemühen, Überzeugungen lebendig auf die Bühne zu bringen, sind Motivation vieler Schauspielhäuser im Bundesland Nordrhein-Westfalen. Die UNESCO zählt das Gebiet heute zu den fünf bedeutendsten Theaterregionen der Welt, neben Tokio, New York und London. 10.000 Aufführungen bringen die rund 6.000 Bühnengehörigen an den 24 meist kommunal getragenen Theatern pro Jahr auf die Bretter.

Engagiertes, politisches Theater, ohne dass "die Kunst verlorengelht", und experimentierfreudige Spielpläne wie die des Düsseldorf Schauspielhauses mit fünf Ur- und Erstaufführungen — das beeindruckt Publikum und Kritiker, die oft weite Anreisen in Kauf nehmen. Generalintendant Günter Bee-litz (Düsseldorf) sieht das Theater als einzig noch verbliebene Möglichkeit, mit Realität und Utopie umzugehen. Und ihn fasziniert auch der Gedanke, dass tausend Menschen zusammenkommen, um eine Theateraufführung zu erleben, ein Ereignis gemeinsam zu feiern.

### PETER TUMARKIN

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JULIUS H. SCHÖNER

## Hinweis

ES IST EIN BUCH VON KEMPNER, dem einstigen stellvertretenden amerikanischen Ankläger beim Alliierten Militärtribunal gegen die sogenannten deutschen Hauptkriegsverbrecher und bei weiteren mit dem Wort Nürnberg verbundenen Prozessen, und auch wieder nicht. Denn der jetzt 84 Jahre alte Kempner hat nicht sein Leben beschrieben, sondern es schreiben lassen von einem Mann des journalistischen Gewerbes, dem er erzählt hat. Deshalb müssen begriffliche und geschmackliche Mißgriffe nicht Kempner zugeschrieben werden — wie etwa der, daß über in Nürnberg Verurteilte und Hingerichtete, unter denen ebenso der General-Oberst Jodl war wie der Herausgeber des Sudelblattes „Der Stürmer“, Julius Streicher, Wendungen gebraucht werden wie „schmieriger Wicht“ und daß Verwandte der Verurteilten, die nicht unbedingt etwas dafür konnten, als „Sippschaft“ bezeichnet werden. Kempner hatte einen interessanten Lebensweg; aufgewachsen als Arztsohn in Berlin, wurde er Jurist, trat in den Dienst des republikanischen Preußen ein, wurde von den Nationalisten ent-

lassen, emigrierte nach Amerika und kam so, als juristisch vorgebildeter Deutschland-Kenner, zu dem erwähnten Amt. Dessen prekäre Züge hat Kempner damals wie heute nicht empfunden; der Gedanke, daß es sich wenigstens teilweise um Siegerjustiz gehandelt haben könnte, und daß die Sowjets kein moralisches Recht hatten, da auf dem Richterstuhl zu sitzen, kommt nur in der Form vor, daß er als abwegig beiseitegewischt wird. Es ist Kempner, einem alten Herrn, zu gönnen, daß er auf seinen Lebensweg — er hat übrigens, was separat veröffentlicht ist, der preußischen Regierung frühzeitig, aber leider vergeblich zu Maßnahmen gegen die „verfassungsfeindlichen“ Nationalsozialisten geraten — wohlwollend zurückblickt; es ist anzuerkennen, daß er nicht klagt über ihm widerfahrene Unbill. Der Hauch der Selbstgerechtigkeit, der über dem Buch liegt, mag an der Diktion des Aufschreibers liegen. Der Buchtitel verrät einen Anspruch, der ein bißchen groß ist — nimmt man ihn nicht als Beschreibung einer subjektiven Empfindung. (Robert M.W. Kempner: Ankläger einer Epoche. Lebenserinnerungen. In Zusammenarbeit mit Jörg Friedrich. Verlag Ullstein, Frankfurt, Berlin und Wien 1983, 476 Seiten, 42 Mark.) (F.A.Z.)

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## Robert M.W. Kempners Memoiren

Robert M.W. Kempner: "Ankläger einer Epoche". Ullstein-Verlag, Berlin. 476 Seiten. DM 42,00.

"Ankläger einer Epoche" heissen die Lebenserinnerungen Robert M.W. Kempners. Der grosse Jurist und Humanist hat ein grosses Buch geschrieben, die Bilanz eines faszinierenden Lebens (auf die demnächst ausführlicher eingegangen werden soll). Kempner, seit Jahrzehnten Mitarbeiter des "Aufbau", erinnert sich in dem Kapitel über den Beginn eines neuen Lebens in den USA, in die er auf der Flucht vor den Nazis gekommen war: "Wenn Sie die Stellenanzeigen in der Zeitung 'Aufbau', dem ausgezeichneten Zentralorgan für all diese Menschen (d.h. Emigranten) ansehen, dann können Sie heute noch an den Anzeigen sehen, wie die sozialen Strata zusammengesetzt waren: höherer Mittelstand, unterer Mittelstand" (Seite 179).

Drei Seiten weiter stellt Kempner fest: "Das Blatt, dessen jahrelanger Mitarbeiter ich bin — Herbert Weichmann stand ihm organisatorisch zur Seite — floriert noch heute und wird in der ganzen Welt gelesen."

An die Rolle des "Aufbau" bei der Aufdeckung der Euthanasie-Verbrechen erinnert Kempner auf Seite 203: "Und allmählich kamen fünf oder sechs Personen zu mir. Sie hatten meine Aufsätze im 'Aufbau' gelesen, und wollten wissen, ob man etwas gegen das plötzliche Versterben von Verwandten in Anstalten tun könne, die schwindelhaften Todesurkunden, die grosse Aktion gegen die sogenannten nutzlosen Esser, in sinnverkehrter Weise Euthanasie genannt."

Kempners Lebenserinnerungen sind eine Fundgrube für jeden, der die Weimarer Republik, die Nazizeit und den Aufbau einer Demokratie in Deutschland nach 1945 erlebt hat oder sich für diese Epochen interessiert.

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DEUTSCHE BÜCHER



liche Personen, sondern gem. § 9 Nr. 3 KStG n. F. auch für Körperschaften.

#### IV. Annex: Regelungen für Sonderformen

*Forstbetriebe* gemeinnütziger Körperschaften sind von der Körperschaftsteuer künftig befreit (§ 5 I Nr. 9 S. 2 KStG n. F.).

Die Einkommensgrenze, bis zu der *Stiftungen* für den Unterhalt des Stifters und seiner nächsten Angehörigen sowie für die Pflege ihres Andenkens aufkommen dürfen, wurde von ¼ auf ½ erhöht (§ 58 Nr. 5 AO).

Der *Höchstbetrag für Spenden an politische Parteien* wurde auf 100000 DM festgestellt und die Veröffentlichungsgrenze für Parteispenden wurde von 40000 DM auf 20000 DM vermindert (§ 54 VII KStG n. F.).

Gewerbebetriebe in der neuen Rechtsform der *Europäischen Wirtschaftlichen Interessenvereinigung (EWiV)* unterliegen der Gewerbesteuer (§ 5 I GewStG n. F.).

§ 3 Nr. 26 EStG wurde dahin erweitert, daß die steuerfreie Aufwandsentschädigung von 2400 DM pro Jahr für nebenberufliche Lehr- und Unterrichtstätigkeiten auf nebenberufliche Tätigkeiten im *Pflegedienst* ausgedehnt wurde.

## Mitteilung

### Ernst Katzenstein (11. 2. 1897–19. 10. 1989)

Am 19. 10. 1989 ist *Dr. Ernst Katzenstein* nach langer Krankheit im 92. Lebensjahr verstorben. Mit ihm starb eine außergewöhnliche Persönlichkeit, ein Mann von großer menschlicher Integrität, herausragender Intelligenz und forensischer Begabung, der mit unermüdlicher Beharrlichkeit die Interessen der Verfolgten des NS-Regimes vertrat.

*Ernst Katzenstein* wurde am 11. 2. 1897 in Bodenwerder bei Hameln geboren. Nach dem Studium der Rechtswissenschaft wurde er Anwalt in Hameln, bis die nationalsozialistische Verfolgung seinem Beruf ein Ende setzte. Er wanderte 1934 nach Palästina aus, studierte das dortige Recht und bestand bereits 1936 das Anwaltsexamen. Im gleichen Jahr ging er mit seiner Familie nach London, wo er nach dem Studium des englischen Rechts die Prüfung als Barrister bestand. Nach Jerusalem zurückgekehrt, nahm er dort seine Anwaltspraxis wieder auf. Im Jahre 1949 folgte er einer Aufforderung zur Mitarbeit bei der Jewish Restitution Successor Organization (IRSO) in Nürnberg, deren Direktor er 1955 wurde. Die Conference on Jewish Material Claims against Germany ernannte ihn 1956 zu ihrem Repräsentanten in der Bundesrepublik; in dieser Eigenschaft wurde er hier der engste Mitarbeiter von *Dr. Nahum Goldmann*.

In allen Funktionen waren *Ernst Katzensteins* Kenntnisreichtum und Initiative entscheidend für erfolgreiche Verhandlungen mit den gesetzgebenden Körperschaften und Behörden, die zu den verschiedenen Rückerstattungsabkommen, zum Bundesrückerstattungsgesetz, zum BEG-Schlußgesetz, zu den rückerstattungsrechtlichen und entschädigungsrechtlichen Sonderfonds sowie zum Härtefonds von 1980 führten. Seine Memoranda und Zuschriften waren von kristalliner Klarheit und Prägnanz, seine mündlichen Darlegungen von großer Überzeugungskraft. Insgesamt kann seine Mitwirkung nicht hoch genug eingeschätzt werden.

Im Jahr 1988 mußte er aus gesundheitlichen Gründen seine berufliche Tätigkeit aufgeben. Er verbrachte das letzte Jahr seines Lebens bei seinem Sohn und dessen Familie in Israel.

Die Verfolgten des Naziregimes haben ihm außerordentlich viel zu verdanken. Alle, mit denen er menschlich und beruflich zu tun hatte, werden seiner gedenken, seine Freunde und engeren Mitarbeiter werden ihn niemals vergessen.

Dr. Karl Brozik, Frankfurt

## Buchbesprechungen

**Anwaltschaftsrecht.** Von *Max Vollkommer* (NJW-Schriftenreihe, H. 50). – München, Beck 1989. XXXI, 361 S., kart. DM 58,-.

Zum Thema dieses Buches liegen bereits das ebenfalls umfangreiche Werk von *Borgmann-Haug*, 2. Aufl. (1986) und das kürzere von *Rinsche*, 3. Aufl. (1989) vor. Während diese beiden von der Praxis aus geschrieben sind, werden im Werk von *Vollkommer* von der Wissenschaft her die Rechtsprobleme und die Rechtsanwendung unter die Lupe genommen. Der Verfasser ist auch nicht Rechtsanwalt sondern Universitätsprofessor, aber mit vorausgehender langjähriger Erfahrung als Richter. Seine wissenschaftliche Sicht führt in entscheidenden Punkten dazu, daß er dieses Rechtsgebiet als Teil des Allgemeinen Haftungsrechts begreift und daran jeweils die einschlägige, teilweise noch „versteinerte“ Rechtsprechung mißt. Das 7½-seitige Inhaltsverzeichnis weist bereits aus, wie er dabei überall vom Großen ins Detail gegangen ist, beim Anwaltsvertrag, den Anwaltspflichten, bei den Haftungsvoraussetzungen, den Haftungsschranken und den Beweisfragen. Beim Anwaltsvertrag erscheinen z. B. neben den Besonderheiten für die Sozietät (Rdnrn. 50ff., 261) auch die nachvertraglichen Pflichten aus dem Anwaltsvertrag, Rdnrn. 82f. Zu den Anwaltspflichten sei hingewiesen auf die Rechtsprüfungspflicht, Rdnrn. 119f. mit Zusammenfassung in Rdnrn. 142ff. Das alte Problem der Kollegialgerichtsentscheidung wird für die vorausgegangene, ferner für die den Rechtsfehler veranlassende sowie für die nachfolgende (Kollegial-) Gerichtsentscheidung untersucht, Rdnrn. 302–307. Nun soll in der Besprechung eines so aufschlußreichen und umfangreichen Werkes einiges aus den Grundfragen der Anwaltschaft, die der *Verfasser* am Schluß seines Vorwortes nennt, näher angesprochen werden:

Auf der im Einzelnen dargelegten Grundlage der Rechtswidrigkeit = Pflichtwidrigkeit (Rdnrn. 263) = Außerachtlassung höchstmöglicher Sorgfalt (Rdnrn. 265f.), womit das Fehlen der letzteren bereits ein Merkmal der Rechtswidrigkeit darstellt, wird deutlich, daß als Verschulden nicht schon das Fehlen höchstmöglicher oder äußerster Sorgfalt in Betracht kommen kann (Rdnrn. 267). Zum Verschulden gerade auch zum Anwaltsverschulden wird sodann nachdrücklich verständlich gerade von der wissenschaftlichen Seite her – ein *einheitlicher* objektiver Maßstab für das materielle und das prozessuale Verschulden verlangt (Rdnrn. 272ff.) und dazu die Meinung von *Borgmann-Haug* und mancher Entscheidungen über die Trennung zwischen einem weniger strengen materiellen Verschuldensmaßstab und einem strengeren subjektiven Maßstab des prozessualen Verschuldens verworfen (Rdnrn. 277ff.), eine Trennung, die mir rechtssystematisch auch schwer haltbar erscheint. Gegen diese Trennung ist auch der *BGH*, wie der *Verfasser* darlegt, mit der geforderten „üblichen, von einem ordentlichen Rechtsanwalt zu fordernden Sorgfalt“ (Rdnr. 275, die *Borgmann-Haug* S. 346 allerdings als „Leerformel“ bezeichnen), wozu auf den Begriff des „ordentlichen Kaufmanns“ hingewiesen und das Ganze in Rdnrn. 278ff., 284ff. in allen Einzelheiten dargelegt und abgegrenzt wird. Dabei spielt in den Darlegungen mit Recht die Änderung des § 233 ZPO a. F. gegenüber der n. F. eine wesentliche Rolle. Der Fachanwalt muß sich als Spezialist an einem erhöhten Standard messen lassen, Rdnrn. 288f. Fragwürdig erscheint die vom *Verfasser* anerkannte *BGH*-Meinung für ausländische Rechtsanwälte, bei denen ein milderer Maßstab der erforderlicheren Sorgfalt gelten soll. Haben sie denn, wenn sie bei un tätig werden, die Rechtsprüfungspflicht für das Deutsche Recht nicht genauso wie der deutsche Rechtsanwalt?

Ein anderer Schwerpunkt: Zur Kausalitätsproblematik (eingehend Rdnrn. 332ff.) gehört die Frage der Haftung des Anwalts für richterliche Fehlentscheidungen, Rdnrn. 381–389; sie ist ein altes, aber nach *BGH*, NJW 1988, 486 wieder aktuelles Problem. Die dargelegten nötigen Unterscheidungen vermeiden dabei, daß über die Konstruktion „Nichtverhinderung einer Fehlentscheidung“ das *allgemeine* Prozeßrisiko, eines der Lebensrisiken der Parteien, auf den Anwalt überwältigt wird, was als gefährliche Ausweitung der Anwaltschaftspflicht so gerne versucht wird. Grundlage für das Ergebnis des Verfassers (Rdnr. 389) sind seine Darlegungen über die Fehlerverhütungspflicht (Rdnrn. 184ff.) unter Beachtung des Schutzzweckes (Rdnr. 385) und der Risikozurechnung (Rdnr. 388). Schließlich ist für den Regreßprozeß der Schadensbegriff von entscheidender Bedeu-



brachten, weil dieser Überschuß der gemeinnützigen Betätigung der Körperschaft zur Verfügung gestellt werden mußte. Die Vereinigung aller wirtschaftlichen Betätigungen zu einem einzigen wirtschaftlichen Geschäftsbetrieb führt mithin durch den dabei möglichen Verlustausgleich zur Aufrechterhaltung der Gemeinnützigkeit des Vereins im übrigen.

### 3. Besteuerungsgrenze und Freibetrag für den wirtschaftlichen Geschäftsbetrieb

Übersteigen die Einnahmen einschließlich der Umsatzsteuer aus wirtschaftlichen Geschäftsbetrieben, die keine Zweckbetriebe sind, insgesamt nicht 60000 DM im Jahr, so unterliegen die diesen Geschäftsbetrieben zuzuordnenden Besteuerungsgrundlagen nicht der Körperschaftsteuer und der Gewerbesteuer (§ 64 AO n. F.). Der Betrag von 60000 DM pro Jahr ist eine *Steuerfreigrenze*, was bedeutet, daß die Steuerpflicht insgesamt in diesem Jahr nicht eintritt, wenn die Einnahmen aus dem einzigen wirtschaftlichen Geschäftsbetrieb unter 60000 DM bleiben. Zu beachten ist, daß hier auf die Einnahmen und nicht etwa auf den Gewinn abgestellt wird. Dies dient der Vereinfachung, läßt aber bei weitem keinen so großen Spielraum wie dies auf den ersten Blick erscheinen mag.

Daneben ist in § 24 KStG n. F. ein *Freibetrag von 7500 DM* aufgenommen worden. Dieser Freibetrag kommt allen Körperschaften zugute. Die bisherige Regelung enthielt in § 24 KStG a. F. eine Freigrenze von 5000 DM für kleinere Körperschaften, die nunmehr entfällt. Diese Regelung gilt auch für die Gewerbesteuer (§ 11 GewStG n. F.).

### 4. Verhinderung von Mißbrauch

Um einen Mißbrauch der steuerlichen Begünstigungen durch „Zellteilung“ zu verhindern, wurden zwei Bestimmungen in das Gesetz aufgenommen:

(1) Dem § 51 AO wurde die Regelung angefügt, daß funktionale *Untergliederungen (Abteilungen)* von Körperschaften nicht als selbständige Steuersubjekte gelten. Damit können von einem Verein durch mehrere funktional selbständige Glieder nicht die Steuervergünstigungen mehrmals in Anspruch genommen werden.

(2) § 64 IV AO n. F. enthält die Bestimmung, daß die *Aufteilung einer Körperschaft* in mehrere selbständige Körperschaften zum Zweck der mehrfachen Inanspruchnahme der Steuervergünstigungen als Mißbrauch von rechtlichen Gestaltungsmöglichkeiten i. S. des § 42 AO gilt. Teilt sich also etwa ein einheitlicher Verein in mehrere Teilvereine auf, die jeweils selbständige Vereine sind, um auf diese Weise und Weise der steuerlichen Vergünstigungen mehrfach teilhaftig zu werden, so wird dies steuerlich nicht beachtet. Steuerlich wird so verfahren, wie wenn der Verein noch ein einziges einheitliches Steuerrechtssubjekt wäre. Die bürgerlichrechtliche Selbständigkeit der mehreren Teilvereine bleibt steuerlich unbeachtlich.

### 5. Umsatzsteuerliche Neuregelungen

Zunächst wurde durch die Einfügung des § 66a in die Umsatzsteuer-Durchführungsverordnung eine wesentliche Erleichterung hinsichtlich der *Aufzeichnungspflichten* geschaffen. Der Unternehmer ist nämlich künftig von den Aufzeichnungspflichten des Umsatzsteuergesetzes befreit, soweit er die abziehbaren Vorsteuerbeträge nach dem in § 23a UStG festgesetzten Durchschnittssatz berechnet.

Gemeinnützige Körperschaften können die abziehbare *Vorsteuer mit einem Durchschnittssatz von 7 v. H. des steuerpflichtigen Umsatzes* in Ansatz bringen, wenn der steuerpflichtige Umsatz im vorangegangenen Kalenderjahr 60000 DM nicht überstiegen hat (§ 23a I, II UStG n. F.). Dies ist eine wesentliche Erleichterung insbesondere für gemeinnützige Vereine, weil sie der oft schwer möglichen Erfassung und Aufteilung der Vorsteuerbeträge enthoben sind.

Die umsatzsteuerlichen Vergünstigungen gelten künftig auch für *Zusammenschlüsse von Vereinen*, insbesondere von Gesellschaften des bürgerlichen Rechts, übergeordneten Verbänden und Gemeinschaften (§ 12 II Nr. 8c UStG n. F.).

### 6. Altmaterialsammlungen

Bisher konnten Erlöse aus der Verwertung von Altmaterialsammlungen nicht steuerbegünstigt oder steuerfrei an die bedürftigen Empfänger weitergegeben werden. Dies auch dann, wenn Spontansammlungen für Katastrophenopfer durchgeführt wur-

den, bei denen die sammelnden Organisationen sämtliche Erlöse in Geld oder Sachen an die bedürftigen Empfänger weiterleiteten. Dies galt und gilt stets als wirtschaftlicher Geschäftsbetrieb, der versteuert werden muß. Naturgemäß ist bei diesen Altmaterialverwertungen der Reingewinn verhältnismäßig hoch, weil die Sammler stets ehrenamtlich, also ohne Entgelt tätig werden und die anfallenden sonstigen Kosten häufig auch noch von Mäzenen und Sponsoren übernommen werden. Hier nun hat der Gesetzgeber eine Regelung eingeführt, die nur noch den *branchenüblichen Reingewinn* für solche Sammlungsergebnisse der Besteuerung unterwirft. Dieser kann geschätzt werden.

Gegenüber der alten Handhabung ist dies sicherlich eine entgegenkommende, begünstigende Neuregelung. Bedauerlich allerdings erscheint es, daß der Gesetzgeber sich aus Wettbewerbsgründen nicht hat bereifinden können, derartige Sammlungen für bedürftige Katastrophenopfer völlig von der Besteuerung freizustellen. Die öffentliche Hand „verdient“ so auch an Hilfsaktionen, die durch Katastrophen ausgelöst wurden. Der Hinweis auf die Wettbewerbsneutralität zu anderen Sammlern erscheint mir hier etwas gezwungen, besonders wenn man bedenkt, daß auch die öffentlichen Hände sehr wohl zur Hilfe für Katastrophenopfer aufrufen.

## III. Änderungen im Spendenbereich

Der Spenden-Abzugssatz für *mildtätige Zwecke* wurde auf 10 v. H. des Gesamtbetrags der Einkünfte des Spenders angehoben (§ 10b I EStG n. F.). Dabei blieben die Spenden zu anderen begünstigten Zwecken insoweit auf der Strecke, als sie nicht in den erhöhten Abzugssatz eingebunden wurden.

In § 10b III EStG n. F. wurde die bisherige Verwaltungsregelung bei *Verzicht auf Aufwendungsersatz* in das Gesetz übernommen. Danach können Aufwendungen, die jemand zugunsten einer gemeinnützigen Körperschaft macht, aber dieser nicht in Rechnung stellt, sondern als Spende gewertet wissen will, sowie der Verzicht auf erdiente Vergütungen zugunsten des gemeinnützigen Zwecks (nur) dann als abzugsfähige Spenden behandelt werden, wenn der „Spender“ eigentlich einen durch Vertrag oder Satzung des Vereins eingeräumten Rechtsanspruch auf die Erstattung der Aufwendungen oder auf die Vergütung hat. Sein Erstattungsanspruch darf auch nicht unter der Bedingung des Verzichts eingeräumt worden sein. Diese Möglichkeit erlaubt es künftig einem gemeinnützigen Verein immer dann eine entsprechende Spendenbescheinigung auszustellen oder ausstellen zu lassen, wenn der „Spender“ einen satzungsmäßigen oder vertragsmäßigen Rechtsanspruch auf die Erstattung oder Vergütung hat, auf die er zugunsten des gemeinnützigen Vereins verzichtet.

Große Bedeutung hat der neu in das Gesetz aufgenommene *Vertrauensschutz für den Spender* (§ 10b IV EStG n. F.). Danach kann jeder Spender auf die Richtigkeit der erhaltenen Spendenbescheinigung vertrauen, wenn er diese nicht durch falsche Angaben erlangt hat und wenn ihm die Unrichtigkeit nicht bekannt ist. Selbst wenn dem Verein die Begünstigung der Gemeinnützigkeit entzogen oder verweigert wird, bleibt der Spender geschützt. Seine Steuerermäßigung bleibt ihm erhalten, wenn er guten Glaubens gehandelt hat.

Hiermit korrespondiert der ebenfalls neu in das Gesetz aufgenommene *Haftungstatbestand*. Der Spendenempfänger haftet nämlich für die entgangene Steuer dann, wenn er vorsätzlich oder grob fahrlässig eine unrichtige oder unerlaubte Spendenbescheinigung ausstellt oder wenn er veranlaßt, daß die Spende nicht zu dem satzungsgemäßen gemeinnützigen Zweck verwendet wird. Der gemeinnützige Verein, der Spenden für den gemeinnützigen Zweck entgegennimmt, muß also für den Steuerausfall dann einstehen, wenn er keinen gemeinnützigen Zweck mit der Spende erfüllt oder wenn er eine unrichtige Spendenbescheinigung ausgestellt hat. Die Haftungssumme macht 40 v. H. des gespendeten Betrags aus. In dieser Höhe schätzt das Gesetz den Steuerausfall, der dadurch entsteht, daß der Spender den Spendenabzug nach § 10b EStG geltend macht.

Für *Durchlaufspenden*, mit denen gemeinnützige Zwecke im Ausland gefördert werden, muß künftig das Bundesministerium, in dessen Aufgabenbereich der jeweilige Zweck fällt, die Spendenbescheinigung erteilen, falls keine andere Durchlaufstelle die Spendenbescheinigung ausstellt.

Diese Regelungen gelten nicht nur gem. § 10b EStG für natür-



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Die Einkommensgrenze, bis zu der Stiftungen für den Unterhalt des Stifters und seiner nächsten Angehörigen sowie für die Pflege ihres Andenkens aufkommen dürfen, wurde von  $\frac{1}{4}$  auf  $\frac{1}{3}$  erhöht (§ 58 Nr. 5 AO).

Der Höchstbetrag für Spenden an politische Parteien wurde auf 100 000 DM festgestellt und die Veröffentlichungsgrenze für Parteispenden wurde von 40 000 DM auf 20 000 DM vermindert (§ 54 VII KStG n. F.).

Gewerbebetriebe in der neuen Rechtsform der Europäischen Wirtschaftlichen Interessenvereinigung (EWiV) unterliegen der Gewerbesteuer (§ 5 I GewStG n. F.).

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In allen Funktionen waren Ernst Katzensteins Kenntnisreichtum und Initiative entscheidend für erfolgreiche Verhandlungen mit den gesetzgebenden Körperschaften und Behörden, die zu den verschiedenen Rückerstattungsabkommen, zum Bundesrückerstattungsgesetz, zum BEG-Schlußgesetz, zu den rückerstattungsrechtlichen und entschädigungsrechtlichen Sonderfonds sowie zum Härtefonds von 1980 führten. Seine Memoranda und Zuschriften waren von kristalliner Klarheit und Prägnanz, seine mündlichen Darlegungen von großer Überzeugungskraft. Insgesamt kann seine Mitwirkung nicht hoch genug eingeschätzt werden.

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Dr. Karl Brozik, Frankfurt

Anwaltshaftungsrecht. Von Max Vollkommer (NJW-Schriftenreihe, H. 50). – München, Beck 1989. XXXI, 361 S., kart. DM 58,-.

Zum Thema dieses Buches liegen bereits das ebenfalls umfangreiche Werk von Borgmann-Haug, 2. Aufl. (1986) und das kürzere von Rinsche, 3. Aufl. (1989) vor. Während diese beiden von der Praxis aus geschrieben sind, werden im Werk von Vollkommer von der Wissenschaft her die Rechtsprobleme und die Rechtsanwendung unter die Lupe genommen. Der Verfasser ist auch nicht Rechtsanwalt sondern Universitätsprofessor, aber mit vorausgehender langjähriger Erfahrung als Richter. Seine wissenschaftliche Sicht führt in entscheidenden Punkten dazu, daß er dieses Rechtsgebiet als Teil des Allgemeinen Haftungsrechts begreift und daran jeweils die einschlägige, teilweise noch „versteinerte“ Rechtsprechung mißt. Das 7½-seitige Inhaltsverzeichnis weist bereits aus, wie er dabei überall vom Großen ins Detail gegangen ist, beim Anwaltsvertrag, den Anwaltspflichten, bei den Haftungsvoraussetzungen, den Haftungsschranken und den Beweisfragen. Beim Anwaltsvertrag erscheinen z. B. neben den Besonderheiten für die Sozietät (Rdnrn. 50 ff., 261) auch die nachvertraglichen Pflichten aus dem Anwaltsvertrag, Rdnrn. 82 f. Zu den Anwaltspflichten sei hingewiesen auf die Rechtsprüfungspflicht, Rdnrn. 119 f. mit Zusammenfassung in Rdnrn. 142 ff. Das alte Problem der Kollegialgerichtsentscheidung wird für die vorausgegangene, ferner für die den Rechtsfehler veranlassende sowie für die nachfolgende (Kollegial-) Gerichtsentscheidung untersucht, Rdnrn. 302–307. Nun soll in der Besprechung eines so aufschlußreichen und umfangreichen Werkes einiges aus den Grundfragen der Anwaltshaftung, die der Verfasser am Schluß seines Vorwortes nennt, näher angesprochen werden:

Auf der im Einzelnen dargelegten Grundlage der Rechtswidrigkeit = Pflichtwidrigkeit (Rdnrn. 263) = Außerachtlassung höchstmöglicher Sorgfalt (Rdnrn. 265 f.), womit das Fehlen der letzteren bereits ein Merkmal der Rechtswidrigkeit darstellt, wird deutlich, daß als Verschulden nicht schon das Fehlen höchstmöglicher oder äußerster Sorgfalt in Betracht kommen kann (Rdnrn. 267). Zum Verschulden, gerade auch zum Anwaltsverschulden wird sodann nachdrücklich – verständlich gerade von der wissenschaftlichen Seite her – ein einheitlicher objektiver Maßstab für das materielle und das prozessuale Verschulden verlangt (Rdnrn. 272 ff.) und dazu die Meinung von Borgmann-Haug und mancher Entscheidungen über die Trennung zwischen einem weniger strengen materiellen Verschuldensmaßstab und einem strengeren subjektiven Maßstab des prozessualen Verschuldens verworfen (Rdnrn. 277 ff.), eine Trennung, die mir rechtssystematisch auch schwer haltbar erscheint. Gegen diese Trennung ist auch der BGH, wie der Verfasser darlegt, mit der geforderten „üblichen, von einem ordentlichen Rechtsanwalt zu fordernden Sorgfalt“ (Rdnr. 275, die Borgmann-Haug S. 346 allerdings als „Leerformel“ bezeichnen), wozu auf den Begriff des „ordentlichen Kaufmanns“ hingewiesen und das Ganze in Rdnrn. 278 ff., 284 ff. in allen Einzelheiten dargelegt und abgegrenzt wird. Dabei spielt in den Darlegungen mit Recht die Änderung des § 233 ZPO a. F. gegenüber der n. F. eine wesentliche Rolle. Der Fachanwalt muß sich als Spezialist an einem erhöhten Standard messen lassen, Rdnrn. 288 f. Fragwürdig erscheint die vom Verfasser anerkannte BGH-Meinung für ausländische Rechtsanwälte, bei denen ein milderer Maßstab der erforderlicheren Sorgfalt gelten soll. Haben sie denn, wenn sie bei un tätig werden, die Rechtsprüfungspflicht für das Deutsche Recht nicht genauso wie der deutsche Rechtsanwalt?

Ein anderer Schwerpunkt: Zur Kausalitätsproblematik (eingehend Rdnrn. 332 ff.) gehört die Frage der Haftung des Anwalts für richterliche Fehlentscheidungen, Rdnrn. 381–389; sie ist ein altes, aber nach BGH, NJW 1988, 486 wieder aktuelles Problem. Die dargelegten nötigen Unterscheidungen vermeiden dabei, daß über die Konstruktion „Nichtverhinderung einer Fehlentscheidung“ das allgemeine Prozeßrisiko, eines der Lebensrisiken der Parteien, auf den Anwalt überwältigt wird, was als gefährliche Ausweitung der Anwaltshaftungspflicht so gerne versucht wird. Grundlage für das Ergebnis des Verfassers (Rdnr. 389) sind seine Darlegungen über die Fehlerverteilungspflicht (Rdnrn. 184 ff.) unter Beachtung des Schutzzwecks (Rdnr. 385) und der Risikozurechnung (Rdnr. 388). Schließlich ist der Regreßprozeß der Schadensbegriff von entscheidender Bedeu-



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# The Journal of CRIMINAL LAW, CRIMINOLOGY, AND POLICE SCIENCE

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NO. 2

## PIONEERS IN CRIMINOLOGY

### II. Gustav Aschaffenburg (1866-1944)

HANS VON HENTIG

Professor Hans von Hentig, Dean of the Bonn Law School, has been for ten years the Co-Editor of the *Monatschrift fuer Kriminalpsychologie und Strafrechtsreform* which was founded by Professor Aschaffenburg. He was dismissed by Hitler in 1935, came to America in 1936, taught at Yale, State Universities of California, Oregon, Iowa, Colorado and Kansas City. He has been Research Assistant to the Attorney General in Washington, D. C. and Director of the Colorado Crime Survey. Three years ago he was called back to assume the chair of Criminology at the University of Bonn. Professor von Hentig is author of *Crime, Causes and Conditions*, McGraw-Hill, 1947 and *The Criminal and His Victim*, Yale University Press, 1948. More recently he has published the first volume of a work on *Punishment*, entitled, *Early Concepts and Cultural Continuities*. The second volume: *The Therapy of Crime* will be out in the autumn. We are able to include the picture of Professor Aschaffenburg below through the courtesy of Dean von Hentig.—EDITOR.

Kiel

I

The names—Henry Maudsley, Caesar Lombroso, and Gustav Aschaffenburg—suggest the tremendous impetus that criminology has experienced from medical science—mainly from psychiatry. Maudsley lived before my time. I was not young anymore when Lombroso's daughter conducted me in Turin through the shrine-like study of the eminent Italian who has been "buried" so many times and is not dead yet. But Aschaffenburg—I knew him well. We have been fighters on the same battle-field through many years. Fate fell on him like a thunderbolt; an unjust and an undeserved fate. He came to the hospitable shores of the United States broken in heart and broken in health. His hope to find a publisher came to naught. He who had played a prominent part at all



GUSTAV ASCHAFFENBURG



Otto Kirchheimer

Punishment and social structure 1939

The fate of small business in Nazi Germany  
1975

Von der Weimarer Republik zum Faschismus  
1976 (wegen Literaturverzeichnis vergleiche Photokopie)

Die Rechtsordnung des Nationalsozialismus  
in: Kritische Justiz 1971, 356 ff.

Staatsgefüge und Recht des Dritten Reichs  
in: Kritische Justiz 1976, 39 ff.



Die Liste der Werke ist hoffentlich vollständig. Einige der aufgeführten Werke waren trotz größter Bemühungen in Bonn nicht aufzufinden.

Friederwald

Nach Rücksprache mit Prof. Köster konnte der gewünschte Aufsatz aufgefunden werden. Wir werden Ihnen den Beitrag nachsenden



# Otto Kirchheimer Staatsgefüge und Recht des dritten Reiches

Kritische Justiz  
1976, 39 ff.

## Einleitung

### I

*Otto Kirchheimers Arbeiten – die sich über einen Zeitraum von knapp vierzig Jahren erstrecken – haben in der Bundesrepublik eine beachtliche Rezeption erfahren. Mit dem Wiederabdruck der 1935 in Paris unter dem Pseudonym »Dr. Hermann Seitz« verfaßten Anklageschrift gegen das nationalsozialistische Staatssystem: »Staatsgefüge und Recht des dritten Reiches« wird eine fast verschollene Schrift Kirchheimers wieder zugänglich gemacht. Sie ergänzt die bisher bekannten Untersuchungen Kirchheimers über den Faschismus<sup>1</sup> und verleiht seiner kämpferischen Auseinander-*

Der Verfasser ist an weiteren Informationen über Otto Kirchheimers Wirken in der Weimarer Zeit und in der Emigration in Paris wie auch überhaupt an persönlichen Urteilen heute noch lebender Zeitgenossen über die sozialistische Bewegung in der Weimarer Republik interessiert. Er bittet um Zuschriften an die am Ende des Hefes angegebene Adresse.

Frau Anne Kirchheimer sei für Zusendung der Schrift und Genehmigung zum Wiederabdruck gedankt. Ferner sei all denjenigen Herren gedankt, die mich in ihren Zuschriften durch Informationen, Rat und Kritik unterstützt haben.

- 1 Otto Kirchheimer, Politik und Verfassung. Frankfurt, 1964 (es 95); ders., Politische Justiz – Verwendung juristischer Verfahrensmöglichkeiten zu politischen Zwecken (zuerst: Princeton, 1961; deutsche Übersetzung und Bearbeitung: A. R. L. Gurland), Neuwied/Berlin, 1965. Vgl. hierzu die Rezensionen von: Richard Schmid, in: Juristenzeitung, Jg. XXI, 1966, Nr. 9, S. 325; Dieter Hart, in: Kritische Justiz, Heft 3/1970, S. 360 ff.; Helmut Ridder, Politische Justiz. Zur Erinnerung an Otto Kirchheimer, in: Neue politische Literatur, Jg. XIII, 1968, S. 301 ff. Dort auch Anm. 3 mit weiteren Hinweisen. Ferner: Otto Kirchheimer, Politische Herrschaft. Fünf Beiträge zur Lehre vom Staat, Frankfurt, 1967 (27. 1967). Funktionen des Staats und der Verfassung. 10 Analysen, Frankfurt, 1972 (es 548). In den USA ist 1969 ein Sammelband erschienen: Politics, Law and Social Change. Selected Essays of Otto Kirchheimer, edited by Frederic S. Burin and Kurt L. Shell, with »An Introduction to His Life and Work« by John H. Herz and Erich Hula, New York/London, 1969. Georg Rusche / Otto Kirchheimer, Sozialstruktur und Strafvollzug (New York, 1939), (deutsche Übersetzung: Helmut und Susan Kapczynski), Frankfurt/Köln, 1974. Vgl. hierzu die Rezension von Karin Rausch, in: Kritische Justiz, Heft 2/1975, S. 213 ff. Im Herbst 1976 erscheint ein weiterer Band mit frühen Aufsätzen von Kirchheimer, herausgegeben und mit einer Einleitung des Verfassers im Suhrkamp Verlag Frankfurt u. a. werden dort auch die in Anm. 28 aufgeführten Aufsätze abgedruckt.
- 2 Von den Herren Dr. Eugene Anshel, New York (6. 4. 1975), Prof. Ernst Friesenhahn, Bonn (16. und 19. 7. 1975), Prof. Arkadius R. L. Gurland, Darmstadt (27. 9. 1975) und Prof. John H. Herz, New York (25. 3. 1975) wurde mir bestätigt, daß diese Arbeit von Kirchheimer stammt.
- 3 Von den Arbeiten Kirchheimers über den Faschismus seien hier genannt:  
»The Legal Order of National Socialism« (zuerst in: Studies in Philosophy and Social Science, Bd. IX, 1941). Nachdruck (deutsche Übersetzung: Monika Weiss – Ulrich Mückenberger) in: Kritische Justiz, Heft 4/1971, S. 356 ff.; auch in: Funktionen des Staats... a. a. O., S. 115 ff. (Anm. 1); Georg Rusche / Otto Kirchheimer, Sozialstruktur und Strafvollzug, a. a. O., Kap. XI (Anm. 1); »Criminal Law in National Socialist Germany«, in: Studies in Philosophy and Social Science, Photomechanischer Nachdruck München 1970, Jg. VIII, 1939–40, S. 444 ff.; »Changes in the Structure of Political Compromise«, a. a. O., Jg. IX, 1941, S. 264 ff. (273 ff.) Die beiden zuletztgenannten Aufsätze werden auch in dem im Herbst 1976 erscheinenden Sammelband abgedruckt.



setzung mit dem Nationalsozialismus einen wichtigen, zusätzlichen Akzent. Kirchheimers Studien gehören bekanntlich in den Zusammenhang der Arbeiten von Ernst Fraenkel<sup>4</sup> und Franz L. Neumann,<sup>5</sup> die zur gleichen Zeit marxistisch orientierte Analysen des nationalsozialistischen Staats- und Rechtssystems vorgelegt haben.

## II

»Staatsgefüge und Recht des Dritten Reiches« wurde von Kirchheimer wahrscheinlich in dem Zeitraum Juli–August 1935 in Paris geschrieben. Dies geht aus der im Text angegebenen Literatur hervor, besonders aber aus der umgehend in der Rubrik »Juristische Rundschau« der »Deutschen Juristen-Zeitung« am 15. September 1935 veröffentlichten scharfen Polemik. Aus dieser offiziellen Reaktion ist zu entnehmen, daß Kirchheimers Schrift im nationalsozialistischen Deutschland bekannt geworden ist. Der namentlich nicht gezeichnete Beitrag stammt möglicherweise von Carl Schmitt<sup>6</sup>, 1933 bis 1936 Herausgeber der »Deutschen Juristen-Zeitung«. Auf einem maschinenschriftlichen »Aufkleber« zu Kirchheimers Schrift – der nachträglich weiteren Exemplaren beigelegt wurde – wird Carl Schmitt als Verfasser dieser Replik angegeben. Die Form, in der Kirchheimer seinen Text veröffentlichte, konnte es zudem nahelegen, daß Carl Schmitt – der unter dem Nationalsozialismus zum »Preußischen Staatsrat«, »Mitglied der Akademie für Deutsches Recht« und zum »Reichsgruppenwalter der Reichsgruppe Hochschullehrer des Nationalsozialistischen Rechtswahrerbundes« avancierte – sich dazu äußert: Denn Kirchheimer hatte, um die Verbreitung seiner Schrift in Deutschland zu sichern, zum Mittel der Mystifikation gegriffen und ihr nach Farbe des Umschlags, Satzbild und Titel den äußeren Anschein eines »Heft 12« der bekannten, von Carl Schmitt edierten Schriftenreihe »Der deutsche Staat der Gegenwart« mit der Verlagsangabe »Hanseatische Verlagsanstalt, Hamburg, 1935« gegeben. Diese Aufmachung war als Tarnung gewählt. Mit einer derartigen Tarnung wurden nicht selten illegale Schriften verbreitet. So erschien z. B. das »Prager Manifest«, weitgehend verfaßt von Rudolf Hilferding, herausgegeben vom emigrierten Teil-Partei Vorstand der sozialdemokratischen Partei mit dem Aufdruck »Die Kunst des Selbstrasierens«.

4 Ernst Fraenkel, Der Doppelstaat (zuerst New York, 1941, Rückübersetzung aus dem Englischen von Manuela Schops in Zusammenarbeit mit Ernst Fraenkel), Frankfurt-Köln, 1974; ders., Reformismus und Pluralismus, Hamburg, 1973, Abschnitt III, Nr. 7, 8, 9. Vgl. zu Fraenkel die Rezension des Verfassers von »Reformismus und Pluralismus« in: Kritische Justiz, Heft 3 1975, S. 326 ff. Siehe zur Faschismusanalyse Fraenkels den Aufsatz von Bernhard Blanke, Der deutsche Faschismus als Doppelstaat, in: Kritische Justiz, Heft 3 1975, S. 221–243. Dort auch die ausführlichen Literaturhinweise zur Faschismuskritik.

5 Franz L. Neumann, Behemoth. The Structure and Practice of National Socialism 1933–1944 (zuerst 1942, New York, erweitert 1944, New York), New York Evanston, 1966 (4). Siehe ferner Neumanns Aufsätze unter dem Pseudonym »Leopold Franz« in der »Zeitschrift für Sozialismus« Karlsbad 1933–36, Nachdruck Glashütten Taunus, 1970. Leopold Franz (= Franz L. Neumann), Die Gewerkschaften in der Demokratie und in der Diktatur (Probleme des Sozialismus, Sozialdemokratische Schriftenreihe, Nr. 13), Verlagsanstalt »Graphia« Karlsbad, 1935; sowie die entsprechenden Arbeiten in: Franz Neumann, Demokratischer und autoritärer Staat. Beiträge zur Soziologie der Politik (Reihe Basis), Frankfurt, 1967.

6 Zu Carl Schmitt siehe: Helmut Ridder, Ex oblivione malum. Randnoten zum deutschen Partisanenprozeß, in: Heinz Maus (Hrsg.), Gesellschaft, Recht und Politik. Wolfgang Abendroth zum 60. Geburtstag, Neuwied, Berlin, 1968, S. 305 ff. Auch Kirchheimer hat sich sehr intensiv mit Carl Schmitt auseinandergesetzt. Siehe z. B. die Aufsätze in: Funktionen des Staats . . . a. a. O., (Anm. 1) und Otto Kirchheimer / N.(athan) Leites, Bemerkungen zu Carl Schmitts »Legalität und Legitimität«, in: Archiv für Sozialwissenschaft und Sozialpolitik, Bd. 68, Jg. 1932/33, Tübingen, 1933, S. 457–487. Dieser Aufsatz wird auch in den im Herbst 1976 erscheinenden Sammelband mit aufgenommen.

7 Diese Schriftenreihe erschien von 1933 bis 1936, und zwar die Hefte 1 bis 20.

8 Vgl. Annedore Leber / Freya Gräfin von Moltke, Für und wider. Entscheidungen in Deutschland 1918–1945 (zuerst 1961), Berlin/München, 1970 (11), S. 179.

Das wirklich in der von Schmitt (1935) hatte zum Thema »Berichte Rechts«. Ein Vergleich der Seitz-abweichende graphische Gestaltung Copyrightangabe 1934 statt 1935 a die letzte Hinweisseite im Original Veröffentlichung. Der Titel »Staatsg an den Titel einer Publikation an, Schmitt, »Staatsgefüge und Zusammen Die Replik der »Deutschen Juristen- aus:

»Die Verwirklichung und Sicherung Ehre der Völker und die gegense gründet, ist eines der unverrück Deutschlands. Auf vielfältige Weise wäre ein auf überholter Anschauun nen als übliche oder wirksame Mi echten geistigen Zusammenarbeit d ger Anerkennung und nicht nur intellektuelle« beruht. Für das Vers im Ausland sind deshalb verantwor Zusammenkünfte und der Gedan besonders hohem Wert. Während e hungen nicht fehlt und auch schon einer internationalen Clique, der, Welt gelegen ist, immer wieder d anbahnende wirkliche Verständigun erscheint jedes Mittel recht, und selb zurück. Ein besonders drastisches B eine offenbar in Frankreich und H den nationalsozialistischen Rechtsa tivität als Ausdruck und Mittel ei entlarven. Es verlohnt sich nicht, deren Lektüre bald langweilig wi sowohl kommunistisch-marxistische gumente gegen den nationalsozialis wie das intellektuelle ist auch das sich doch diese »Enthüllungsschrift und einen verbrecherischen Mißb Druck- und Verlagsrechte darste nämlich als »Heft 12« der vom Her W. L.] veröffentlichten Schriftenre seatische Verlagsanstalt, Hamburg, gefüge und Recht des dritten Reich Hermann Seitz. Sicher tut man d

9 Die vorstehenden Bemerkungen zur D Auskünften von Prof. Ernst Friesenhal Hinweis auf diese Schrift bei Bernhard Bl Buch von Schmitt, Staatsgefüge und Z angezeigt in: Carl Schmitt, Positionen 1923–1939, Hamburg, 1940, »Zu Nr. 20



Das wirklich in der von Schmitt herausgegebenen Reihe veröffentlichte Heft 12 (1935) hatte zum Thema »Berichte über die Lage des Studiums des öffentlichen Rechts«. Ein Vergleich der Seitz-Broschüre mit dem Originalheft 12 zeigt eine abweichende graphische Gestaltung des Textes, Unstimmigkeit im Verlagssignet, Copyrightangabe 1934 statt 1935 auf dem Umschlag; schließlich unterscheidet sich die letzte Hinweisseite im Originalheft 12 von der entsprechenden Seite der Seitz-Veröffentlichung. Der Titel »Staatsgefüge und Recht des Dritten Reiches« lehnte sich an den Titel einer Publikation an, die als Heft 6 der Reihe erschienen war: Carl Schmitt, »Staatsgefüge und Zusammenbruch des Zweiten Reiches«.<sup>9</sup>

Die Replik der »Deutschen Juristen-Zeitung« auf Kirchheimers Anklageschrift fiel so aus:

»Die Verwirklichung und Sicherung einer wahren Friedensordnung, die sich auf die Ehre der Völker und die gegenseitige Anerkennung ihrer Daseinsberechtigung gründet, ist eines der unverrückbaren und unveräußerlichen Ziele des neuen Deutschlands. Auf vielfältige Weise wird versucht, dieses Ziel zu erreichen, und es wäre ein auf überholter Anschauung beruhender Irrtum, lediglich staatliche Aktionen als übliche oder wirksame Mittel anzusehen. Vor allem bedarf es auch einer echten geistigen Zusammenarbeit der Völker, die auf uneingeschränkter gegenseitiger Anerkennung und nicht nur auf einer äußerlich organisierten »coopération intellectuelle« beruht. Für das Verständnis des nationalsozialistischen Deutschlands im Ausland sind deshalb verantwortungstragende wissenschaftliche Arbeiten sowie Zusammenkünfte und der Gedankenaustausch mit ausländischen Gelehrten von besonders hohem Wert. Während es von deutscher Seite an solchen ernstesten Bemühungen nicht fehlt und auch schon erfreuliche Erfolge festzustellen sind, wird von einer internationalen Clique, der, nach dem Wort des Führers, am Unfrieden der Welt gelegen ist, immer wieder der Versuch gemacht, die sich mehr und mehr anbahnende wirkliche Verständigung zwischen den Völkern zu hintertreiben. Dabei erscheint jedes Mittel recht, und selbst vor kriminellen Handlungen scheut man nicht zurück. Ein besonders drastisches Beispiel für diese Störungsversuche ist neuerdings eine offenbar in Frankreich und Holland gedruckte Hetzschrift, die sich bemüht, den nationalsozialistischen Rechtsaufbau mit scheinbar »wissenschaftlicher« Objektivität als Ausdruck und Mittel einer brutalen Zwangs- und Klassenherrschaft zu entlarven. Es verlohnt sich nicht, näher auf den Inhalt dieser Schrift einzugehen, deren Lektüre bald langweilig wird, da sie sich hilflos in der Zwickmühle dreht, sowohl kommunistisch-marxistische als auch liberal-bürgerlich-rechtsstaatliche Argumente gegen den nationalsozialistischen Rechtsaufbau vorzubringen. Ebenso tief wie das intellektuelle ist auch das moralische Niveau dieses Unternehmens, bedient sich doch diese »Enthüllungsschrift« selbst einer Tarnung, die eine glatte Fälschung und einen verbrecherischen Mißbrauch der allgemein anerkannten Herausgeber-, Druck- und Verlagsrechte darstellt. In der äußeren Aufmachung gibt sie sich nämlich als »Heft 12« der vom Herausgeber der DJZ [= Deutsche Juristen-Zeitung, W. L.] veröffentlichten Schriftenreihe »Der deutsche Staat der Gegenwart« (Hanseatische Verlagsanstalt, Hamburg) und trägt den vielversprechenden Titel »Staatsgefüge und Recht des dritten Reiches«. Als Verfasser zeichnet ein völlig unbekannter Hermann Seitz. Sicher tut man diesem Instrument der Völkerverhetzung zu viel

<sup>9</sup> Die vorstehenden Bemerkungen zur Dechiffrierung der Seitz-Broschüre beruhen auf schriftlichen Auskünften von Prof. Ernst Friesenhahn, Bonn (16. 7. und 19. 7. 1975). Dementsprechend ist der Hinweis auf diese Schrift bei Bernhard Blanke in seinem Aufsatz (Anm. 4) in Anm. 1 zu korrigieren. Das Buch von Schmitt, Staatsgefüge und Zusammenbruch des Zweiten Reiches, Hamburg, 1934, wird angezeigt in: Carl Schmitt, Positionen und Begriffe im Kampf mit Weimar - Genf - Versailles, 1923-1939, Hamburg, 1940, »Zu Nr. 20«, S. 315 f. (316).



Ehre an, wenn man sich überhaupt damit beschäftigt. Aber es erscheint doch notwendig, die internationale Aufmerksamkeit wieder einmal auf die verbrecherischen Methoden zu lenken, mit denen eine internationale Verbrecherfront versucht, die geistige Zusammenarbeit der Völker und damit die Verwirklichung eines echten Friedens zu hintertreiben.\* (Deutsche Juristen-Zeitung, 40. Jg., 1935, H. 18 v. 15. 9. 1935, S. 1104 f.)

Diese Replik zeigt, daß die Bedeutung von Kirchheimers Schrift verstanden wurde. In dem Aufkleber wird ihre Funktion folgendermaßen bestimmt:

»In Tausenden von Exemplaren nach Deutschland versandt, will diese Analyse der faschistischen Rechtsentwicklung den deutschen Juristen helfen, hinter dem Nebel nationalsozialistischer Phrasen die brutale zynische Wirklichkeit des neuen Rechts zu erkennen. So ist diese Schrift ein Zeichen der Solidarität ausländischer Juristen mit ihren zum Schweigen verurteilten Kollegen im Dritten Reich. Sie ist zugleich eine Waffe gegen das barbarische Hitler-Regime.«<sup>10</sup>

### III

Geboren war Otto Kirchheimer am 11. November 1905 in Heilbronn.<sup>11</sup> Er besuchte Schulen in Heilbronn, in Heidelberg-Neuenheim und zuletzt in Ettenheim/Lahr, wo er im Frühjahr 1924 das Abitur machte. Das Studium begann er in Münster mit Philosophie und Geschichte. Danach studierte er Jura in Köln, Bonn und Berlin. Vorlesungen und Seminare besuchte er u. a. bei Karl Vorländer, Max Scheler, Heinrich Triepel, Rudolf Smend, Carl Schmitt. Seine juristische Dissertation »Zur Staatstheorie des Sozialismus und Bolschewismus«<sup>12</sup> schrieb er 1928 bei Carl Schmitt in Bonn. Nach dem Studium war Kirchheimer bis 1932 Referendar im preußischen Justizdienst. Das Assessorexamen machte er 1932 in Berlin, wo er sich auch als Rechtsanwalt niederließ. Als Referendar arbeitete er u. a. bei Franz L. Neumann, der eine Anwaltspraxis zusammen mit Ernst Fraenkel in Berlin hatte.

Als Mitglied der sozialdemokratischen Partei bewegte sich Kirchheimer vorwiegend in Akademikerkreisen. Er war seit etwa 1930 einer der jüngeren linksstehenden Sozialdemokraten, die die Gelegenheit nutzten, in der von Rudolf Hilferding seit

<sup>10</sup> Die Bemerkung, daß »Tausende von Exemplaren« dieser Schrift im nationalsozialistischen Deutschland verbreitet wurden, konnte von den von mir angeschriebenen Herren leider nicht näher konkretisiert werden. Weder Prof. Otto Kahn-Freund, Haslemere, England (17. 7. 1975); Prof. Walter Fabian, Köln (22. 9. 1975); Prof. Fritz Eberhard, Berlin (mündliche Auskunft vom 8. 10. 1975); Prof. Martin Drath, Karlsruhe (22. 10. 1975); Prof. Hans Mayer, Tübingen (28. 10. 1975) noch die anderen Herren konnten mir darüber näher Auskunft geben. Einzig Prof. Georg Schwarzenberger, London (4. 10. 1975), teilte mir mit, daß er in der Emigration in London davon gehört hatte, daß in Paris die Seitz-Broschüre in der vorliegenden Aufmachung hergestellt und nach Deutschland geschmuggelt werden sollte. Von der »Deutschen Bücherei« in Leipzig (3. 10. 1975) und der »Deutschen Bibliothek« in Frankfurt (13. 10. 1975) sowie der »Hanseatischen Verlagsanstalt GmbH Hamburg« (28. 10. 1975) konnte mir leider auch nichts näheres mitgeteilt werden.

<sup>11</sup> Die folgenden biographischen Bemerkungen stützen sich auf: Herz Hula, »An Introduction . . .«, a. a. O., S. IX-XXXVIII (Anm. 1); Horst Ehmke, Otto Kirchheimer. Nachruf, in: AöR, Bd. 91, 1966, S. 117-119; biographische Notiz von Otto Kirchheimer, in: Hermann Kesten (Hrsg.), Ich lebe nicht in der Bundesrepublik, München, 1964, S. 173. Ferner stütze ich mich auf schriftliche Auskünfte der Herren Dr. Eugene Ansel, New York (6. 4., 20. 5., 4. 8. 1975), Prof. Martin Drath, Karlsruhe (22. 10. 1975, 17. 11. 1975), Prof. Ernst Friesenhahn, Bonn (16. 7., 19. 7. 1975), Prof. Arkadius R. L. Gurland, Darmstadt (27. 2., 27. 9. 1975) und Prof. Franz Kirchheimer, Freiburg (22. 9. 1975).

<sup>12</sup> Verfügbar war nur der Abdruck in: Zeitschrift für Politik, Bd. XVII, Berlin, 1928, S. 593-611, und zwar der Teildruck »Zur Staatslehre des Sozialismus und Bolschewismus«. Im Besitz von Frau Anne Kirchheimer befindet sich auch nur dieser Teildruck. Nach Auskunft der Universitätsbibliothek Bonn ist die Arbeit dort nicht mehr vorhanden. Auch Prof. Ernst Friesenhahn, der im juristischen Seminar in Bonn Nachforschungen angestellt hatte, hat mir mitgeteilt, daß die Dissertation als Ganzes dort nicht mehr vorhanden sei. Der zur Verfügung stehende Teildruck wird ebenfalls in den projektierten Sammelband aufgenommen.

1924 herausgegebenen Monat  
Möglichkeit insbesondere durch  
Zeitschrift durch Albert Salo  
schaft gehörte Kirchheimer zu  
Ernst Fraenkel, Otto Kahn-F  
freundschaftliche Kontakte un  
damaligen Staats- und Verfa  
politische Krise hervorgeruf  
Verfassungswirklichkeit – z.  
Preußen-Konflikt im Juli 193  
lich wurden Seminare von H  
lehrte und im Herbst 1932 ei  
der zu dieser Zeit Professor an  
ihnen intensiv diskutiert. Wi  
Kirchheimer 1931 der Abspalt  
Gründung der SAP (Sozialist  
feld und Max Seydewitz führ  
Weimarer Republik u. a. im  
kanischen Richterbund. Im S  
Frankfurt/Main die Stelle er  
stand zur Wahl. Nachdem a  
von Preußen durch einen Sta  
mer die Möglichkeit, die Ste  
auf Lebenszeit – verbaut.  
Kirchheimers Arbeiten erschi  
senkampf«, »Die Gesellschaft  
wissenschaft und Sozialpolit  
1933 kann man nennen: »We  
Kirchheimer diese Schrift ste  
empfunden habe<sup>16</sup> – 1930 in  
und die ebenfalls 1930 veröffe  
Gerade die in Kirchheimers S  
wenn sie nicht besonders sta  
Studenten von Bedeutung wa  
schen Blättern« und im »Klas  
zeit Hermann Heller<sup>18</sup> und

<sup>13</sup> Vgl. Ernst Fraenkel, Vorwort zu  
Verfassungskrise 1931-32, Darms

<sup>14</sup> Vgl. u. a. Kirchheimer, Politische  
a. a. O., (Anm. 1); die Schriften  
und Politik – Quellentexte 1918-

<sup>15</sup> Von den Aufsätzen bis 1933 sind  
worden. Siehe die Abdrucke in  
Staats . . ., a. a. O., (Anm. 1).

<sup>16</sup> Helmut Ridder, Politische Justiz,

<sup>17</sup> Die Schrift »Grenzen der Enteign  
»Weimar – und was dann?« in:  
zuletztgenannte Schrift, die in de  
und wird, in der Weimarer Repub  
(= Dora Fabian), Bericht über:  
Jungsozialistische Blätter, Jg. X,

<sup>18</sup> Hermann Heller, Freiheit und Fo  
Studentenbundes, in: Die Justiz,  
Heller, Gesammelte Schriften, 3

<sup>19</sup> Franz Neumann, Die soziale Bed



1924 herausgegebenen Monatsschrift »Die Gesellschaft« zu publizieren, wobei diese Möglichkeit insbesondere durch die vorübergehende Übernahme der Redaktion der Zeitschrift durch Albert Salomon eröffnet wurde.<sup>13</sup> In der Berliner SPD-Juristenschaft gehörte Kirchheimer zu den jüngeren sozialdemokratischen Juristen, die wie Ernst Fraenkel, Otto Kahn-Freund, Martin Drath und Franz Neumann nicht nur freundschaftliche Kontakte untereinander hatten, sondern die sich intensiv mit der damaligen Staats- und Verfassungstheorie, mit den durch die ökonomische und politische Krise hervorgerufenen Wandlungen des Verfassungsrechts und der sog. Verfassungswirklichkeit – z. B. der Brüning'schen Notverordnungspolitik, dem sog. Preußen-Konflikt im Juli 1932 – theoretisch auseinandergesetzt hatten.<sup>14</sup> Gelegentlich wurden Seminare von Hermann Heller – der 1932 an der Berliner Universität lehrte und im Herbst 1932 eine Professur in Frankfurt erhielt – und Carl Schmitt – der zu dieser Zeit Professor an der Berliner Handelshochschule war – besucht und in ihnen intensiv diskutiert. Wie verschiedene andere linke Sozialdemokraten stand Kirchheimer 1931 der Abspaltung einer linkssozialdemokratischen Richtung, die zur Gründung der SAP (Sozialistische Arbeiterpartei Deutschlands) unter Kurt Rosenfeld und Max Seydewitz führte, abwartend gegenüber. Politisch aktiv war er in der Weimarer Republik u. a. im Sozialistischen Studentenbund und später im Republikanischen Richterbund. Im Sommer 1932 war an der »Akademie der Arbeit« in Frankfurt/Main die Stelle eines Arbeitsrechtlers zu besetzen. Auch Kirchheimer stand zur Wahl. Nachdem das Papen-Regime die sozialdemokratische Regierung von Preußen durch einen Staatsstreich aus dem Amt gejagt hatte, war für Kirchheimer die Möglichkeit, die Stelle in Frankfurt einzunehmen – beamtenrechtlich eine auf Lebenszeit – verbaut.

Kirchheimers Arbeiten erschienen u. a. in »Jungsozialistische Blätter«, »Der Klassenkampf«, »Die Gesellschaft«, »Die Arbeit«, »Die Justiz« und »Archiv für Sozialwissenschaft und Sozialpolitik«.<sup>15</sup> An separat gedruckten Schriften aus der Zeit vor 1933 kann man nennen: »Weimar – und was dann?« – Helmut Ridder berichtet, daß Kirchheimer diese Schrift stets als sein zwar nicht reifstes, aber »stärkstes Werk« empfunden habe<sup>16</sup> – 1930 in der »Jungsozialistischen Schriftenreihe« erschienen, und die ebenfalls 1930 veröffentlichte Broschüre »Die Grenzen der Enteignung«.<sup>17</sup> Gerade die in Kirchheimers Schrift »Weimar – und was dann?« – die übrigens, auch wenn sie nicht besonders stark verbreitet, für die Bewegung der Sozialistischen Studenten von Bedeutung war –, aber auch in den Artikeln in den »Jungsozialistischen Blättern« und im »Klassenkampf« entwickelten Gedankengänge hatten seinerzeit Hermann Heller<sup>18</sup> und Franz Neumann<sup>19</sup> zu scharfer Kritik veranlaßt. Die

13 Vgl. Ernst Fraenkel, Vorwort zum Neudruck, Zur Soziologie der Klassenjustiz und Aufsätze zur Verfassungskrise 1931–32, Darmstadt, 1968, S. VII–XIV (VII f.).

14 Vgl. u. a. Kirchheimer, Politische Herrschaft, a. a. O., S. 7 ff. (Anm. 1); ders., Funktionen des Staats . . . , a. a. O., (Anm. 1); die Schriften von Fraenkel (Anm. 4, Anm. 13); Thilo Ramm (Hrsg.), Arbeitsrecht und Politik – Quellentexte 1918–1933, Neuwied, 1966.

15 Von den Aufsätzen bis 1933 sind bisher die Beiträge aus der Zeitschrift »Die Gesellschaft« nachgedruckt worden. Siehe die Abdrucke in: Politische Herrschaft, a. a. O., (Anm. 1) und: Funktionen des Staats . . . , a. a. O., (Anm. 1).

16 Helmut Ridder, Politische Justiz, a. a. O., S. 302 (Anm. 1).

17 Die Schrift »Grenzen der Enteignung« ist abgedruckt in: Funktionen des Staats . . . , a. a. O., (Anm. 1). »Weimar – und was dann?« in: Politik und Verfassung, a. a. O., (Anm. 1). Interessant ist, daß die zuletztgenannte Schrift, die in der Bundesrepublik häufig innerhalb der »Linken« herangezogen wurde und wird, in der Weimarer Republik in bezug auf Verbreitung »kein Erfolg« beschieden war. Vgl. D. F. (= Dora Fabian), Bericht über: Reichsausschußsitzung der Jungsozialisten (Aus der Bewegung), in: Jungsozialistische Blätter, Jg. X, Berlin, 1931, Heft 3/März 1931, S. 94 f. (95).

18 Hermann Heller, Freiheit und Form in der Reichsverfassung. Rede zur Verfassungsfeier des Deutschen Studentenbundes, in: Die Justiz, Bd. V, 1929 30, Heft 11 August 1930, S. 672 ff. Abgedruckt auch in: Heller, Gesammelte Schriften, 3 Bde., Leiden, 1971, Bd. II, S. 373 ff.

19 Franz Neumann, Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung, in: Die Arbeit,



«ästhetisch-heroischen Revolutionsromantiker von links und rechts»<sup>20</sup>, schreibt Heller, die «unter dem Schutze ihrer verfassungsrechtlichen Freiheitsgarantien diese Republik selbst in Grund und Boden kritisieren» und sich dabei besonders «kultiviert und geistreich» vorkommen, wenn sie der Weimarer Verfassung «Mangel an Stil vorwerfen, den einheitlichen Geist vermissen und ihr nachsagen, sie habe die politischen Grundentscheidungen nicht getroffen, sondern sei ihnen ausgewichen, habe sie vertagt»<sup>21</sup>, seien in ihrem Wesen gegen die Weimarer Verfassung gerichtet. Denn gerade diese Verfassung «hat allen lebendigen gesellschaftlichen Kräften Rechtsventile offen gelassen, die eine gewaltlose Beseitigung der gesellschaftlichen Widersprüche gestatten»<sup>22</sup>, wobei gerade das Ideal der Verfassung, der «soziale Rechtsstaat»<sup>23</sup>, eine für Proletariat und Bourgeoisie gleichermaßen erstrebenswerte Aufgabe sei.

Das nationalsozialistische System vertrieb den Juden Kirchheimer wie viele andere Sozialisten aus Deutschland.<sup>24</sup> Im Sommer 1933 emigrierte er nach Paris. Seine dortige Tätigkeit stand im Zusammenhang mit dem von Max Horkheimer geleiteten Institut für Sozialforschung, das von Frankfurt in die Emigration gegangen war. 1937 verließ er Frankreich und ließ sich in den Vereinigten Staaten nieder. In den USA arbeitete er im Institute of Social Research (Horkheimer), später im State Department, danach – von 1955 bis 1962 – als Professor an der New School for Social Research. Von 1962 bis zu seinem Tode am 22. November 1965 war er Professor für Public Law and Government an der Columbia-Universität.

Otto Kirchheimer hatte schon kurz nach dem Zweiten Weltkrieg die Möglichkeit erwogen, einen Ruf an eine Universität in der Bundesrepublik Deutschland anzunehmen. Schon 1947 wurden – durch Vermittlung von Ernst Friesenhahn – Gespräche mit der Juristischen Fakultät der Universität Frankfurt über eine Professur oder wenigstens eine Gastprofessur geführt. Im Jahre 1962 wurden – u. a. über Ernst Friesenhahn, Wilhelm Hennis, A. R. L. Gurland und das Frankfurter Institut für Sozialforschung – Verhandlungen mit der Universität Frankfurt und dem Hessischen Kultusministerium, diesmal über einen Lehrstuhl für Wissenschaftliche Politik an der Universität Frankfurt geführt, die bis zum Entwurf einer Berufungsvereinbarung gediehen. Zu diesem Zeitpunkt konnte Kirchheimer allerdings aus persönlichen Gründen eine sofortige Übersiedlung in die Bundesrepublik nicht in Angriff nehmen. 1965 fanden erneute Verhandlungen statt, diesmal mit der Universität Freiburg. Kirchheimer sollte dort den Lehrstuhl für Politische Wissenschaft übernehmen, wobei u. a. Horst Ehmke die Verhandlungen in Freiburg führte, während u. a. Richard Schmid als Vermittler zum Kultusministerium in Stuttgart eingeschaltet war. Durch den Tod Kirchheimers im November 1965 wurden die Verhandlungen

Jg. VII, Berlin, 1930, Heft 9, S. 569 ff.; siehe auch Franz Neumann, Koalitionsfreiheit und Reichsverfassung. Die Stellung der Gewerkschaften im Verfassungssystem, Berlin, 1932, S. 39.

<sup>20</sup> Heller, Freiheit und Form . . ., in: Die Justiz, a. a. O., S. 675 (Anm. 18).

<sup>21</sup> Ebda. S. 674.

<sup>22</sup> Ebda. S. 675.

<sup>23</sup> Zur kritischen Nachzeichnung der von Heller geprägten Formel vom «sozialen Rechtsstaat» verweise ich auf meinen Aufsatz «Bemerkungen zur Formel vom «sozialen Rechtsstaat», der in Nr. 22 der Zeitschrift «Probleme des Klassenkampfes» erscheinen wird und auf die dort angezeigte Literatur.

<sup>24</sup> Carl Schmitt z. B., der seinen «Schüler» Kirchheimer in der Weimarer Zeit immer wieder hervorgehoben hat, siehe dessen Schrift, Der Hüter der Verfassung (Berlin, 1931), Nachdruck Berlin, 1969 (2), S. 142, hat dies jedoch nicht gehindert, sich unter dem Nationalsozialismus an antisemitischen Hetzkampagnen zu beteiligen. Exemplarisch siehe hierzu: Carl Schmitt, Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist. Schlußwort auf der Tagung der Reichsgruppe Hochschullehrer des NSRB vom 3. und 4. Oktober 1936, in: Deutsche Juristen-Zeitung, Jg. 41, Berlin, 1936, Heft 20/15. Oktober 1936, Sp. 1193–1199. Siehe hierzu auch die notwendige und zutreffende Kritik von: Helmut Ridder, Ex oblivione malum, a. a. O., S. 319 (Anm. 6).

gegenstandslos.<sup>25</sup> Otto Kirchheimer wurde in die Bundesrepublik eingeladen, sondern in der politischen und gesellschaftlichen Vielzahl von Analysen zeigen.<sup>26</sup> Ergänzend zum Literaturverzeichnis der 27. Ausgabe werden die für Kirchheimers hier mitgeteilt.<sup>28</sup>

#### Rechtsstaat und richterliche Un

Inwieweit die überkommenen Nationalsozialismus vereinbar s unstreitig. Nach den autoritä Reichsjuristenführer Staatsmin Dr. Lammers, Staatssekretär im die praktischen Bedenken ge Rechtsstaat zu bezeichnen. Die nationalsozialistischen Rechtsst verstehen haben, ist aber insbes Staatsratsmitglieds Carl Schmitt Geschichte des 19. Jahrhunderts schlaue Konstruktion des rückseralen Epoche war. An dem Sa müsse sich preußische Konsols Aushängeschild für Sekurität u des Rechts war, wie Max Weber entwickelten verkehrskapitalist sellenschaftlichen Positionen wur

<sup>25</sup> Die vorstehenden Informationen be (16. 7. 1975), Prof. Gurland (27. 9. Stuttgart (1. 10. 1975). Siehe auch di Horst Ehmke, Otto Kirchheimer. N Kampf um Verfassungspositionen, K auf eine Berufung an eine westdeuts

<sup>26</sup> Siehe: Politics, Law and Social Chan Kirchheimers in: Kesten (Hrsg.), Ich

<sup>27</sup> Politics, Law and Social Change, a. Aufsätze bis 1933. Siehe S. 480. Es Ausgabe angeführt wird. Siehe He Literaturverzeichnis S. 479.

<sup>28</sup> Ergänzungen zum Literaturverzeich 1933): 1) Bedeutungswandel des Par Heft 10/Okt. 1928, S. 305–308. 2) P Blätter. Sozialistische Politik und 1928, S. 526–529. 3) Das Problem d Heft 8/August 1929, S. 232–234. 4) Zum Verfassungstag, in: Der Klasse Jg. III, II. Halbjahresband 1929, He des Verfassungssystems. Auch ein Blätter. Sozialistische Politik und W S. 456–458. 6) Reichsgericht und E niengesetzes?, in: Die Justiz. Monat des Republikanischen Richterbundes reform, in: Die Arbeit. Zeitschrift fü Heft 12/(Dez.) 1932, S. 730–742.



gegenstandslos.<sup>25</sup> Otto Kirchheimer wurde nicht nur häufig zu Gastvorträgen in die Bundesrepublik eingeladen, sondern war auch stets ein aufmerksamer Beobachter der politischen und gesellschaftlichen Entwicklung in der Bundesrepublik, wie eine Vielzahl von Analysen zeigen.<sup>26</sup>

Ergänzend zum Literaturverzeichnis in der Auswahlbibliographie der amerikanischen Ausgabe<sup>27</sup> werden die folgenden, dort nicht aufgeführten frühen Aufsätze Kirchheimers hier mitgeteilt.<sup>28</sup>

Wolfgang Luthardt

### Rechtsstaat und richterliche Unabhängigkeit

Inwieweit die überkommenen Anschauungen über Rechtsstaat mit dem Wesen des Nationalsozialismus vereinbar sind, war in Wissenschaft und Praxis lange Zeit nicht unstrittig. Nach den autoritativen Äußerungen der Reichsminister Dr. Frick, Reichsjuristenführer Staatsminister Dr. Frank, Staatssekretär der Reichskanzlei Dr. Lammers, Staatssekretär im Reichsjustizministerium Dr. Freisler sind allerdings die praktischen Bedenken geschwunden, den nationalsozialistischen Staat als Rechtsstaat zu bezeichnen. Die theoretische Klarheit darüber, was wir unter dem nationalsozialistischen Rechtsstaat, dem »deutschen Rechtsstaat Adolf Hitlers« zu verstehen haben, ist aber insbesondere aus den Interpretationen des Professors und Staatsratsmitglieds Carl Schmitt zu entnehmen. Eindringliche Beschäftigung mit der Geschichte des 19. Jahrhunderts hat hier gelehrt, daß dieser Rechtsstaat nur eine schlaue Konstruktion des rücksichts- und bedenkenlosen Individualismus der liberalen Epoche war. An dem Satz des alten Rothschild, wer ruhig schlafen wolle, müsse sich preußische Konsols kaufen, weist er nach, daß dieser Rechtsstaat nur ein Aushängeschild für Sekurität und Berechenbarkeit darstellte. Die Berechenbarkeit des Rechts war, wie Max Weber nachwies, die Grundlage des Funktionierens einer entwickelten verkehrskapitalistischen Gesellschaftsordnung. Alle erworbenen gesellschaftlichen Positionen wurden durch einen Rechtsbezug, dessen Verlauf und

25 Die vorstehenden Informationen beruhen auf schriftlichen Auskünften der Herren Prof. Friesenhahn (16. 7. 1975), Prof. Gurland (27. 9. 1975), Prof. Kirchheimer (22. 9. 1975) und Dr. Richard Schmid, Stuttgart (1. 10. 1975). Siehe auch die Bemerkungen von Friesenhahn in 46. DJT, Bd. II, C 67 f., sowie Horst Ehmke, Otto Kirchheimer. Nachruf, a. a. O., S. 119 (Anm. 11). Die Ansicht von Jürgen Seifert, Kampf um Verfassungspositionen, Köln/Frankfurt, 1974, S. 128, daß Kirchheimer bis zu seinem Tode auf eine Berufung an eine westdeutsche Universität gewartet habe, ist nicht zutreffend.

26 Siehe: Politics, Law and Social Change, a. a. O., Auswahlbibliographie, S. 481 f. (Anm. 1) und den Brief Kirchheimers in: Kesten (Hrsg.), Ich lebe nicht in der Bundesrepublik, a. a. O., S. 85 ff. (Anm. 11).

27 Politics, Law and Social Change, a. a. O., S. 479-483 (Anm. 1). Die Ergänzungen beziehen sich auf die Aufsätze bis 1933. Siehe S. 48c. Es sei hier erwähnt, daß die Seitz-Broschüre in der amerikanischen Ausgabe angeführt wird. Siehe Herz/Hula, »An Introduction . . .«, a. a. O., S. XVI, Anm. 16 und Literaturverzeichnis S. 479.

28 Ergänzungen zum Literaturverzeichnis in der Auswahlbibliographie der amerikanischen Ausgabe (vor 1933): 1) Bedeutungswandel des Parlamentarismus, in: Jungsozialistische Blätter, Berlin 1928, Jg. VII, Heft 10/Okt. 1928, S. 305-308. 2) Panzerkreuzer und Staatsrecht, in: Der Klassenkampf. Marxistische Blätter. Sozialistische Politik und Wirtschaft, Jg. II, II. Halbjahresband 1928, Heft 17/1. September 1928, S. 526-529. 3) Das Problem der Verfassung, in: Jungsozialistische Blätter, Berlin 1929, Jg. VIII, Heft 8/August 1929, S. 232-234. 4) Verfassungswirklichkeit und politische Zukunft der Arbeiterklasse. Zum Verfassungstag, in: Der Klassenkampf. Marxistische Blätter. Sozialistische Politik und Wirtschaft, Jg. III, II. Halbjahresband 1929, Heft 15/1. August 1929, S. 455-459. 5) Artikel 48 und die Wandlungen des Verfassungssystems. Auch ein Beitrag zum Verfassungstag, in: Der Klassenkampf. Marxistische Blätter. Sozialistische Politik und Wirtschaft, Jg. IV, II. Halbjahresband 1930, Heft 15/1. August 1930, S. 456-458. 6) Reichsgericht und Enteignung. Reichsverfassungswidrigkeit des Preußischen Fluchtliniengesetzes?, in: Die Justiz. Monatsschrift f. Erneuerung d. Deutschen Rechtswesens. Zugleich Organ des Republikanischen Richterbundes, Bd. V, 1929/30, Heft 9/Juni 1930, S. 553-565. 7) Die Verfassungsreform, in: Die Arbeit. Zeitschrift für Gewerkschafts-Politik und Wirtschaftskunde, Berlin 1932, Jg. IX, Heft 12/(Dez.) 1932, S. 730-742.



Chancen für alle Parteien vorausberechenbar waren, geschützt. Dieser hohle Gesetzesstaat, der gegenseitige Verpflichtungen von Bürger und Staatsgewalt anerkennt, ist durch den nationalsozialistischen Rechtsstaat überwunden. Dem Terminus Rechtsstaat kommt nunmehr eine veränderte Bedeutung zu. Der Rechtsstaat des alten Rothschild war identisch mit einer in der Form des Konkurrenzkapitalismus organisierten Gesellschaft. Hier war es Funktion des Staates, dem Einzelnen seine minutiös ausgearbeitete Rechtsordnung zur Verfolgung seiner Ansprüche zur Verfügung zu stellen, und man war stolz darauf, daß diese Rechtsordnung nebst der daraus folgenden Zwangsapparatur mindestens theoretisch jedem ohne Ansehen der Person zur Verfügung stand.

Der Übergang vom Konkurrenz- zum Monopolkapitalismus ließ das Bedürfnis für jene Rechtsformen immer mehr verschwinden. Die großen kapitalistischen Unternehmungen, Großbanken ebenso wie Monopolkonzerne waren längst nicht mehr darauf angewiesen, die Auseinandersetzungen mit Angehörigen anderer Sozialgruppen vor den Gerichten durchzuführen. Sie konnten sich von einem Staat, den sie, sei es durch Kreditsperre, sei es durch Söldnerhorden beherrschten, ihre jeweiligen Wünsche durch Gesetz oder Notverordnung befriedigen lassen. Seit die Wirtschaftskrise auch noch die Erfüllung bereits rechtskräftig entschiedener Ansprüche in Frage stellte, seit der Staat die Zwangsvollstreckung auch in den großen landwirtschaftlichen Grundbesitz inhibierte, und die Zahlungsverpflichtung ans Ausland nicht mehr von der Rechtskraft eines Urteils, sondern von der nach devisenpolitischen Gesichtspunkten erteilten oder verweigerten Genehmigung von Verwaltungsstellen abhing, war die bisherige Gerichtsapparatur weithin sinnlos geworden.

Auch die Aufgaben, die traditionell den anderen Rechtsgebieten zufielen, sind nicht mehr dieselben. Zunächst ließ die durch die Krise verursachte rein quantitative Zunahme der strafrichterlichen Tätigkeit die überlieferten Rechtsgarantien stark in den Hintergrund treten. Weiter ist den Strafgerichten ein neuer Aufgabenkreis erwachsen: die Ausrottung aller politischen Gegner, verbunden mit der Ausrichtung der gesamten Justiztätigkeit nach den politischen Gesichtspunkten des Nationalsozialismus. So wurde das Gesicht der Strafjustiz entscheidend verändert.

Arbeitslosigkeit und zunehmende Zurückdrängung des Gewerkschaftsapparats hatten schon vor der nationalsozialistischen Revolution das Tätigkeitsgebiet der Arbeitsgerichte stark eingengt. Der große Prozeß der Auswechslung marxistisch eingestellter Arbeiterschichten gegen Anhänger des Nationalsozialismus vollzog sich ohne Hemmung von seiten der Arbeitsgerichtsbarkeit und der Wegfall aller kollektiven Streitigkeiten, die Rückbildung des Arbeitsrechts zu einem persönlichen Dienstrecht schloß das Recht überhaupt von einem Gebiet aus, in das es erst in der Zeit des Weimarer Systems eingedrungen war.

Nachdem der Nationalsozialismus die Herrschaft von Monopolkapital und Großgrundbesitz neu zu stabilisieren versucht hat, wurde dazu geschritten, das neue Verhältnis mit einer angemessenen zeitentsprechenden Ideologie zu versehen. Die überkommenen Vorstellungen vom Recht wurden einer gründlichen Revision unterzogen, die Beschränkung des Rechts auf das ethische Minimum fallen gelassen und die Identität von Recht und Moral zum Leitsatz erhoben. Praktisch gewendet hieß das folgendes: Man will, nachdem die Angelegenheiten der den Staat beherrschenden Schichten durch Gesetze des Führers oder durch Vereinbarung zwischen Bürokratie und Monopolkapital geregelt sind, den mittleren und ärmeren Schichten des Volkes die Illusion verschaffen, daß es auch für sie eine Flucht aus der Gleichförmigkeit ihres Elends gebe, ein außerhalb der Gesetzesparagrafen aufzuspürendes Recht auf Befriedigung ihrer individuellen Bedürfnisse. Man versucht, die wachsende Verelendung weiter Volksschichten mit darauf zurückzuführen, daß ein

formales Recht bisher die Durchsetzung der Interessen der Gesamtnation nicht zuließ. Dem Recht, wird so die Schuld an der Wirtschaftsschrumpfung und Monopolisierung zugeschrieben. Das juristische Hilfsmittel sollte in der Lage sein, dem Volksglauben ein liberales Gebrauchsmittel als Vehikel eines wiedererwachten Rechts darzustellen, das das ganze Recht seines äußeren Kleides entkleiden, ohne daß ein einziges Element der Rechtsordnung verloren geht. Der neue Dynamismus, der Theorie eine neue Spielart der Lehre von der richterlichen Unabhängigkeit war nach Ausscheidung derjenigen Elemente, die unerwünscht betrachtete, seine Unerschütterliche Unabhängigkeit ist, was jener Unabhängigkeit vergleichbar, die richterliche Unabhängigkeit hieß ehemals Freiheit der richterlichen Entscheidung, die mindestens angestrebter Wahrung der Interessen der verschiedenen Gruppen. Die neue richterliche Unabhängigkeit ist die Tatsache, daß das Gesetz als solches nicht mehr durch den Richter und mit rückwirkender Kraft auf den Richter, sondern dem Vorbehalt der Generalklausel der richterlichen Unabhängigkeit «steht».

«Eine gewisse politische Instinktsicherheit, die die richterliche Unabhängigkeit leitende Grundsätze des völkischen Führerrechts sind».

Wenn Rechtsstaat ehemals den Verfall des Rechts bedeutete, so wird die Schematisierung bedeutete, so wird der Inbegriff des deutschen Rechtsstaats, daß Recht gefunden wird, liegen nicht mehr in der einzelnen Entscheidung nach dem Gesetz. Wie wirkt sich dies auf den einzelnen Richter aus?

#### *Materielles und prozessuales Strafrecht im nationalsozialistischen Kongreß für Strafrecht*

Rascher und durchgreifender als in der Zeit der Weimarer Republik wurde die Umgestaltung nationalsozialistischer Gedanken im Strafrecht durchgeführt. Bevor noch die völlige Umarbeitung des Strafrechts vollendet werden konnte, hat der Nationalsozialismus die Grundideen des »volkszerstörenden Liberalismus« des 19. Jahrhunderts als »nationalsozialistischen Ideengegensatz« ausgeschaltet. Ausgeschaltet wurde aus der Strafrechtswissenschaft der Begriff mit seiner bürgerlichen Berechtigung, die durch den geschaffenen neuen Menschentypus ersetzt wurde. Grundidee ist das nationalsozialistische

1 Fauser, das Gesetz im Führerstaat im Beuthener Urteil als ein Gegenbeispiel zu dem Urteil sei die Instinktsicherheit völlig Volksgenossen zum Tod verurteilte».

2 Vgl. darüber die grundlegenden Ausführungen



formales Recht bisher die Durchsetzung ihrer begründeten Ansprüche an die Gesamtnation nicht zuließ. Dem Recht, insbesondere einem verlästerten römischen Recht, wird so die Schuld an Verhältnissen zugeschoben, die Arbeitslosigkeit, Wirtschaftsschrumpfung und Monopolkapital verursachten.

Das juristische Hilfsmittel sollte in Anlehnung an den Grundsatz von Treu und Glauben ein liberales Gebrauchmachen von Generalklauseln bieten. Die Generalklausel als Vehikel eines wiedererwachten Naturrechts stellte i. d. Tat die Möglichkeit dar, das ganze Recht seines normativen und zwingenden Charakters zu entkleiden, ohne daß ein einziges positives Gesetz geändert zu werden brauchte. Der neue Dynamismus, der Theorie u. Praxis erfaßte, fand seine Verkörperung in einer neuen Spielart der Lehre von der richterlichen Unabhängigkeit. Dem Richtertum war nach Ausscheidung derjenigen Elemente, die der Nationalsozialismus als unerwünscht betrachtete, seine Unabsetzbarkeit neu garantiert worden; aber diese richterliche Unabhängigkeit ist, wie man mit Recht bemerkt hat, nicht mehr mit jener Unabhängigkeit vergleichbar, die dem Richtertum früher zustand. Unabhängigkeit hieß ehemals Freiheit der Urteilsfindung in Bindung an die Gesetze unter mindestens angestrebter Wahrung der Neutralität gegenüber sozialen und politischen Gruppen. Die neue richterliche Unabhängigkeit ist gekennzeichnet durch die Tatsache, daß das Gesetz als solches jeweils ohne Formalität vom Führer abänderbar und mit rückwirkender Kraft aufhebbar ist, und daß es, wie schon gezeigt, unter dem Vorbehalt der Generalklausel, der »Vereinbarkeit mit der nationalsozialistischen Weltanschauung« steht.

»Eine gewisse politische Instinktsicherheit ist nach nationalsozialistischer Auffassung Voraussetzung auch der richterlichen Unabhängigkeit. Sie bedeutet Selbständigkeit in der Bindung an leitende Grundsätze des völkischen Führerstaats.«<sup>1</sup>

Wenn Rechtsstaat ehemals den Versuch der Objektivierung durch Garantien und Schematisierung bedeutete, so wird nunmehr ein gegensätzliches Element zum Inbegriff des deutschen Rechtsstaats Adolf Hitlers erhoben. Die Garantien dafür, daß Recht gefunden wird, liegen nicht mehr im Gesetz, sondern in dem Ausrichten der einzelnen Entscheidung nach der nationalsozialistischen Weltanschauung.

Wie wirkt sich dies auf den einzelnen Rechtsgebieten aus?

*Materielles und prozessuales Strafrecht unter Berücksichtigung der dem 11. Internationalen Kongreß für Strafrecht und Gefängniswesen vorgelegten Fragen.*

Rascher und durchgreifender als in anderen Rechtsgebieten hat sich die Durchsetzung nationalsozialistischer Gedankengänge auf strafrechtlichem Gebiet vollzogen. Bevor noch die völlige Umarbeitung der Strafrechtsprinzipien bewerkstelligt werden konnte, hat der Nationalsozialismus dafür Sorge getragen, daß die letzten Reste des »volkszerstörenden Liberalismus« aus dem Strafrecht entfernt und die wichtigsten nationalsozialistischen Ideengänge in die Wirklichkeit umgesetzt wurden. Ausgeschaltet wurde aus der Strafrechtspflege ein »veralteter Rechtssicherheitsbegriff mit seiner bürgerlichen Berechenbarkeit, die dem vom Nationalsozialismus geschaffenen neuen Menschentyp in keiner Weise mehr entspricht.«<sup>2</sup> An zwei Grundideen ist das nationalsozialistische Strafrecht ausgerichtet: Schutz des deut-

<sup>1</sup> Fauser, das Gesetz im Führerstaat im Archiv f. öff. Recht Bd. 26. S. 149 weist auf das bekannte Beuthener Urteil als ein Gegenbeispiel aus der Zeit des vernationalsozialistischen Rechts hin. Diesem Urteil sei die Instinktsicherheit völlig abgegangen, als es »wegen eines Polen mehrere deutsche Volksgenossen zum Tod verurteilte«.

<sup>2</sup> Vgl. darüber die grundlegenden Ausführungen bei Henkel, Strafrichter und Gesetz im neuen Staat, 1934.



2  
schen Volks »in seinem gegenwärtig rauschend-strömenden Leben und in seiner Zukunft«<sup>3</sup> und Niederreißung aller Schranken, die das Gericht an der Findung der materiellen Gerechtigkeit verhindern könnten.

Es ist vor allem der Strafprozeß, der eine umfassende Reform erfahren hat, mit dem Ziele, die Belange des Individuums und seinen Schutz hinter das Interesse des Staates und der materiellen Wahrheit zurücktreten zu lassen. Hier ergibt sich jedoch für das Strafprozeßrecht genau so wie für das Strafrecht eine nicht zu unterschätzende Schwierigkeit. Was ist materielle Wahrheit im Strafrecht? Einer der bekanntesten deutschen Strafrechtsautoren der Gegenwart schreibt in seiner aufsehenerregenden Schrift »Politische Strafrechtswissenschaft« über »die notwendige Ausrichtung unserer strafrechtlichen Institute an dem Prinzip der politischen Folgerichtigkeit«. Er fragt sich aber, ob die Methoden, die »auf der politischen Folgerichtigkeit basieren«, d. h. in erster Linie das Interesse der staatsbeherrschenden Schicht im Auge haben, gleichzeitig der materiellen Wahrheit dienen. Man hat sich sehr angewöhnt, die strafprozessualen Sicherungsmaßnahmen der früheren Gesetzgebung, deren Beseitigung im gegenwärtigen Augenblick in großem Ausmaß vor sich geht, lediglich vom Standpunkt des Individuums aus anzusehen. Aber das ist offensichtlich keine erschöpfende Würdigung. Denn die strafprozessualen Garantien – etwa der Verteidigung oder der Beweisaufnahme – sollten doch in letzter Linie dazu dienen, ein vollständiges Tatsachenbild und damit die Erkenntnis der materiellen Wahrheit zu schaffen.

Höchste Gerechtigkeit bedeutet im Rechtsleben des Nationalsozialismus kein abstraktes Ideal; er identifiziert sie vielmehr mit seiner Vorstellung von den Lebensinteressen des deutschen Volkes und gelangt so sehr rasch von der Höhe eines abstrakten Ideals zur Dienstbarmachung des strafrechtlichen Zwangsapparats für seine politischen Ziele.

*»Wir wissen, daß Sinn und Zweck des Strafrechts nicht selbständig und isoliert erkannt werden können, sondern nur als Ausfluß des den Staat jeweils gestaltenden obersten politischen Prinzips.«<sup>4</sup>*

Diese Ausrichtung der Gerechtigkeit im Dienste der Politik führt zunächst zu einer Ausdehnung des strafrechtlichen Bereichs. Die Garantiefunktion des Strafgesetzes macht dem Bestreben Platz, seinen Anwendungsbereich in recht elastischer Weise zu erweitern, nachdem schon im Lauf der letzten zwei Jahre durch zahllose Einzelvorschriften teils neue Straftatbestände geschaffen, teils die Strafrahmen für schon bestehende Delikte heraufgesetzt worden sind. Die ausdrückliche Einführung der Gesetzesanalogie mag nicht nur praktisch unübersehbare Folgen haben, sie stößt auch die Grundlagen unseres Gerichtsverfassungswesens um. Der neue Wortlaut des § 2 StGB:

*»Bestraft wird, wer eine Tat begeht, die das Gesetz für strafbar erklärt oder die nach dem Grundgedanken eines Strafgesetzes und nach gesundem Volksempfinden Bestrafung verdient.«*

scheint darauf hinzudeuten, daß nur die Gesetzes-, nicht die Rechtsanalogie beachtlich ist. Eine Tat soll auch bestraft werden, wenn sie zwar dem Gedanken eines vorhandenen Strafgesetzes entspricht, aber nicht unter einen genau formulierten Tatbestand subsumiert werden kann. Zunächst muß die Notwendigkeit einer solchen Bestimmung, die keine mittel- und westeuropäische Gesetzgebung sonst kennt, in Zweifel gezogen werden. In einem autoritären Staat, in dem der Führer jederzeit die notwendigen Gesetze erlassen kann, können erwiesene Gesetzeslücken sofort geschlossen werden. Zudem läßt der Wortlaut, der ausdrücklich auf das

<sup>3</sup> Freisler, Gedanken zur Strafrechtserneuerung im nationalsozialistischen Strafrecht, Berlin 1933, S. 9.  
<sup>4</sup> Schaffstein, Politische Strafrechtswissenschaft 1934, S. 28.

»gesunde Volksempfinden« Bezug nehmen ausgeschlossen sein soll. Diese Anwendung einer bestehenden Norm auf Straftatbestände aus der Gesamtheit heraus erschaffen. Sie ist echte Staatsform gleichbedeutend mit der Instanz. Wenn z. B. auf dem Richter zur Strafbarkeit ein solches Delikt nur im Einzelfall bekannt, so handeln sie anders, die man bisher geradezu angesehen hat, ist damit eine neue Weltanschauung nicht mehr zu verkennen; sie muß vor allem auch die Volksströmungen, interpretiert als »gesundes Volksempfinden« darzustellen. Ein Staat natürlich nur das, was sich der Nationalsozialismus erhebt »a poena sine lege« durch ausdrückliche andere Garantie des Individuums ebenso allgemein anerkanntes seiner Machtübernahme schon von Strafgesetzen. Es ist bezugnehmend auf den Kriminologenkongreß nur eine Milderung der Straftatbestände internationalen Juristenforum Straftatdrohungen rückwirkend anzuwenden würde bedeuten, die Straftatbestände zu ziehen. Es würde bedeuten, den gerechten Maßstab anzulegen, die Tat auch nicht der Instanz des Landes für richterliche diese stärkste Verletzung der Rechtsanalogie seit März 1933 praktiziert. Nur mit Hilfe solcher Straftatbestände der Internationale Kriminalrechtstag Hinrichtungen politischer Straftäter – Theoretiker wie Praktiker – wir hier einmal davon abssehen, ohne daß überhaupt für Straftatbestände getroffen werden konnten. Sachverhalte aus den Jahren 1933 bis 1935 angewandt wurden. Straftatbeständebruch oder selbst, Straftatbestände mit tödlichen Straftatbeständen, wird nun mit dem Tod bestraft. Schon Jahre vor Hitlers Straftatbestände, daß die heute zum Straftatbestände mußten, beweist, daß Straftatbestände nichts nachgewiesen werden



»gesunde Volksempfinden« Bezug nimmt, nicht klar erkennen, daß die Rechtsanalogie ausgeschlossen sein soll. Diese aber besteht nicht nur in der sinngemäßen Anwendung einer bestehenden Norm, sondern führt zu Deduktionen, die völlig neue Straftatbestände aus der Gesamtheit der nationalsozialistischen Weltanschauung heraus erschaffen. Sie ist echte richterliche Gesetzgebung, damit aber unter jeder Staatsform gleichbedeutend mit der Verwandlung des Richtertums in eine politische Instanz. Wenn z. B. auf Grund dieses neuen § 2 StGB morgen die deutschen Richter zur Strafbarkeit der Mischehe gelangen, obwohl das geltende Gesetz ein solches Delikt nur im Disziplinarrecht des Beamtentums und der Wehrmacht kennt, so handeln sie als Gesetzgeber, nicht als Richter. Ihre Unabhängigkeit aber, die man bisher gerade als die Folge ihrer strikten Bindung an das Gesetz angesehen hat, ist damit entfallen. Die Justiz hat also die nationalsozialistische Weltanschauung nicht mehr nur in der geprägten Form des Gesetzes zu beachten; sie muß vor allem auch das befolgen, was ihr die jeweilige Tagespolitik, was Volksströmungen, interpretiert von Politikern der herrschenden Partei, als »gesundes Volksempfinden« darbieten. Dabei ist »gesundes Volksempfinden« im totalen Staat natürlich nur das, was der Führer als solches bezeichnet.

Hat sich der Nationalsozialismus erst im Juni 35 dazu entschlossen, den Grundsatz »nulla poena sine lege« durch ausdrückliche Gesetzesvorschrift abzuschaffen, so hat er eine andere Garantie des Individuums gegenüber dem staatlichen Strafapparat, die ein ebenso allgemein anerkanntes Grundprinzip allen Strafrechts ist, unmittelbar nach seiner Machtübernahme schon über Bord geworfen: das Verbot der Rückwirkung von Strafgesetzen. Es ist bezeichnend, daß dieses Problem den 11. Internationalen Kriminologenkongreß nur insoweit beschäftigen wird, als es sich um eine nachträgliche *Milderung* der Strafgesetzgebung handelt (3. Frage-Sektion I). Vor einem internationalen Juristenforum ist die bloße Frage, ob auch *Verschärfungen* der Strafandrohungen rückwirkende Kraft erhalten sollen, unmöglich. Sie auch nur zu diskutieren würde bedeuten, dem gesamten europäischen Strafrecht den Boden zu entziehen. Es würde bedeuten, an die Handlungen eines Rechtsbrechers einen in sich ungerechten Maßstab anzulegen, einen Maßstab nämlich, den zur Zeit der Begehung der Tat auch nicht der höchste Gerichtshof und die höchste Justizverwaltungsinstanz des Landes für richtig gehalten hat.

Eben diese stärkste Verletzung des allgemeinen Rechtsempfindens hat der Nationalsozialismus seit März 1933 praktiziert. Nur auf Grund der Rückwirkung von Strafverschärfung konnte van der Lubbe zum Tod verurteilt und hingerichtet werden. Nur mit Hilfe solcher mörderischen Konstruktionen, deren bloße Möglichkeit der Internationale Kriminologenkongreß nicht diskutieren wollte, waren die Hinrichtungen politischer Gegner möglich, für die die Juristen des dritten Reichs – Theoretiker wie Praktiker – sich einmal werden verantworten müssen. Wenn wir hier einmal davon absehen, daß viele zum Tod verurteilt und hingerichtet wurden, ohne daß überhaupt für eine Verurteilung hinreichende *tatsächliche* Feststellungen getroffen werden konnten, so handelt es sich juristisch betrachtet darum, daß auf Sachverhalte aus den Jahren 1930 bis 32 Gesetze und Strafen aus den Jahren 1933 bis 1935 angewandt wurden. Was vor Hitlers Machtübernahme allenfalls als Landfriedensbruch oder selbst, wenn der Kausalzusammenhang erwiesen wäre, als Körperverletzung mit tödlichem Ausgang mit Gefängnis hätte bestraft werden können, wird nun mit dem Tod geahndet. Teilweise handelt es sich um »Delikte«, die schon Jahre vor Hitlers Machtübernahme begangen sein sollen. Die bloße Tatsache, daß die heute zum Tod Verurteilten früher außer Verfolgung gesetzt werden mußten, beweist, daß – mit den Mitteln einer regulären Justiz wenigstens – ihnen nichts nachgewiesen werden konnte. So wurden, um nur einige zu erwähnen,



- Paul Foelz, Ewald Szodry, 21 und 19 Jahre alt, wegen eines Vorfalls vom 12. März 1932 am 24. Juli 1933 zum Tode verurteilt;
- Ernst Sander am 23. 12. 33 in Hamburg zum Tod verurteilt, weil er am 3. 12. 33 einen Hamburger Polizei-Hauptwachtmeister getötet haben soll;
- Joseph Reitinger, 20 Jahre alt, am 21. 11. 34 hingerichtet, weil er am 4. Juni 32 einen SA-Mann erschossen haben soll;
- Karl Jänicke, Reichsbannermann, am 5. 7. 35 hingerichtet, weil er – nach der eidlichen Aussage von SA-Leuten – am 28. 3. 31 bei einem Zusammenstoß einen SA-Mann erschossen haben soll;
- Johannes Becker aus Kassel am 12. 7. 35 hingerichtet, weil er am 12. 6. 31 einen Polizei-Wachtmeister erschossen haben soll.

Bei der Neubearbeitung des allgemeinen Teils des Strafrechts wie auch bei den verschiedenen Sondergesetzen, die neue politische Delikte schaffen, macht sich die Tendenz bemerkbar, den strafrechtlichen Tatbestand mehr und mehr von der eigentlichen sichtbaren Straftat abzulösen und an den *Willen* des Täters zu knüpfen. Zur Begründung hierfür verweist man unter anderem darauf, daß es der Eigenart arischer Völker entspreche, nicht die Tat, sondern den Willen in den Mittelpunkt der Betrachtung zu stellen, und beruft sich darauf, daß der Dichter eines wesensverwandten arischen Volkes sein Werk »Schuld und Sühne« und nicht »Tat und Sühne« genannt habe.<sup>5</sup> Aber solche auf einen vagen Rassebegriff gegründeten Argumente dienen hier wie auch sonst überall nur zur Verdeckung der wahren Zusammenhänge. Wie unser bürgerliches Recht nicht deshalb unbrauchbar ist, weil es das Produkt römisch-rechtlicher und jüdischer Geistesverfassung darstellt, sondern weil es der Ausdruck einer an ihrem Ende angelangten kapitalistischen Gesellschaftsordnung ist, so ist auch der Durchbruch hemmungslos subjektivistischer Straftheorien nicht als die Rückkehr zu arischen Sitten zu verstehen, sondern als verzweifelte Schutzwehr einer überall bedrohten Gesellschaftsordnung, die wähnt, durch maximale Ausdehnung des Strafrechtsschutzes Sicherheit zu finden.

Die Einführung des »Willensstrafrechts«, die Akzentverlegung von der Tat auf den verbrecherischen Willen dient gleichzeitig dazu, den Willen des Einzelnen zu isolieren und seine Rückführbarkeit auf allgemeine soziale Zustände zu leugnen. War bisher weitgehend Strafrechtsmaxime, daß die strafrechtlichen Gebote der Kräfte des Menschen, sie zu befolgen, Rechnung tragen sollten, so wird jetzt unter völligem Absehen von der sozialen Situation der Grundsatz »du kannst, denn du sollst« aufgestellt und damit das Strafrecht eindeutig auf den Notwendigkeiten der herrschenden Klasse, nicht aber auf den Möglichkeiten der existierenden Gesellschaftsordnung begründet. Damit wird natürlich die Funktion der Strafe, besser zu wirken, von Anfang an ausgeschaltet. Denn wenn die strafrechtlichen Gebote nur noch der Sicherung einer Herrschaftsordnung dienen, diese aber so gestaltet ist, daß ein normgemäßes Verhalten auf allen Lebensgebieten nur noch im Ausnahmefall möglich ist, so ist der Besserungszweck der Strafe hinfällig geworden. Die Strafe ist dann reine Repression gegen einen Feind, sei es nun auf sozialem, kirchlichem oder politischem Gebiet. Die erste Frage der Sektion II in der Tagesordnung des 11. Internationalen Kriminologenkongresses wird also im Deutschland Adolf Hitlers hundertprozentig verneint. Wenn in einem autoritativen Artikel im »Völkischen Beobachter« vom 2. Dezember 34 auf den Kampfcharakter des nationalsozialistischen Strafrechts hingewiesen wird, das nicht nur gegen begangenes Unrecht

<sup>5</sup> Ebert, Deutsche Justiz 1934, S. 48 ff. und Freisler, Zeitschrift der Akademie für deutsches Recht 1934, S. 82.

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<sup>6</sup> O., S. 82.

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reagieren solle, sondern auch dafür Sorge zu tragen habe, in einem ständig arbeitenden Läuterungsprozeß alle feindlichen Elemente auszuschalten, so ist damit der jenseits aller strafrechtlichen Begriffe und Vorstellungen liegende politische Rachecharakter des sogenannten Willensstrafrechts zugegeben.

Aber auch wenn man von solchen generellen Einwänden gegen die Umformung des Strafrechts in ein parteipolitisches Kampfinstrument im Dienste der den Staat beherrschenden Gruppe einmal absieht, ergeben sich eine Reihe schwerwiegender juristischer Bedenken gegen die Anwendung des Willensstrafrechts. Seine konkrete Bedeutung tritt vor allem in einer grenzenlosen Erweiterung des Versuchsbegriffs zu Tage, dem jedes objektive Tatkenzeichen genommen wird. Die Hauptverteidigungslinie eines Staates in der Bekämpfung des Versuchs zu finden<sup>6</sup>, mag bestechend klingen. In Wirklichkeit führt es dazu, wie ein so dem Nationalsozialismus ergebener Autor wie Oetker schreibt, »gesetzestreue Rechtsgenossen mit Zweifeln zu plagen, ob ein Tun noch zu verantworten ist oder bereits gegen ein Gefährdungsverbot verstößt; es entsteht ein viel zu weit getriebener rechtspolizeilicher Gefährdungsschutz, der Tätigkeitstrieb und Entschlußkraft hemmt«.<sup>7</sup>

Übrigens haben die ersten Anwendungen der Grundsätze des Willensstrafrechts dem Ansehen der deutschen Rechtspflege im Ausland sehr geschadet. Die Tatsache, daß in Deutschland politische Gegner des Regimes ohne Beweis irgendeiner auch noch so geringfügigen Teilnahmehandlung auf Grund bloßer sog. intellektueller Urhebererschaft zum Tod verurteilt wurden, hat im Ausland kein Verständnis gefunden.<sup>8</sup> Besonders unangenehm für das Ansehen der deutschen Justiz sind solche Theorien, wenn ausländische Behörden amtlich mit ihnen befaßt werden. So wurde kürzlich dem Schweizer Bundesrat ein Auslieferungsersuchen gegen den früheren kommunistischen Reichstagsabgeordneten Heinz Neumann wegen gemeinen Mordes unterbreitet. Der Mord bzw. die Anstiftung zum Mord sollte darin gefunden werden, daß Neumann bezüglich zweier Polizeioffiziere geäußert haben soll: »Lebt das Schwein immer noch?« Da die Polizeioffiziere kurz darauf von unbekanntem Tätern erschossen wurden, bezichtigte man Neumann der Anstiftung zum Mord, ohne auch nur zu behaupten, daß er mit den Mördern in irgendeiner Verbindung gestanden habe. Der Schweizer Bundesrat mußte natürlich eine so merkwürdige Anwendung der Willenstheorie ablehnen, ohne daß er überhaupt das Auslieferungsersuchen dem Bundesgericht zur Stellungnahme vorgelegt hätte. Es ist daher kein Wunder, daß ein hervorragender juristischer Fachmann einer unserem Vaterland so befreundeten Nation wie Polen zu folgender für das Ansehen der deutschen Rechtspflege im Ausland nicht gerade schmeichelhaften Äußerung kommt:

*«La période de la législation actuelle restreint encore sans aucun doute la sphère de l'intérêt international à la réforme du droit pénal allemand.»<sup>9</sup>*

Was an den Änderungen des materiellen Strafrechts seit dem Sieg der nationalen Revolution am meisten auffällt, ist – abgesehen vom sog. politischen Strafrecht – nicht die Schaffung neuer Straftatbestände. Die Abänderung von Bestimmungen wie

<sup>6</sup> Freisler a. a. O., S. 82.

<sup>7</sup> Oetker in Nationalsozialistisches Handbuch für Recht und Gesetzgebung S. 1346.

<sup>8</sup> Um nur ein neueres Beispiel zu zitieren, sei auf den Bericht über den Prozeß gegen den Rote-Hilfefunktionär Rudolf Klaus hingewiesen, den die französische Zeitung »Le Temps« vom 27. 5. 35 veröffentlichte. Dieser Bericht schließt, nachdem er die Urteilsgründe des Volksgerichts wiedergegeben hat, mit den Sätzen: »Welches sind also die dem Verurteilten vorgeworfenen Verbrechen? Hierüber wird nichts genaues veröffentlicht.«

<sup>9</sup> Stanislaus Rapoport, Richter am Obersten Gerichtshof Polens und Professor an der Universität Warschau in Revue internationale de droit pénal 1934 Nr. 3: »Die Periode der gegenwärtigen Gesetzgebung vermindert wiederum ganz ohne Zweifel den Umfang des internationalen Interesses an der Reform des deutschen Strafrechts« (Übers. d. Red.).







kann jetzt jede nicht ausdrücklich von der Regierung anerkannte Tätigkeit auf politischem, sozialem oder religiösem Gebiet mit schweren Freiheitsstrafen oder Todesstrafe geahndet werden. In der Interpretation der an und für sich schon weit gefaßten gesetzlichen Vorschriften läßt man sich die größte Freiheit. So wurden kürzlich die Teilnehmer einer katholischen Jugendveranstaltung auf Grund einer Verordnung des Reichspräsidenten zur Abwehr kommunistischer staatsgefährdender Gewaltakte (V. O. vom 28. II. 33) bestraft, weil durch die Aktivität der katholischen Jugendorganisation eine solche Unruhe entstehen könnte, daß dadurch das Wiederaufleben kommunistischer Terrorakte gefördert werden könnte.

Ein anderer recht ungewöhnlicher Zug dieser Gesetzgebung besteht darin, daß sie unliebsame Äußerungen auch dann bestraft, wenn ihre Wahrheit nachgewiesen werden kann. Zwar sprechen die einschlägigen Gesetzstellen (V.O. des Reichspräsidenten zur Abwehr heimtückischer Angriffe gegen die Regierung der nationalen Erhebung vom 21. 3. 33 und § 90 f. des Strafgesetzbuches, Volksverrat durch Lügenhetze) von »gröblich entstellten Behauptungen«. Aber in der Praxis der Sondergerichte wird dem Angeklagten keine Gelegenheit gegeben, seine Behauptungen zu beweisen. Statt eine unparteiische Beweisaufnahme durchzuführen, wird hier einfach die Sachdarstellung der Regierung als Wahrheit und alles andere als gröbliche Entstellung gewürdigt. Rechtspolitisch schwerer noch als das Unrecht, das hierdurch dem Angeklagten geschieht, wirkt die Tatsache, daß auf diese Weise keinerlei Kritik an staatlichen Institutionen zugelassen ist. Anstatt die Unzufriedenheit zu kanalisieren, indem man ihre harmloseste Ausdrucksform legalisiert, drängt man sie in den unkontrollierbaren Bereich der Illegalität ab. Die politische Strafgesetzgebung im heutigen Deutschland ist daher nicht nur vom Standpunkt des Liberalismus und der Humanität der schwersten Anfechtung unterworfen; sie ist auch vom Standpunkt der Herrschenden aus nur recht bedingt zweckmäßig. Sie übt keine positive Erhaltungsfunktion, sondern nur reine Unterdrückungsfunktion aus. deren Erfolge bekanntlich auf lange Sicht immer höchst zweifelhafter Natur sind.

Man hat dem überkommenen Strafprozeß den Vorwurf volks- und staatsfremden Liberalismus gemacht, weil er darauf Bedacht nahm, die Rechte des Angeklagten sicher zu stellen. Man hat diese humanitären Verirrungen zu beseitigen gesucht und eine Reihe von Bestimmungen, die in dieser Richtung zu tendieren schienen, abgeändert. Das formale Beweisrecht ist weitgehend beseitigt, die Rechtsmittel des Angeklagten erheblich beschränkt und das Verbot der reformatio in peius beseitigt. Wird dadurch die Strafrechtspflege verbessert? Wird dadurch dem Ziel gedient, das doch auch der Nationalsozialismus als Aufgabe des Strafrechts bezeichnet, der Erforschung der materiellen Wahrheit? Die Erfahrungen haben bewiesen, daß Gerichte und Staatsanwälte keine größeren Fähigkeiten als jede andere bürokratisch organisierte Behörde besitzen. Da aber die ihnen aufgebürdete Verantwortung, über Freiheit und Leben ihrer Mitmenschen zu entscheiden, ungleich schwerer und verantwortungsvoller ist als die jeder anderen Behörde, umgibt man traditionsgemäß ihre Amtstätigkeit mit größeren Kautelen, indem man demjenigen gewisse Rechte einräumt, über dessen Schicksal entschieden werden soll. Ein amerikanischer Anwalt hat unlängst eine Statistik darüber veröffentlicht, wie hoch der Prozentsatz der Freisprechung von Angeklagten ist, die einen Pflicht- bzw. einen frei gewählten Verteidiger haben. Es zeigte sich, daß bei freier Verteidigung 40 Prozent mehr Freisprüche erzielt wurden als bei der Amtsverteidigung. Die deutschen Kriminalstatistiken lassen eine solche Untersuchung leider nicht zu, aber jeder, der in diesen Fragen über praktische Erfahrungen verfügt, wird bestätigen, daß das Verhältnis bei unseren Gerichten nicht anders sein wird. Nur eine wirksame Verteidigung, ein



großzügiges Beweisaufnahmerecht und liberale Gewährung von Rechtsmitteln führen zu materieller Wahrheitsermittlung. Je mehr man aber, wie dies gegenwärtig bei uns geschieht, das Verfahren bürokratisiert und zu einer gewöhnlichen behördlichen Handlung herabwürdigt, deren bloßes Objekt der Angeklagte ist, desto geringer sind die Chancen, die materielle Wahrheit zu finden.

Alle diese Gesichtspunkte sowie auch die folgenden Ausführungen über die Besonderheiten politischer Prozesse werden von den Delegierten des Internationalen Kriminologenkongresses zu berücksichtigen sein, wenn sie die zweite Frage der Sektion I diskutieren: »Welche Maßnahmen sind zu empfehlen, um die sog. Monstreprozesse abkürzen zu können?« Die Abkürzung eines Prozesses kann niemals etwas anderes bedeuten als Beschneidung der Rechte des Angeklagten und der Verteidigung, Verstärkung des Einflusses der Justizbürokratie auf den Prozeßverlauf bis zur völligen Ermessensfreiheit der Prozeßleitung. Wie man auch den Begriff des Monstreprozesses zu definieren versuchen mag – immer werden darunter diejenigen Prozesse verstanden werden, die das größte Interesse in der Öffentlichkeit finden und den regierenden Kreisen aus irgendeinem Grunde unangenehm werden könnten. Die hier angedeutete Entwicklung des deutschen Strafprozesses mag den außerdeutschen Juristen zeigen, welches die Maßnahmen sind, die keineswegs ergriffen werden dürfen, wenn die Justiz eines Landes nicht in Willkür und Barbarei zurückfallen soll.

Die Abänderungen, die der deutsche Strafprozeß in den letzten Jahren erlitten hat, erschöpfen sich nicht in der Beseitigung aller Garantien für den Angeklagten. Es ist weiter durch Änderungen auf dem Gebiet der Gerichtsverfassung die aktive Teilnahme der Bevölkerung an der Strafjustiz zum Verschwinden gebracht. An die Stelle der früheren Schöffen und Geschworenen sind die ernannten Vertreter der herrschenden Partei getreten. Der Einfluß weiterer Bevölkerungskreise auf die Strafjustiz ist beseitigt, die Justiz zur reinen Parteimaschine geworden. Dazu kommt, daß jede öffentliche Kontrolle ausgeschaltet ist. Die Verhandlungen sind zwar, soweit sie nicht den herrschenden sozialen, politischen und militärischen Gruppen in irgendeiner Form Unannehmlichkeiten bereiten können, öffentlich; aber es gibt keine unabhängige Gerichtsberichterstattung mehr, sondern die Justizbürokratie stellt mit Hilfe der Justizpressestelle dem Berichterstatter das Material zur Verfügung, das allein er veröffentlichen darf.

Erschweren alle diese Umstände erheblich die Findung der materiellen Wahrheit im Strafprozeß, so kommen für die *politische* Strafjustiz noch eine Reihe weiterer Gründe hinzu, die die Erforschung der Wahrheit geradezu unmöglich machen. Zunächst ist hier die strafverfolgende Behörde nicht eine gewöhnliche, nach bürokratischen Gesichtspunkten arbeitende Staatsanwaltschaft, sondern eine Zentralstaatsanwaltschaft im Justizministerium, die ihre Weisungen unmittelbar für jeden Einzelfall von der Regierung bezieht. Weiter ist die verfolgende Polizeibehörde nicht die ordentliche Polizei, sondern die Geheime Staatspolizei. Ihre Dienste sind sicherlich für die Regierung besonders wertvoll; denn sie benutzt in der Behandlung ihrer Gefangenen alle Methoden, die ihr für die Erzielung der von ihren Auftraggebern im Einzelfall gewünschten Ergebnisse besonders geeignet erscheinen. Ob sie das mitunter mit den fragwürdigsten Mitteln gewonnene Belastungsmaterial dem Staatsanwalt unterbreiten und so einen Prozeß einleiten oder ob sie den politischen Gegner lieber ohne Richterspruch in einem Konzentrationslager unterbringen will, liegt im Ermessen der Gestapo. Man kann daher ruhig sagen, daß die politische Justiz in Deutschland in erster Instanz immer von der Staatspolizei ausgeübt wird, die nach ihrem Gutdünken und mit Mitteln bestraft, die in keiner Gesetzgebung der Welt vorgesehen sind. Und nur im Fall der Opportunität gibt sie nach Beendigung

ihres eigenen Verfahrens den Fall a nochmaligen Verhandlung auf Grund gesammelten Beweise ab.

Das in dieser Weise befaßte Volksgericht ist zusammengesetzt aus besonders vertretbaren Funktionären der Verwaltungspolitischen Partei. Es bestimmt selbst die Verhandlungseröffnung und erheben will. Seine Entscheidungen allein niemals ausreichende Schutz des Angeklagten durch frei gewählten Verteidiger. Der Anwalt hat im Staate Adolf Hitler sein Mandat nur so weit zu vertreten vereinbar ist. Überschreitet er diese Grenzen zu rechnen<sup>12</sup>, sondern selbst m Zeit (vgl. die lange Inhaftierung eines anderen vorgeworfen werden konnte Thälmann zu verteidigen). In dem haben diese Tendenzen zur Unterdienenden Angeklagten dienenden Verteidiger, der nicht nur vor der des Vorsitzenden bedarf, sondern eine Angabe besonderer Gründe die W kann, ist in der Tat jeder Bewegung seinem Mandanten eine wirkliche Verfahrens führen dazu, daß man betrachten kann. Die Art seiner Z auf der vorbereitenden Arbeit der Verteidigung – all dies beweist, daß des wahren Sachverhalts angestrebt Gegners. So ist das Volksgericht eine Behörde mit unbeschränkter Kompe

Die Wirtschaftskrise hat in ihren Anstalten ununterbrochen ver in den Gefängnissen erheblich ge Gefangenen beträgt heute in eine 50–60 Pfennig im Jahre 32. Es ist diese gewaltige Verschlechterung eine bedauerliche Folge unserer ge eine bessere und dauernd beizubeh Ebenso unbegreiflich ist die sad Freisler seit längerer Zeit nach sch macht in seiner letzten Schrift in Ansehen des deutschen Rechts a Gerechtfertigt werden alle Versch Generalprävention, der Abschrec Einzelnen zugefügt werden, eine außer Acht läßt und die asoziale F

<sup>12</sup> Vgl. von der Goltz, Deutsche Juristen

<sup>13</sup> Freisler, Grundzüge eines allgemeinen



ihres eigenen Verfahrens den Fall an das Volksgericht oder ein Sondergericht zur nochmaligen Verhandlung auf Grund der von ihr und mit ihren spezifischen Mitteln gesammelten Beweise ab.

Das in dieser Weise befaßte Volksgericht ist eine ad hoc ernannte Kommission, zusammengesetzt aus besonders vertrauenswürdigen Richtern und anderen beamteten Funktionären der Verwaltungsbürokratie, des Militärs und der nationalsozialistischen Partei. Es bestimmt selbstherrlich über den Umfang der Beweise, die es erheben will. Seine Entscheidungen sind unanfechtbar. Und auch der letzte, für sich allein niemals ausreichende Schutz gegen parteiische Strafjustiz, die Verteidigung des Angeklagten durch frei gewählte Anwälte, ist zu einer Farce herabgewürdigt. Der Anwalt hat im Staate Adolf Hitlers ganz allgemein die Pflicht, das Interesse seines Mandanten nur so weit zu vertreten, als dies mit dem Wohl des Staates vereinbar ist. Überschreitet er diese Grenze, so hat er nicht nur mit Disziplinarstrafen zu rechnen<sup>12</sup>, sondern selbst mit administrativer Verhaftung auf unbestimmte Zeit (vgl. die lange Inhaftierung des Berliner Rechtsanwalts Rötter, dem nichts anderes vorgeworfen werden konnte, als daß er sich bereit gefunden hatte, Ernst Thälmann zu verteidigen). In dem Gesetz über das Verfahren vor dem Volksgericht haben diese Tendenzen zur Unterbindung einer wirklich den Interessen des Angeklagten dienenden Verteidigung ihren schärfsten Ausdruck gefunden. Ein Verteidiger, der nicht nur vor der Übernahme der Verteidigung der Genehmigung des Vorsitzenden bedarf, sondern dem auch in jedem Stadium des Verfahrens ohne Angabe besonderer Gründe die Weiterführung der Verteidigung untersagt werden kann, ist in der Tat jeder Bewegungsfreiheit beraubt und kaum noch in der Lage, seinem Mandanten eine wirkliche Hilfe zu sein. Alle diese Besonderheiten des Verfahrens führen dazu, daß man das Volksgericht überhaupt nicht als ein Gericht betrachten kann. Die Art seiner Zusammensetzung, die Basierung seiner Tätigkeit auf der vorbereitenden Arbeit der Geheimen Staatspolizei, die Unterdrückung der Verteidigung – all dies beweist, daß hier nicht eine unvoreingenommene Ermittlung des wahren Sachverhalts angestrebt wird, sondern die Ausrottung des politischen Gegners. So ist das Volksgericht nichts anderes als eine politische Verwaltungsbehörde mit unbeschränkter Kompetenz über das Schicksal aller deutschen Bürger.

Die Wirtschaftskrise hat in ihrem Gefolge nicht nur die Belegschaft der Gefangenenanstalten ununterbrochen vermehrt, sie hat auch gleichzeitig das Lebensniveau in den Gefängnissen erheblich gesenkt: Der Tagessatz für die Verpflegung eines Gefangenen beträgt heute in einem Berliner Gefängnis 30–32 Pfennig gegenüber 50–60 Pfennig im Jahre 32. Es ist kaum begreiflich, daß sich Autoren finden, die diese gewaltige Verschlechterung der Lebensbedingungen der Gefangenen nicht als eine bedauerliche Folge unserer gegenwärtigen Verhältnisse ansehen, sondern sie als eine bessere und dauernd beizubehaltende Strafmethodik feiern. Ebenso unbegreiflich ist die sadistisch anmutende Suche, die der Staatssekretär Freisler seit längerer Zeit nach schärferen Gefangenenhaltungsmethoden betreibt. Er macht in seiner letzten Schrift in dieser Richtung Vorschläge, die jeden, dem das Ansehen des deutschen Rechts am Herzen liegt, nur ehrlich betrüben können.<sup>13</sup> Gerechtfertigt werden alle Verschärfungen im Strafvollzug durch den Gedanken der Generalprävention, der Abschreckung für die Allgemeinheit. Die Leiden, die dem Einzelnen zugefügt werden, eine Behandlung, die bewußt das Erziehungsmoment außer Acht läßt und die asoziale Einstellung sowie den Willen zum Verbrechen nur

<sup>12</sup> Vgl. von der Goltz, Deutsche Juristenzeitung 1934, S. 182.

<sup>13</sup> Freisler, Grundzüge eines allgemeinen deutschen Strafrechts, S. 100.



bestärken kann, soll gleichzeitig die übrige Bevölkerung davor zurückhalten, ihrerseits straffällig zu werden. Die in einem solchen Maß noch nie dagewesene Überfüllung der deutschen Strafanstalten beweist freilich, daß mindestens bisher der erstrebte Erfolg nicht eingetreten ist. In Preußen ist schon 1933 die Zahl der Gefängnisinsassen auf 56 928 gegen 37 982 im Jahre 1932, also um 50 Prozent gestiegen. Nach den Ausführungen des Staatsanwalts Schäfer in einer Rede in Königsberg hat sich die Zahl der Gefangenen gegenüber dem Jahre 1930 mehr als verdoppelt, wobei noch nicht einmal die 49 000 Konzentrationslagerinsassen mitgerechnet sind.

Ebensowenig überzeugend erscheinen die Argumente, mit denen die immer häufiger werdende Verhängung und Vollstreckung der Todesstrafe begründet wird. Freisler erklärt ihre Zweckmäßigkeit dadurch als erwiesen, daß seitdem Terrorakte gegen die Träger des Nationalsozialismus unterblieben seien. Dabei weiß er ganz genau, daß die antifaschistischen Gegner des Nationalsozialismus den Mord als Werkzeug der Politik grundsätzlich ablehnen und daß die politischen Terrorverordnungen weder zur Zeit ihres Erlasses eine Rechtfertigung besessen haben noch sie – nach seinem eigenen Zugeständnis – heute besitzen. Übrigens dürfte es selbst vom Standpunkt Freislers aus unmöglich sein, ein Todesurteil wie das gegen Rudolf Claus wegen Fortsetzung seiner Tätigkeit als »Roter Helfer«, als aktives Mitglied der proletarischen Hilfsorganisation, der Roten Hilfe, begrifflich zu machen.

#### *Das Staats- und Verwaltungsrecht des Dritten Reichs*

*»Adolf Hitler ist derjenige, der richtunggebend voranschreitet mit der Aufgabe, das ganze Volk zur Volksgemeinschaft zu führen. Dementsprechend ist Volk nicht mehr Summe von Untertanen; das widerspricht dem Führerprinzip – sondern Volk ist die Gefolgschaft des Führers auf dem Wege zur Volksgemeinschaft.«*

Gewisse Schwierigkeiten sind aus dieser mehr metaphysischen als realen Stellung des Führers schon dadurch entstanden, daß juristische Abgrenzungen zwischen den verschiedenen Kundgebungen des Führers nicht einfach sind und ihre rechtliche Tragweite oft im dunkeln bleibt. Noch heute ist theoretisch nicht völlig geklärt, welche Rechtswirkung dem sog. Gesetz zukommt, das die Akte des 30. Juni 1934 als im Staatsnotstand begangen für rechtens erklärt. Es bedarf des metarechtlichen Begriffs der Führung, um die Einheit von verwaltungsmäßiger Exekution, gerichtlichem Urteil und post facto Rechtfertigung in Form des Individualgesetzes – erlassen durch eben diejenigen, die dieses »Urteil« gesprochen und ausgeführt haben, – faßbar zu machen. Solche Schwierigkeiten erhellen auch aus der Diskussion darüber, wie weit man zwischen Gesetzen der Führung und allgemeinpolitischen Äußerungen der Führung zu unterscheiden habe. In akademischen und bürokratischen Kreisen wird »mit Rücksicht auf die dadurch im öffentlichen Leben entstehende Verwirrung« abgelehnt, allen Willensäußerungen der Führung ohne Rücksicht auf ihre Form gesetzesähnliche Verbindlichkeit zuzubilligen. Andere Elemente möchten autoritativen Äußerungen des Führers mindestens die Fähigkeit zuerkennen, früheres Recht aufzuheben. Hier tritt offen der Gegensatz zwischen den konservativen Traditionen der Bürokratie und den Agitationsbedürfnissen der Partei auf. Der Reichstag, in dem sich früher der Widerstreit sozialer und politischer Interessen abspielte, tritt zwar nur noch zur Entgegennahme politischer Kundgebungen des Führers ein- bis dreimal im Jahr zusammen (weshalb bekommen eigentlich seine 600 nationalsozialistischen Mitglieder ihre Diäten, die das vier- bis fünffache des Einkommens eines einfachen Volksgenossen betragen?) und der

Führer ist allmächtig und souverän; je sich verschiedene Einflüsse und Tendenzen. In der sozialen Wirklichkeit des Dritten Reichs ist der Führer der Führer einer Bürgerkriegspartei, die die politischen Verhältnisse der Krisenjahre Staatsrechtlich findet diese Inbesitznahme des Parteiführers Hitler als formale Verfassung des Reichs, in der Gewährung privater Verträge dieser Armee wurden mit Staatsämtern. Gesetz zur Wiederherstellung des öffentlichen Rechts mit Mitgliedsnummer bis zu 100 000 einzusetzen und ihnen die Arbeitsplätze Angestellten zu verschaffen. Eine zentralistische die nationalsozialistische Erhebung – die größten Gesundheitsschädigungen erlitten. Ausgleich hierfür und um die Reichsgesetz vom gleichen Datum das Kaiserliche ändert, daß Gesundheitsbeschädigungen keine Entschädigungspflicht entstehen. in Form von Häusern, Grundstücke. Ausgleich bürgerlichrechtlicher Ansprüche. Der Führer denkt, sich die Zivildienstpflicht, nach Möglichkeit zu lassen.«<sup>14</sup> Um jeden Versuch, der Herrschaft vorzuzugreifen zu vereiteln, wurde gesorgt. Um jeden Oppositionsansatz innerhalb der staatlichen Gesetzgebung nicht nur die strengste Zentralisierung der Gesetzgebung, sondern neuerdings wurden Unterabteilungen des Reichs der selbständigen Vermögensverwaltung des Reichsschatzmeisters der Reichsbank. Aber die politische Machtposition des Führers. Sicherungen sagt noch nichts darüber, welchen Einfluß auf die Lenkung des Reichs Hitler kann den Pfründen- und Ämtern erhalten, daß der Staatsführer Hitler das Reich des Reiches anschließt. So übernimmt die Darstellung der ausschlaggebenden Entscheidungen ihren Führer anerkennen, garantieren ein System gegenseitiger Garantien keine Bedeutung zu. Juristisch hat das zu einer möglichen Einwirkung der zivilen Verwaltung ausgeschlossen wurde. Gleichsam die Reichswehr bei Hitlers Machtantritt. Reichs die alte Militärgerichtsbarkeit der nationalsozialistischen Partei in den Reichsgesetz ausdrücklich, daß die Volksgemeinschaft in der Partei und ihren Gliedern im dritten Reich keine Abgeordneten

<sup>14</sup> Rechtsanwalt und Gauführer Dr. Röhm



Führer ist allmächtig und souverän; jedoch in der Person des Führers selbst kreuzen sich verschiedene Einflüsse und Tendenzen.

In der sozialen Wirklichkeit des deutschen Reichs ist der Führer zunächst der Anführer einer Bürgerkriegspartei, die unter taktisch geschickter Ausnutzung der politischen Verhältnisse der Krisenjahre sich des Staatsapparates bemächtigt hat. Staatsrechtlich findet diese Inbesitznahme des Staates ihren Ausdruck in der Einsetzung des Parteiführers Hitler als formell unumschränkten Herrscher des Deutschen Reichs, in der Gewährung privater Vorteile an seine Bürgerkriegsarmee. Die Spitzen dieser Armee wurden mit Staatsämtern ausgestattet, die man sich mit Hilfe des Gesetzes zur Wiederherstellung des Berufsbeamtentums verschaffte. Die Anhänger mit Mitgliedsnummer bis zu 100 000 versuchte man, in unteren Beamtenstellen einzusetzen und ihnen die Arbeitsplätze der verjagten marxistischen Arbeiter und Angestellten zu verschaffen. Eine zusätzliche Versorgung wurde den »Kämpfern für die nationalsozialistische Erhebung« zuteil, soweit sie im Kampf gegen die Marxisten Gesundheitsschädigungen erlitten hatten (Reichsarbeitsblatt 5. 3. 34). Zum Ausgleich hierfür und um die Reichskasse nicht zu sehr zu belasten, wurde durch Gesetz vom gleichen Datum das Kriegspersonenschadengesetz dahingehend abgeändert, daß Gesundheitsbeschädigungen von Anhängern staatsfeindlicher Parteien keine Entschädigungspflicht entstehen lassen. Der Sicherung der Bürgerkriegsbeute in Form von Häusern, Grundstücken, Zeitungsbetrieben dient das Gesetz über den Ausgleich bürgerlichrechtlicher Ansprüche. Es bestätigt, daß »der Nationalsozialismus nicht daran denkt, sich die Ergebnisse des 30. Januar 33 im Wege eines Zivilrechtsstreits, nach Möglichkeit noch im Wege des Versäumnisurteils abjagen zu lassen.«<sup>14</sup> Um jeden Versuch, der herrschenden Partei Konkurrenz zu machen, im vornherein zu vereiteln, wurde gesetzlich die Gründung neuer Parteien verboten. Um jeden Oppositionsansatz innerhalb der Partei zu ersticken, wurde mit Hilfe staatlicher Gesetzgebung nicht nur eine Parteigerichtsbarkeit etabliert, sondern auch die straffste Zentralisierung der gesamten Parteiorganisation durchgeführt. Erst neuerdings wurden Unterabteilungen und Hilfsorganisationen der NSDAP das Recht der selbständigen Vermögensdisposition genommen und diese von der Billigung des Reichsschatzmeisters der Partei abhängig gemacht.

Aber die politische Machtposition der NSDAP samt dem System ihrer rechtlichen Sicherungen sagt noch nichts darüber aus, welche sozialen Gruppen den überwiegenden Einfluß auf die Lenkung der Staatsgeschäfte ausüben. Der Parteiführer Hitler kann den Pfründen- und Ämterbesitz seiner Anhänger nur dadurch aufrechterhalten, daß der Staatsführer Hitler sich den herrschenden sozialen Gruppen des Staates anschließt. So übernimmt er neben seinem Amt als Parteiführer die Repräsentation der ausschlaggebenden sozialen Kräfte. Indem diese den Parteistaat und ihren Führer anerkennen, garantiert er ihren unangetasteten Bestand. In diesem System gegenseitiger Garantien kommt der *Reichswehr* eine immer steigende Bedeutung zu. Juristisch hat das zunächst darin seinen Ausdruck gefunden, daß jede mögliche Einwirkung der zivilen Gewalt in den Geschäftsbereich der Reichswehr ausgeschlossen wurde. Gleichsam als Belohnung für die positive Stellungnahme der Reichswehr bei Hitlers Machtantritt wurde gleich in den ersten Tagen des dritten Reichs die alte Militärgerichtsbarkeit wiederhergestellt. Um Eingriffe der nationalsozialistischen Partei in den Heeresbetrieb fern zu halten, bestimmt das neue Wehrgesetz ausdrücklich, daß während der Zugehörigkeit zur Armee die Mitgliedschaft in der Partei und ihren Gliederungen ruht. Fügt man dem noch hinzu, daß es im dritten Reich keine Abgeordneten mehr gibt, die Fragen zum Heeresbudget zu

<sup>14</sup> Rechtsanwalt und Gauführer Dr. Römer in der Westfälischen Landeszeitung.



stellen in der Lage sind, so rundet sich das Bild einer Militärmacht, wie es selbst im deutschen Kaiserreich in dieser Machtfülle und Unabhängigkeit nicht bestanden hat.

Ferner ist Hitler gehalten, diejenigen Schichten, die schon das Heraufkommen seiner Partei durch Zuwendungen aller Art begünstigt haben und die auch weiterhin in Deutschland die stärkste soziale Gruppierung darstellen, zu stützen. Zwei Garantien sind es, über deren Unverbrüchlichkeit er im Interesse des Industrie- u. Finanzkapitals wacht: die ausschließliche Verfügungsmacht über die Produktionsmittel und die Herrschaft über die Lohnarbeit. Die nationalsozialistische Literatur behauptet zwar, daß dem Begriff des Eigentums im Nationalsozialismus nur noch die Bedeutung einer Verwaltungszuständigkeit zukomme.<sup>15</sup> Es ist richtig, daß in Deutschland heute die Erlangung und Erhaltung wirtschaftlicher Positionen nicht mehr schlechthin auf der Ausübung eines formalrechtlichen Eigentumstitels beruht, sondern weitgehend von wirtschafts- und sozialpolitischen Eingriffen der Gesetzgebung abhängt. Entscheidend aber ist nicht, daß in den Eigentumsbereich eingegriffen wird, sondern *wie* sich die Eingriffe auf soziale Macht und Lebenshaltung der einzelnen Bevölkerungsschichten auswirken. Wenn die geltenden Preisüberwachungsvorschriften dem Kaufmann nicht mehr erlauben, seine Preise auf die zukünftigen Gesteungskosten zu basieren, so nimmt ihm der Staat zweifellos sein Betriebskapital fort. Wenn es dem Arbeiter untersagt wird, Koalitionen zwecks Erlangung günstiger Lohnbedingungen zu schließen, so beschränkt ihn der Staat in der Verwertung seines Produktionsmittels, der Arbeitskraft, während er durch dieselbe Handlung (Niedrighaltung der Löhne) seinem wirtschaftlichen Gegenspieler, dem Unternehmer, einen wirtschaftlichen Vorteil zuwendet. Wenn das Erbhofgesetz dem Bauern die Aufnahme von Hypotheken unmöglich macht und damit den Weg zum Realkredit verschließt, so beschränkt es ihn in der Ausübung seines Eigentumsrechts. Aber hat der nationalsozialistische Staat die Aufbauprinzipien der deutschen Schwerindustrie angetastet? Hat er nicht durch das Gesetz über die Errichtung von Zwangskartellen der Schwerindustrie neue Machtmittel verliehen? Hat der Nationalsozialismus überhaupt etwas Grundsätzliches an dem System des industriellen und großagrarischen Feudalismus geändert? Hat nicht die Durchführung des Grundsatzes »eine starke Wirtschaft im starken Staat« gewaltige Opfer der Nichtbesitzenden zu Gunsten der Reichen erfordert (man denke nur an die Begünstigungen der Reichen im Erbschaftssteuergesetz oder die Einstellung der Strafverfolgung wegen Steuervergehen, sofern es sich um nationale Elemente handelte, die ihre Steuern nur deshalb nicht zahlten, um das Ende der Weimarer Republik zu beschleunigen).

Die Errichtung des totalen Staates bedeutet auch zur gleichen Zeit die Todesstunde jeder Selbstverwaltung. Die städtische Selbstverwaltung ist durch die deutsche Gemeindeordnung vom 30. Januar 1935 vollkommen beseitigt worden, Bürgermeister und Beigeordnete wurden zu Staatsfunktionären und hieran ändert auch die Tatsache nichts, daß der örtlichen Parteiorganisation gewisse, allerdings recht schmale Einwirkungsrechte gewährleistet wurden. Die Gemeinderäte vollends sind reine Zierstücke, was ungewollt auch der Gesetzgeber eingesteht, wenn er sie ausdrücklich verpflichtet, sich zu bestimmten Beratungsgegenständen zu äußern und eine etwa abweichende Meinung kundzutun. Gemeinderäte, die dem Willen der Bevölkerung Ausdruck verleihen könnten und reale Einflußmöglichkeiten auf die Verwaltungsgeschäfte hätten, brauchte man nicht besonders zu solchen Selbstverständ-

<sup>15</sup> Wieacker, Deutsche Juristenzeitung 1935, S. 1449.

lichkeiten zu verpflichten. Hand in Hand mit der Gemeinde auf die Führung ihrer Amtstätigkeitsbereiche. Die ehrenamtlichen Gemeinderäte mit weniger als 10 000 Einwohnern sind sparsamer; doch dient sie praktisch der Partei die Vertreter der ärmeren Bevölkerung zu erhalten und diese den reichen Industriellen erfahrungsgemäß für ihre ehrenamtlichen Aufgaben machen verstehen. Charakteristisch ist ein preußisches Gesetz vom 17. 7. 1935, die Gemeindeordnung übergegangen in die Gemeindeordnung, die nur als Konkurrenz mit heute in allen anderen Staaten, Frankreich, im Kampf um die Übernahme der großen Betriebe entbrannt ist, sucht der Nationalsozialismus in Italien nachahmend, diese Betriebe zu den Händen zu spielen.

Wie weit im dritten Reich Rechtsstaatlichkeit stehen, ist theoretisch noch nicht geklärt. Die strittene Auffassung, daß es »weder wirtschaften gegen den politischen Führer noch bilden Führer vollkommen widersprechen« der Geheimen Staatspolizei unter Kontrolle hinsichtlich der Garantie des Menschen, jedenfalls gänzlich aus. Ein anderer Gegenstand, der der Überlegenheit seiner dynamischen Charaktere Verwaltungorgane, namentlich aber der nationalsozialistischen Partei gegenüber der nichtnationalsozialistischen Partei bekanntlich durch verschiedene Gesetze der nationalsozialistischen Gesetzgebung verwirklicht. Die Entscheidung feststellen, daß nicht verboten sei; denn die Gerichte sind Anschauungen über diejenigen Grundsätze der nationalsozialistischen Gesetzgeber sind aus nicht alle Untergerichte dieser Bundesländer. Standesbeamte von Wetzlar mit nach der Vollziehung einer Mischehe verwirkt. Kleinhandels ist keiner gesetzlich. gewisse Elemente in der nationalsozialistischen Gesetzgebung zu demolieren und ihre Schließung öffentlichen Gewalten in solchen Fällen oder die Bezahlung von Entschädigungen Verwaltungsbehörden von der Anwesenheit die öffentliche Ruhe und Ordnung.

<sup>16</sup> Maunz, Neue Grundlagen des Verwaltungsrechts.

<sup>16a</sup> Diese sprachliche Unkorrektheit entspricht

<sup>17</sup> RGZ 134, S. 1.



lichkeiten zu verpflichten. Hand in Hand mit der Ausschaltung des Einflusses der Gemeinde auf die Führung ihrer Angelegenheiten geht die Einschränkung ihres Tätigkeitsbereichs. Die ehrenamtliche Verwaltung des Bürgermeisteramts in Gemeinden mit weniger als 10 000 Einwohnern erscheint zunächst als Zeichen großer Sparsamkeit; doch dient sie praktisch dazu, auch innerhalb der Kreise der herrschenden Partei die Vertreter der ärmeren Bevölkerungsschichten von den Ämtern fernzuhalten und diese den reichen Interessenten in die Hände zu spielen, die sich erfahrungsgemäß für ihre ehrenamtliche Tätigkeit immer sehr gut bezahlt zu machen verstehen. Charakteristisch ist auch eine Bestimmung, die sich schon in einem preußischen Gesetz vom 17. 7. 1933 fand und von da in ähnlicher Fassung in die Gemeindeordnung übergegangen ist: der Staat verbietet den Gemeinden jede Betätigung, die nur als Konkurrenz mit der Privatwirtschaft anzusehen ist. Während heute in allen anderen Staaten, Frankreich und USA zum Beispiel, ein heftiger Kampf um die Übernahme der großen Versorgungsbetriebe in die öffentliche Hand entbrannt ist, sucht der Nationalsozialismus, darin das Beispiel des faschistischen Italien nachahmend, diese Betriebe zu Lasten der Bevölkerung dem Privatkapital in die Hände zu spielen.

Wie weit im dritten Reich Rechtsmittel gegen Verwaltungsakte zur Verfügung stehen, ist theoretisch noch nicht genügend geklärt. Immerhin ist die wohl unbestrittene Auffassung, daß es »weder Rechte des einzelnen noch von Untergemeinschaften gegen den politischen Führer geben kann, da das dem konkreten Rechtsgebilde Führer vollkommen widersprechen würde«<sup>16</sup>, dazu angetan, den<sup>16a</sup> Rechtsschutz der Geheimen Staatspolizei nicht stattfinden könne, schließt die Rechtskontrolle hinsichtlich der Garantie des wichtigsten Rechtsguts, Freiheit und Leben des Menschen, jedenfalls gänzlich aus.

Ein anderer Gegenstand, der der Überprüfung der Gerichte und Verwaltungsgerichte kraft seines dynamischen Charakters entzogen ist, ist das Verhalten der unteren Verwaltungsorgane, namentlich aber einzelner Gliederungen der nationalsozialistischen Partei gegenüber der nichtarischen Bevölkerung. Ihre Angelegenheiten sind bekanntlich durch verschiedene Gesetze des Führers geregelt worden; doch hat die nationalsozialistische Gesetzgebung zur Rassenfrage bei weitem nicht alle Punkte des Parteiprogramms verwirklicht. So konnte das Reichsgericht in einer berühmt gewordenen Entscheidung feststellen, daß die künftige Eingehung von Mischehen nicht verboten sei; denn die Gerichte seien nicht befugt, den nationalsozialistischen Anschauungen über diejenigen Grenzen hinaus Geltung zu verschaffen, die der nationalsozialistische Gesetzgeber sich selbst gezogen habe.<sup>17</sup> Man weiß, daß durchaus nicht alle Untergerichte dieser Entscheidung beigetreten sind und daß jüngst der Standesbeamte von Wetzlar mit nachheriger Billigung des dortigen Landgerichts die Vollziehung einer Mischehe verweigert hat. Auch der Umfang des jüdischen Kleinhandels ist keiner gesetzlichen Ausnahmeregelung unterworfen. Das hindert gewisse Elemente in der nationalsozialistischen Bewegung nicht, jüdische Geschäfte zu demolieren und ihre Schließung zu erzwingen. Es ist nicht bekannt, daß die öffentlichen Gewalten in solchen Fällen die Wiedereröffnung des Geschäfts bewirkt oder die Bezahlung von Entschädigung angeordnet hätten. Im Gegenteil gehen die Verwaltungsbehörden von der Ansicht aus, daß nicht die Plünderer und Angreifer die öffentliche Ruhe und Ordnung stören, sondern der jüdische Geschäftsmann, der

<sup>16</sup> Maunz, Neue Grundlagen des Verwaltungsrechts, Hamburg 34.

<sup>16a</sup> Diese sprachliche Unkorrektheit entspricht dem Original.

<sup>17</sup> RGZ 134, S. 1.



es wage, Beschwerde zu führen. Man sieht deutlich, daß gerade in der Judenfrage die Rechtsentwicklung noch kräftig im Fluß begriffen ist, wie überhaupt dem dynamischen Charakter des Nationalsozialismus die Festlegung bestimmter Rechtsgarantien widerspricht. Mindestens soweit es sich um die mehr emotionalen als sozialen Interessen der unteren Bevölkerungsschichten handelt, verschmäh man es nicht, die jeweiligen Rechtsgrundsätze aus den Bedürfnissen der politischen Agitation und Ablenkung zu entnehmen.

### *Nationalsozialistisches Arbeitsrecht*

Es ist in seinen Grundlinien dadurch bestimmt, daß der Führer – wie schon oben dargelegt – sich die für ihn unentbehrliche Unterstützung der industriellen Kreise dadurch zu sichern sucht, daß er ihnen neben der freien Verfügung über die Produktionsmittel auch das Recht garantiert, die Bedingungen des Arbeitsverhältnisses nach ihrem Gutdünken festzusetzen. Die so gefundene nationalsozialistische Lösung des Problems unterscheidet sich freilich wesentlich von den in anderen Ländern üblichen Formen der Arbeitsorganisation. In England, Frankreich, Belgien etwa – alles Staaten, die eine hochentwickelte, im Eigentum privater Kapitalistengruppen stehende Industrie besitzen – wird das Arbeitsverhältnis durch das Gegenüberstehen zweier organisierter Sozialgruppen beherrscht: der Arbeitnehmer und Arbeitgeber. Arbeitsbedingungen und Lohn hängen von der jeweiligen Stärke und dem Organisationsgrad der beiden Gruppen und ihrer Unterorganisationen ab. Ein Eingreifen des Staates findet nur statt, wenn und soweit diese beiden Parteien nicht zu einer Einigung gelangen. Diesem offenen Kampf der beiden großen Sozialgruppen hat bekanntlich die nationalsozialistische Revolution ein Ende bereitet. Sie hat an die Stelle der marxistischen Gewerkschaften die deutsche Arbeitsfront gesetzt, deren Aufgaben mehr psychologischer als sozialer Natur sind. Auf diesen besonderen Aufgabenkreis, der vornehmlich die Erziehung der marxistisch verseuchten Arbeiterschaft zu dem idealen Gedankengut des Nationalsozialismus bezwecke, berufen sich die nunmehr von den höchstrichterlichen Instanzen einhellig ausgesprochenen Entscheidungen, nach denen die deutsche Arbeitsfront nicht als Rechtsnachfolgerin für die Verpflichtungen der marxistischen Gewerkschaften haftet.<sup>18</sup> Während also die deutsche Arbeitsfront das gesamte Vermögen der marxistischen Gewerkschaften übernommen hat, müssen sich viele frühere Angestellte der aufgelösten Verbände, die um ihre Ansprüche gebracht sind, mit dem Gedanken an die ideale Mission der deutschen Arbeitsfront trösten. Während die Arbeitsfront im wesentlichen auf die Beschäftigung mit den ideellen Gütern beschränkt wird, verschafft das Gesetz zur Ordnung der nationalen Arbeit der Autorität des Betriebsführers in allen sozialen Fragen im weitesten Ausmaß Geltung. Es muß in diesem Zusammenhang auf die glückliche Fügung hingewiesen werden, die die Ausarbeitung dieses Gesetzes in der Hauptsache in die Hände des Ministerialdirektors Dr. Mansfeld legte, der schon in der marxistischen Zeit als Rechtswalter der Unternehmer dafür kämpfte, diesen das ausschließliche Bestimmungsrecht in ihren Betrieben zu verschaffen. Dieser ausgezeichnete Kenner der Bedürfnisse der Betriebsführer hat in diesem Gesetz den Grundgedanken des Führertums in der Wirtschaft verwirklicht: Das System der Kollektivnormen ist zerschlagen, das Schwergewicht für alle sozialen Normen in den Betrieb verlegt, wo der verantwortungsbewußte Betriebsführer selbst zum Wohl der Betriebsgemein-

schaft die Verhältnisse seiner Gefolgschaft dem Staat durch den von ihm ernannten nissen und positiven Einwirkungsrecht Lohns ist nicht gänzlich abgeschafft kann der Treuhänder der Arbeit an Betriebsführer bestimmt wird, gemäß Notwendigkeiten teilnehmen. Das Recht ers einzugreifen, steht dem Treuhänder Irrtum anzunehmen, er könne einem U das Eigentum am Betrieb aberkennen erkannte Kartelle auflösen. Solche Be der kapitalistischen Wirtschaftsordnung jeder andere nicht kommunistische St So brachte der Nationalsozialismus au fassung nichts anderes als eine bisher gegenüber seiner Gefolgschaft. Der h schaft hervorgerufenen Mißstimmung kühnsten juristischen Neuerungen d *sozialen Ehrengerichtbarkeit*. Diese allein der Unternehmer über die Pr abseits von den rein materiellen In deutschem Volksgenossen mit Achtu soll lernen, den Unternehmer trotz s Vertrauen und ohne Vorurteile zu be Sozialordnung wirkungsvoller aufrec sphäre zwischen den Betriebsangehör Organisation der Arbeitsfront dient a materiellen Interessen der Arbeitersch nehmer in die Hand gelegt werden –, Wirtschaftsfrieden und ungestörter C Übrigens steht die Zahl der bisher du 34, davon 56 gegen Betriebsführer ge man in Fachliteratur und Propaganda Freilich können die Gefolgschaftsm Ehrengerichtsverfahrens gegen den B Fragen der materiellen Veränderung Linie gerichtet ist, bietet das Ehre wenn dem Betriebsführer wegen gr gemeinschaft begründeten sozialen P aberkannt wird, geht doch das Eig schaft über. In folgerichtiger Aufrec nung kann das Urteil des Ehrenger Geschäftsführung im allgemeinen u dabei ist nur, ob die Ernennung de (so Huber, Deutsche Juristenzeitun sche Folgerichtigkeit im Auge hat) schaft als bisheriger Betriebsführer Aufl. 1934, der die kapitalistische F die Belegschaft alias Gefolgschaft

<sup>18</sup> Juristische Wochenschrift 1935, S. 1338.

<sup>19</sup> Von der Goltz, Juristische Wochenschrift



schaft die Verhältnisse seiner Gefolgschaft regelt. Immerhin verbleiben natürlich dem Staat durch den von ihm ernannten Treuhänder eine Reihe von Aufsichtsbefugnissen und positiven Einwirkungsrechten. Das verlästerte System des politischen Lohns ist nicht gänzlich abgeschafft und durch Richtlinien und Tarifordnungen kann der Treuhänder der Arbeit an der Lohnentwicklung, wie sie durch die Betriebsführer bestimmt wird, gemäß den politischen und volkswirtschaftlichen Notwendigkeiten teilnehmen. Das Recht, in die eigentliche Sphäre des Betriebsführers einzugreifen, steht dem Treuhänder aber nur bedingt zu. Es wäre ein grober Irrtum anzunehmen, er könne einem Unternehmer, der sich sozialschädlich verhält, das Eigentum am Betrieb aberkennen oder er könne von ihm als sozialschädlich erkannte Kartelle auflösen. Solche Befugnisse würden gegen die Grundprinzipien der kapitalistischen Wirtschaftsordnung verstoßen, die der Nationalsozialismus wie jeder andere nicht kommunistische Staat anerkennt und schützt.

So brachte der Nationalsozialismus auf dem Gebiet der Eigentums- und Arbeitsverfassung nichts anderes als eine bisher ungeahnte Machtstellung des Betriebsführers gegenüber seiner Gefolgschaft. Der hierdurch in breitesten Schichten der Arbeiterschaft hervorgerufenen Mißstimmung entgegenzutreten, war der Zweck einer der kühnsten juristischen Neuerungen des Nationalsozialismus, der Einführung der *sozialen Ehrengerichtsbarkeit*. Diese soll zwar nichts an der Tatsache ändern, daß allein der Unternehmer über die Produktionsmittel verfügt, aber sie soll ihn – abseits von den rein materiellen Interessen – zwingen, dem Arbeitnehmer als deutschem Volksgenossen mit Achtung entgegenzutreten. Der Arbeiter hingegen soll lernen, den Unternehmer trotz seiner unterschiedlichen sozialen Stellung mit Vertrauen und ohne Vorurteile zu betrachten. Mit andern Worten: um die geltende Sozialordnung wirkungsvoller aufrecht zu erhalten, soll die psychologische Atmosphäre zwischen den Betriebsangehörigen gebessert werden. Ebenso wie schon die Organisation der Arbeitsfront dient auch die soziale Ehrengerichtsbarkeit nicht den materiellen Interessen der Arbeiterschaft – die vielmehr vertrauensvoll dem Unternehmer in die Hand gelegt werden –, sondern sie dient der »Aufrechterhaltung von Wirtschaftsfrieden und ungestörter Gemeinschaftsarbeit.«<sup>19</sup>

Übrigens steht die Zahl der bisher durchgeführten Verfahren: insgesamt 61 im Jahre 34, davon 56 gegen Betriebsführer gerichtet, in keinem Verhältnis zu der Rolle, die man in Fachliteratur und Propaganda dem neuen Ehrengerichtsverfahren einräumt. Freilich können die Gefolgschaftsmitglieder durch die Einleitung eines sozialen Ehrengerichtsverfahrens gegen den Betriebsführer nicht viel erreichen; denn für die Fragen der materiellen Veränderungen im Betrieb, auf die ihr Interesse in erster Linie gerichtet ist, bietet das Ehrengerichtsverfahren keinen Stützpunkt. Selbst wenn dem Betriebsführer wegen grober Verfehlungen der durch die Betriebsgemeinschaft begründeten sozialen Pflichten das Recht zur Führung des Betriebs aberkannt wird, geht doch das Eigentum am Betrieb keineswegs auf die Gefolgschaft über. In folgerichtiger Aufrechterhaltung der kapitalistischen Eigentumsordnung kann das Urteil des Ehrengerichtshof lediglich eine Spaltung zwischen der Geschäftsführung im allgemeinen und der Betriebsführung hervorrufen. Streitig dabei ist nur, ob die Ernennung des neuen Betriebsführers durch den Treuhänder (so Huber, Deutsche Juristenzeitung 1935, Seite 207, der mehr die propagandistische Folgerichtigkeit im Auge hat) oder durch den Eigentümer, in seiner Eigenschaft als bisheriger Betriebsführer (so Mansfeld-Pohl Anm. 4 zu § 3 des AOG 2. Aufl. 1934, der die kapitalistische Folgerichtigkeit für sich hat), erfolgen muß. Für die Belegschaft alias Gefolgschaft ist der formale Wechsel des Betriebsführers

<sup>19</sup> Von der Goltz, Juristische Wochenschrift 1935, S. 1281.



ziemlich gleichgültig. Und auch der Betriebsführer gibt häufig, um Scherereien mit den Behörden zu vermeiden, recht gern und aus eigenem Antrieb die Betriebsführung an eine bei den Behörden gut angeschriebene Person ab, ein Verfahren, das besonders bei nichtarischen Firmen beliebt ist. Dazu kommt, wie eine Reihe von Entscheidungen der sozialen Ehrengerichte zeigen, daß bei größeren Betrieben jede Verantwortung des Betriebsführers entfällt, sofern er nur mit genügender Sorgfalt eine mit den gesetzlichen Bestimmungen bekannte Aufsichtsperson ausgewählt hat.<sup>20</sup> Insoweit scheidet eine adäquate Durchführung auch nur der psychologischen Leitgedanken dieses Gesetzes an den Verhältnissen eines entwickelten Kapitalismus, in dem die Frage der persönlichen Verantwortlichkeit keine entscheidende Rolle spielt.

Auch der Glaube, durch eine Intensivierung des betrieblichen Gemeinschaftsgeistes und der Verantwortung des Unternehmers den hart erkämpften Arbeitsplatz des arbeitenden Volksgenossen besser zu schützen als durch die formalen Vorschriften der früheren Gesetze mit den Kompetenzen ihrer marxistischen Betriebsräte, hat sich bald als trügerisch erwiesen. Das mußte die nationalsozialistische Gesetzgebung selbst anerkennen, wenn sie in der Begründung des Gesetzes über Kündigungsschutz vom 30. Januar 1934 sagt: Häufiger als erwartet, haben Unternehmer in Verkennung ihrer Pflichten in der neuen Arbeitsverfassung den Widerruf der Kündigung abgelehnt, sich also von der Weiterbeschäftigung durch Zahlung der Entschädigung losgekauft, auch wenn die Weiterbeschäftigung ihnen hätte im Einzelfall zugemutet werden können und einer wirklichen betriebsgemeinschaftlichen Gesinnung entsprochen hätte. (Reichsarbeitsblatt 1934, I, 274). In folgerichtiger Anwendung kapitalistischer Gedankengänge hat nun der nationalsozialistische Gesetzgeber aus diesem Mangel an unternehmerlichem Gemeinschaftsbewußtsein nicht die Folge gezogen, die zwangsweise Weiterbeschäftigung des zu Unrecht entlassenen Arbeiters anzuordnen, sondern hat lediglich den regulären Höchstbeitrag der Abkehrschädigung von vier auf sechs Monatsgehälter erhöht. Dazu kommt die unbegrenzte Kündigungsmöglichkeit sowohl gegenüber dem einfachen Gefolgschaftsmitglied als auch gegenüber dem vom Unternehmer selbst ausgewählten Vertrauensrat. Der Treue- und Gefolgschaftsbegriff, mehr dem Feudalismus als modernen kapitalistischen Existenzbedingungen entsprechend, bannt die Möglichkeit des Kündigungseinspruchs in enge Schranken. Staatsfeindlichkeit führt selbstverständlich zur sofortigen Entlassung. Mit andern Worten: jede sozial- oder wirtschaftspolitische Kritik kann als Störung des Gemeinschaftsgeistes erachtet und zum Anlaß sofortiger Kündigung genommen werden.

Alles dies sowie die Tatsache, daß der Vertrauensrat weder seinen gesetzlichen Aufgaben noch seiner vom Unternehmer bestimmten personellen Zusammensetzung nach ein wirksames Organ zur Vertretung der Arbeitsinteressen sein kann, führt dazu, daß sich die materielle Stellung des Gefolgschaftsmitglieds von der des Arbeiters in der Weimarer Republik recht unvorteilhaft unterscheidet. Da aber durch diese Verschiebung der sozialen Machtsphären zum Nachteil der Arbeiterschaft auch die vom Nationalsozialismus so heiß erstrebte Überbrückung und Ausrottung des Klassengeistes gefährdet scheint, ist neuerdings durch die sogenannte Leipziger Vereinbarung zwischen dem Reichsarbeits- und Reichswirtschaftsminister sowie dem Leiter der deutschen Arbeitsfront ein Versuch gemacht worden, die Unvollkommenheiten der nationalsozialistischen Arbeitsverfassung zu verbessern. Diese Vereinbarung vom 26. März 1935 wird von Mansfeld als Vollendung der

<sup>20</sup> Vgl. die in der juristischen Wochenschrift 1935 S. 1302 angeführten Urteile.

deutschen Sozialverfassung bezeichnet, die einen halben und inkonsequenten Tag überhaupt keine organisierte Tätigkeit unter Einfluß der Arbeitsverfassung zeigt. Die Leipziger Vereinbarung will zur Überwindung der Gefahr, halbe, unerfüllbare Forderungen an die schwächere Sozialpartei, die Arbeiterfront, der Arbeitsfront und der deutschen Gewerkschaften, weitgehend zu verschmelzen sucht. Sie will die Einheit der Arbeiterschaft mit den von der Regierung durch die Einrichtung paritätischer Ausschüsse zu steuern. Aber die Verschmelzung der Parteien des Produktionsprozesses. Sie will die Funktionen, die allein sie zu einer wirksamen Arbeit machen würden; sie führt vielmehr zu einer Zersplitterung der Erziehungsfunktionen der Arbeiterschaft. Die Ausschüssen aber, in denen die Arbeiterschaft vertreten ist, führt werden soll, hat man sich angelegenheitlich bemüht, ein Ergebnis zu geben. Insbesondere bei den Angelegenheiten einzelner Betriebe und Gewerkschaften paritätischen Ausschüsse das „Gefühl“ nicht erhöht wird. Die ganze Leipziger Vereinbarung auch noch im dritten Jahr nach dem Inkrafttreten der Arbeitsverfassung den größten Schaden zu vermeiden, immer zu ändern muß.

### Das Erbhofrecht

Das Reichserbhofgesetz, eine der wichtigsten Gesetze des Reichs, verfolgt den Zweck, „unter anderem als Blutquelle des deutschen Volkstums“ dreifacher Hinsicht eine radikale Reform zu bewirken. Einmal verschließt es dem sogenannten Erbhof den Sinn des Wortes den Erwerb von Grundbesitz. Zweitens eine einschneidende Rechtsänderung durch die Unvererblichkeit und Belastbarkeit des Erbhofs. Drittens nur in Ausnahmefällen mit Billigung des Reichsarbeitsministers darf. Das bedeutet aber auch, wie Mansfeld sagt, die Verweigerung des Realkredits für den Erbhof. Der Erbhofkredit verweist.<sup>21</sup> Da eine Zwangsversteigerung der Forderungen gesetzlich ausgeschlossen ist, ist der Personalkredit versperrt. Die dritte

<sup>21</sup> Juristische Wochenschrift 1935, S. 1334.

<sup>22</sup> Vgl. die Darstellung im nationalsozialistischen



deutschen Sozialverfassung bezeichnet.<sup>21</sup> In Wirklichkeit beweist diese Vereinbarung, die einen halben und inkonsequenten Schritt zurück zur kollektiven Selbstverwaltung unter Einfluß der Arbeitnehmer bedeutet, daß das dritte Reich bis zum heutigen Tag überhaupt keine organische Sozialverfassung besitzt, sondern daß es zwangsläufig der Partei der wirtschaftlich Starken folgt und nur manchmal, in Zeiten der Gefahr, halbe, unerfüllbare und niemals erfüllte Versprechungen an die schwächere Sozialpartei, die Arbeiterschaft macht.

Die Leipziger Vereinbarung will zunächst den Antagonismus der beiden Bürokratien, der Arbeitsfront und der der Unternehmerschaft, beseitigen, indem sie sie weitgehend zu verschmelzen sucht. Sie sucht weiter der wachsenden Unzufriedenheit der Arbeiterschaft mit den vom Unternehmer beherrschten Vertrauensräten durch die Einrichtung paritätischer Arbeitsausschüsse für die einzelnen Wirtschaftszweige zu steuern. Aber die Verschmelzung von Arbeitsfront und Wirtschaftsbürokratie bedeutet keine Änderung der sozialen Machtverhältnisse zwischen den beiden Parteien des Produktionsprozesses. Sie gibt nicht etwa der Arbeitsfront die sozialen Funktionen, die allein sie zu einer wahrhaften Interessenvertretung der Werktätigen machen würden; sie führt vielmehr höchstens dazu, daß auch die ideellen und Erziehungsfunktionen der Arbeitsfront nunmehr von einer von Unternehmergehensichtspunkten beherrschten Wirtschaftsbürokratie ausgeübt werden. Den paritätischen Ausschüssen aber, in denen theoretisch Willensübereinstimmung herbeigeführt werden soll, hat man sich ängstlich gehütet, irgendwelche Entscheidungsbefugnis zu geben. Insbesondere bleibt ihnen jede Einwirkungsmöglichkeit auf die Angelegenheiten einzelner Betriebe versagt. Es leuchtet ein, daß auch durch solche paritätischen Ausschüsse das »Gefühl der inneren Beteiligung« der Gefolgschaft nicht erhöht wird. Die ganze Leipziger Vereinbarung beweist nichts anderes, als daß auch noch im dritten Jahr nach dem Aufbruch der Nation die nationalsozialistische Arbeitsverfassung den größten Schwierigkeiten begegnet, und daß man, um wenigstens eine offene Auflehnung der davon unmittelbar betroffenen breitesten Volksschichten zu vermeiden, immer wieder einzelne Formen dieser Arbeitsverfassung ändern muß.

#### *Das Erbhofrecht*

Das Reichserbhofgesetz, eine der markantesten Rechtsschöpfungen des dritten Reichs, verfolgt den Zweck, »unter Sicherung alter deutscher Erbsitten das Bauerntum als Blutquelle des deutschen Volkes zu erhalten«. Dieses Gesetz bedeutet in dreifacher Hinsicht eine radikale Abkehr von den bisherigen Rechtszuständen. Einmal verschließt es dem sogenannten nichtarischen Personenkreis im weitesten Sinn des Wortes den Erwerb von landwirtschaftlichem Besitz mittlerer Größe. Die zweite einschneidende Rechtsänderung besteht in dem Ausschluß der Veräußerlichkeit und Belastbarkeit des Erbhofs, die nach dem Gesetz die Regel bilden soll und nur in Ausnahmefällen mit Billigung einer Gerichtsinstanz durchbrochen werden darf. Das bedeutet aber auch, wie dem Gesetzgeber wohl bewußt war, den Ausschluß des Realkredits für den Erbhofinhaber, den man auf den Weg des Personalkredits verweist.<sup>22</sup> Da eine Zwangsvollstreckung in den Erbhof wegen persönlicher Forderungen gesetzlich ausgeschlossen ist, scheint praktisch auch der Weg zum Personalkredit versperrt. Die dritte umwälzende Rechtsänderung betrifft das Erb-

<sup>21</sup> Juristische Wochenschrift 1935, S. 1284.

<sup>22</sup> Vgl. die Darstellung im nationalsozialistischen Handbuch für Recht und Gesetzgebung, 1935, S. 1064.



recht. Das Gesetz schließt die Erbteilung aus, läßt nur einen Deszendenten, in der Regel den ältesten Sohn, als erbberechtigt für den gesamten Erbhof zu und verwehrt die übrigen Deszendenten auf das im allgemeinen nicht vorhandene sonstige Vermögen und auf bloße nicht in Geld umwertbare Naturalunterhaltsansprüche. Da Landwirte, die nicht unter die Erbhofklausel fallen, Realkredit finden und ihren Grundbesitz parzellieren können, drängen die Bauern und ihre nicht erbhofberechtigten Nachkommen mit aller Macht danach, von der Segnung des Erbhofs der ihnen Kredit und Erbe versperrt, loszukommen. Die Abgrenzung ist aber äußerst schwierig und oft paradox. Ist ein Landwirt mit geringem Grundbesitz überdurchschnittlich tüchtig, so daß er aus dem Ertrag seines Hofes das Leben seiner Familie bestreiten kann, so ist er trotzdem kein Erbhofbauer, da man nicht weiß, ob etwa ein wenig tüchtiger Erbe aus dem Hof den Unterhalt der Familie bestreiten könnte.<sup>23</sup> Der besonders in Süddeutschland häufige Fall, daß neben landwirtschaftlichem Grundbesitz ein mit der landwirtschaftlichen Tätigkeit zusammenhängendes Gewerbe betrieben wird, führt zur Vereinigung der Erbhofeigenschaft, das heißt die Straße zum Realkredit bleibt offen, während dem nicht mit Regelmäßigkeit Gelderträge beziehenden Erbhofbauer der Weg zum Realkredit versperrt ist. Die erbrechtlichen Bestimmungen führen zu einer unvermeidlichen Proletarisierung der nicht erbhofberechtigten Kinder, gleichgültig ob diese nun den Hof ohne jede Absiehungsschädigung verlassen oder nicht. Bleiben sie, so sind sie nichts anderes als Dienstpersonal mit dem einzigen Unterschied, daß ihre Dienststelle nicht aufgekündigt werden kann. Es ist verständlich, daß die so übergangenen sich mit ihrem Proletarierlos nicht begnügen wollen und den Lebenswandel des Erbhofbesitzers nach Ereignissen ableuchten, die gerichtliche Entziehung der Bauernfähigkeit begründen könnten. Wenn bisher die Anträge auf Entziehung der Bauernfähigkeit mehr von Gläubigern als von erbhofberechtigten Angehörigen gestellt wurden, so liegt das lediglich an der Neuheit des Gesetzes, an der Tatsache, daß noch nicht überall die Entscheidung gefallen ist, welche Besitztümer unter das Gesetz fallen, und daß die Erbfälle noch nicht zahlreich waren. Doch schon jetzt zeichnet sich eine Entwicklung ab, die der Aufrechterhaltung gesunder Familienzustände, der das Gesetz gerade dienen will, entgegenläuft. Der Kampf um Grund und Boden, sei es von seiten des Zwangsvollstreckung suchenden Gläubigers, sei es von seiten eines ungeduldigen Sohnes oder eines von der Proletarisierung bedrohten Bruders, wird jetzt nicht mehr mit juristischen, sondern mit moralischen Kategorien ausgefochten. Obwohl man bei der kurzen Geltungsdauer des Erbhofgesetzes noch nichts endgültiges über seine Wirkungen sagen kann, scheinen doch die sozialen Nachteile dieser Neuschöpfung ihre Vorteile reichlich aufzuwiegen. Die Frage des kleinen Grundbesitzes wird nicht gelöst; die Abgrenzung des Erbhofbauern von andern Landwirten trennt willkürlich in sich einheitliche Bevölkerungskategorien des Landes; das Kreditproblem des mittleren Bauern wird unlösbar, die Nachkommenschaft wird bis auf ein Glied gesetzlich proletarisiert und dadurch wie auch durch die Möglichkeit des Wechsels im Erbhofbesitz zwischen Gliedern der Familie auf Grund richterlichen Beschlusses wird der Frieden innerhalb der Familie zerstört.

### Rückblick

Soweit die Änderungen des Verwaltungs-, Arbeits- und Bauernrechts den Anschein erwecken, als ob Linderungen der durch die Krise hervorgerufenen wirtschaftlichen

<sup>23</sup> Erbhofgericht Karlsruhe, Juristische Wochenschrift 1935, S. 2014.

...maßnahmen beabsichtigt wären  
...Besserung von Einzelexistenz  
...Allgemeinheit herbeigeführt. D  
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...überraschen, der den Nationa  
...Kommun und seinem gesellschaftl  
...Interessen einer hauchdünnen  
...Änderungen des Strafrechts a  
...Vollkommenheit einer staatlichen  
...Menschen unvorstellbar gew  
...sozialistischen Sozialistengesetz  
...schien worden wie in einem ei  
...manche Todesurteile wurden in  
...streckt; mehr als zehn zum Tod  
...Augenblick, da diese Zeilen  
...Justizpraxis: die systematische  
...wie das Volksgericht am 4. Aug  
...geordneten Kaiser mit der allein  
...kultur staats- und volksgefährde  
...wenige Tage früher gegen d  
...Adolf Claus, das Todesurteil aus  
...nationalsozialistischen Bewegung, d  
...vom Leben zum Tod beförd  
...Kriegsterrors ist eingetreten. Das d  
...Bedrohung. Richter und Rechts  
...an dieser Justiz mitwirken, dür  
...ander ein solches Strafrecht als  
...Aufgabe einer nachfolgenden F  
...dung des Nationalsozialismus au  
...den Boden für das Rechtssys  
...ten.



Schwierigkeiten beabsichtigt wären, haben sie nur persönliche Umschichtungen, d. h. Besserung von Einzelexistenzen in der Wirtschaft und Bürokratie auf Kosten der Allgemeinheit herbeigeführt. Der Mißerfolg der Maßnahmen, welche die Regierung Hitler zur Behebung der Krise anwandte, wird offenkundig. Das kann den nicht überraschen, der den Nationalsozialismus seiner politischen Herkunft nach als reaktionär und seinem gesellschaftlichen Auftrag nach als ausschließlichen Vertreter der Interessen einer hauchdünnen Oberschicht erkennt.

Die Änderungen des Strafrechts aber dienen in ganz überwiegender Maße der Vervollkommnung einer staatlichen Unterdrückungsmaschinerie, wie sie für zivilisierte Menschen unvorstellbar gewesen ist. Während der elfjährigen Anwendung des Bismarckschen Sozialistengesetzes sind nicht so viele Jahre Freiheitsentzug ausgesprochen worden wie in einem einzigen Monat nationalsozialistischer Justiz. 50 politische Todesurteile wurden in den zweieinhalb Jahren der Regierung Hitler vollstreckt; mehr als zehn zum Tode Verurteilte sitzen noch in den Todeszellen und im Augenblick, da diese Zeilen geschlossen wurden, beginnt eine ganz neue »Justiz«-praxis: die systematische zum Tode Verurteilung der politischen Gegner. So wie das Volksgericht am 4. August den ehemaligen kommunistischen Reichstagsabgeordneten *Kaiser* mit der alleinigen Begründung zum Tode verurteilte, daß »er sich für staats- und volksgefährdende kommunistische Ideen eingesetzt« habe, so wie es wenige Tage früher gegen den Funktionär der Internationalen Roten Hilfe, *Rudolf Claus*, das Todesurteil aussprach, kann es täglich die anderen Funktionäre der antifaschistischen Bewegung, die Führer der Gewerkschaften und des Katholizismus vom Leben zum Tode befördern. Eine neue unausdenkbare Verschärfung des Justizterrors ist eingetreten. Das deutsche Volk in all seinen Schichten steht unter Todesdrohung. Richter und Rechtsanwälte, die mit wachsenden inneren Hemmungen an dieser Justiz mitwirken, dürften sich kaum länger verhehlen können, daß ein Staat, der ein solches Strafrecht als Schutz braucht, keinen Bestand hat.

Die Aufgabe einer nachfolgenden Rechtsgestaltung wird es sein, dem Vernichtungsfeldzug des Nationalsozialismus auf allen Gebieten des Rechts ein Ende zu setzen und den Boden für das Rechtssystem eines sozialistischen Deutschland zu bereiten.

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## Warum hat Kanzler Kohl nicht Kirchheimer zitiert?

Die lange Diskussion um die „Volkspartei“ / Wissenschaftlicher und politischer Mißbrauch

**Alf Mintzel**, Die Volkspartei. Typus und Wirklichkeit. Ein Lehrbuch. Westdeutscher Verlag, Opladen 1984. 388 S., kt., 48,— DM.

Alf Mintzel, langjähriger Berliner Parteienforscher, seit 1981 Professor für Soziologie an der Universität Passau, hat ein merkwürdiges Buch geschrieben: Er referiert und kommentiert darin die wissenschaftliche und politische Diskussion über die „Volkspartei“, also denjenigen Parteitypus, der insbesondere für das Parteiensystem der Bundesrepublik Deutschland charakteristisch (geworden) ist. Mintzel, der sich seine wissenschaftlichen Meriten vor allem durch ein monumentales Werk über die CSU erworben hat, das 1975 erschien, hatte sich schon damals mit dem Volkspartei-Konzept nicht befreunden können und vorgeschlagen, statt dessen von „Massen- und Apparatparteien modernen Typs“ zu sprechen. Nun plädiert er — das ist das Fazit seines neuen Buches — dafür, den Begriff der „Volkspartei“ aus der sozialwissenschaftlichen Fachsprache zu eliminieren. An dieser Empfehlung ist zweierlei erstaunlich: die wenig einleuchtende Begründung und vor allem die Tatsache, daß Mintzel keinen Begriff als Ersatz vorschlägt. Es scheint, der Autor überschätzt sowohl die Problematik des Volkspartei-Konzepts als auch den Vorteil seiner Eliminierung.

In Mintzels Begründung spielt der Umstand, daß „Volkspartei“ nicht nur ein wissenschaftlicher, sondern auch ein historisch-politischer Begriff ist, eine wesentliche Rolle: Parteien haben sich im Kaiserreich und in der Weimarer Republik als Volksparteien bezeichnet, die es im Sinne des wissenschaftlichen Begriffs nicht oder allenfalls teil-

weise waren; heute wird dieser Begriff gelegentlich von den Unionsparteien für sich okkupiert und der SPD streitig gemacht; in den letzten Jahren wird auch von grün-alternativer Seite Fundamentalkritik am „Volksparteiensyndrom“ formuliert, die als ebenso überzogen erscheint wie die korrespondierende Hoffnung auf die Möglichkeit einer „basisdemokratischen“ „Partei neuen Typs“; es kommt zu Vermischungen wissenschaftlicher und politischer Argumentation, vor allem durch die Fixierung vieler Sozialwissenschaftler auf die SPD.

Mintzel versichert nun zwar, es gehe nicht um die „Kreation eines wissenschaftlich ‚neutralen‘ neuen Begriffes“, trotzdem hat man den Eindruck, daß ihn diese Ambivalenz des Volkspartei-Konzepts erheblich und über Gebühr irritiert. Bezeichnend dafür ist folgender kritischer Kommentar Mintzels über einen politischen Text, nämlich Ausführungen Helmut Kohls über „Die Volkspartei CDU“: „Es fehlt jegliche theoretisch-analytische Bezugnahme. Der Name Otto Kirchheimer wird an keiner Stelle erwähnt... Jenseits von theoretisch-analytischen Gesichtspunkten und gar wissenschaftstheoretischen Vorüberlegungen und Skrupeln skizziert Kohl... das Modell einer ‚Volkspartei‘...“ Warum muß der Vorsitzende einer Partei, die sich seit ihrer Gründung als Volkspartei verstanden und sich nach vorherrschender Ansicht zunehmend in diese Richtung entwickelt hat, den deutsch-amerikanischen Politikwissenschaftler Kirchheimer erwähnen, der in einem Aufsatz über den „Wandel des westeuropäischen Parteiensystems“, der 1965 in einer deutschen

Fachzeitschrift erschien, die Parteitypologie um die „catch all party“ — von Erwin Faul mit „Allerweltpartei“ bzw. „Volkspartei“ übersetzt — bereicherte? Warum sollen Politiker „wissenschaftstheoretische Vorüberlegungen“ anstellen, bevor sie sich über ihre Partei äußern?

Mintzel scheint sich mit dem Verhältnis von Politik und Wissenschaft schwerzutun. So hält er es offenbar nicht für möglich, daß der wissenschaftliche Begriff „Volkspartei“ für verschiedene politische Parteikonzepte offen sein könnte. Darin dürfte aber doch gerade der Nutzen solcher Begriffe liegen, daß sie strukturelle Gemeinsamkeiten verschiedener politischer Gestaltungsvarianten herauszuarbeiten erlauben.

Doch für Mintzels Vorschlag, das Volkspartei-Konzept aus der sozialwissenschaftlichen Fachsprache zu eliminieren, ist nicht nur der politische, sondern auch der wissenschaftliche „Mißbrauch“ des Begriffs maßgeblich; weiterhin macht er geltend, daß heute — abweichend von Kirchheimers Interpretation — weitgehend Einvernehmen bestehe, die Volkspartei stelle ein spezifisches Merkmal des Parteiensystems in der Bundesrepublik dar; und schließlich sei der Begriff in einem „wissenschaftstheoretisch-terminologischen Sinn“ (was immer das sein mag) nicht zwingend. Welcher Begriff ist das schon? Auch die anderen Bedenken scheinen nicht durchschlagend zu sein: Wenn Volksparteien ein Spezifikum der Bundesrepublik sein sollten, was von Mintzel mit Recht hervorgehoben und auch von maßgeblichen ausländischen Autoren so gesehen wird, spricht das

doch eher für die Beibehaltung des Konzepts.

Im übrigen läßt sich die fragwürdige Verwendung von Begriffen nicht nur durch ihre Eliminierung beheben, ihr kann auch — insbesondere im wissenschaftlichen Bereich — durch Kritik entgegengewirkt werden. Diesem ebenso undankbaren wie notwendigen Geschäft widmet sich denn Mintzel auch ausgiebig, durchweg fair (auch der Rezensent erfährt einige Belehrung) und in vieler Hinsicht durchaus zutreffend. Es sind in der Tat zahlreiche Unklarheiten, Widersprüche, Rückfälle hinter ein bereits erreichtes Reflexionsniveau zu beanstanden. Das alles ist verdienstvoll, ebenso wie verschiedene „Ausgrabungen“, insbesondere die Erinnerung daran, daß die meisten Argumente heutiger Kritiker der Sozialdemokratie bereits Anfang des Jahrhunderts von Eduard Bernstein oder Robert Michels — zudem eindrucksvoller — formuliert wurden.

Ob die Dokumentation und Kommentierung der Volkspartei-Debatte sich als „Lehrbuch“ eignet, scheint allerdings fraglich zu sein. Wahrscheinlich ist diese Firmierung doch eher eine Marketing-Idee des Verlags, der es leider versäumt hat, eine Vielzahl von — auch sinnenstellenden — Druckfehlern auszumerzen. Dagegen hängt es wohl nicht nur mit dem Lehrbuch-Charakter des Werkes zusammen, daß Mintzel ständig mit „szientistischen“ Meßblättern herumfuchtelt, was auch eine Überforderung wissenschaftlicher Arbeiten darstellt. Vielleicht ist viel mehr als „empirische Evidenz“ nicht erreichbar. Unter diesem Stichwort schreibt Mintzel einige lezenswerte Seiten darüber, was wir über wesentliche Strukturen der „Großparteien“ in der Bundesrepublik, für die eben die Bezeichnung „Volksparteien“ üblich geworden ist, wissen. Das ist gar nicht so wenig.

PETER HAUNGS





Stephan Kuttner

## Stephan Kuttner

### Persönlichkeit und wissenschaftliches Werk\*)

Vor fünfzig Jahren, 1930, hat Stephan Kuttner in Berlin unter dem Strafrechtler Eduard Kohlrausch über die juristische Natur der falschen Beweisaussage promoviert. Es war ein aktuell-dogmatisches Thema, das aber in bester historisch-vergleichender Tradition entwickelt wird, in einer Methode, die aus der historischen Rechtsschule heraus- und in mancher Hinsicht über sie hinausgewachsen war. Nachdrücklich wandte sich Kuttner gegen die Vermengung von rechtlich-materiellen mit religiös-formalen Auffassungen in den Eidesdelikten, gegen eine Fehlvorstellung, die nur in der deutschen neueren Strafrechtsentwicklung zu finden ist, nicht aber in anderen Rechtsordnungen, auch nicht in diesem Ausmaß im mittelalterlichen kanonischen Recht. Womit wir schon das kommende Forschungsfeld Kuttners angesprochen haben, dem er sich zunächst noch von der dogmengeschichtlichen Fragestellung des Strafrechters her nähert. Aber gerade diese Fragestellung veranlaßt ihn, sich den ungedruckten Quellen, den Handschriften des 12. und 13. Jahrhunderts zuzuwenden, um aus ihnen die Dogmatik der bisher kaum beachteten frühen Kanonistik zu gewinnen. Gefördert von der damaligen Notgemeinschaft der deutschen Wissenschaft unternimmt er die erste Handschriftenreise in Deutschland und nach Rom; seinen ersten bedeutenden Fund, die Glossa Palatina, kann er 1932 in der Kan. Abt. der Savigny-Zeitschrift bekanntgeben. Aber jäh wird seine weitere juristische und historische Ausbildung in Berlin abgeschnitten. Der Unrechtsstaat versperrt ihm die Wege zum Assessorexamen und zur Habilitation, das drohende Grauen vertreibt ihn 1933 für immer aus dem Lande seiner Geburt und seiner wissenschaftlichen Lehrjahre. Mit ihm scheidet Frau Eva von Berlin, die mutige Gefährtin, von großem Herzen und starker Sinnesart — ohne sie wird sein Leben auch als Wissenschaftler unvorstellbar sein, und jedem seiner Freunde wird

\*) Laudatio anlässlich des 50jährigen Doktorjubiläums Stephan Kuttners, gefeiert von der Rechts- und Staatswissenschaftlichen Fakultät der Universität Bonn am 13. Oktober 1980. — Die Form der Ansprache wird hier beibehalten.



auch ihre Freundschaft und herzliche Gastlichkeit zuteil werden. Rom wird ihr neues Zuhause, hier kommen auch die ersten von neun Kindern zur Welt. An der Vatikanischen Bibliothek findet Kuttner eine wissenschaftliche Anstellung, später lehrt er am päpstlichen Institutum utriusque iuris, dem Vorläufer der Lateranuniversität. Seine tiefe Dankbarkeit gegenüber Pius XI. hat er stets bewahrt, seine Stimme wird bewegt, wenn er auf den Papst und auf dessen Nachfolger, Pius XII., zu sprechen kommt. Pius XI. ist es auch, der ihn mit der Erstellung eines Repertoriums der kanonistischen Handschriften beauftragt. Vorher hatte Kuttner noch das Ergebnis seiner bisherigen Forschungen in den *Studi e Testi* veröffentlichen können: seine nach wie vor grundlegende „Kanonistische Schuldlehre“, systematisch aufgrund der handschriftlichen Quellen dargestellt, wie der Untertitel treffend lautet. Mit diesem Buch verläßt er die Dogmengeschichte des Strafrechts, um sich von nun an ganz der Erforschung der Handschriften zu widmen und den Weg zu Editionen aus der Frühzeit der klassischen Kanonistik zu öffnen. Bedeutsam aber bleibt der dogmengeschichtliche Einstieg in die Handschriftenforschung; denn einmal kann er seine Kenntnis der kanonistischen Schuldlehre als Leitfaden durch die neuzuentdeckenden Werke benutzen, und zweitens und wichtiger bewahrt ihn der dogmengeschichtliche Blick vor einer selbstgenügsamen Handschriftenforschung, und das Ziel wird er nicht aus den Augen verlieren, die Lehren und Lösungen der Kanonisten aus den Handschriften ans Tageslicht zu bringen und in den gehörigen Zusammenhängen zu erschließen und zu verstehen.

Im Jahr 1937 veröffentlicht Kuttner sein vorbildlich gewordenes „Repertorium der Kanonistik“ als Vorarbeit zu einem Corpus glossatorum zwischen 1140 und 1234. Das Buch erwuchs aus der Entdeckung oder Neuanalyse von mehreren Hundert Handschriften in ganz Europa. Aus den Handschriften werden die einzelnen Werke herausgeschält, vorgeführt, bestimmt und gruppiert. In seinem Aufbau läßt sich das Repertorium von der Arbeitsweise der Kanonisten selbst leiten. Am Anfang stand dort das Glossieren der auctoritates, der Rechtstexte zunächst des Dekrets, dann der fünf Kompilationen des alten Kanons. Von den so entstehenden Glossenmassen entwirft Kuttner eine praktikable dreiteilige Typologie. Bald trat bei den Kanonisten neben die Glossen eine Vielfalt weiterer literarischer Formen wie die Summen, Distinktionen, Casus usw.; sie werden von Kuttner unter entwicklungsgeschichtlichem Vorzeichen geordnet und definiert. Kuttner entdeckt

auch eine eigene französische Schule der Dekretistik mit einem rheinischen Ableger, die er der Bologneser Kanonistik zur Seite stellt, in späteren Forschungen ergänzt durch die anglo-normannische Schule — das Ganze eine der großen Einsichten in die Vielstimmigkeit der mittelalterlichen Kultur, die über dem tragenden einheitlichen Grundton zum Klingen kam. Mit diesem Repertorium hat Kuttner unser Einblicksvermögen in die Gedankenwelt der mittelalterlichen Juristen auf eine neue Stufe gehoben und den Forschungsdrang frisch angeregt; wie Savigny die mittelalterliche Wissenschaft vom römischen Recht, so hat Kuttner das kanonische Recht in seiner neuen wissenschaftlichen Gestalt erschlossen und als Forschungsfeld erst wirklich bereitet.

Noch einmal muß Kuttner sein Heim und seine Arbeitsstätte aufgeben, als nach Kriegsausbruch die tödliche Bedrohung auch auf Italien übergriff. 1940 verläßt er Europa und emigriert in die Vereinigten Staaten von Amerika, wo er und seine Familie endlich Wurzel schlagen können und Obdach und Heimat für immer finden. Er erhält eine Professur an der Catholic University in Washington. Hier kann er seine bisherige Forschungsarbeit fortsetzen; zugleich öffnet sich ihm die reizvolle Aufgabe, in der Ausbildung den amerikanischen Klerikern — zukünftige Bischöfe und Kardinäle zählten zu seinen Schülern — einen guten Teil auch ihres historischen Erbes zu vermitteln. Mehr noch, es wird ihm die Möglichkeit geboten, einer überragend begabten Nation einen ihr bisher kaum bekannten Bereich der Geisteswissenschaft nahezubringen, kaum bekannt deshalb, weil die Geschichte des kanonischen Rechts weithin kontinentaleuropäische Rechtsgeschichte ist. So zählt Kuttner zu den aus Europa vertriebenen Wissenschaftlern, die einmal ein amerikanischer Gelehrter mit einer für uns Deutsche mehrfach bitteren Bemerkung „Hitler's backhanded gift to American education“ genannt hat. — Kuttners Publikationen widmen sich zunächst der Weiterführung des Repertoriums durch Handschriftenforschung von einer Eleganz, wie sie vor ihm nur Emil Seckel erreicht hatte. Wir nennen aus der Kriegs- und Nachkriegszeit nur zwei Arbeiten, die Abhandlung über Bernardus Compostellanus Antiquus, die weit mehr enthält als Informationen bloß über diesen Glossator, und die „Refléxions sur les Brocards des Glossateurs“, die sich mit bestimmten Literaturformen beschäftigen und dem Gegenstand gemäß die Legisten, also die mittelalterlichen Lehrer des römischen Rechts, miteinbeziehen. Dieser Artikel ist natürlich nicht der einzige Ort geblieben, an dem Kuttner die Verflechtung und Verklammerung der beiden Rechte



beobachtet hat, wir weisen besonders noch auf seinen Aufsatz von 1953 hin über die Rolle des weltlichen für das kanonische Recht, eine der Abhandlungen zu grundlegenden Fragen des kanonischen Rechts, auf die noch zurückzukommen ist.

Mit den 50er Jahren erreichen wir einen neuen Abschnitt in Kuttners wissenschaftlichem Wirken. In einem denkwürdigen Vortrag 1949 vor der Mediaeval Academy of America hatte er eindringlich die Notwendigkeit begründet, an die Edition von Werken der frühen Kanonistik gemeinschaftlich und in einem institutionellen Rahmen heranzugehen, hierbei den reichen Gewinn geschildert, der aus solchen Editionen über die Geschichte des kanonischen Rechts hinaus für das Verständnis der mittelalterlichen Kultur fließen würde, in ihrer geistigen Welt, aber auch in der Realität des mittelalterlichen Lebens. Daneben hatte er die Neuedition von Rechtsquellen gefordert, sei es des Dekrets Gratians, sei es der Konstitutionen der ökumenischen Konzilien. Hier hatte er selbst schon bedeutende Vorarbeit geleistet, weit über das im Repertorium abgesteckte Jahrhundert hinaus, beginnend mit den Konstitutionen des 1. Lyoner Konzils (das vor allem durch die Absetzung Kaiser Friedrichs II. geläufig ist). Sein lebhaftes Interesse an diesem Gegenstand führt ihn wiederholt bis zum Trienter Konzil ins 16. Jh. — Die Forderungen im Vortrag von 1949 werden drei Jahre später in einer Resolution auf dem in Bologna zum Gedächtnis Gratians stattfindenden Kongreß aufgegriffen, nach weiteren drei Jahren, 1955, wird das Institute of Research and Study in Medieval Canon Law unter Leitung Kuttners in Washington gegründet als zentrale Forschungs- und Koordinationsstätte beiderseits des Atlantiks, später nach Berufungen seines Direktors über Yale (1964) nach Berkeley (seit 1970) übertragen. Ein Bündel von Aufgaben kam mit dem Institut auf Kuttner zu; besonders das jährlich erscheinende Bulletin gibt Zeugnis von der rastlosen Tätigkeit und seinem nie ermüdenden Ansporn und Drängen der dem Institut verbundenen Wissenschaftler in aller Welt, Historiker, Juristen oder Theologen. Manche Veröffentlichung, die seinen Namen nicht trägt, läßt seine ratende und helfende Hand spüren, „Einer trage des Anderen Last“ ist das Motto, unter das er sein Wirken gestellt hat. Vom Institut gestützt und von Kuttner wahrhaft beseelt sind die kanonistischen Fachkongresse, in eindrucksvoller Vereinigung des Wissenschaftlichen mit dem Menschlichen. Zu den mittelbaren Wirkungen seiner Arbeit gehört auch, daß in den letzten Jahrzehnten keine Monographie zu kanonistischen Themen von

Rang erschienen ist, die nicht Stoff aus unedierten Quellen eingearbeitet hätte (soweit sie überhaupt die frühe Klassik beachtet).

Editionen sollen einen neuen Quellenkreis erschließen, hier die Lehre der frühen Kanonistik, auf der die Wissenschaft aller späteren Jahrhunderte aufgebaut hatte. Die hiermit angeschnittene Frage nach den Erkenntnisquellen des Rechts der Kirche überhaupt führt Kuttner einmal zur Auseinandersetzung mit Ulrich Stutz, den er in Berlin noch hatte hören können, und seiner Schule, die bekanntlich eine Vorliebe für die kirchliche Verfassungs- und Institutionengeschichte gezeigt und ihre germanistische Herkunft nie geleugnet hatte, deshalb sich aber auch sagen lassen muß, die Rechtswissenschaft und das in ihr gelehrt kanonische Recht vernachlässigt zu haben. Die Frage nach den Quellen führt und treibt aber weiter, auf den Weg zu den Grundlagen und dem Wesen des kanonischen Rechts, zu Beobachtungen durch die Jahrhunderte hindurch und über sie hinaus, zu Überlegungen, die man einer allgemeinen Rechtslehre oder einer Rechtstheorie — immer in bezug auf das kanonische Recht — zuzählen könnte. Solchen Beobachtungen nähert sich Kuttner stets von neuem, von den verschiedensten Seiten her, belebt sie hierbei durch reiche Illustrationen aus der Geschichte. Wir finden Betrachtungen dieser Art beispielsweise in einem — weiteren — überzeugenden Vortrag vor der Mediaeval Academy, 1955 gehalten, über „Methodological Problems Concerning the History of Canon Law“. Ferner nennen wir hier Kuttners Würdigung des nach Stutz und Feine zweiten großen Entwurfs einer Rechtsgeschichte der Kirche aus unserem Jahrhundert, der *Prolégomènes* von Gabriel Le Bras (hinter dessen Konzept freilich unseres Erachtens manche Fragezeichen zu setzen wären). Um nur einige der von Kuttner angesprochenen grundlegenden Themen in Stichworten zu nennen: Das kanonische Recht ist das Recht des *corpus mysticum Christi* und nicht nur eines sozialen Verbands gleich dem Staat (in diesem Zusammenhang kommen die Thesen Rudolph Sohms ins Spiel, zuletzt diskutiert in den „Reflections on Gospel and Law in the History of the Church“). Aus dieser Natur des kanonischen Rechts folgt notwendig das ständige Zwiegespräch mit der Theologie in Dogmatik und pastoraler Praxis. Das kanonische Recht ist aber genauso gut mit dem weltlichen Recht verwoben, besonders im Mittelalter, als sich die kirchliche und die weltliche Sphäre im täglichen Leben ineinanderschoben. Der Blick auf die Wirklichkeit führt auch die Spannung zwischen dem gelehrten und dem gelebten Recht vor Augen, beidem muß der gebührende Platz eingeräumt



werden. Dieser Reichtum an Bezügen und Verknotungen spiegelt sich in der Vielfalt der Rechtsquellen und Rechtsinstitute, und dem mittelalterlichen Kanonisten war aufgegeben, den ausufernden Vorrat in Überlieferung und Neubildung zu ordnen, zu vergleichen und in Einklang zu bringen. So gewinnt Kuttner den einprägsamen Titel "Harmony from Dissonance" für eine Vorlesung über das mittelalterliche kanonische Recht. Musikalische Bilder wie dieses und andere, die wir verschiedentlich finden, sind nicht nur dem Gegenstand angemessen, sondern sprechen auch aus der Musikalität eines Autors, der gleich anderen bedeutenden Wissenschaftlern ein ausgezeichneter Klavierspieler ist. Aus den Grundfragen zum kanonischen Recht erwächst auch Kuttners Vortrag vor Papst Paul VI. zur Fünfzigjahrfeier des Codex iuris canonici, 1967 gehalten, ein Höhepunkt in Kuttners an Ehrungen gewiß nicht armem wissenschaftlichem Leben, zugleich glanzvoller Rückblick auf den Beginn seiner Laufbahn in der Vatikanstadt. Mehrmals befaßt sich Kuttner ferner mit dem Rechtsinstitut der Dispensation, neben dem Privileg gleichsam der Prüfstein für eine Theorie des kanonischen Rechts; so nehmen zwei Aufsätze Fragen der Dispensation zum Ausgangspunkt, nämlich "Pope Lucius III and the Bigamous Archbishop of Palermo" (bigamus hier nicht unserem, sondern im Sinn des zum zweiten Mal heiratenden Witwers) und "Urban II and the Doctrine of Interpretation". Mit welchen Titeln wir zu den zahlreichen Einzeluntersuchungen Kuttners über die verschiedensten Themen aus dem mittelalterlichen Kirchenrecht gelangt wären, und von denen wir doch einige mehr herausgreifen sollten: noch aus den 30er Jahren über den Ursprung des Ausdrucks „positives Recht“; später über die Vorstellungen von einem gemeinen Recht der Kirche bei den gregorianischen Reformern, von denen auch der berühmte Dictatus papae Gregors VII. nicht abweicht; oder über die Autorität der Teile des Corpus iuris canonici mit Beobachtungen, die einem anachronistischen Gesetzespositivismus entgegentreten; dann der Vortrag zur Eröffnung des Bologneser Kongresses „Graziano: L'uomo e l'opera“; ferner über Juristenschelte in einem Scholarenvers englischer Herkunft; schließlich, im letzten Jahrzehnt, zwei Aufsätze mit philosophiegeschichtlichen Motiven, der eine über ein Zitat Gratians aus dem Timaeus des Plato-Chalcidius im Umkreis einer naturrechtlichen Gütergemeinschaft, der andere über eine einigermaßen rätselhafte spätantike Definition der Gerechtigkeit als „naturae tacita conventio in adiutorium multorum inventa“.

Gerade die zuletzt genannten Abhandlungen erfüllen den Leser mit hoher Bewunderung: wie hier aus der Interpretation eines Textes sich ein Thema in einem weiten Bogen entfaltet, hat in unserem Wissenschaftszweig nicht seinesgleichen. Mit erstaunlicher Belesenheit und dem feinsten Einfühlungsvermögen werden die Texte gehoben aus dem ganzen Geflecht rechts- und geistesgeschichtlicher Abhängigkeiten und Wechselwirkungen. Ein Einzelthema zwar wird durchgeführt, aber die Erfahrung des Ganzen schwingt mit, durchwebt und belebt die Teile. Eine Frische, eine Leichtigkeit liegt über solcher Wissenschaft, daß man — sit venia analogiae — den Geist Mozartscher Musik zu spüren glaubt. Mit dieser Weise hat Kuttner in seinen Schriften den unverwechselbaren, ihm eigenen Ton angeschlagen. Auf diesem Wege gibt es keinen Abschluß, keine Erstarrung, er führt zu keiner Grenze. Solche Studien — divertimenti con canoni obbligati, wie Du sie einmal genannt hast — sind es, die wir uns, vor allen anderen Arbeiten, von Dir, lieber Stephan, wünschen, vorerst einmal für das nächste Jahrzehnt.

Knut Wolfgang Nörr

*Verzeichnis der erwähnten Schriften in der Reihenfolge ihrer Zitierung*

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- Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX., systematisch auf Grund der handschriftlichen Quellen dargestellt (Studi e Testi 64), Città del Vaticano 1935.
- Repertorium der Kanonistik (1140—1234): Prodromus corporis glossatorum I (Studi e Testi 71), Città del Vaticano 1937.
- (zusammen mit Eleanor Rathbone) Anglo-Norman Canonists of the Twelfth Century, in: Traditio 7 (1949—51) 279—358.
- Bernardus Compostellanus Antiquus: A Study in the Glossators of the Canon Law, in: Traditio 1 (1943) 277—340.
- Réflexions sur les Brocards des Glossateurs, in: Mélanges J. de Ghellinck II, Gembloux 1951, 767—792.



- Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law, in: *Scritti di Sociologia e Politica in onore di Luigi Sturzo II*, Bologna 1953, 349—363.
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- Rezension von Hans Erich Feine, *Kirchliche Rechtsgeschichte I: Das katholische Kirchenrecht*, 2. Aufl. 1954, in: *Tijdschrift voor Rechtsgeschiedenis* 23 (1955) 365—370.
- Methodological Problems Concerning the History of Canon Law, in: *Speculum* 30 (1955) 539—549.
- Vers une nouvelle histoire du droit canon, in: *Revue historique de droit français et étranger* 1958, 78—83.
- Reflections on Gospel and Law in the History of the Church, in: *Liber Amicorum Monseigneur Onclin*, Gembloux 1976, 199—209.
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- Il Codice di diritto canonico nella storia, in: *Commemorazione del cinquantesimo anniversario della promulgazione del Codex iuris canonici, celebrata all'augusta presenza del santo padre Paolo VI il 27 maggio 1967*, 17—39.
- Pope Lucius III and the Bigamous Archbishop of Palermo, in: *Medieval Studies Presented to Aubrey Gwynn, S. J.*, Dublin 1961, 409—454.
- Urban II and the Doctrine of Interpretation: a Turning Point? in: *Post Scripta: Essays on Medieval Law and the Emergence of the European State in Honor of Gaines Post* (*Studia Gratiana* 15), Rom 1972, 55—86.
- Sur les origines du terme « droit positif », in: *Revue historique de droit français et étranger* 1936, 728—740.
- Liber canonicus*: a Note on "Dictatus papae" c. 17, in: *Studi Gregoriani* 2, Rom 1947, 387—401.
- Quelques observations sur l'autorité des collections canoniques dans le droit classique de l'Eglise, in: *Actes du Congrès de droit canonique*, Paris 22—26 Avril 1947, Paris 1950, 305—312.
- Graziano: L'uomo e l'opera, in: *Studia Gratiana* 1, Bologna 1953, 17—29.
- Das Galienus opes et sanctio Justiniana, in: *Linguistic and Literary Studies in Honor of Helmut A. Hatzfeld*, Washington D.C. 1964, 237—246.

- A Forgotten Definition of Justice, in: *Mélanges G. Fransen II* (*Studia Gratiana* 20), Rom 1976, 75—109.
- Gratian and Plato, in: *Church and Government in the Middle Ages: Essays Presented to C. R. Cheney*, Cambridge 1976, 93—118.
- Eine bis 1966 vollständige Bibliographie enthält Band I der *Collectanea Stephan Kuttner* (*Studia Gratiana* 11), Bologna 1967, auf p. XXI—XXVI.
- Kürzlich sind mehrere von Kuttners Schriften zu zwei Sammelbänden vereinigt worden (*Variorum Reprints*, London): *The History of Ideas and Doctrines of Canon Law in the Middle Ages; und Medieval Councils, Decretals, and Collections of Canon Law*.





*American Jewish* **KC** *Fraternity, Inc.*

and **MAX MAINZER MEMORIAL FOUNDATION, INC.**

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BULLETIN

Liebe Freunde :

Ich schreibe diese Zeilen kurz nachdem der Autobus von Washington wieder in New York eingetroffen ist und wir alle noch unter dem Eindruck dieses hoechst gelungenen KC Treffens in der Hauptstadt unseres Landes stehen. Richard Auerbach hatte fruher bemerkt, dass am Ende einer jeden solchen Tagung gesagt wird: "Dieses war aber in der Tat das schoenste Treffen !" - und so war es dann auch im April 1984. Das Wetter, das Hotel, die Verpflegung, alles war ausserordentlich gut, die von Kb. John Shyburgh so hervorragend organisierten Bus-Rundfahrten (mit der wissensreichen Fuehrung von Stephen Forman) zeigten uns viel Neues und Interessantes in Washington.

Was mich besonders beeindruckte, war die Vitalitaet aller Teilnehmer, mit der sie nicht nur die Sehenswuerdigkeiten wahrnahmen, sondern mit der sie auch auf die hochinteressanten Reden von Judge Harold Greene (ueber die "Aufteilung" von AT&T) und der Henry Kellermann (siehe Seite 3 ) reagierten.

Unser Dank sei hier all denen ausgesprochen, die zu dem Gelingen der Tagung beigetragen haben : Carlos Doernberg, der mit den Vorbereitungen beschaefigt war und am Freitag Abend die Versammelten herzlich begruesste; Inge Wolf, die namens der KC Frauen in ihrer charmanten warmen Art Worte des Willkommens sprach; der 85 Jahre junge Curt Nemrow, der die Anwesenden aufrief, die Vergangenheit nicht zu vergessen und Dinge, die uns an fruhere Zeiten erinnern, nicht zu zerstoeren, sondern sie weiterzureichen, damit kuenftige Generationen aus ihnen lernen; Leonard Teicher und Fritz Levy wie auch Inge Berner, die ihr grosses Teil beigesteuert haben, um dieses Treffen erfolgreich zu gestalten. Wir waren erfreut, Ella Auerbach dieses Mal wieder in unserer Mitte zu sehen, deren Gesundheit ihr die Teilnahme erlaubte.

Es ist in dem beschraenkten Raum dieses unseres Bulletins nicht moeglich, alle Reden wiederzugeben. Es ist auch nicht moeglich, Johnny Elton's unnachahmlichen Charm und Witz in gedruckte Worte zu uebertragen. Wir danken ihm fuer die frohe Stimmung, die er dem Freitag-Abend gab.

Ganz besonders verbunden sind wir dem bereits oben erwaehten Kb. John Shyburgh, der uns nicht nur seine Lokalkenntnisse und Verbindungen zur Verfueung stellte und unermuedlich fuer uns taetig war, sondern der sich selbst auch als ausgezeichnete Redner erwies. Er brachte uns U.S. District Judge Harold Greene fuer das Samstag-Bankett und Dr. Henry Kellermann fuer die Sonntags-Ansprache. Beide Redner sind nicht KCer, stammen aber aus "unseren Kreisen" und ihre aufschlussreichen, interessanten Ansprachen wurden mit grossem Beifall aufgenommen.



Waehrend der Tagung gratulierten wir neben Albert Philipp (siehe Seite 13) auch den anwesenden Geburtstagskindern Curt Nemrow, William Wolf und Carlos Doernberg.

Bei dieser Gelegenheit sprechen wir unserem aeltesten KCer, unserem in London lebenden Freunde Walter Dux zu seinem 95. Geburtstage auch an dieser Stelle unsere herzlichsten Glueckwuensche aus. (Siehe Seite 10 )

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Nun noch ein paar allgemeine Nachrichten :

Wir weisen auf die Generalversammlung der American Jewish KC Fraternity und der Max Mainzer Memorial Foundation, Inc. hin, die am

14. Juni 1984 um 5 Uhr nachmittags  
in den Raeumen der Congreg. Habonim  
44 West 66 Street  
New York, NY 10023

stattfindet. Vor der Generalversammlung haben wir wieder unseren allgemein beliebten

**KAFFEEKLATSCH**

der in den gleichen Raeumen um 2 Uhr nachmittags beginnt.

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Das alljaehrliche Treffen auf der Ullmann-Farm (Beaver Lake House) ist auf Wunsch vieler Teilnehmer auf den

12. Oktober 1984

verschoben worden, so dass wir die schoenen Herbstfarben dort erleben koennen. Weitere Einzelheiten folgen.

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Die Nachrichten ueber das alljaehrliche Gstaad-Treffen sind versandt worden. Die KCer finden sich dort in der Zeit vom 15. Juli bis 3. August 1984 zusammen; die Hauptveranstaltung ist auf die Tage vom 26. bis 27. Juli angesetzt worden. Anmeldungen mit Hinweis auf die KC-Abmachung sind zu richten an PALACE HOTEL, 3780 Gstaad, Schweiz. (siehe Seite 23).

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Fuer die Sommerferien wuenschen wir allen gute Erholung, erneute und gestaerkte Gesundheit, und sagen

"AUF FROHES WIEDERSEHEN IM HERBST "

K. Peter Lekisch



Schwerin

Chicago

Loewenthal

Berlin

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### **Betr.: Guido Kisch**

Ernst G. Lowenthals würdiger Nachruf auf Professor Guido Kisch (*Aufbau* vom 2. August) verdient eine Ergänzung bezüglich Kischs New Yorker Jahre, die auch für die Geschichte des *Aufbau* von Interesse ist. Einer Ende 1940 im *Aufbau* erschienenen Anregung folgend, rief Kisch (mit Dr. Wilfred C. Hulse und dem Unterzeichneten) die "Arbeitsgemeinschaft für Geschichte und Familienforschung der Juden in Mitteleuropa" ins Leben (*Aufbau*, 7. November 1941), die über zehn Jahre lang das geistige Leben der Emigration in New York wesentlich bereicherte. Der *Aufbau* berichtete, beginnend am 13. Februar 1942, regelmässig über die monatliche Vortragsveranstaltungen der Arbeitsgemeinschaft. Vortragende waren Ismar Elbogen, Adolf Kober, Max Wiener, Jacob Hoffmann, Joachim Prinz, Max Gruenewald, Rahel Wischnitzer, Hugo Hahn, Dora Edinger, Leo Baerwald, Max Osborn und viele andere. Kisch berichtete in seinen *Erinnerungen: Der Lebensweg eines Rechtshistorikers* (Sigmaringen, 1975, Seite 150/151) über diese Arbeitsgemeinschaft. In New York erschien auch über 20 Jahre lang die von Guido Kisch 1938 begründete und von ihm herausgegebene Zeitschrift *Historia Judaica: A Journal of Studies in Jewish History*, die 1962 in die *Revue des Études Juives* (Paris), aufging. Die Jahre der Zusammenarbeit mit Professor Kisch waren mir eine Quelle innerer Bereicherung.

**Kurt Schwerin, Chicago**

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**Sinatrika**



## ERNEST C. STIEFEL

... noch eine Zukunft  
KLAUS HILDEBRAND

### Hinweis

POLITISCHE JUSTIZ. Als eine „widerspruchsvolle Verbindung“, die „Verheißung und Verhängnis“ in sich berge, hat der 1965 verstorbene Jurist und Politologe Otto Kirchheimer den Titel seines großen Werkes „Politische Justiz“ gekennzeichnet, das jetzt als Taschenbuch erschienen ist (Politische Justiz. Verwendung juristischer Verfahrensmöglichkeiten zu politischen Zwecken. Aus dem Amerikanischen übersetzt von A. R. L. Gurland. Fischer Taschenbuchverlag, Fischer Wissenschaft 7352, 687 Seiten, 29,80 Mark). Das Buch verfolgt in drei großen Teilen Fälle, Gründe, Methoden und Apparate der politischen Justiz, hauptsächlich seit dem Ersten Weltkrieg, quer durch die politischen Systeme — ein Standardwerk, dem die Realität jeden Tag neues Anschauungsmaterial hinzufügt. F.A.Z.

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(ap)

**diplomierter Einkäufer.** Der *Schweizerische  
Verein für Materialwirtschaft und Einkauf (SVME)*  
hat dieses Jahr zum siebtenmal unter der Aufsicht des  
Biga eine *höhere Fachprüfung* für Einkäufer durchge-  
führt. Mit den 46 erfolgreichen Kandidaten hat sich  
die Zahl der «diplomierten Einkäufer» auf 263 er-  
höht. (Mitg.)

**Rechtshistoriker Guido Kisch gestorben.** In seinem  
97. Altersjahr ist in Basel der Rechtshistoriker *Profes-  
sor Guido Kisch* gestorben. Der in Prag geborene  
Kisch war Ehrendozent der Juristischen Fakultät der  
Universität Basel, Offizier des *Palme académiques*,  
Träger des *Jacob-Burckhardt-Preises* sowie Mitglied  
mehrere Akademien und Gelehrtenvereinigungen.

(sda)

**SIB unter neuer Leitung.** Das Präsidium des  
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4054 Basel, den 7. Juli 1985  
Schalerstrasse 14

### TODESANZEIGE

In tiefem Schmerz nehmen wir Abschied von meinem geliebten Mann,  
gütigen Vater, Grossvater, Schwiegervater und Anverwandten

Prof. Dr. iur.

## Guido Kisch

der uns nach einem reich erfüllten Leben verlassen hat. Im Geiste blei-  
ben wir immer vereint.

*Hilde Kisch  
Dr. Alexander L. und Hindy M. Kisch  
Suzanne und Amy  
Verwandte und Freunde*

Die Beerdigung findet am Mittwoch, 10. Juli, um 11.15 Uhr auf dem  
israelitischen Friedhof Basel, Theodor-Herzl-Strasse 90, statt.

Gottesdienst im Trauerhaus: abends 19.45 Uhr;  
Mittwoch, Donnerstag, Sonntag und Montag.

Statt Blumen zu spenden,  
gedenke man bitte wohltätiger Institutionen.

DTX500095F



Kantorowicz

## XI. Im Exil (1933–1940)

### 1. Entlassung und Emigration

Den 30. Januar 1933 erlebte Hermann Kantorowicz während seines oben erwähnten Forschungssemesters in Florenz, in einem Land also, dessen Regime zwar ideologisch mit der nun in Deutschland an die Macht gekommenen nationalsozialistischen Bewegung verbunden war, das aber noch nicht wie in späteren Jahren von Deutschland so abhängig war, daß eine unmittelbare Gefahr für seine Person bestanden hätte. Er war jedoch gezwungen, eine Entscheidung zu treffen. Denn er gehörte zu den ersten fünfundzwanzig deutschen Professoren, die sofort nach der Machtergreifung ihres Amtes enthoben wurden, was allein schon zeigt, welchen Bekanntheitsgrad er sich durch seine politische und wissenschaftliche Wirksamkeit erworben und welchen Haß er dadurch auf sich gezogen hatte. Nach dem „Gesetz zur Wiederherstellung des Berufsbeamtentums“ vom 7. April 1933<sup>263</sup> konnten Beamte und Professoren entlassen werden, wenn ihre bisherige politische Tätigkeit keine Gewähr dafür bot, daß sie jederzeit rückhaltlos für den nationalen Staat eintreten würden oder wenn sie nicht-arischer Abstammung waren. Auf Kantorowicz trafen beide Kriterien zu. Am 25. April 1933 wurde er in den einstweiligen Ruhestand versetzt, am selben Tag wie Hermann Heller, Eugen Rosenstock-Huussy, Ludwig Wertheimer, Richard Honig, Guido Kisch und Gerhart Husserl. Am 26. September 1933 erfolgte die endgültige Entlassung Kantorowicz<sup>264</sup>. Gleichwohl erhielt Kantorowicz noch bis 1935 eine gekürzte Pension. Dies ist wohl darauf zurückzuführen, daß das „Gesetz zur Wiederherstellung des Berufsbeamtentums“ für Frontkämpfer des Ersten Weltkrieges und Beamte, die schon vor dem 1. August 1914 im Staatsdienst standen, Ausnahmen vorsah, bei denen die Entlassung nur über eine zwangsweise Pensionierung mit Pensionsanspruch zu erreichen war (das dafür erforderliche Interesse einer „Vereinfachung der Verwaltung“ war fast immer gegeben). Am 4. November 1935 wurden jene Ausnahmen aufgehoben und

<sup>263</sup> Reichsgesetzblatt I, S. 175.

<sup>264</sup> Horst Göppinger, Die Verfolgung der Juristen jüdischer Abstammung durch den Nationalsozialismus, Villingen 1963, S. 93. Zur Entlassung und Emigration Guido Kischs vgl. dessen Autobiographie *Der Lebensweg eines Rechtshistorikers*, Sigmaringen 1975, S. 97 ff.



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Kantorowicz

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kommt schon dadurch zum Ausdruck, daß den beiden Begriffen ein verschiedener Bedeutungsgehalt zukommt, mögen sie auch nicht scharf voneinander abgrenzbar sein. Während schon nach dem Sprachgebrauch unter „Anpreisen“ von Gelegenheit zu sexuellen Handlungen, der in Form einer Empfehlung oder Reklame enthaltene Anreiz zu verstehen ist, die angebotene Gelegenheit zu nutzen, genügt für das „Anbieten“ schon die ausdrückliche oder stillschweigende Erklärung der Bereitschaft zu sexuellen Handlungen, also der bloße Nachweis einer solchen Gelegenheit. Daß die Betroffene danach mit ihren Inseraten Gelegenheit zu sexuellen Handlungen angeboten hat, kann nach den getroffenen Feststellungen nicht zweifelhaft sein. Daß dies durch Verbreiten von Schriften geschehen ist, bedarf keiner weiteren Erläuterung.

Der Anwendbarkeit des absoluten Werbeverbots des § 120 Abs. 1 Nr. 2 OWiG steht vorliegend auch nicht entgegen, daß sich das Angebot zu entgeltlichen sexuellen Diensten nicht schon aus dem Wortlaut selbst oder dem Zusammenhang der Werbetexte, sondern nur aus den Umständen und der Üblichkeit ergab. Denn auch die verdeckte Werbung, die das Angebot zu entgeltlicher sexueller Handlung in „verbrämter“ oder (durchschaubar) getarnter Form vermittelt, wird nach einhelliger Rechtsprechung und dem überwiegenden Teil des Schrifttums vom Werbeverbot erfaßt, sofern für den durchschnittlichen Leser nicht zweifelhaft sein kann, daß damit für Prostitution geworben werden soll. Da das Gesetz, wie dargelegt, jede nach außen erkennbare Werbung für Prostitution verhindern will, kann es auch keinen Unterschied machen, ob ein Inserat die Dinge beim Namen nennt oder so umschreibt, daß hieraus oder aus den Umständen der Werbung für den durchschnittlichen, nicht ganz wirklichkeitsfremden Leser hervorgeht, daß eine Prostituierte Gelegenheit zu entgeltlichen sexuellen Handlungen anbietet. Diese Rechtsgrundsätze hat das AG richtig erkannt. Es hat angenommen, daß die unter der Bezeichnung „Hostess“ und unter der Angabe einer Telefonnummer in einer

Boulevardzeitung, zum Teil unter der Rubrik „le, Hostessen, Kavaliers“ veröffentlichten jeden nicht ganz wirklichkeitsfremden Leser erkennbar machten, daß damit Gelegenheit zu sexuellen Handlungen angeboten wurde. wiegend auf tatsächlichem Gebiet liegende keinen Rechtsfehler erkennen. Auch die Begriffe der ein unvermeidbarer Verbotsirrtum verhält der rechtlichen Nachprüfung stand.

Entgegen der Auffassung der Rechtsbeschwerde das Werbeverbot auch nicht dadurch gegen Verhältnissatz, daß „andere sexuell einschlägige“ (wie z. B. grob anstößige Kinoreklamen) Gesetzgeber „ungleich gewichtet und gewertet“ Hier fehlt es schon an der Vergleichbarkeit der Sachverhalte. Ebenso wenig kann aus der unterschiedlichen Verfolgungspraxis verschiedener Verwaltungen ein Verstoß gegen den Gleichheitsgrundsatz entgegengestellt werden, der einer Ahndung im vorliegenden (OLG Hamm NJW 1977, 687; MDR 1978, 954). Die Beweisaufnahme im genannten Verfahren hat allerdings ergeben, daß Zustellungen gegen das Werbeverbot von den Ordnungsbehörden kleinerer Städte, nicht aber durch die Verwaltung der Landeshauptstadt München verfolgt werden kann dahinstehen, worauf die unterschiedliche Verfolgungspraxis beruht. Bedenken, ob es tunlich ist, in kleineren Städten eine „verbrämte“ Prostitutionswerbung unterbinden, werden immerhin auch in der Rechtsprechung (Göhler aaO § 120 RdNr. 16 mit weit. w. weisen). Es liegt im pflichtgemäßen Ermessen der zuständigen Verwaltungsbehörde, ob sie in dem vorliegenden Art einschreitet oder nicht (§ 120 OWiG). Das Rechtsbeschwerdegericht hat keine Befugnis, die Ausübung des Ermessens durch die Verwaltungsbehörde zu überprüfen (OLG Schleswig GewA 390/391).

Glückwunsch

Friedrich Kessler 80 Jahre

Am 25. August 1981 hat Professor Dr. Friedrich Kessler M. A., LL.D., sein 80. Lebensjahr vollendet. Seine Schüler, Kollegen und Freunde in Deutschland gratulieren ihm zu diesem Tag und erinnern sich dabei dankbar der Bereicherung, die nicht nur die Rechtswissenschaft, sondern auch sie selbst persönlich von diesem Manne erfahren haben.

Friedrich Kessler ist einer jener großen Juristen, welche die mit dem Jahre 1933 einsetzenden Ereignisse aus Deutschland vertrieben haben. Als Sohn einer Juristenfamilie aus dem südwestdeutschen Raum im Jahre 1901 geboren (sein Vater war Oberlandesgerichtsrat in Stuttgart), studierte er nach dem Abitur u. a. in Berlin, an deren Rechtswissenschaftlichen Fakultät er sich im Jahre 1931 mit einer Schrift über „Die Fahrlässigkeit im nordamerikanischen Deliktsrecht“ habilitierte. Nach einer kurzen Tätigkeit als Richter übernahm er die Stelle eines Referenten im damaligen „Institut für Ausländisches und Internationales Privatrecht“ in Berlin (dem heutigen Max-Planck-Institut in Hamburg) und war nebenher als Privatdozent an der Handelshochschule in Berlin tätig. Im Institut arbeitete er im Team der bekannten deutschen Internationalrechtler und Rechtsvergleicher, die Deutschland im Jahre 1933 und danach zum größten Teil verlassen haben und später – vornehmlich in den USA und in England – berühmt geworden sind. Er selbst emigrierte in die Vereinigten Staaten.

Dort setzte er seine Studien an der Yale Law School fort, bis er daselbst im Jahre 1938 zum „Assistant Professor“ ernannt

wurde. Noch im gleichen Jahr erhielt er einen Ruf als „Associate Professor“ an die „University of Chicago“, dem er im Jahre 1942 stieg er in Chicago zum „Full Professor“ wurde 1944 als Anwalt in Illinois zugelassen.

Die wohl entscheidenden und fruchtbarsten Jahre sein sowohl als Schriftsteller wie auch als akademischer Lehrer brachte Friedrich Kessler jedoch an der „Yale Law School“ der er im Jahre 1947 – als Nachfolger des bekannten „Contract“-Autors Arthur Corbin – auf den renommierten „Sterling“-Lehrstuhl zurückberufen wurde. Die dortige Tätigkeit im Jahre 1970 ließ ihn abermals im wahrsten Sinne des Wortes zu neuen Ufern aufbrechen: Er folgte einem Angebot der „Law School“ der „University of California“ in Berkeley als „Visiting Professor“ weiterhin in Lehre und Forschung. Erst im Jahre 1977 beendete er seine Lehrtätigkeit in Berkeley.

Ungleich vielen seiner Emigranten-Kollegen liegt der Schwerpunkt der wissenschaftlichen Arbeit von Friedrich Kessler im internationalen Recht, nicht einmal in der eigentlichen Rechtsvergleichung. Friedrich Kessler wurde in der Sache vielmehr zum Meister vor allen Dingen des „law of contracts“. Der große Williston, dessen Ideen noch die erste Auflage des „Restatement of the Law Contracts“ aus dem Jahre 1934 herrschten, wurde von dem nicht weniger bedeutenden Arthur Corbin „überwunden“: der Glaube an die unverbrüchlichkeit des überlieferten Systems eherner Prinzipien des „common law“ (Williston) wurde von der Einsicht abgelöst, daß e

AG Beding  
Admission Control  
Aufg. 2. Corbin



wendig ist, in jedem Einzelfall eine gründliche Fakten-Analyse (Lehre von den „operative facts“) vorzunehmen, die allein dem Richter das Ergebnis seiner Entscheidung vermitteln könne (Arthur Corbin). Friedrich Kessler, der – wie gesagt – an der Yale Law School die Nachfolge von Arthur Corbin antrat, führte dogmatisch über Williston und Arthur Corbin hinaus. Weder wollte er – wie Williston – an den überlieferten Regeln des common law festhalten und sie durch Anpassungen an die neuen sozialen Erscheinungen, die im Gefolge der großen Depression auch die USA erschütterten, modifizieren. Noch wollte er, um dieser neuen Erscheinung Herr zu werden, – wie Arthur Corbin – „die Fakten sprechen lassen“. Sein Ziel war stattdessen ein Neubau der Regeln des „common law“ in vielen Bereichen. In seinem berühmten Werk „Contracts, Cases and Materials“, dessen erste Auflage im Jahre 1953 und dessen zweite Auflage im Jahre 1970 in Zusammenarbeit mit Grant Gilmore (Kesslers Nachfolger auf dem „Sterling“-Lehrstuhl an der Yale Law School) erschien, und in vielen Aufsätzen nimmt Kessler den Grundsatz der „freedom of contract“ zum Ansatzpunkt seiner Dogmatik. Seine von ihm immer wieder aufgeworfene Kernfrage lautet, wo die hierauf basierenden Rechtssätze ihre Grenzen finden und durch neue Regeln ersetzt werden müssen, etwa im Bereich der Allgemeinen Geschäftsbedingungen den Kunden oder im Versicherungsrecht den Versicherungsnehmer adäquat zu schützen. Grant Gilmore<sup>1</sup> kommentiert diesen Beitrag Friedrich Kesslers zur Weiterentwicklung des US-amerikanischen „contract Law“ wie folgt: „... many of (his) ideas ... have, in the 1970's

become legal commonplaces which everyone accepts and no one disputes. These ideas were by no means commonplaces in the 1940's. It is, at least occasionally, the happy fate of profoundly original thought to become old-hat within a generation of being first set down.“

Es hieße, die Schilderung der Persönlichkeit Friedrich Kesslers arg zu verkürzen, würde man nicht auch auf seine Bedeutung als akademischer Lehrer hinweisen. Viele deutsche Kommilitonen haben nach dem zweiten Weltkrieg in den USA im Hörsaal zu seinen Füßen gesessen. Der Eindruck ist unauslöschlich. Ein amerikanischer Kollege sagte mir einmal nach der Vorlesung: „Gee, I have never seen a man who can get so much excited about law, as him.“ Verabredungen unmittelbar nach der Vorlesung konnte er kaum treffen. Trauben von Studenten pflegten ihn zu umlagern; die Diskussionen hinderten ihn am Fortkommen.

Schließlich: Zu den schönsten Erinnerungen jeder USA-Reise gehören die persönlichen Begegnungen mit Friedrich Kessler und seiner Gattin, einer geborenen Kahn (die aus dem gleichen Berliner Hause stammt wie Franz Kahn, der am Ende des vergangenen Jahrhunderts, bzw. am Anfang dieses Jahrhunderts die Grundlagen des deutschen Internationalen Privatrechts zu schaffen half). Zuerst das malerische weiße Haus in New Haven an der Ostküste, dann in den 70er Jahren das Haus in der Michigan Avenue hoch oben in den Bergen von Berkeley mit dem Blick über die Bay von San Francisco: Mögen Friedrich Kessler noch viele Jahre fruchtbaren Schaffens und beiden Kesslers noch viele Jahre glücklichen Zusammenlebens vergönnt sein!

Otto SANDROCK, Münster i. W.

<sup>1</sup> In Yale Law Journal Bd. 84 (1978), 672 ff.

## Literatur

Heinrich Georg Ritzel/Joseph Bückler: Handbuch für die Parlamentarische Praxis mit Kommentar zur Geschäftsordnung des Deutschen Bundestages, Kommentator Verlag, Frankfurt/Main 1981, 874 Seiten, 168.– DM.

Wenn das Vorwort zu einem Handbuch für die Parlamentarische Praxis den derzeitigen Vorsitzenden des Geschäftsausschusses des Deutschen Bundestages bescheiden sagen läßt, die in diesem Band enthaltene Kommentierung stelle keine „amtliche“ Begründung zu der seit Oktober 1980 geltenden Neufassung der Bundestagsgeschäftsordnung dar, so ist dabei natürlich Koketterie im Spiel. Denn ganz selbstverständlich muß die Darstellung und Interpretation aus der Feder des Mannes, der in den mehr als 20 Jahren seiner Tätigkeit als Ausschußsekretär – wie die Bezeichnung untertreibend immer noch lautet – Parlamentarier als einfache Abgeordnete wie als Vorsitzende hat kommen und gehen gesehen, Authentizität und Autorität beanspruchen. Das gilt umso mehr, als es außer den Debattenbeiträgen bei der Beschlußfassung im Bundestag keine „Materialien“ im eigentlichen Sinne des Wortes gibt, also vor allem für den Fortbestand eigentlich kritikwürdiger und häufig auch schon kritisierte Regelungen der Geschäftsordnung sich eine offizielle Rechtfertigung nirgends findet. Der interessierte Leser wird beim ersten Durchblättern dieses Handbuchs die trotz ihres Bemühens um Vollständigkeit übersichtliche Zusammenstellung der einschlägigen Geschäftsordnungs-, Verfassungs- und Gesetzestexte nebst Anlagen deshalb mehr feststellend als wertend zur Kenntnis nehmen und sich auf den Kommentarteil konzentrieren, der an den geschriebenen Normen der Geschäftsordnung entlang einen Einblick in das Binnenrecht des Bundestages geben soll.

In dieser Zielsetzung hat das Handbuch für die Parlamentarische Praxis einen bzw. anderthalb Vorgänger im selben Verlag: 1952 erschien von dem damaligen Ausschußvorsitzenden und dessen Mitarbeiter der „Ritzel/Koch“ als Kommentar zu der gerade verabschiedeten ersten eigenen Geschäftsordnung des Bundestages, nachdem man sich vorher mit dem Rückgriff auf die Verfahrensregeln des Weimarer Reichstages begnügt hatte. Eine solche Handreichung war für die Mitglieder des noch nach seinem Selbstverständnis suchenden ersten Parlaments der zweiten deutschen Republik unentbehrlich; mit einer gewissen Nostalgie nimmt man heute das immer noch interessante

schmale blaue Leinenbändchen zur Hand. Anknüpfend an diese Tradition lieh Heinrich Georg Ritzel Anfang der 70er Jahre seinen Namen dem Unternehmen, die inzwischen vorgenommenen Änderungen und gemachten Erfahrungen aufzuarbeiten und in einem Handbuch für die Parlamentarische Praxis zusammenzustellen. Dieser erste „Ritzel/Bückler“ teilte das Schicksal mancher Loseblattveröffentlichung, nie abgeschlossen zu werden. Daß der langjährige Direktor des Deutschen Bundestages und damit Dienstvorgesetzte von Bückler, Troßmann, 1967 mit dem an angelsächsischen Vorbildern orientierten „Parlamentsrecht und Praxis des Deutschen Bundestages“ und zehn Jahre später mit einem eigenen Kommentar zum „Parlamentsrecht des Deutschen Bundestages“ aufwartete, mag die Lust an einer Fortsetzung nicht gerade gefördert haben. Die Überarbeitung und Neufassung der Geschäftsordnung bot dann Anlaß zu einem Neuansatz, der sich allerdings dem Vergleich mit diesen Vorgängern und Konkurrenten ausgesetzt sehen muß.

Der Schwierigkeit, daß nicht alles, was die parlamentarische Praxis bestimmt, auch in Paragraphen der Geschäftsordnung Ausdruck findet, begegnet Bückler – wie vor ihm Troßmann – dadurch, daß er gelegentlich längere Vorbemerkungen (etwa bei § 10 zu den Fraktionen, bei § 35 zu den Redezeiten, bei § 54 zu den Ausschüssen oder bei § 125 zum Grundsatz der Diskontinuität) oder Anhänge (etwa bei § 12 zu den Stellenanteilen der Fraktionen bei der Besetzung von Positionen oder bei § 46 zur Fragestellung bei Abstimmungen) oder gar beides (etwa bei § 48 zu den Abstimmungsregeln) einschleibt. Gerade darin finden sich dann häufig Perlen aus der Vergangenheit, die selbst Spezialisten und Kennern der Parlamentszene unbekannt sein dürften, aber eben auch die These von dem „ritualisierten historischen Irrtum“, den viele Verhaltensweisen des Parlaments heute manifestieren (vgl. dazu Jekewitz, Der Staat 15 (1976), S. 537 ff), mit treffenden Beispielen stützen. Dort ist auch vor allem die ältere, weitgehend in Vergessenheit geratene Literatur verwertet, deren durchgehende Aufarbeitung – auch wenn man die Anlage als Handbuch in Rechnung stellt – an anderer Stelle schon einmal vermißt werden könnte. Diesen Einwand mußte sich aber auch schon Troßmann entgegenhalten lassen (vgl. die Rezensionen in ZParl. 1978, S. 131 ff, und GA 1978, S. 28 ff), wobei letzterer meist dort reichlich verhalten argumentiert, wo seine persönliche Meinung gegen die Parlamentspraxis steht,



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## In Recognition

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Address (Laudatio) on the Bestowal of the Degree of Doctor Iuris  
Honoris Causa of Cologne University (Law Faculty) on  
Friedrich Kessler

*Andreas Wacke\**

Dean,  
Ladies and Gentlemen,  
In particular, highly esteemed colleague Kessler!

I. This year Cologne University is celebrating its 600th anniversary.<sup>1</sup> It was founded on the model of the University of Paris (which is about one century older) by privilege of Pope Urban VI, dated 21 May 1388. Cologne's jubilee coincides with the birthday of Europe's oldest university at Bologna, which is 900 years old. Among the universities in the then so-called Holy Roman Empire of the German Nation, that of Cologne is the fourth oldest, founded only a few years or decades later than those of Prague, Vienna, and Heidelberg. And within today's Federal Republic of Germany, Cologne is merely two years younger than its Heidelberg sister.

An occasion as rare as a 600th anniversary must be celebrated in accordance with its eminent importance. It was beyond question for Cologne's Law Faculty (which is the oldest of today's seven faculties)<sup>2</sup> that on this occasion three foreign scholars of repute should be honored with the degree of doctor iuris honoris causa, thus expressing Cologne's links with the international world of scholarship. In choosing those three candidates my faculty has taken great pains. In particular, the title has never been awarded for merely political reasons. Only prominent scholars have been considered as candidates, those whose works reflect a close relationship with German legal thinking.

After due consideration one professor from Austria, one from Japan, and the third from the United States were chosen—namely Felix Ermacora of Vienna, a specialist in public international law, Hiroshi Shiono of Tokyo, professor of administrative law, and last

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\* Professor, University of Cologne Law School.

1. Erich Meuthen, et al. (eds.), *Kölner Universitätsgeschichte*, 3 vols., (1988).

2. Its history is recently described in H. J. Becker, "600 Jahre Rechtswissenschaft in Köln," in *Festschrift der Rechtswissenschaftlichen Fakultät zur 600-Jahr-Feier* 3-30 (Cologne 1988).



but not least, Friedrich Kessler, an expert in the fields of private and comparative law. Following the order of seniority, Kessler should be mentioned first of all. The other two scholars were honored at Cologne University in July 1988. For health reasons Professor Kessler was unfortunately unable to travel to Cologne on that occasion. So the dean of my faculty, Prof. Dr. Wolfgang RUFNER, asked me to convey to you, Mr. Kessler, the award of honors on his behalf. Fulfilling this request is also a great honor to me, all the more since I am delighted to be visiting your famous university for the first time within the framework of the long-standing exchange of professors between both faculties.

II. As most of you know, for Friedrich Kessler life was not without obstacles. He had to move about a number of times. Born in 1901 in Hechingen, he is nearly as old as this century. Incidentally, he will be 87 tomorrow, August 25th. His father was judge at the Stuttgart appellate court. Immediately after the first World War, Friedrich began reading law at Tübingen University, but to his great disappointment he had to return to grammar school, because his final school exam, which had been brought forward for war reasons, was annulled. Later he continued his studies in Munich, Marburg, and Berlin. Such mobility reflects his early endeavor to widen his horizon. In Munich, the scholar who impressed him most was Max Weber.

At an early stage, Kessler also became interested in American law. In 1928 he graduated from Berlin University with a doctoral thesis on U.S. marriage law. Then he worked at the newly founded Kaiser-Wilhelm-Institute of Foreign and International Private Law at Berlin, of which Ernst Rabel was the first director. His dissertation was published in the first volume of what is now called *Rabels Zeitschrift* (1927, pp. 185-207, 816-866).

In 1932 Kessler completed his professoral thesis (Habilitationsschrift) on negligence in North American law of delict ("Die Fahrlässigkeit im nordamerikanischen Deliktsrecht", Berlin, 187 pp.). Already this early publication, still worth reading, shows Kessler's mastery. It ideally combines insight into the historical background of the law of torts with a brilliant comparative description of its Anglo-American development up to the early 1930s, with emphasis on the law of negligence and with due regard to German law. Thinking in terms of legal principles and the concrete manifestations of case law are intertwined. Pragmatic approach prevails, which—in line with classical Roman law—avoids all false generalizations, such as, for example, Rudolf von Jhering's exaggerated characterization of *culpa*, or fault, as the basis of all delictual or contractual liability. And Kessler's early book even hints at his later interests in the field of contract law, for instance with regard to problems of product liability, in rightly stating that in this matter the law of torts is—in his words—"the pioneer of progress" (p. 111).

He then lectured at the Berlin School of Economics (*Handels-*

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*hochschule*) for a short time, up to the beginning of Nazi rule. Due to his Jewish wife, his political convictions, and his respect for the rule of law, Kessler decided to leave Nazi Germany.

Kessler's fate typifies the fate of numerous emigrants during the so-called Third Reich. Thousands left our country, among them numerous academics who sought to establish a new life in a new country. For Germany, this brain drain was an immeasurable loss. After the Second World War it took many years to regain international standards in academic research.

The liberality shown by the United States in offering refuge is commendable.<sup>3</sup> Yet the start was arduous for many, such as the specialist in Roman law, Hans Julius Wolff, who had to make a living as a dish washer and a language teacher. Kessler was saved such hardship. He continued working in his field as law professor, and after lecturing at Yale, went to Chicago in 1938. In 1947 he returned to Yale. His position as Sterling Professor there up to 1970 marks the central period of his creativity. It was in this period that he published his case book on contract law, which up to 1986 has been published in three editions.

After his retirement in 1970, Kessler went to Berkeley, where he taught regularly up to 1978 and occasionally later. He also lectured as a Visiting Professor at Harvard.

His merits as an eminent scholar have been honored by other universities and law associations. He was awarded an M.A. at Yale in 1947 and an LL.D. at Boston in 1970. He is also a member of the Illinois Bar, and a life member of the American Law Institute.

III. Understandably, many immigrants strive to adapt themselves to their host country, to be "more American than the Americans themselves." Kessler resisted that temptation. He never sought to shake off his continental European upbringing in legal thinking. He never fully dismantled the intellectual bridge linking his American experience with his native land. Experts characterize his case book on American contract law as "the most European." In numerous contributions to German *Festschriften* and collected works Kessler portrayed developments of American contract law from the perspective of a scholar familiar with German legal thinking.

Kessler has up to this day remained in an intellectual way what may be called a "Wanderer between two worlds"—quoting the title of a book by Walter Flex, which was much read in Germany during the First World War, when Kessler was a young man.

It was this comparative perspective embodied in his method of legal research that was decisive for the unanimous resolution of the Law Faculty of Cologne University to bestow the title of doctor iuris honoris causa upon Mr. Kessler.

3. The fate of German lawyers who immigrated to the United States is vividly described by Ernst E. Stiefel, "Die deutsche juristische Emigration in den USA," 1988 JZ 421-426.

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## Grant Gilmore as I Remember Him

Friedrich Kessler†

Grant Gilmore's was a singularly rich life. His writings on commercial law, contracts, and admiralty, and his work on the Uniform Commercial Code, opened new vistas; they inspired his colleagues and students alike. Grant's many works were distinguished by penetrating analysis, by the elegance of his prose, by what the French call *clarté*. The success of Grant's work is due in large measure to an enviable and supreme self-confidence, which enabled him to strike out boldly in his attack on many a traditional doctrine and in his attempt to blaze new trails. As a result of his work, the law in the fields he chose for study will never be the same.

Fate has not allowed him to finish the work he set out to do. The planned revision of his work on secured transactions<sup>1</sup> may never appear. Nor will his part of the biography of Justice Oliver Wendell Holmes that he undertook to complete.<sup>2</sup> Gilmore's part of the third edition of our casebook on contracts<sup>3</sup> had to be entrusted to other hands.

Grant Gilmore was not only my coauthor, he was a personal friend. As friendships go nowadays, ours was a friendship of long standing. When I rejoined the Yale faculty in 1947 after a stay of nine years in Chicago, Grant arranged for me to teach a section of the contracts course. My own casebook (coauthored by Malcolm Sharp) was not yet completed and so I used the book that Addison Mueller, who taught another section of the course, had prepared. Grant was keenly interested in contracts and it came about that the three of us met almost daily in Mueller's attractive office to discuss the many challenging questions raised by Mueller's book.

After an interval of many years, my own casebook required reworking, and since Sharp was no longer interested in the book, a new partner had to be found. After being turned down by two of my colleagues, I approached Grant and, after making full disclosure, asked him to be my co-author. Much to my surprise, he accepted immediately. I had found an ideal collaborator.

Readers familiar with Grant's style will have no difficulty in recognizing his contribution to the book. In addition to writing eight chapters,

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1. G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (1965).

2. The first two volumes of that biography have already been published. See 1 M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870 (1957); 2 M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882 (1963).

3. F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS (2d ed. 1970).



## Grant Gilmore

Grant also prepared a teacher's manual.<sup>4</sup> It is a pity that the manual is not available to the general public. It not only guides the reader through the labyrinth of contract law, but it also contains an introduction of its own that offers a gentle critique of my own introduction in the casebook.

Although we never talked about it, Grant and I were convinced that collaboration was possible despite differences in opinion. And we did have many differences in opinion. I have not radically changed my views as to the central position of freedom of contract nor do I believe in what Grant was fond of calling "contorts." By introducing the concept of contort, Grant meant to express his belief that contracts and torts would eventually be absorbed into a general law of obligation.<sup>5</sup> I would express the idea somewhat differently and more cautiously. In the language of Patterson, "Anglo-American law, with its consensual-relational duties, its feudal survivals and its original tort theory of contract, can stretch its conception of consensual obligation pretty far."<sup>6</sup> But consent will remain a vital ingredient of contractual obligations; though there are many bridges between contracts and torts, their distinctive features will endure. However deep our disagreement on this or other scores, Grant and I had a most successful collaboration.

Grant was an eminently private person. He was also a very kind and tolerant friend to whom I owe an immense debt of gratitude. What he said about me in a most generous essay in the *Yale Law Journal*<sup>7</sup> applies with equal force to him. The evenings in his house, the hospitality of the Gilmores on Edgehill Road, belong to my fondest memories. They made my return from Chicago to New Haven a most enriching experience.

4. F. Kessler & G. Gilmore, *Teacher's Manual, Contracts: Cases and Materials* (1972) (unpublished).

5. G. GILMORE, *THE DEATH OF CONTRACT* 87-94 (1974).

6. Patterson, *Compulsory Contracts in the Crystal Ball*, 43 *COLUM. L. REV.* 731, 743 (1943).

7. See Gilmore, *Friedrich Kessler*, 84 *YALE L.J.* 672 (1975).



Yale 1975

## Friedrich Kessler

Grant Gilmore†

All of us who live by the law know from our own experience that everything we do is determined by the society of which, willingly or unwillingly, we are a part. The subject matter of the law, unlike that of other intellectual disciplines, has no independent existence divorced from the society in which a particular legal system is embedded. We are time-bound and we are space-bound; otherwise we are not lawyers.

During the 1930's the Nazi government forced many of the best minds in Germany and Austria into exile. I am sure that no one who has not experienced that fate can even begin to understand the personal tragedy involved. The intellectual problems of the exile—whom, with our 20th century gift for euphemism, we call the refugee—may be somewhat easier for those of us who have had the good fortune to live out our lives in the culture we were born into to comprehend.

It seems to me that the lawyer confronts, in his land of refuge, a situation of appalling difficulty. The great mathematician in residence at Princeton has no need to readjust his theories to take account of American conditions. It is at least arguable that the great psychoanalyst can carry on his work quite as effectively in his London study as he could have done in Vienna. But the legal scholar, translated at midpoint in his career from Berlin to New Haven or Chicago, faces problems of a different order of magnitude.

I assume that the simplest part of the problem is learning and mastering the new system. That merely requires a few years of diligent study—an unpleasant but by no means an insuperable task. What seems to be difficult to the point of impossibility is to fuse the old learning and the old insights with the new learning and the new insights in such a way that each will enrich the other. I have known excellent lawyers who could, with ease, switch back and forth between a civil law system and a common law system but who seemed to keep their separate bodies of learning in watertight compartments within

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Friedrich Kessler

their own minds. Fritz Kessler's extraordinary achievement was to become a common lawyer without ceasing to be a civilian.

A German lawyer whose intellectual formation took place during the 1920's and the early 1930's must have been acutely aware of the intolerable stresses which play upon an established legal system during a period of social dissolution. For Germany the trauma of defeat in World War I was followed by a disastrous inflation; the eerie truce of the Weimar Republic led to the erosion of all governmental authority and the acceptance of dictatorship and Hitler. No lawyer who had lived through such a period could have retained any illusions about the stability and permanence of any legal system in a time of troubles. Unprecedented solutions to unheard of problems had become the legal order of the day.

In the early 1930's the orthodox legal establishment in the United States seems to have felt untroubled and secure. After the terrible convulsion of the Civil War this country had enjoyed the longest period of what can, without irony, be described as peace and prosperity that has fallen to the lot of any modern industrial state. The war with Spain and World War I had hardly disturbed our tranquility. Periods of economic recession, occasionally violent, had all been short-lived and seem never to have affected the mass of the population. Against this background of long-continued social, economic and political stability, American law had apparently achieved a sort of legal nirvana. The great treatises of Wigmore, Williston and others had organized, rationalized and purified the major fields into which we divide the Corpus Juris. The American Law Institute was about to complete its strange task of reducing the fundamental principles of the common law to black letter text in the Restatements. The idea of law—a stable law for a stable society—seems to have achieved an extraordinary degree of popular acceptance, among laymen and lawyers alike.

It is true that there were voices of dissent. The ravages of the Great Depression had, for the first time in the history of the Republic, created the beginnings of a native radical movement, although in truth the radicals of the 1930's embraced the American dream quite as enthusiastically as their conservative counterparts. On the legal front the Realists in the law schools were making angry noises, but it was far from clear exactly what it was that they were angry about. The mood of the country was perfectly caught up in the cheerfully meaningless statement that the only thing we had to fear was fear itself. That is, nothing was really wrong, the troubled clouds would



pass away and, once again, everything would be for the best in the best of all possible worlds.

It may be that everything does work out for the best. I am inclined to think that there could never have been a better time for someone with Kessler's gifts and background to have come among us. His German experience and training no doubt made it easier for him than it was for any of his American-born contemporaries to avoid the dogmatic excesses both of the conservatives who fancied themselves to be traditionalists and of the Realists who fancied themselves to be radicals.

He chose to do his principal work in the area of contract law. It is clear from his earliest articles that he had decisively rejected what had come to be accepted as the orthodox or classical version of American contract law, formulated principally by Williston in his great treatise and in the Restatement of Contracts whose preparation Williston had dominated. That is to say, Kessler rejected the Willistonian formulation not only as a normative statement of what American contract law ought to be but as an historical statement of what in fact it had been. Undoubtedly Kessler felt himself much more at home, intellectually, with Arthur Corbin whose own lifelong work on contracts, which culminated in the publication of his treatise in 1950, had been in effect devoted to destroying the Willistonian version of contract theory. Indeed Kessler felt such veneration for Corbin as a friend and as a scholar that in the 1960's he devoted much of his time and thought to a project, which has not been realized, of redoing (as distinguished from updating) the entire Corbin treatise. And yet Kessler, in his analysis of contract, ultimately parted company with, or went beyond, Corbin. Corbin's great accomplishment had been to dispel the illusion that there was or ever had been or ever could be a unitary theory of contract or a single doctrine of consideration and so on. Corbin, who had little interest in or use for abstract doctrine, stopped with his atomistic disintegration of received theory and counseled that we should devote ourselves, principally or perhaps exclusively, to the study of what he liked to call the "operative facts" of cases. To Kessler the idea that there could be salvation in studying the "operative facts" seemed to be quite as much an illusion as the idea that there could ever have been a unitary theory of contract. Toward the end of a remarkable article on contracts of adhesion,<sup>1</sup> Kessler (without naming Corbin) commented that: "The prevailing dogma, . . . in-

1. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 48 COLUM. L. REV. 629 (1943).



sisting that contract is *only* a set of operative facts, helps to preserve the illusion that the 'law' will protect the public against any abuse of freedom of contract."<sup>2</sup> In Kessler's view a broader philosophical base was needed.

A somewhat detailed analysis of the contracts of adhesion article will throw light not only on Kessler's own ideas and the theoretical structure toward which he was working but also on his unique contribution to American legal scholarship. The preliminary point should be made that many of the ideas in the article have, in the 1970's, become legal commonplaces which everyone accepts and no one disputes. These ideas were by no means commonplaces in the 1940's. It is, at least occasionally, the happy fate of profoundly original thought to become old-hat within a generation of being first set down.

In "Contracts of Adhesion" Kessler first sketched the development of a theory of contract which largely depended on the autonomy, or freedom of the will, of the contracting parties. He linked that development with the development of free enterprise capitalism as that system had come to be in the 19th century. "[F]reedom of contract," he commented, "is the inevitable counterpart of a free enterprise system. As a result, our legal lore of contracts reflects a proud spirit of individualism and of *laissez faire*."<sup>3</sup> However, "[t]he development of large scale enterprise . . . made a new type of contract inevitable—the standardized mass contract." Such contracts, which have many useful features, are, typically, what Kessler called "contracts of adhesion"—that is, "take it or leave it" contracts imposed by enterprises in a strong bargaining position on their customers or clients who have no choice but to deal on the terms dictated by the stronger party. Courts and commentators, wedded to a unitary theory, had failed to give overt doctrinal recognition to the emergence of a radically new type of "contractual" arrangement. Instead, they had sought to pursue the policy of protecting the weaker against the stronger party by indulging in tortured interpretations of contractual clauses. "Society had thus to pay a high price in terms of uncertainty for the luxury of an apparent homogeneity in the law of contracts."<sup>4</sup> As a concrete illustration of his thesis, Kessler took the law of insurance—particularly the situation of the applicant for insurance who suffers loss before the insurance company has got around to "accepting" the "offer" and issuing a formal policy. Under our classical contract theory the insurance

2. *Id.* at 641.

3. *Id.* at 630.

4. *Id.* at 633.



company could not, of course, be liable in such a situation. And yet many courts had indeed held the companies liable—if not in contract then in tort. Kessler's conclusion was:

[T]he courts pay merely lip service to the dogma that the common law of contracts governs insurance contracts. With the help of the law of torts they nullify those parts of the law of contracts which in the public interest are regarded as inapplicable. Disguised as tort law the courts recognized a liability for *culpa in contrahendo* thus making new law with regard to the formation of insurance contracts.<sup>5</sup>

Kessler then reviewed examples of what he considered to be "inevitable" "inconsistencies and contradictions within the legal system resulting from the uneven growth of the law and from conflicting ideologies"—such as the fragmentation of consideration theory and the continuing growth, as a counter-principle, of the idea which came to be known as promissory estoppel and won a grudging acceptance in § 90 of the *Restatement of Contracts*. In the last few pages of the article he moved to broad philosophical ground:

The individualism of our rules of contract law, of which freedom of contract is the most powerful symbol, is closely tied up with the ethics of free enterprise capitalism . . . .

With the decline of the free enterprise system due to the innate trend of competitive capitalism toward monopoly, the meaning of contract has changed radically. . . . Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms . . . .<sup>6</sup>

In the happy days of free enterprise capitalism the belief that contracting is law making had largely emotional importance. Law making by contract was no threat to the harmony of the democratic system. On the contrary it reaffirmed it. The courts, therefore, representing the community as a whole, could remain neutral in the name of freedom of contract. The deterioration of the social order into the pluralistic society of our days with its powerful pressure groups was needed to make the wisdom of the contract theory of the natural law philosophers meaningful to us . . . .<sup>7</sup>

For a pluralistic society, a pluralistic theory of contracts was needed: "[F]reedom of contract must mean different things for different types of contracts."<sup>8</sup>

5. *Id.* at 635; on *culpa in contrahendo*, see p. 678 *infra*.

6. *Id.* at 640.

7. *Id.* at 641.

8. *Id.* at 642.



Friedrich Kessler

There are three aspects of Kessler's thought in the contracts of adhesion article to which I would like to draw particular attention.

The first is his linkage of the development of classical contract theory and in particular of the great symbol, freedom of contract, to the development of "free enterprise capitalism" and of the economic theory of *laissez faire*. That there was such a linkage has come to be one of the truisms of much current legal writing. Kessler must have been one of the first scholars to have made the point explicitly that late 19th century economic theory and late 19th century legal theory had much in common and that both could be taken as having instinctively reflected the extraordinary changes in the methods of production and distribution which, in the industrialized countries of Western Europe and in the United States, had followed the industrial revolution of the 18th century. At least in this country he was, so far as my own knowledge takes me, the first to develop this idea, which has had profound consequences both on our understanding of our legal past and on our evaluation of our legal present.

The second point is his insistence that by the 1940's American contract law, reflecting the society which gave it birth, had already entered what would undoubtedly be a protracted period of crisis and breakdown. It was by no means true that the only thing we had to fear was fear itself. What we had to fear was the innate tendency of the economic system toward increasing monopoly and the "deterioration" of the social order into contending pressure groups. Under such economic and social pressures, the greater part of our late 19th century theory of contractual obligation would have to be reworked. Kessler used the insurance cases to demonstrate how the reworking process was in fact being carried out. The basic point of his argument was, however, that the inevitable process could be carried out, or could happen to us, in various ways. A poor way of doing it was for the courts to continue to give "lip service" to outmoded doctrines while, at the same time, they discovered and followed complicated routes of escape to avoid the results which the doctrines evidently commanded. That was what most of the courts had been doing in the insurance cases. A better way, Kessler suggested, would be to recognize that radically changed circumstances require radically new doctrines. Once we have recognized that, we can at least go about fashioning our new doctrines rationally. Rationality is no guaranty of a successful outcome but it is certainly to be preferred to the pretense that we are standing by the old rules while in fact we are, with varying degrees of discretion, avoiding their application. (That writer - Kessler - had a vast



amount of unnecessary confusion about what the law really is—a confusion which afflicts not only laymen but lawyers, judges and even law professors.

The preceding discussion brings us to our third point, which is the altogether remarkable way in which Kessler's analysis of American contract law was enriched by his civil law background. I earlier quoted a passage from his discussion of the insurance cases in which he wrote: "Disguised as tort law the courts recognized a liability for *culpa in contrahendo* . . ."<sup>9</sup> "*Culpa in contrahendo*" is not, I assume, a term of art with which most American lawyers are familiar (except for the happy few who had the good fortune to study their contract law with Kessler).

The *culpa in contrahendo* idea was familiar in German jurisprudence, having been introduced by Jhering in the 1860's and having subsequently had a considerable influence on the development of contract law, both decisional and statutory, in Germany and other European countries.<sup>10</sup> The idea, stated in a brief and oversimplified form, was that there are many situations in which liability should be imposed on a party whose lack of diligence, carelessness, negligence or other fault (*culpa*) causes the failure of negotiations toward a contract in which he and some other party (or parties) have been engaged. The idea thus assumed what might be called a pre-contractual liability: the fact that *A* and *B* have entered into a process of contractual negotiations imposes on both a duty to go forward in good faith. The failure of the negotiations by the fault of either should lead to the imposition of liability on the party at fault, who should be required to reimburse the innocent party for any losses suffered in reasonable reliance on the assurances, representations or other actions of the party chargeable with fault.

In the contracts of adhesion article Kessler had introduced *culpa in contrahendo* in connection with the American cases which had, on no satisfactory theory, imposed liability on dilatory insurance companies—a situation which the *culpa in contrahendo* idea fitted like a glove. Twenty years later he returned to the subject in a magisterial article which argued, with a wealth of learning, (and, in my own opinion, conclusively proved) that, over a broad spectrum of contract law, American courts have for a long time been reaching results which

9. See p. 676 *supra*.

10. See Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).



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are entirely consistent with civil law *culpa in contrahendo* theory.<sup>11</sup> However, the American judges, unlike their civil law counterparts, have not had the benefit of anything like a well-articulated theory. They have been condemned to the uncertain fate of explorers penetrating an uncharted wilderness. Consequently the growth of American law in this area has been ragged, uneven, eccentric and needlessly confused. In law as in most other things there is much to be said for knowing not only where you want to get to but also what the best way of getting there is. A decent theory is to a judge what a good road map is to a tourist in a strange country.

Most foreign legal scholars who come to this country are baffled at the enormous investment of time and thought which American law teachers make, not only in their teaching but in the preparation of teaching materials. Kessler's conversion to the American approach was symbolized by the publication of his *Cases and Materials on Contracts*, the first edition, prepared with the help of his colleague, Professor Malcolm Sharp of the University of Chicago Law School, having appeared in 1953. Most casebooks are not much more than cannibalizations of the other casebooks in the field. Kessler's casebook is one of the very few which can profitably be studied as an intellectual construct. His analysis of emerging trends in contract law, which, in the best Socratic method, he chose to leave implicit in his arrangement of the cases, was startlingly original—so original indeed as to mystify and discourage some would-be users of the book. During the late 1960's I worked with Kessler on the revision of the casebook for a second edition, which appeared in 1970. In the course of working my way through the materials, I found myself continually amazed at the regularity with which the insights which had guided him when he first put the materials together in the 1940's had been verified by the case law results of the intervening 20 years. And, from our discussions and correspondence, it soon became clear that his hypotheses on the future course of the law were as fertile and as imaginative in the late 1960's as they had been 20 years earlier. It may well be that prediction is not what legal scholarship is all about. Even so, there are few of us who would not take at least a modest pleasure in seeing our own predictions come true within our lifetimes.

The most innovative feature of the original edition of the casebook was the inclusion of a series of chapters on specialized types of contracts which had been subjected to an unusual degree of governmental



regulation and control. Thus there was a chapter on the impact of the antitrust laws on contractual arrangements, a chapter on labor contracts or collective bargaining agreements, a chapter on insurance contracts and a chapter on automobile dealer franchises. The inclusion of this material, which had been entirely foreign to the basic course in contracts in American law schools, reflected the theoretical position which Kessler had taken in the contracts of adhesion article: that the growing pluralism of our society must inevitably be reflected in a growing pluralism of our contract theories. It is also clear, from Kessler's published writings during the 1950's, that his own principal interest had become the impact of governmental regulation and control on the underlying forms of contractual obligation which were affected. It should be added that Kessler's innovative approach to what the basic contract course should be about does not seem to have caught on in the academic marketplace. That may be because there are few instructors who move as easily as Kessler does from contract theory to economic regulation. Or it may be that the tradition of specialized courses in the law school curriculum was too powerful to be displaced. Or that Kessler, as he has done not infrequently, had put forward a novel idea long before most of his colleagues were ready to accept it. It is by no means beyond the realm of possibility that the law school contracts course of the 1980's will have evolved along the lines that Kessler apparently envisioned in the 1940's.

I am inclined to believe that civilians have always tended to rank correct—or at least coherent—theory higher in the hierarchy of legal values than common lawyers have. We have always been devoted to what I once described as the typically muddle-headed process of thinking known as the genius of the common law.<sup>12</sup> And as Holmes (who was not always faithful to his own precepts) cautioned us long ago, we should, as lawyers, be guided not by logic but by experience—although it is not all that easy to understand how a nonlogical system can, on any theory, qualify as a system of law.

The downgrading of theory, doctrine or rules has been a notable feature of a great deal of 20th century American legal writing. Corbin's impatience with doctrine and his almost obsessive concern with the operative facts of cases may be taken as prototypical of this approach. During the 1920's and 1930's the ill-assorted and diverse group which came to be known as the Legal Realists preached a contempt for doctrine which, at its worst, degenerated into a nihilistic anti-intellectual-

12. 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 202 (1965).



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ism. Another aspect of the antidoctrinal bias of most of the Realist writing was the vigorous promotion of what came to be called empirical studies, using techniques inspired by or borrowed from our cousins the social scientists—particularly the sociologists. This part of the Realist construct has continued to flourish down to our own time, although its practitioners have long since ceased to describe themselves as Realists. The empirical study idea, in a nutshell, comes down to this: If you gather all the facts (or all the “relevant” facts) about a problem, you will be in a better position to decide the case, draft the statute or what not than you would be if the facts were not available to you. The only trouble with this attractive and apparently common-sensical idea is that, with respect to any problem complex enough to be worth thinking about, it is not true. The facts cannot be gathered; even if they could be gathered, they would, having lost currency, no longer be facts (except in the historical sense) by the time you got around to evaluating them. It was bad enough for a hypothetical 19th century judge to say: It is not I who speak but the law which speaks through me. It would be even worse for a hypothetical 20th century judge (or legislator) to say: It is not I who speak but the facts which speak through me. The illusion of certainty, however arrived at, is always to be shunned.

I think that Kessler was one of the very few men of his generation who, having decisively rejected the doctrinal orthodoxy of the period—the Restatement of Contracts and all that—seems never to have been tempted to go on to some form of antidoctrine as salvation. The nihilists said: If your theory isn't perfect, it isn't anything—tear it down. The social scientists said: Don't give us theory—give us facts. Kessler, undoubtedly influenced by his training as a civilian, said: If our old theories no longer work as they should, we need new theories, but the principal thing is to understand why it is that we are doing what we are doing instead of doing something else.

My impression is that there has been, over the past few years, in the law reviews and in monographs, much more theoretical investigation and inquiry than I can remember having seen in the literature before, say, 1970. I am thinking principally of writing in the field of contract—of which there has been a great deal—but I would be surprised if the same phenomenon has not manifested itself in other fields. I do not mean to suggest that Kessler is responsible for this apparently dramatic resurgence of interest in basic theory, although it is clear, from the regularity with which his articles are being cited, that his work has not been forgotten. But it is true that problems of



the type which, from the 1940's on, engaged Kessler's restless mind and energies have, almost overnight, come to be of consuming interest to a great many excellent minds in the 1970's.

Kessler has always been an intensely private man. He seems to have been uninterested in public acclaim, kudos and the outward trappings of success. He worked by himself, for himself, paying not the slightest heed to the prevailing intellectual and academic fashions. Perhaps, in his far from idle retirement, it may amuse him to be told that the crowd appears to be following hard on his once solitary footsteps.



## NACHRUFE

## Hans Kelsen †

Einundeinhalb Jahre, nachdem seines 90. Geburtstages, fast könnte man sagen, weltweit gedacht werden konnte, ist Hans Kelsen am 19. April 1973 gestorben. Es erscheint weder nötig noch möglich, etwas Neues über Leben, Wirken und Bedeutung dieses großen Rechtsgelehrten zu sagen. Anlässlich seines 80. und seines 90. Geburtstages hat diese Zeitschrift mit Glückwünschen seiner in knappen Würdigungen gedacht<sup>1</sup>.

So mag der Lebensweg Kelsens, der zugleich eine Epoche europäischer politischer Geschichte widerspiegelt, ganz kurz in Erinnerung gerufen werden<sup>2</sup>. Er wurde am 12. Oktober 1881 in Prag geboren, wuchs aber in Wien auf, wo er sich 1911 mit einem ersten großen Werk „Hauptprobleme der Staatsrechtslehre“ an der rechts- und staatswissenschaftlichen Fakultät habilitierte. Nachdem er dort 1917 außerordentlicher Professor geworden war, folgte er 1919 dem berühmten österreichischen Professor für Staats- und Verwaltungsrecht *Edmund Bernatzik* auf dessen Lehrkanzel. In die Zeit dieser seiner Tätigkeit fällt seine maßgebliche und den Verfassungsinhalt entscheidend mitbestimmende Arbeit an der österreichischen Bundesverfassung vom 1. Oktober 1920, deren wesentliche und beste Bestandteile nach wie vor von ihm bestimmt sind. Als vielleicht größte Leistung ist hier die Ge-

staltung der Verfassungsgerichtsbarkeit zuzunennen, deren Grundzüge sich ungeachtet mancher Ergänzungen bis heute bewährt haben. Insbesondere hatte es Kelsen vermieden, dem Verfassungsgerichtshof Kompetenzen zuzuweisen, die ihn mit Entscheidungen belasten würden, die, wie vor allem die Kompetenz für ein Parteiverbot, wie es nach Art. 21 GG für das BVerfG der Fall ist, eine Entscheidung über eine primär politische Frage bedeuten würden. Die Kompetenz zur Entscheidung über die Verfassungsmäßigkeit von Staatsverträgen – nicht nur, wie im System des Grundgesetzes unmittelbar über das Zustimmungsgesetz und damit nur mittelbar über den Inhalt eines Staatsvertrages – wurde erst viel später, nämlich durch das Bundesverfassungsgesetz v. 4. 3. 1964 in die österreichische Bundesverfassung eingefügt. Angesichts der Schwierigkeiten, die eine solche Kompetenz mit sich bringen kann, sei aber auf die von Kelsen unter klarer Erkenntnis von Schwierigkeiten in Normenkontrollverfahren schon für die Normenkontrolle gegenüber Gesetzen vorgesehene Möglichkeit einer Fristbestimmung für das Außerkrafttreten der als verfassungswidrig erkannten Normen hingewiesen. Eine solche Möglichkeit ist dem BVerfG leider nach wie vor aus überspitzten dogmatischen, aber dafür pra-

<sup>1</sup> *Spanner*, AöR 86 (1961), S. 484 ff.; *Walter*, AöR 97 (1972), S. 143.

<sup>2</sup> Leben und Werk *Kelsens* sind eingehend geschildert und gewürdigt worden von *Métall*: *Hans Kelsen, Leben und Werk*, 1969.



xisfremden Skrupeln versagt, so daß das Gericht sich selbst mehrfach eine der österreichischen Lösung nahekommende Praxis zurechtlegen mußte, um unabwiesbaren Bedürfnissen der Praxis zu entsprechen. In den Jahren von 1921–1930 war Kelsen auch Mitglied des Verfassungsgerichtshofes.

Vor allem die Entwicklung der österreichischen Innenpolitik von der Demokratie weg zu einem autoritären Ständestaat veranlaßte Kelsen 1930, einem Ruf an die Universität Köln zu folgen, wo er aber im Hinblick auf die Entwicklung des nationalsozialistischen Regimes keine längere Wirksamkeit finden konnte. Über Genf (Institut des Hautes Etudes Internationales) und Prag führte ihn sein Weg im Jahre 1940 in die Vereinigten Staaten, wo er nach kurzer Tätigkeit an der Harvard Law School schließlich full professor an der Universität Berkeley wurde. Zahlreiche Reisen zu Vorträgen und wissenschaftlichen Diskussionen führten ihn immer wieder nach Europa und auch nach Wien und Salzburg, wo ihm insbesondere auch der viel zu früh aus dem Leben geschiedene René Marcic fruchtbare Gespräche vermittelte.

Unter allen Schriften Kelsens<sup>3</sup> ist es wohl die „Reine Rechtslehre“<sup>4</sup>, die am meisten nicht nur bekannt, sondern auch verkannt worden ist. Manche Kritik an ihr wäre unterblieben, wenn sich die Kritiker die Kennzeichnung vor

<sup>3</sup> Das Schriftenverzeichnis bei Mé-tall, aaO (s. Anm. 2), S. 122 ff., enthält nicht weniger als 604 Titel; in der „Festschrift für Hans Kelsen zum 90. Geburtstag“, herausgegeben von Merkl †, Verdross, Marcic †, Walter, 1971, S. 325 f., sind noch weitere 16 Titel angeführt.

<sup>4</sup> Reine Rechtslehre, 1932; 2., vollständig neu bearbeitete und erweiterte Aufl., 1960. Eine knappe Charakteristik der Reinen Rechtslehre gibt Walter in der oben (Anm. 3) genannten Festschrift, S. 1 ff.

Augen gehalten hätten, die Kelsen ihr selbst gegeben hat: „Die Reine Rechtslehre ist eine Theorie des positiven Rechts; des positiven Rechts schlechthin, nicht einer speziellen Rechtsordnung. Sie ist eine allgemeine Rechtslehre, nicht Interpretation besonderer nationaler oder internationaler Rechtsnormen.“<sup>5</sup> Als ihr methodisches Grundprinzip hat Kelsen die Befreiung der Rechtswissenschaft von allen ihr fremden Elementen bezeichnet. Wenn er ausführt, daß dies eine Selbstverständlichkeit zu sein scheint, daß aber ein Blick auf die traditionelle Rechtswissenschaft, wie sie sich im Laufe des 19. und 20. Jahrhunderts entwickelt hat, zeigt, wie weit die Rechtswissenschaft davon entfernt ist, der Forderung der Reinheit zu entsprechen, und daß sie sich in völlig kritikloser Weise mit Psychologie und Soziologie, mit Ethik und politischer Theorie vermengt hat, so ist ihm bis in die Gegenwart hierin durchaus beizupflichten.

Der bekannte Vorwurf, die Reine Rechtslehre sei eine Rechtslehre ohne Recht, bedeutet ein grundsätzliches Mißverständnis der Reinen Rechtslehre. Auch hier wieder vermißt man das genaue Studium des Wesens der Reinen Rechtslehre, denn: „Eine positivistische und das heißt realistische Rechtslehre behauptet nicht – wie immer wieder betont werden muß –, daß es keine Gerechtigkeit gebe, sondern daß tatsächlich sehr viele voneinander verschiedene und einander möglicherweise widersprechende Gerechtigkeitsnormen vorausgesetzt werden.“<sup>6</sup> Der Vielfalt der Ideen über die materiale Gerechtigkeit entspricht die Vielfalt der Naturrechtslehren, sofern es sich nicht um eine religiös-metaphysische Naturrechtslehre handelt. Wenn aber

<sup>5</sup> Reine Rechtslehre, 2. Aufl., 1960, S. 1.

<sup>6</sup> AaO (s. Anm. 5), S. 403 f.

eine Rechtstheorie ihren Gegenstand allein in den Rechtsnormen erkennt, so muß sie von solcherart unterschiedlich bestimmten Inhalten derselben absehen und in diesem Sinn eine Reine Rechtslehre sein. Jede Kritik, die ihr aber irgendeinen materialen Gerechtigkeitsinhalt absprechen zu können glaubt, geht daher von einem Mißverständnis aus und daher ins Leere.

Viele Kränkungen, aber auch viele Ehren begleiteten den Weg Kelsens, die späten Jahre seines Lebens mit ihren zahlreichen akademischen Auszeichnungen, vor allem einer ganzen Reihe von Ehrendoktoraten, mögen ihn wohl manche Unbill früherer Jahre haben vergessen lassen, zumal menschliche Güte und Toleranz ein Wesenszug seiner Persönlichkeit gewesen sind.

So seien zum Schluß die Sätze aus Kelsens Schrift „Was ist Gerechtigkeit?“<sup>7</sup> wiedergegeben, die der älteste von Kelsens Schülern, Leonidas Pitamic (Ljubljana), anlässlich seines 90. Geburtstages in der Österr. Zeitschrift für öffentl. Recht<sup>8</sup> zitiert hat:

<sup>7</sup> 1953, S. 43.

<sup>8</sup> Bd. 21 (1971), S. 261 f.

„Ich habe diese Abhandlung mit der Frage begonnen: Was ist Gerechtigkeit? Nun, an ihrem Ende, bin ich mir wohl bewußt, diese Frage nicht beantwortet zu haben. Meine Entschuldigung ist, daß ich in dieser Hinsicht in bester Gesellschaft bin. Es wäre mehr als anmaßend, meine Leser glauben zu machen, mir könnte es gelingen, was die größten Denker verfehlt haben. Und in der Tat, ich weiß nicht und kann nicht sagen, was Gerechtigkeit ist, die absolute Gerechtigkeit, dieser schöne Traum der Menschheit. Ich muß mich mit einer relativen Gerechtigkeit begnügen und kann nur sagen, was Gerechtigkeit für mich ist. Da Wissenschaft mein Beruf ist und sohin das wichtigste in meinem Leben, ist es jene Gerechtigkeit, unter deren Schutz Wissenschaft, und mit Wissenschaft Wahrheit und Aufrichtigkeit gedeihen können. Es ist die Gerechtigkeit der Freiheit, die Gerechtigkeit des Friedens, die Gerechtigkeit der Demokratie, die Gerechtigkeit der Toleranz.“

Möge dies als Vermächtnis eines großen Rechtsgelehrten und Menschen in verpflichtender Erinnerung bleiben.

Hans Spanner



## HANS KELSEN—IN MEMORIAM

*By Benjamin Akzin*

At the age of 91, one of this century's greatest legal scholars, Hans Kelsen, died in April 1973 at Berkeley, California. As a student of his at the zenith of his scholarly activity, in Vienna of the twenties, and ever since his friend and admirer, I would like to dedicate these lines to the memory of the man who, more than anyone else, influenced my legal thinking and my approach to scholarship generally.

Kelsen was born in Prague in 1881 and moved to Vienna in his childhood. There he grew up, studied, taught, and acquired his renown as one of the world's masters of public law and jurisprudence. A lecturer in 1911 and a full professor in 1919 at the University of Vienna, he stayed with that institution until 1930. With reactionary trends growing steadily stronger, he then embarked on a 12-year long period of wanderings. For a few years he taught at the University of Cologne, in Germany, and was even elected its rector, but after the Nazis came to power, Kelsen, who had long been attacked by them as the embodiment of the "Jewish-Talmudic spirit", moved to the German University in Prague, in the still democratic Czechoslovakia of those days. But at that university, too, pro-Nazi tendencies made themselves felt, and his next station was the famous Institute of International Studies in Geneva. When the Second World War broke out, he left for the United States.

Kelsen's approach to legal science, based as it was on systematic logical analysis, with profound philosophical underpinnings, was foreign to the pragmatic American conception of law, a conception which—to quote Justice Oliver Wendell Holmes—considered that "the life of the law is not logic, but experience", and it was not easy for Kelsen to find his place on the American academic scene. But in 1942 he was appointed professor of political science at the University of California at Berkeley, and gradually Kelsen's influence made itself felt among political scientists, international lawyers, and legal philosophers in the United States as well. Retiring in 1952, Kelsen, by then the recipient of countless academic honours on all continents, continued his research activities, gave guest lectures at many universities in Europe and Latin America, but his home remained in Berkeley. Just as he had been attacked by Nazis in the past, he became, and remained to the end, the foremost adversary of legal scholars in the Soviet Union and its satellites, who invariably consider it necessary to devote a large part of their theoretical writings to polemics with Kelsen.



Kelsen was of Jewish origin, but until the rise of the Nazis he felt no particular relation toward Jewish tradition, culture, or aspirations. Fairly early in life he declared himself an "undenominational", thus formally severing his links with the Jewish community. Ever since the twenties, I often discussed with him problems of Judaism and Zionism, and would like to put on record that unlike many extremely assimilated Jews, Kelsen showed no trace of either an inner or an active antagonism toward the movement of Jewish national revival. His attitude toward it was one of a somewhat distant intellectual curiosity, but not sharing either national or religious Jewish consciousness, he simply watched it from afar. He neither helped nor hindered. Still, one characteristic might have indicated a certain kinship-feeling on his part: Vienna was, at the time, full of Jewish youngsters from Eastern Europe who encountered difficulties in getting admitted to the University. Kelsen used to help them to gain admission, and if they proved talented, he would treat them with special cordiality. His attitude changed with the rise of Nazism. From then on, he proclaimed himself a Jew, showed much interest in Zionism (and later—in the Jewish State), followed its development and expressed anxiety over its future. One of his daughters settled in Palestine in the thirties, but had to leave the country in the fifties for family reasons. After the establishment of the State, there was talk of inviting Kelsen to settle in Jerusalem, an idea with which he concurred most heartily, but complications arose and the scheme fell through.

Kelsen's fields of specialization were unusually broad. His friendship with Sigmund Freud caused him to delve deeply into psychology, on which he published several papers. He did noted research in political theory and wrote on the ideas of Plato, Aristotle and Dante. In philosophy he inclined toward neo-Kantianism, and his better students were expected by him to familiarize themselves with philosophical literature, especially that dealing with epistemology and methodology of science. At a later period he did much work in sociology, anthropology and the history of religion. But his main domains, and those in which he attained fame, were constitutional law, international law, and jurisprudence. It was he who, in the main, authored the Austrian Constitution of 1920—a model for many democratic constitutions and a document under which Austria is ruled to this day. During the entire democratic span of pre-war Austria, 1920-1929, he served as judge of the country's Constitutional Court and, as its permanent *rapporteur*, wrote most of the Court's decisions. Though his renown rests mainly on his theoretical writings, Kelsen also disclosed an exemplary clarity of thought and a pronounced sense of reality when interpreting legal systems (thus his commentaries on the Austrian Constitution and on the United Nations Charter), when analyzing specific problems (thus his book on the foundation of Czechoslovakia and its citizenship problems) and when writing judicial decisions.

However, Kelsen's main contribution to legal science was in the domain of jurisprudence. His principal books in this field were: *Main Problems of the*

*Theory of Constitutional Law* (1911); *The Problem of Sovereignty and the Theory of International Law* (1920); *The Sociological and the Juristic Concept of the State* (1923); *General Theory of the State* (1925); *The Pure Theory of Law* (1934). Much of the substance of these books, written originally in German, was incorporated in his *General Theory of Law and State*, written by Kelsen in English in 1945 for the English-speaking public. This series of studies had an enormous impact on modern legal thinking, and they, together with his numerous articles, laid the foundation to the trend known as the School of the pure theory of law or the Viennese School. While Kelsen's own writing was done in three languages—German, French, English—his work has been translated into 24 languages at least, thus making him the most translated jurist or political scientist of the century.

Kelsen regards positive law as an autonomous normative system. To attribute legitimacy to the precepts of the system it is necessary to share the assumption that their source, the "basic norm", from which all others derive their validity, is itself valid, i.e., that its binding force and claim to obedience are acknowledged. The sovereign is the entity to which the authority is attributed in a given society to determine the basic norm. Since that entity stands at the summit of all other institutions of the society in question, the society itself can be considered sovereign; but basically legal institutions are nothing else than personifications of bundles of normative authority delegated to individuals or collective groups, and therefore it is the norm rather than the institution that is, theoretically, the essential factor. The sovereign State, from a juristic viewpoint, is accordingly identical with the complete legal system, a system that does not derive its authority from an outside source. The rest of the norms and commands and institutions within the State constitute a hierarchical structure, with the validity of each determined by the extent to which it is authorized by the system's higher norms and can be reconciled with them. The so-called "unlawful" acts of the State and of all public authorities within the State are merely deeds of individuals or collective bodies who act beyond the powers conferred upon them. Therefore, they should not be properly attributed to the State or to the authorities in question, and this is the ground upon which they should be considered unlawful. If international law is regarded as superior to the domestic law of the State, this means that the body known as State is not sovereign, but that its authority is determined and limited by a universal legal system at whose apex stand the fundamental rules of international law.

The only meeting-point of this scheme with social reality, according to Kelsen, is the requirement that the attribution of sovereignty to any given entity (an individual, a group, the sum-total of a State's population, the international community, or a metaphysical being) corresponds sufficiently to average behaviour in society to serve as a reasonable explanation (Kelsen's own expression is *ein brauchbares Deutungsschema*—a usable interpretative scheme) of human behaviour. If this correspondence drops beneath a reason-



able minimum, as in the case of a successful revolution, the previous assumption does not necessarily hold any longer, and the legal system may have to be construed anew, around a new sovereign and a new basic norm, even if the material contents of most legal rules remains identical. In any case, the correspondence between actual social behaviour and the normative system—and this goes for any normative system, not only for that of positive law—can be approximative at best. Complete congruence between them is excluded, for there is a necessary tension between the *is* and the *ought*. It is this tension which explains the phenomena of unlawful behaviour and of criminality. The legal system reacts to these deviations by sanctions, and judicial agencies are those authorized to determine whether a given behaviour is contrary to valid legal norms.

This "positivistic" approach, negating as it does the relevance for the positive law of natural law principles on the one hand and of sociological considerations on the other, has met with serious criticism on various sides. Its opponents can be found among legal sociologists, historians of law, and followers of different ideologies—religious believers, moralists, liberals, socialists, and adherents of totalitarian schools from the right and the left alike. All of them accused Kelsen of dry formalism. Indeed, like many an abstract model, Kelsen's scheme is somewhat narrow, it eliminates (knowingly, in the interest of the purity of an *ought*-oriented method) a number of factors, and the picture presented by it is therefore one-sided and somewhat artificial. But as an exercise in legal logic and as a means to clarify the phenomena of validity and unlawfulness of presumed legal norms (with a private law contract also a norm which is *prima facie* binding on the parties), the Kelsenian approach has added to legal analysis a dimension of sharpness and precision that was lacking heretofore.

It would be wrong to think that Kelsen himself was oblivious of social realities or indifferent to values. The point he made was that while the validity and form of legal norms is to be determined solely within the premises of the given legal system, their material contents is a function of social pressures and of political and ethical values, and that the two spheres should not be intermingled. As to the "meta-juristic" realities and values themselves, especially the values of ethics and of liberal democracy, Kelsen was very sensitive and even attached to them. Witness his writings that dealt with social and political problems, such as his classical essay *On the Meaning and Value of Democracy* (1920), *Socialism and the State* (1920), *The Problem of Parliamentarism* (1926), *Society and Nature* (1943), and *Political Theory of Bolshevism* (1948). The title of one of his monographs, *Peace Through Law*, has been adopted as the name of an important international organization.

Ever since 1925, Kelsen devoted much thought to problems of international law, with the concept of sovereignty and the relationship between international law and domestic ("municipal") law as the starting points of his enquiries. His articles on the subject and especially his courses in the Academy

of International Law at the Hague constitute a most significant contribution to the theory of that branch of legal science. But he also dealt with the positive law of nations as such, and his already noted commentary on the Charter of the United Nations, first published in 1950, has been received as an authoritative and masterly exposition.

And finally, a few words on Kelsen as a teacher and educator. Despite the complexity and abstractness of his speaking style, Kelsen was a most eloquent lecturer, and exuded great personal charm. His lectures invariably attracted students in masses. To the better students he was easily accessible, and he liked to draw them nearer, to encourage them and to help them to advance. Even when they disagreed with his views, he took it in good spirit, as long as they knew how to bolster their position by sound argument. The universities of the world, from the Far East to the two Americas, not to speak of Europe, are full of teachers who have been influenced in some measure by his teachings. In Israel, Kelsen's closer disciples are represented by Professor Hans Klinghoffer of the Hebrew University and by myself.<sup>1</sup>

All those of us who were privileged to know him more intimately, cherish the memory not only of an outstanding scholar but also of a warm and inspiring personality.

<sup>1</sup> For my own views on Kelsen's jurisprudential scheme, see: B. Akzin, "Analysis of State and Law Structure" (in: S. Engel and R. A. Metall, ed., *Law, State and International Order, Essays in Honor of Hans Kelsen*, 1964); a German version is: "Die Struktur von Staat und Recht" (*Der Staat*, 1964, pp. 261-280). For my attitude toward Kelsen's views on international law, see: B. Akzin, "Les Problèmes Fondamentaux du Droit International Public", 1929; and: "L'Ecole Autrichienne et le Fondement du Droit International Public" (1929) *Revue du Droit International*.



Um welche sachlichen Strukturen es sich dabei handelt, kommt, wie mir scheint, am besten dadurch in den Blick, daß man von einer Fallgestaltung ausgeht, die jetzt durch die Zulässigkeit der Versuchsbestrafung in Absatz IV auch praktisch möglich geworden ist. Wie wäre die Rechtslage, wenn der Beamte in der Tat *widerrechtlich* gehandelt, der Widerstehende dies aber nicht gewußt, sondern geglaubt hätte, der Beamte handele *rechtmäßig*? Dann hätte der Widerstehende irrtümlich angenommen, seine Widerstandsleistung sei rechtswidrig, obwohl sie in Wahrheit rechtmäßig war. Natürlich kann der irrige Glaube an die Widerrechtlichkeit seiner Handlung diese nicht wirklich widerrechtlich machen. Es handelt sich nach den bekannten Grundsätzen um einen klaren Fall des Wahnverbrechens. Darin aber zeigt sich, daß der Irrtum über die Rechtmäßigkeit der Amtshandlung nichts anderes ist als der Irrtum über die Rechtswidrigkeit der Widerstandsleistung. Der Zusatz von der „Rechtmäßigkeit“ der Amtshandlung hebt lediglich das ohnehin selbstverständliche Erfordernis der Rechtswidrigkeit der Widerstandsleistung hervor. Der Tatbestand des § 113 hätte ohne jede sachliche Änderung auch lauten können: „Wer einem Beamten . . . in seiner Amtsausübung *widerrechtlich* Widerstand leistet.“ Das wollen *Bindings* und *Hippels* Worte besagen, daß die Hervorhebung der Rechtmäßigkeit der Amtshandlung überflüssig ist: Verboten ist die Widerstandsleistung ohnehin nur, wenn sie rechtswidrig ist, und rechtswidrig ist sie nur, wenn der Beamte rechtmäßig gehandelt hat. Das *Reichsgericht* hatte also tatsächlich recht mit seiner Behauptung, daß das Merkmal „rechtmäßig“ in § 113 kein Tatbestand i. S. des § 59 ist; — nur hatte es unrecht, daraus zu folgern, es sei eine objektive Strafbarkeitsbedingung. Es ist vielmehr die überflüssige, weil selbstverständliche Hervorhebung der Rechtswidrigkeit der Widerstandshandlung. Daraus folgt, daß der Irrtum über die Rechtmäßigkeit der Amtshandlung mit dem Irrtum über die Rechtswidrigkeit der Widerstandsleistung identisch ist und folglich nach den Grundsätzen des Verbotsirrtums behandelt werden muß. Der Tatvorsatz des Täters muß in § 113 lediglich die Kenntnis umfassen, daß er einer *Amtshandlung* eines *Beamten* Widerstand leistet; dieser vorsätzliche Widerstand ist rechtswidrig, wenn der Beamte rechtmäßig handelt; das Bewußtsein des Täters von der Rechtswidrigkeit seiner Widerstandsleistung ist nach allgemeinen Grundsätzen nur Moment seiner Schuld oder der „Vorwerfbarkeit“ seiner vorsätzlichen Widerstandsleistung. Die Widerstandsleistung ist vorwerfbar nicht nur dann, wenn der Täter ihre Rechtswidrigkeit kannte, sondern schon dann, wenn er sie erkennen konnte, mag er dabei im letzteren Falle bei verzeihlicherem Verbotsirrtum in Analogie zu § 51 II milder bestraft werden. Straflös bleibt er nur bei völlig schuldlosem Verbotsirrtum. Damit kommen wir nicht nur zur dogmatisch richtigen, sondern auch zur praktisch befriedigendsten Lösung. Die Tätigkeit des Vollstreckungsbeamten erhält den erforderlichen umfassenden Strafschutz, aber nicht auf Kosten der Verletzung des Schuldprinzips! Der letztere Fehler belastete leider schwer die Lösung des *Reichsgerichts*: Ließ *Binding* den Schutz des Vollstreckungsbeamten ganz unzureichend, so überdehnte das RG ihn umgekehrt, indem es den Täter auch bei verzeihlichem Verbotsirrtum strafte. Schlimm ist in dieser Beziehung RGSt 2, 411, wo der befehlende Beamte einen klaren Fall der Freiheitsberaubung in mittelbarer Täterschaft begangen hatte, wo aber nicht er, sondern — der widerrechtlich arretrierte Bauer wegen Widerstand gegen die Staatsgewalt bestraft wurde! Im ganz

ähnlich gelagerten Falle RGSt 6, 433 hat das RG den befehlenden Vorgesetzten mitsamt seinen Untergebenen nach § 341 bestraft, obwohl der Irrtum beider kein anderer war als im früheren Falle!

In der gegensätzlichen Auslegung des § 113 durch das *Reichsgericht* und durch *Binding* wiederholt sich ihre gegensätzliche Auffassung über den Verbotsirrtum. Da das RG den Irrtum über die Rechtswidrigkeit für unbeachtlich erklärte, mußte es die Rechtmäßigkeit der Amtsausübung zu einer objektiven Strafbarkeitsbedingung machen, während *Binding*, der auf Grund seiner Normen-Theorie das Bewußtsein der Rechtswidrigkeit zum Vorsatz rechnete, auch die Kenntnis der Rechtmäßigkeit der Amtshandlung zum Tätervorsatz fordern mußte. Die Konsequenzen beider Auffassungen sind, wie wir sahen, unannehmbar!

Vom Boden der Schuldtheorie aus läßt sich die bisher hoffnungslos erscheinende Aporie in § 113 zu einem dogmatisch und praktisch gleich befriedigenden Ergebnis auflösen. Von ihr aus schließen sich auch § 113 und § 53 harmonisch aneinander. Sofern der Beamte rechtswidrig handelt, hat der Bürger ein Notwehrrecht gegen ihn. Sofern der Bürger schuldhaft-irrig glaubt, der Beamte handele rechtswidrig und er könne sich gegen ihn wehren, handelt er widerrechtlich und leistet vorsätzlichen Widerstand in *gemildeter* Schuld. Auch die Putativnotwehr, die er dabei übt, schließt nicht seinen *Tatvorsatz* (die vorsätzliche Widerstandsleistung) aus, sondern mildert nur die Schuld. Ein Grund mehr, die verfehlte Lehre von den negativen Tatbeständen wieder ad acta zu legen!

Die gleichen Grundsätze gelten natürlich auch für § 117. Für den Tatvorsatz genügt, daß der Täter die Person, der er Widerstand entgegengesetzt, als Forstbeamten, Waldeigentümer, Forstberechtigten, Jagdaufseher usw. (mindestens mit *dolus eventualis*) erkennt, während sein irriger Glaube an die Unrechtmäßigkeit des Vorgehens dieser Personen nicht den *Vorsatz* der Widerstandsleistung beseitigt, sondern lediglich die *Vorwerfbarkeit* (Schuld) der vorsätzlichen Widerstandsleistung berührt. Damit wird jener unbegreifliche und oft beklagte Widerspruch in der Rechtsprechung beseitigt, daß die „Rechtmäßigkeit“ bei *Amtshandlungen* eine objektive Strafbarkeitsbedingung, bei *Rechtsausübungen* aber Tatbestandsmerkmal sein soll<sup>11</sup>.

Zum Schluß sei bemerkt, daß nach denselben Grundsätzen auch der Irrtum des Täters über die „Rechtsgültigkeit“ einer Verordnung in § 110 zu beurteilen ist. Auch hier ist die Rechtsgültigkeit weder ein Tatbestand i. S. des § 59<sup>12</sup>, noch eine objektive Strafbarkeitsbedingung, wie es das Reichsgericht<sup>13</sup> irrig annahm, sondern ein Element der *Rechtspflicht* des Täters. „Gelten“ heißt „verpflichten“. Nur *gültige* Normen verpflichten zum Gehorsam. Ist die Norm ungültig, dann verpflichtet sie nicht, und der Irrtum des Täters, sie sei gültig, kann sie nicht gültig machen. Der Irrtum des Täters über die Rechtsgültigkeit der Norm in § 110 ist also der Irrtum über seine Rechtspflicht und damit auch über seine Rechtspflichtverletzung. Er ist ein klarer Fall des Verbotsirrtums, der nach dessen Grundsätzen zu behandeln ist. Nichts anderes gilt in der dritten Alternative des § 110 für den Irrtum über die „Zuständigkeit“ einer Behörde zum Erlaß einer Anordnung. Doch soll dieses Problem in anderem Zusammenhang gesondert behandelt werden.

<sup>11</sup> Vgl. RG HRR 1931 Nr. 157.

<sup>12</sup> So mit Recht RGSt 36, 422; 39, 344; 40, 64; st.Rspr.

<sup>13</sup> in RGSt 64, 76.

### Hans Kelsen und Rudolf Smend

Zum 70. Geburtstag der beiden Gelehrten

Von Prof. Dr. WALTER JELLINEK, Heidelberg

Nicht die Harmonie, sondern der Gegensatz ist es, der die beiden Siebenzigjährigen miteinander verbindet, *Hans Kelsen*, der am 11. Oktober 1881 in Prag, und *Rudolf Smend*, der am 15. Januar 1882 in Basel das Licht der Welt erblickt hat.

*Smends* Hauptwerk „Verfassung und Verfassungsrecht“, 1928, könnte geradezu den Untertitel „Anti-Kelsen“ führen, und *Kelsens* kritische Schrift „Der Staat als Integration, eine prinzipielle Auseinandersetzung“, 1930, beschäftigt sich ausschließ-



lich mit der genannten Abhandlung von Smend. Aber auch auf der Wiener Staatsrechtslehretagung, im Jahre 1928, trafen sich, wenn wir eine auf Feuerbach und Savigny gemünzte Wendung Radbruchs gebrauchen dürfen, die beiden Gestirne nur, um sich desto heftiger abzustoßen. Allerdings stand damals nicht Smend unmittelbar im Vordergrund, aber Heinrich Triepel bezog sich in seinem Bericht über „Wesen und Entwicklung der Staatsgerichtsbarkeit“ ausdrücklich auf die Smend'sche Lehre von der Integration, und Kelsen war der Mitberichterstatter. Richard Thoma, der Verhandlungsleiter, meinte in seiner versöhnlichen Art, die beiden Redner seien von zwei Seiten her in den Wald eingedrungen und hätten sich auf einem Platze getroffen. Dies lehnte aber Triepel im Schlußwort mit der Bemerkung ab, wenn man beim Bilde bleiben wolle, so hätten sich Kelsen und er im Walde verfehlt. So kann denn auch dieser Begrüßungsaufsatz als Gemeinsames nur die hervorragende Bedeutung der beiden Gelehrten unterstreichen, während sie sachlich wirklich nichts Wesentliches miteinander gemein haben, Kelsen, der unerbittliche Logiker, und Smend, der große Künstler des Zusammenschauens.

Kelsen hatte schon seine Jugendschriften, die Studie über die Staatslehre des Dante Alighieri und den Kommentar zur österreichischen Reichsratswahlordnung, hinter sich, als er in Seminar meines Vaters in Heidelberg einen Vortrag hielt, in dem er sich leidenschaftlich zum Monismus in der Staatslehre bekannte. Demgemäß hat er sich fort und fort entwickelt nach dem Gesetz, wonach er angetreten. Monismus herrscht vor allem in der Methode, mit der er an den Staat, seine Eigenschaften und seine Tätigkeiten herantritt, die viel genannte Methodenreinheit der Wiener Schule. Obgleich es sicher auch Menschen gibt, die das staatliche Geschehen als Wirklichkeit betrachten und daher nicht Juristen zu sein brauchen und als Lehrer der political science vielfach auch gar nicht Juristen sind, verwirft Kelsen diese soziologische Betrachtungsweise und hält ausschließlich die normative Betrachtung des Staates für richtig. Die Folge ist, daß er auch alle politischen Wertungen von seiner Lehre fernhält, weshalb denn seine Lehre als Reine Rechtslehre weltbekannt geworden ist. Diesen Vorsatz führt Kelsen mit unbedingter Folgerichtigkeit durch, davon legt sein Hauptwerk, die „Allgemeine Staatslehre“, 1925, bezeugtes Zeugnis ab. Vermöge des Dämons Monismus, der ihn gepackt hat, verwirft er überall Zweifeln, die man bei der Betrachtung des Staates bisher angenommen hatte. So gibt es jene bekannte Prioritätsfrage zwischen Staat und Recht: Wer war eher da, der Staat oder das Recht? Man hat die Frage schon mit der Frage der Sophisten verglichen, was eher da gewesen sei, das Huhn oder das Ei. Für Kelsen besteht dieses Problem nicht, da für ihn Staat und Recht ein und dasselbe ist. Desgleichen bekämpft er, darin gewissen englischen Juristen verwandt, die Unterscheidung von privatem und öffentlichem Recht, da bei der Annahme eines vom Privatrecht verschiedenen öffentlichen Rechts das rechtsstaatliche Ideal gefährdet sei, wonach auch der obrigkeitliche Staat nur vermöge gesetzlicher Ermächtigung gegen den einzelnen vorgehen könne. Ebenso wenig gibt es für Kelsen den Unterschied zwischen Bundesstaat und Staatenbund. Vor allem können sich nach ihm diese beiden angeblich verschiedenen Staatenverbindungen nicht dadurch unterscheiden, daß es im Staatenbund ein Recht auf Sezession gebe, das dem Gliedstaat im Bundesstaat versagt sei. Seine Auffassung berührt sich hier seltsamerweise nicht nur mit der föderalistischen Lehre eines Max von Seydel und eines Otto Mayer, sondern auch mit der Bismarcks, der in einem Augenblick des Unmuts über die Zusammensetzung des Reichstages mit dem Gedanken spielte, das Deutsche Reich, wie einen Staatenbund, durch übereinstimmenden Beschluß der Landesregierungen wieder aufzulösen und dann, gleichzeitig mit der Einführung eines andern Wahlrechts, neu zu gründen. Auch die Unterscheidbarkeit der Staaten in souveräne und nicht-souveräne Staaten leugnet Kelsen folgerichtig. Bekannt ist weiter die rechtsphilosophische Frage, an wen die Befehle des Gesetzgebers gerichtet sind. So hat Binding in sei-

nem berühmten Buch über die Normen und ihre Übertretung die an die Bürger gerichteten Befehle als die sog. Normen und die den Staat zum strafenden Einschreiten verpflichtenden Strafgesetze unterschieden. Kelsen verwirft auch diese Zweiteilung, indem er das Gesetz als ein hypothetisches Urteil auf faßt, ohne daß über die Frage des Normadressaten gestritten werden müsse. Auch die Unterscheidbarkeit der Wirkungskreise der Gemeinden in einen eigenen und in einen übertragenen leugnet er, da auch der eigene Wirkungskreis dem Gesetze seinen Ursprung verdanke. Vor allem bekannt aber ist Kelsens Monismus in der Frage des Verhältnisses von Völkerrecht und Landesrecht. Auch hier ist er der völlige Antipode von Triepel, der vom Dualismus dieser beiden Rechtskreise ausging, während Kelsen das Landesrecht nur durch Völkerrecht für erklärbar ansieht — wohl der bedenklichste Teil seiner monistischen Lehren, da es auch nach außen abgeschlossene Staaten geben kann, die trotz Fehlens von außenpolitischen und daher völkerrechtlichen Beziehungen in vollem Umfange Staaten sein können.

Die Einfachheit und Klarheit seiner Darstellung hat Kelsen die Gunst vor allem jüngerer Juristen verschafft, die seiner Lehre mit unbeirrbarer, oft sogar fanatischer Treue anhängen. Auch seine kampffrohe Sprache, die „Erledigung“ (einer seiner Lieblingsausdrücke) fremder Lehrmeinungen, mag an diesem Erfolge mitgewirkt haben. Ja, in einem Punkte, in dem man Kelsen mit dem besten Willen nicht folgen kann, hat er sogar seinen großen Gegenspieler Smend auf seine Seite gezogen (Verf. S. 151), wenn er Angriffe auf den Satz „Reichsrecht bricht Landesrecht“ richtet und ihn für falsch und nicht rechtsstaatlich bezeichnet, da er das kompetenzwidrig erlassene Reichsgesetz schütze. Dabei beansprucht der Satz doch in Wirklichkeit nur für die konkurrierende Gesetzgebung Gültigkeit und bringt in diesem Bereiche die Überordnung des Bundes durchaus richtig zum Ausdruck. Aber gerade die Schärfe seiner Sprache hat Kelsen manchen wissenschaftlichen Gegner verschafft, und noch erinnern wir uns seiner geschliffenen Abwehrschriften gegen Sander, Schwind und Hold-Ferneck.

Für unrichtig halte ich es, wenn man Kelsens Lehrmeinungen ein unbewusstes politisches Motiv unterschiebt. Man verkennt dabei die Psychologie des Logikers, für den die Logik alles bedeutet, unabhängig von den damit geschaffenen und zerstörten Werten. Es ist nicht richtig, daß Kelsens reine, den Staat als Wirklichkeit vernachlässigende Rechtslehre nur im Österreich von nach 1918 habe entstehen können, da sich niemand für diesen schwachen, kaum lebensfähigen Staat zu begeistern vermocht habe. Insbesondere entspricht die über allen Staaten stehende Ursprungsnorm Kelsenscher Prägung einem unabweisbaren logischen Bedürfnis. Auch ist es sicher nicht das bittere Gefühl des Emigranten, wenn Kelsen im American Journal of International Law von 1945 das Fortbestehen des Deutschen Reiches als Staat leugnet und die Auffassung vertritt, es sei ein Kondominat unter der Herrschaft der vier Besatzungsmächte geworden; vielmehr hängt auch diese Auffassung mit der schon 1911 in den Grundzügen entwickelten Staatslehre Kelsens zusammen.

Der Dämon Monismus beherrscht aber nicht alle Arbeiten Kelsens, der neben seinen Ausführungen zur Allgemeinen Staatslehre auch noch andere bedeutende Probleme angepackt hat. Vor kurzem erst erschien das umfangreichste seiner Werke, nämlich, in englischer Sprache geschrieben, eine 900 Seiten starke Abhandlung über das Recht der Vereinten Nationen, London 1950, mit Supplement 1951, und auch auf politischem Gebiet begegnen wir ihm, wenn er, sich allerdings immer treu bleibend, über „Wesen und Wert der Demokratie“ geschrieben hat (2. Aufl. 1929). Er kommt dort zu dem Ergebnis, daß die Mehrheitsentscheidungen in der Demokratie deshalb zu begrüßen seien, weil sie die größte Annäherung an die Idee der Freiheit bedeuteten; denn schlimmer als Herrschaft der Mehrheit sei die Vergewaltigung der Mehrheit durch eine Minderheit (S. 9). Auch zeugt es von politischer Unvoreingenommenheit, wenn er, obgleich Anhänger des Verhältnis-



wahlrechts, dem Mehrheitswahlrecht einen wichtigen Vorzug zubilligt, daß es nämlich vermöge der „Irrationalität des mit ihm verbundenen aleatorischen Momentes“ die Ablösung der Parlamentsmehrheit durch die Opposition begünstige (S. 117). Und trotz der Reinheit seiner Rechtslehre und trotz seiner Neigung zur Abkehr von der Wirklichkeit hat sich *Kelsen* nach seinen leidenschaftlich vorgetragenen Ausführungen auf der Wiener Staatsrechtslehrertagung nicht den tatsächlichen Schäden der Rechtsprechung des österreichischen Obersten Gerichtshofes verschlossen, der, unbekümmert um die Rechtsfolgen, die zu Tausenden geschlossenen österreichischen Dispensen für ungültig erklärt hat. In der deutschen Verwaltungsgerichtsbarkeit aber werden *Kelsens* große gesetzgeberischen Fähigkeiten in der Fassung des wichtigen § 36 des süddeutschen Verwaltungsgerichtsbarkeitgesetzes fortleben, wonach die Anfechtungsklage in Ermessenssachen darauf gestützt werden kann, „daß von diesem Ermessen nicht im Sinne des Gesetzes Gebrauch gemacht sei“. Es ist dies die bewußt übernommene Formel des Art. 129 der österreichischen Bundesverfassung vom 1. Oktober 1920, an deren Gestaltung *Kelsen* entscheidend mitgewirkt hat.

*Smends* große Stunde schlug am 24. März 1927, als er auf der Münchener Tagung der Deutschen Staatsrechtslehrer als Mitherrichter einen Vortrag über das Recht der freien Meinungsäußerung hielt. Es handelte sich um die Auslegung des Art. 118 der Weimarer Reichsverfassung, demzufolge jeder Deutsche das Recht hatte, innerhalb der Schranken der „allgemeinen Gesetze“ seine Meinung frei zu äußern. Was sind allgemeine Gesetze? *Smend* beantwortete diese heiß umstrittene Frage dahin, daß es die höherwertigen Gesetze sind, Gesetze also, denen gegenüber die freie Meinungsäußerung aus Gründen des Staatswohles zurückzutreten hat. Kommt in dieser Auffassung die Eigenart *Smends* zum Ausdruck, das ganze staatliche Geschehen unter dem Gesichtspunkt des Wertes zu betrachten, so war ein weiterer Höhepunkt seiner Darlegungen die Forderung nach einer völligen Freiheit der Wissenschaft auch und gerade im Universitätsbereich, also so, daß der Universitätslehrer nicht vermöge seiner dienstlichen Stellung irgendwie an Weisungen und Beeinflussungen von Seiten der Regierung gebunden ist, sofern sich nur seine Bemühung „nach Inhalt und Form als ernsthafter Versuch zur Ermittlung oder zur Lehre der wissenschaftlichen Wahrheit darstellt“. Uns Heutigen erscheint diese Erkenntnis vielleicht als selbstverständlich. Damals hatte sie aber noch mit dem Widerstand der Erläuterungen zur Weimarer Reichsverfassung zu kämpfen. *Smend* hat seine Münchener Ausführungen erst vor kurzem (1950) durch eine kleine Rede über die Göttinger Sieben ergänzt, ein wirkliches Kleinod verfassungsgeschichtlicher Schilderung.

Was auf der Münchener Tagung so wohlthuend empfunden wurde, war, daß man den Eindruck hatte, einen Gelehrten von feinsten Bildung und Kultur sprechen zu hören. Dies ist auch kein Wunder, wenn man bedenkt, daß *Smend* als Rechtshistoriker begann und mit einer, für einen jungen Mann erstaunlichen, Arbeit über die geschichtlichen Hintergründe der preußischen Verfassung von 1850 seinen wissenschaftlichen Weg antrat. In dieser Epoche seines Lebens hat er auch das umfangreichste seiner Werke, nämlich das Buch über das Reichskammergericht, geschrieben, ergänzt durch gelegentliche kleinere geschichtliche Ausführungen. In den letzten Jahren aber greift *Smend* noch dadurch über den Bereich des zünftigen Verfassungsrechtlers hinaus, daß er sich mit wahrer Anteilnahme kirchenrechtlichen und kirchenpolitischen Fragen zuwendet.

Das aber, was *Smend* als *Staatsrechtler* mit einem Schlagwort kennzeichnet, ist der Begriff der *Integration*, den er erstmalig in der Kahl-Festgabe, 1923, in die Verfassungslehre gebracht hat und der den Eckstein seines Hauptwerkes „Verfassung und Verfassungsrecht“, 1928, bildet. „Der Staat . . . lebt“, so führt *Smend* aus (S. 18), „und ist da nur in diesem Prozeß beständiger Erneuerung, dauernden Neuerlebens;

er lebt, um Renans berühmte Charakterisierung der Nation auch hier anzuwenden, von einem Plebiszit, das sich jeden Tag wiederholt. Es ist dieser Kernvorgang des staatlichen Lebens, wenn man so will, seine Kernsubstanz, für die ich schon an anderer Stelle (Kahl-Festgabe S. 16) die Bezeichnung als *Integration* vorgeschlagen habe.“

Bei allen staatsrechtlichen Betrachtungen muß man nach *Smend* den Staat als Ganzes im Auge behalten. Durch diese *Ganzheitsbetrachtung* unterscheidet sich das Verfassungsrecht vom Verwaltungsrecht. „Staatsrecht ist Integrationsrecht, Verwaltungsrecht technisches Recht“ (Verf. S. 131). Daher darf man nicht einfach verwaltungsrechtliche Sätze in das Verfassungsrecht übertragen. So ist ein großer Unterschied zwischen der Staatsaufsicht über die Gemeinden und der Bundesaufsicht über die Einzelstaaten des Bundes, da die Einzelstaaten die Mitinhaber der Bundesgewalt sind und von Bundes wegen mit größerer Zurückhaltung behandelt werden müssen als die Gemeinden von Seiten des Staates. Die Grundrechte als Teile des Verfassungsrechts haben eine andere Bedeutung als beliebige Novellen zur verwaltungsrechtlichen oder bürgerlich-rechtlichen Gesetzgebung. Man darf sie, die vielleicht nicht immer eine technisch einwandfreie Prägung erfahren haben, nicht mit den beim sonstigen Recht üblichen Methoden auslegen, sondern muß in ihnen vielmehr Bekenntnisse erblicken, deren Sinngehalt herauszuarbeiten unsere Aufgabe ist. Aber auch andere Bestimmungen der Verfassung dürfen wir nicht nur nach ihren formalrechtlichen Auswirkungen deuten. Wenn es im Art. 3 der Weimarer Verfassung hieß: „Die Reichsfarben sind schwarz-rot-gold“, so war es nicht angängig, nur zu fragen, welche Gebote oder Verbote in diesem Satze lagen, vielmehr mußte man den Satz vor allem als ein Bekenntnis der Weimarer Republik zu einer bestimmten Idee, nämlich der des liberalen, demokratischen, deutschen Gesamtstaates von 1849, auffassen.

Die Lehre *Smends* ist nicht so leicht faßbar wie die *Kelsens*. Vielleicht erinnert sich noch mancher von seiner Militärzeit her daran, daß es zwei Arten von optischen Entfernungsmessern gibt. Bei dem einen bringt man durch mechanisches Drehen eines Handgriffs und die Herstellung eines bestimmten Winkels zwei Bilder des beobachteten Gegenstandes zusammen und kann dann die Entfernung an einer Skala ablesen. Dieser Entfernungsmesser ist für die größere Anzahl der Bedienungsmannschaften der geeigneter. Dann gibt es aber auch einen Entfernungsmesser, der eine plastisch-stereoskopische Schau vermittelt, vermöge deren man unmittelbar-anschaulich feststellen kann, wie weit der anvisierte Gegenstand entfernt ist. Hierfür gibt es eine weitaus geringere Anzahl geeigneter Bedienungsmannschaften, da die plastische Schau nicht jedermann gegeben ist. So ist es auch mit der Integrationslehre *Smends*, deren volle Bedeutung nur von wenigen Gelehrten alsbald wirklich erkannt oder anerkannt wurde, so von *Triepel*, *Günther Holstein*, *Koellreutter*, *Bilfinger*. In dem von *Anschütz* und *Thomas* herausgegebenen Handbuch des Deutschen Staatsrechts, I 1930, II 1932, in dem allerdings *Smend* und *Triepel* durch Abwesenheit glänzen, finden sich nur geringe Spuren der Integrationslehre. Es ist aber schon viel gewonnen, wenn der an verantwortlicher Stelle Stehende den Sinn der Lehre wenigstens ahnt. Schon diese Ahnung hätte z. B. den Staatsgerichtshof für das Deutsche Reich davor bewahrt, einen für das Ansehen der Verfassungsgerichtsbarkeit solch unheilvollen Spruch zu fällen wie den vom 25. Oktober 1932 in Sachen Preußen contra Reich; denn was man aus der Lehre *Smends* zumindest herauslesen kann, ist, daß ein Verfassungsgerichtshof vor allem *staatsmännisch* entscheiden muß, sich also nicht an der Idealfigur des ehrbaren Handelsmannes oder des guten Familienvaters, sondern an der Figur des guten Staatsmannes auszurichten hat. Ein Staatsmann aber hätte es nie zugelassen, daß Preußen in seinen Funktionen geteilt wurde in ein Preußen für die Regelung der inneren Angelegenheiten, vertreten durch die vom Reichspräsidenten eingesetzte kommissarische Regierung, und in ein Preußen mit der alten preußischen Regierung



für die Vertretung seiner Interessen im Reichsrat. Wennschon der Staatsgerichtshof zugunsten des Reiches entscheiden wollte, so mußte er die alte preußische Regierung für abgesetzt erklären und deren Stimmrecht im Reichsrat ruhen lassen.

Diese Vernachlässigung der Smendschen Schau im Jahre 1932 ist eine ernste Mahnung an die heutigen Staatsgerichtshöfe, das Bundesverfassungsgericht und auch sonstige höchste Gerichte, es sich zur Pflicht zu machen, bei schwierigen Entscheidungen die Smendschen Gedanken auf sich wirken zu lassen. In einzelnen Fällen ist dies schon geschehen. So hat Smend in dem Festgabenaufsatz für Otto Mayer „Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat“ überzeugend dargelegt, daß nach einem ungeschriebenen Satze der Bismarckschen Verfassung die deutschen Länder dem Reiche gegenüber zur Loyalität verpflichtet seien. Diese Schrift ist noch im Zeitalter der Monarchie, im Jahre 1916, erschienen. Aber 34 Jahre darauf, bei einem Verfassungskonflikt vor dem Hessischen Staatsgerichtshof, wies man auf die fruchtbaren Äußerungen Smends hin bei der Frage, ob es einem einzelnen Lande gestattet sei, im Bereiche der konkurrierenden Gesetzgebung in einem Augenblicke vorzuprellen, da der Bund im Begriffe sei, den gleichen Gegenstand durch Bundesgesetz zu regeln. Die gleiche Schrift, von der übrigens ein über 70 Jahre alter Professor auf der Göttinger Staatsrechtslehrertagung im Herbst 1951 unumwunden sagte, sie erst habe ihn bewegt, Staatsrechtslehrer zu

werden, hat in neuester Zeit ein anderer Gerichtshof bei der Frage herangezogen, ob es auch heute noch einem Lande verwehrt sei, eine Steuer zu erheben, die mit Reichssteuern gleichartig sei. Die unmittelbare Weitergeltung des Finanzausgleichsgesetzes der Weimarer Zeit, von 1926, das es im § 2 verbietet, muß man nämlich bei den ausschließlich den Ländern vorbehaltenen Steuern verneinen; denn es fehlt an einer Bestimmung im Bonner Grundgesetz, die, wie Art. 11 der Weimarer Verfassung, dem Bunde die Möglichkeit gibt, Grundsätze zu erlassen, die erforderlich sind, um Schädigungen der Reichseinkünfte und Doppelbesteuerungen auszuschließen. Trotzdem dürfen in solchen Fällen die Bäume nicht in den Himmel wachsen, und es wäre auch hier ein Verstoß gegen die von Smend als ungeschriebener Verfassungsgrundsatz dargestellte Pflicht der Länder zu *bundesfreundlichem Verhalten*, wenn ein Land ohne jegliche Rücksicht eine gleiche Steuer erhebe wie der Bund, selbst wenn dies auf einem den Ländern ausschließlich vorbehaltenen Gebiete geschehen sollte.

So kann Smend seinen 70. Geburtstag mit dem Bewußtsein feiern, daß seine Saat aufgeht und, wie wir hoffen, die Rechtsprechung unserer Verfassungsgerichte, vor allem auch bei der Auslegung der Bonner Grundrechte, nachhaltig beeinflusst. Mögen ihm noch viele Jahre des Schaffens zum Heile unserer Wissenschaft und der Rechtsfindung beschieden sein!

## AUS DER PRAXIS

### Zur Behandlung des nicht auf Antrag des Klägers erlassenen Verweisungsbeschlusses

I. Nach herrschender Rechtsprechung und Lehre ist ein auf § 276 I ZPO gestützter Verweisungsbeschuß nach § 276 II ZPO auch dann unanfechtbar und für das Gericht, an das verwiesen wurde, bindend, wenn wesentliche Voraussetzungen nach Abs. I, wie die mündliche Verhandlung und der Verweisungsantrag des Klägers, gefehlt haben<sup>1</sup>. Lediglich die Verweisung innerhalb eines Landgerichts (von einer Berufungskammer zu einer erstinstanzlichen Zivilkammer) hat das Reichsgericht (RGZ 119, 379 ff., 384) als aus dem Rahmen des § 276 ZPO herausfallende und somit der gesetzlichen Grundlage entbehrende Entscheidung für nicht bindend und aufhebbar erklärt<sup>2</sup>. Nur vereinzelt sagt es (Urteil v. 10. I. 36, JW 1936, 1777 dritter Abs. am Ende), die Sache sei beim verweisenden Landgericht anhängig geblieben, wenn der Verweisungsbeschuß nicht auf Grund mündlicher Verhandlung erlassen worden sei.

Die h. M. wird begründet mit der Notwendigkeit, dem mit § 276 II ZPO verfolgten Zweck, nämlich die Sache nicht fördernde, sondern die Prozesse nur verzögernde Zuständigkeitsstreitigkeiten abzuschneiden, voll Geltung zu verschaffen. Das Wesen der in § 276 vorgeschriebenen Bindung, ihr eigentlicher Sinn bestehe gerade darin, daß im Interesse der Prozeßbeschleunigung auch sachlich unrichtige und auf Verfahrensmängeln beruhende Beschlüsse gedeckt werden sollten<sup>3</sup>. Indessen wird unter Berufung auf RGZ 119, 384 die Beschwerde nach § 567 ZPO gegen einen „nicht einmal den allgemeinen Anforderungen des Gesetzes genügenden“ Beschuß, wie die Verweisung vom Amtsgericht ans Oberlandesgericht, für zulässig gehalten, weil der Kläger sonst durch ein gerichtliches Versehen entrechtet würde, *Baumbach-Lauterbach* § 276 Anm. 3 B und § 567 Anm. 1 C. Auch das Kammergericht hat Beschlüsse, durch die der Rechtsstreit unzulässigerweise an das Reichswirtschaftsgericht und an das Gewerbegericht verwie-

sen wurde, für beschwerdefähig erachtet (KGBl. 21, 68 und OLG Rspr. 25, 118); ebenso OLG Bamberg bei Verweisung ans Gewerbegericht, JW 1910, 688.

Das OLG Kassel (Beschuß v. 13. 7. 22, JW 1924, 213<sup>14</sup>)<sup>4</sup> und neuestens das LG Neuruppin (Beschuß v. 5. 5. 51, NJ 51, 379)<sup>5</sup> haben die Anfechtbarkeit eines ohne Antrag des Klägers ergangenen Verweisungsbeschlusses mit der Begründung bejaht, der Kläger habe ein Anrecht auf die Nachprüfung der Zuständigkeitsfrage im vorgeschriebenen Verfahrensgang und Instanzenzug und es sei ein unerträglicher Zustand, wenn er sich nicht gegen die gesetzwidrige Entziehung dieses Anrechts wehren dürfe.

II. Wir wenden uns nur dem Fall der Außerachtlassung des Antragserfordernisses zu.

Der Beschuß des OLG Kassel hat mit Recht keine Nachfolge (mit Ausnahme des LG Neuruppin) gefunden. Irrig ist zwar die Ansicht, daß § 276 II ZPO jede Anfechtungsmöglichkeit abschneide. Es ist allerdings nicht zu verkennen, daß der Wortlaut „Eine Anfechtung des Beschlusses findet nicht statt“ rein grammatikalisch auch so ausgelegt werden kann, daß schlechthin jeder Beschuß, durch den ein Gericht einen Rechtsstreit an ein anderes Gericht verwiesen hat, unangreifbar und bindend sein soll. Daß diese, durch Loslösung des Begriffs „Beschuß“ in Abs. II aus seinem Sinnzusammenhang und seinen Voraussetzungen in Abs. I gewonnene Auslegung jedoch dann nicht durchführbar ist, wenn sie bei gröberen Irrtümern des verweisenden Gerichts zu ganz unannehmbaren Ergebnissen führen würde, zeigen schon die oben angeführte Rechtsprechung und Lehre. Man denke ferner an eine Verweisung von einem gar nicht angegangenen Gericht, oder an eine Verweisung an ein nicht mehr deutsches Gericht in Schlesien. Muß hiernach aber der Beschuß, um nach § 276 II unanfechtbar und bindend zu sein, außer seinem die Verweisung aussprechenden Inhalt ein solcher sein, den § 276 I (und darüber hinaus das deutsche Prozeßrecht) meint, dann ist auch nicht einzusehen, warum die Verletzung der Vorschrift, daß der Verweisungsbeschuß immer nur die richterliche Verbescheidung eines Parteiantrags sein darf, nicht ebenfalls „den Rahmen des § 276“ sprengt. Darüber, wo die reine Unvernunft beginnt,

<sup>1</sup> Vgl. RGZ 108, 263 (264) und 131, 198 (200); BGHZ 1, 341 (342) und das dort verzeichnete Schrifttum.

<sup>2</sup> Vgl. jedoch die eingehende Ablehnung dieser Entscheidung durch Rosenberg, ZZP 53, 394 ff.

<sup>3</sup> BGH aaO und Anm. Volkmar zu LAG Königsberg, ArbRSamml. Bd. 25 LAG S. 71; ebenso Baumbach-Lauterbach ZPO, 20. Aufl., § 276 Anm. 3 A.

<sup>4</sup> Mit ablehnender Anm. von Buzengeiger.

<sup>5</sup> Mit zustimmender Anm. von Nathan.



# Labour Law

Otto Kahn-Freund (Frankfurt \*1900 † 1979)  
assistant to Sirz Geiner "father of German labour law"  
lecturer London School of Economics + 1945-Holland  
{ Professor of Oxford

Knighted for "his services to labour law"  
the first citation of its kind

Honorary doctorate

John

Brunel

Stockholm

Paris

Cambridge

Leicester

Toronto

1971-1972

The writer of a leading French text book states:  
"It is impossible to learn about labour law  
without being in intellectual and  
human communication with Otto Kahn-Freund"





*Otto Kahn-Freund*

International Collection of Essays  
Collection Internationale d'Etudes  
Colección Internacional de Colaboraciones  
Collezione Internazionale di Saggi Commemorativi  
Internationale Gedächtnisschrift

IN MEMORIAM

SIR OTTO KAHN-FREUND

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MÜNCHEN 1980



## AVANT-PROPOS

par JEAN-MAURICE VERDIER

Président de la Société

Il est plusieurs raisons pour le Président de la Société Internationale de Droit du Travail et de la Sécurité Sociale, sans mérite particulier pourtant, de faire précéder d'un bref propos les Etudes rassemblées à la mémoire et en l'honneur d'Otto Kahn-Freund.

Elles sont en effet les premières réalisées dans le domaine du Droit Social avec cette dimension internationale: rassemblant une cinquantaine de contributions d'auteurs de plus de vingt pays couvrant presque tous les continents; réunissant les concours souhaités par celui auquel elles sont destinées, conscient, tout comme les organisateurs, de l'impossibilité de faire place à tous ceux qui auraient souhaité s'associer à cet hommage; voulues à la mesure de celui dont elles honorent la mémoire, moins du reste en sa qualité de cofondateur et de président d'honneur de la Société qu'au titre de sa contribution incomparable à la réflexion fondamentale sur la fonction du droit social, sa méthode, son évolution, et de l'apport original de sa recherche comparative pour la compréhension des grands phénomènes sociaux de notre temps.

Docteur en droit de l'université de Francfort et licencié en droit de l'université de Londres, Sir Otto Kahn-Freund avait également eu l'occasion de mettre en pratique ses connaissances juridiques lorsqu'il remplit les fonctions de juge dans un conseil de prudhommes en Allemagne, de 1929 à 1933, date à laquelle il émigra en Angleterre. Par la suite il devint membre du barreau anglais et enseigna successivement à la London School of Economics et aux Universités d'Oxford et de Cambridge. Ses nombreux séjours à l'étranger lui donnèrent l'occasion d'enseigner ou de donner des conférences dans de nombreuses universités étrangères et notamment à Paris. L'autorité qu'il s'était acquise dans le domaine du droit du travail comparé l'avait fait tout naturellement désigner comme Editeur principal du Volume XV (Droit du Travail) de l'Encyclopédie internationale de droit comparé publiée en anglais sous les auspices de l'«International Association of Legal Science».

Orateur brillant et persuasif, passant allègrement de l'anglais à l'allemand ou au français, il était un Président ou un rapporteur idéal dans une réunion internationale. Rien d'étonnant donc à ce que plusieurs organisations internationales aient eu recours à ses services, qu'il s'agisse du Conseil de l'Europe où il fut le premier rapporteur d'une commission d'experts indépendants chargée d'études sur la Charte sociale européenne ou du Bureau international du Travail où il présida en 1967 une réunion technique sur les droits des représentants syndicaux et la participation des travailleurs aux décisions dans les entreprises, qui prépara le terrain en vue de l'adoption en 1971 de la convention (n° 135) et de la recommandation (n° 143) sur les représentants des travailleurs. Sa haute compétence juridique jointe à son indépendance d'esprit l'avait par ailleurs fait désigner par le Conseil d'administration du B.I.T. comme membre de la Commission d'investigation et de conciliation en matière de liberté syndicale et du groupe de travail chargé d'étudier le cas des Etats-Unis (Puerto Rico).



*Avant-Propos*

l'hommage est placé sous le patronage de la Société Internationale de Droit du Travail et de la Sécurité Sociale, patronage exceptionnel, mais fondé sur une initiative prise au sein du Comité Exécutif de la Société, au cours du 9<sup>ème</sup> Congrès tenu à Genève en septembre 1978, même si l'idée en avait déjà été avancée lors d'une réunion préparatoire du Congrès par un de ses membres dont le rôle a été par là-même essentiel dans la réalisation de ce projet.

Le rédacteur de ces lignes ne saurait sans outrecuidance en dire davantage, sinon ajouter que la confiance qu'il éprouve comme tant d'autres pour la rigueur et l'ampleur de la tâche obstinée menée par le Maître honoré

pour que cette œuvre commune n'aurait pas été possible sans le soutien financier que nous avons obtenu de la Alfried Krupp von Bohlen und Halbach-Stiftung, Essen, et de la Anglo-German Foundation for the Study of Industrial Society, London. Sitôt sollicités, ils ont promis les moyens nécessaires et se sont mis sur les rangs de ceux qui ont l'honneur d'honorer en Otto Kahn-Freund une des grandes personnalités de notre siècle.

Elles doivent être ici chaudement remerciées, ainsi que la maison d'édition Springer-Verlag, sans le concours de laquelle cette œuvre n'aurait pu être menée à bien.

Je ne dois enfin de témoigner de la grande joie éprouvée par Sir Otto à Salzbourg lorsqu'il apprit le projet d'un hommage mondial, et d'exprimer ma tristesse d'autant plus grande de ne pouvoir, au nom de tous, le lui présenter à l'occasion de son 80<sup>ème</sup> anniversaire que cet hommage aurait été la meilleure manière de fêter.

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## IN MEMORIAM OTTO KAHN-FREUND\*

A few days before his death Otto Kahn-Freund wrote to an American acquaintance: "I am living in a state known as retirement, a state which I still refuse quite to accept for myself." Indeed it is impossible to think of more than formal compliance with a university regulation when he "retired" from the Chair of Comparative Law at Oxford in 1971. His life's work of scholarship continued to the full until the very end. In the poet's words:

"That low man seeks a little thing to do,  
Sees it and does it:  
This high man, with a great thing to pursue,  
Dies ere he knows it."

I came to know Otto as a friend in the last 15 years of his life. Those years have left me rich with the gift of his charity and the dear honour of his friendship. I refer to my own experience only because I know that countless others have had similar experiences. When I first met him it was as a complete stranger seeking the favour of his help in tracking down some collective agreements into which I was researching. His response was immediate and painstaking and before long he had immersed himself in nursing me through the writing of a book on the subject. I recall how at one critical stage, almost every post brought a scribbled note from Otto directing me to a source of which I was unaware or saving me from some error. In the years that followed we fell naturally into that bond which links those who have come to this country as adult immigrants and share a similar critical admiration for the land which has given them refuge. From Otto I received the unfailing guidance and support which made adjustment possible. What was so remarkable about his help was that he never made one conscious of the sacrifice which he was making in time and effort. Instead he communicated, in his characteristically modest way, spontaneous enthusiasm, the sense of urgency and of commitment which inspired one with the confidence which creative work demands.

Like many others, in all parts of the world, I had come under Otto's stimulating influence even before I met him. I remember how, as a student in another country, grappling with the technical problems of the conflict of laws, I came across, in the *Transactions of the Grotius Society*, an article by Otto which overnight transformed my vision of the doctrine of precedent and the role of public policy in law-making by the judges. I experienced the sensation of Keats' "watcher of the skies when a new planet swims into his ken". The "realms of gold" in his lectures and writings on other subjects, in particular labour law, still lay ahead for me.

Yet the written word can never replace the sense of excitement aroused by Otto's lectures. It is no accident that nearly all his most brilliant published works originated as lectures. This was his favourite form of art. He was one of the few law teachers I

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\* Address delivered at the Memorial meeting for Sir Otto Kahn-Freund at the London School of Economics and Political Science on October 8, 1979.



know who re-read the major cases before each lecture. This enabled him to bring a freshness and vitality to everything he had to say. The flowering of his art came like that of a septuagenarian Michelangelo, in the major series of lectures delivered during his retirement: the Hamlyn lectures entitled *Labour and the Law*; the Hague Academy lectures on *The General Problems of Private International Law*; and his British Academy Lectures on *Labour Relations: Heritage and Adjustment*.

These lectures exemplified in their highest form three great legacies which Otto has contributed to our lives.

The first legacy is the internationalisation of legal studies. He linked both academic and practical law in this country to the great Continental European traditions of the civil law and of the sociology of law. One of those rare occasions when he showed irritation was when someone slipped into the error of distinguishing Britain from "Europe" rather than from the Continental Europe. He was in every sense a European. A testament to this is the range of European universities which honoured him with their doctorates: Bonn, Brussels and Leuven, Stockholm and Paris, as well as Cambridge, Leicester and York (Toronto). Another testament is to be found in his work (for 15 years until the end of 1978 as Chief Editor of the Labour Law volume of the International Encyclopedia of Comparative Law; another is his Presidency and later Hon. Presidency of the International Society for Labour Law and Social Security which he helped to refound in the 1950s. His practical influence was felt through his work as first Rapporteur to the Committee of Experts under the European Social Charter of the Council of Europe and as a member of the panel of the Fact Finding and Conciliation Commission on Freedom of Association of the I.L.O. He actively fostered international contacts. It is no accident that in France the writer of a leading modern textbook on Labour Law states: "It is impossible to learn labour law without being in intellectual and human communication with Otto Kahn-Freund", or that he is regarded as one of the inspirations of the most important social realist movement, since the War, in Italian labour law. In Germany he has had an even more widespread influence since the 1950s than he enjoyed in the Weimar period, leading a new generation of scholars back to the principles developed by Sinzheimer and others and later developed by Otto in such a fascinating way in Britain.

He was fond of saying that it was his enforced transition from Weimar Germany to Britain which had made him a comparatist by fate and not by choice. We may count ourselves fortunate that this fate led Otto Kahn-Freund to offer a brilliant series of generalisations – particularly in the field of labour law – which transformed our understanding of what it is that makes the social and legal institutions of this country different from others, so making it possible for us to appreciate the role of law in achieving social justice throughout Europe.

A second legacy was to teach us the lesson of humility in relation to the place of law in human relations. He wrote in letters of gold his belief that "the law is a secondary force in human affairs, and especially in labour relations". This was a message as much, if not more so, for the non-lawyers as for those lawyers whose pride of craft makes them egocentric. He conveyed this lesson by winning the deep respect of friends and opponents for his own technical skills as a lawyer and one with a developed theoretical and practical insight. One may illustrate this by the moderating

role which he played as a member of the Donovan Royal Commission on Trade Unions and Employers' Associations against those who thought it possible to reform industrial relations by direct legal intervention. It is extremely doubtful whether the view held by the majority of the Commission that collective agreements should not be legally enforceable would have prevailed had he not presented the powerful case which now appears in Chapter VIII of the Report. His "lesson of humility" about the role of law did not, however, lead him into the error of believing that the law was an irrelevance. Indeed he has earned a place in the history of two of the major reforms of our century – the law of unfair dismissal and the institution of industrial tribunals – by drafting and pressing for those chapters of the Donovan Report which advocated these developments.

A third legacy of Otto's work was to move the sociology of legislation to the core of teaching and research. He insisted that the focus of study must move from the application of judicial precedent – what he described as the pathological situations which come before the courts – towards an examination of why legislation was used and – often more important – why it was not used, and how it is used. He made his students realise the immense impact of social, political and economic developments on the law – anyone who had the privilege to hear his lectures in this School on the Truck Acts, ranging across a spectrum from Benjamin Disraeli's *Sybil* to Frederick Engels' *Condition of the Working Class* will know what I mean. Much of this is now taken for granted by a younger generation. It was Otto Kahn-Freund – in this the inheritor of the great German traditions of Sinzheimer, Weber and Marx and the Austrian sociologist and lawyer Ehrlich – who helped so substantially to lay the foundations of socio-legal studies in this country. He did this also in a very practical way as a founder member of the social sciences and law committee of the Social Science Research Council and especially through his crucial role in helping to establish the Oxford Centre for Socio-Legal Studies.

These legacies will undoubtedly influence the generations who come after Otto Kahn-Freund. As one who had the privilege of collaborating directly with him my abiding memory is that of his absolute personal and intellectual integrity: his life and his work of scholarship were as one. The young man who would not bend to the Nazis, is for me inseparable from the older man, the international socio-legal scholar, the brilliant teacher, the generous friend and above all, the still passionate democrat.

Bob Hepple



## BIOGRAPHICAL NOTE

Otto Kahn-Freund was born on November 17, 1900 in Frankfurt am Main. He was educated in history and law at the Universities of Frankfurt, Heidelberg and Leipzig. His interest in labour law was aroused by Professor Hugo Sinzheimer (1875-1945), the "father" of the study of collective labour law. Otto Kahn-Freund went to his seminar at Frankfurt and, as he later acknowledged "was simply overwhelmed by both his moral and intellectual power and the strength of his personality". Under Sinzheimer's guidance he took his doctorate on certain aspects of collective bargaining law, published in 1929 under the title "*Umfang der normativen Wirkung des Tarifvertrages und Wiedereinstellungsklausel*". He became Sinzheimer's assistant at the University and in his advocatorial practice. Otto Kahn-Freund also acknowledged his debt to Professor Hans Lewald who first sparked his enthusiasm for what later became his two other main fields, the conflict of laws and comparative law.

After he had completed his final law examination he spent over a year in England and the United States, and he began his study of English law. At the time he had no thought of emigrating from Germany and in 1928 he joined the State judicial service being appointed at the end of January 1929 to the Berlin Labour Court. While a judge he wrote two remarkable works. In "*Das soziale Ideal des Reichsarbeitsgerichts*" (1931) he made a detached but unmistakable attack on the Supreme Labour Court by comparing the ideology behind its decisions with the ideology of the (Italian) fascist labour legislation of 1926. He then wrote an article "*Der Funktionswandel des Arbeitsrechts*", in which he analysed the transformation of Weimar labour law from its original purpose of promoting "collectivism", which supported trade unions and recognised the legitimacy of industrial conflict, to the suppression of conflict, the weakening of the trade unions and the strengthening of the State apparatus. He was particularly critical of the reification of the "works objective" by the judges in their interpretation of the Works Councils Law of 1920.

Otto Kahn-Freund and his wife Elisabeth Klaiss, whom he married in 1931, belonged to a group of socialist intellectuals (he had joined the Social Democratic Party in 1921). He was removed by the Nazis on political grounds on April 1, 1933 - this was even before the removal of the Jewish judges which would inevitably have ended his career. The immediate circumstances were that in March 1933 Kahn-Freund had delivered a courageous judgment in favour of three employees of the radio corporation who had been dismissed on the pretext that they were Communists who planned to sabotage the first of Hitler's broadcasts. He found, as an impartial judge, that there was no evidence whatever to support the allegations against them. He was promptly dismissed. In the following June, just one step ahead of the secret police, he and his wife left.

They came to England, where Kahn-Freund obtained entry as a post-graduate law student to the London School of Economics and Political Science. This became his workplace and spiritual home - with stimulating teachers and colleagues such as Laski and Tawney - for the next 30 years. He obtained the LL.M degree in 1935 and was called to the English Bar in 1936. He was appointed to an assistant lectureship in 1935,



and later a lectureship, a readership in 1947 and a personal Chair in 1951. Initially he taught mainly Commercial Law and his first major contribution to English law was his complete rewriting and expansion of the book by Disney on *Carriage of Goods*, a work which he took through four editions, the last published in 1965. From the end of the War he was responsible for the teaching of Labour Law at the LSE.

When he came to England he immersed himself in the task of informing the British public about the situation under Nazism, using a pseudonym until his father was safely out of Germany. He became a naturalised British subject in 1940. During the War he divided his time between the BBC's German services and helping to maintain a skeleton teaching organisation for LSE while it was evacuated to Cambridge. At the end of the War he worked for a time in the Legal research unit of the Control Commission for Germany.

Soon after coming to England Kahn-Freund began to make a study of collective agreements. At that time there was no "labour law" in England apart from the contract of employment and protective legislation, and a small amount of what was called "trade union" law. Robson and Tillyard had begun to examine collective bargaining and collective agreements. Kahn-Freund brilliantly took up the subject and illuminated a set of basic principles which form the foundation of our understanding of modern collective labour law in Britain. In this there can be clearly detected the influence of Sinzheimer's classification of the functions of collective agreements. Kahn-Freund's analysis, rooted in Austro-German legal sociology, of the law-creating capacity of autonomous collective organisations, added another dimension. His impressive Introduction to the English edition of Renner's *The Institutions of Private Law and their Social Functions* (1949) likewise brought the Continental traditions of the sociology of law to the English-speaking world, and illuminated the differences between common law and civil law systems.

In these and the following years he was responsible for the whole or part of some 26 books and 82 articles in various periodicals and many notes and reviews ranging across the spectrum from labour law to family law, the conflict of laws, comparative law and legal education. His works have appeared in many languages and achieved great practical influence.

He was a popular lecturer in many parts of the world, including Germany, France, Italy and the USA. In 1964 he accepted the Chair of Comparative Law at Oxford, where in addition to developing the study of comparative law he introduced the teaching of labour law (although it was allowed only for post-graduates) and played a key role in the foundation of the Social Science Research Council's Centre for Socio-Legal-Studies. While at Oxford he was appointed a member of the Royal Commission on Trade Unions and Employers' Associations (1965-1968) and he played a decisive role in its deliberations on matters such as the enforceability of collective agreements (which he opposed), the introduction of statutory protection against unfair dismissal and the development of industrial tribunals (which he strongly favoured).

In the 1950s he helped to refound the International Society for Labour Law and Social Security, becoming its President and later Honorary President. He was Honorary President, from its foundation, of the British Industrial Law Society. He

was first Rapporteur to the Committee of Experts under the European Social Charter, and a member of the Fact Finding and Conciliation Commission on Freedom of Association of the I.L.O. He was Chief Editor of Volume XV (Labour Law) of the *International Encyclopedia of Comparative Law* until the end of 1978.

In his later years he received many honours. He was knighted in the Birthday Honours 1976 "For services to labour law" – the first citation of its kind. He was a member of the British Academy from 1965, a Queen's Counsel (1972) and Honorary Bencher of the Middle Temple (1969). He received honorary doctorates from the Universities of Bonn, Brussels, Leuven, Stockholm, Paris, Cambridge, Leicester and York (Toronto).

He retired from his Chair in 1971, but continued an active life of writing and lecturing in many countries. His Hamlyn lectures of 1972 on *Labour and the Law* were published in a second edition in 1977. His *Selected Writings* were published by the *Modern Law Review* (which he had helped to found in 1937) in 1978, and his British Academy lectures, *Labour Relations: Heritage and Adjustments*, were published in 1979.

He died suddenly on August 16, 1979.

Bob Hepple



# Otto Kahn-Freund und Deutschland

von THILO RAMM, Hagen

## *1. Die frühen Jahre*

1. "The most important single fact of my life is, that I am a Jew". Diesen Satz stellte Otto Kahn-Freund an den Anfang seiner Lebenserinnerungen, die er, leider nur für die Kindheit, in seinen letzten Lebensjahren niederschrieb. Fast sechzig Jahre vorher, in einem Brief an seine Eltern vom 14. Mai 1919 hatte er eine andere Stellung bezogen: Er hatte die Bestrebungen des Zentral-Vereins der Bürger jüdischen Glaubens „im Interesse der deutschen Juden, aber nicht in meinem Interesse“ begrüßt. Denn: „Ich bin kein Jude, bin nie einer gewesen, und den äußeren Schein meiner Zugehörigkeit zum Judentum werde ich abschütteln.“ Der Student der Geschichtswissenschaft und spätere Student der Rechtswissenschaft erschien und fühlte sich, um es mit den Worten eines Kommilitonen auszudrücken, als „deutsch-demokratischer assimilierter Frankfurter“. Doch fügte er damals, unter dem Eindruck einer antisemitischen Demonstration in einer Vorlesung seiner Absage an das Judentum den Satz hinzu: „Eines allerdings gibt es, was mich in diesem Entschluß schwankend machen kann – der Antisemitismus, der rapid ansteigt.“ Es ist dies ein Schlüsselwort, das Kahn-Freunds Konfession aus den letzten Lebensjahren in einer Hinsicht verstehen läßt: als freiwilliges Bekenntnis zum Judentum als einer Schicksalsgemeinschaft der Erniedrigten und der Verfolgten. Doch ist diese Konfession noch mehr – sie enthält auch den Hinweis auf das entscheidende Ereignis seines Lebens, auf den Bruch mit Deutschland.

Kahn-Freund stammte aus einem wohlhabenden Haus. Er wuchs in einer kultivierten Umgebung auf, das dem deutschen Bildungsbürgertum im besten Sinne zugeordnet werden konnte. Der Vater hatte sich im Alter von einundvierzig Jahren aus dem Geschäftsleben zurückgezogen, um seinen musischen Neigungen nachzugehen. Doch besteht noch eine weitere, eine politische Vorprägung. Der Großvater mütterlicherseits hatte fünfundzwanzig Jahre in den Vereinigten Staaten gelebt und war auch nach der Rückkehr nach Deutschland amerikanischer Staatsbürger geblieben. Noch stärker war der Einfluß des Onkels Ernst Freund, eines Verwaltungsrechtlers und überzeugten Verfechters der Menschen- und Bürgerrechte, einer der ersten Lehrer an der sehr angesehenen Law School in Chicago. Dies und die reichsstädtische Tradition der Heimatstadt Frankfurt erklären es, weshalb der junge Otto Kahn-Freund als überzeugter Republikaner und als Gegner Preußens aufwuchs. Zum deutschen Kaisertum hatte er keine Beziehung. Ich erinnere mich eines Gesprächs mit ihm über die Novemberrevolution von 1918, in dem er für das Scheitern des mit der Kanzlerschaft des Prinzen Max von Baden begonnenen parlamentarischen Kaisertums kein Wort des Bedauerns fand.



2. Der preußische Militarismus, der deutsche Imperialismus und das bewußte Erleben des Ersten Weltkriegs ließen den jungen Kahn-Freund zum glühenden Pazifisten werden. Diese erste, das ganze Leben bestimmende politische Entscheidung verband sich mit Hugo Sinzheimer: Kahn-Freund sah Sinzheimer erstmals als Redner auf einer Massenveranstaltung in Frankfurt, als dieser für die Friedensresolution des Deutschen Reichstags von 1917 eintrat.<sup>1</sup>

Die Hinwendung vom zunächst ergriffenen kontemplativen Geschichtsstudium zum juristischen Studium wurde mitbestimmt durch den Einfluß der Freunde, die fast sämtlich Jura studierten. Unter ihnen war der zwei Jahre ältere Ernst Fraenkel, der in Frankfurt aufgewachsen war, für Kahn-Freund wichtig. Doch war die Entscheidung in der Persönlichkeit selbst angelegt: Kahn-Freund hatte schon in seinen Arbeiten über die reichstädtische Entwicklung sich moderner juristischer Kategorien bedient. Er war der Gegenwart zugewandt, er wollte sie mitgestalten.

3. Ernst Fraenkel stellte auch den Kontakt zum Sozialismus und zur Arbeiterbewegung her – als Dreiundzwanzigjähriger trat Kahn-Freund der Sozialdemokratischen Partei bei – und vermittelte den unmittelbaren Zugang zu Sinzheimer, jenem Manne, der in einzigartiger Weise die Eigenschaften eines klugen und vorausschauenden Politikers, eines Gelehrten von hohem Rang, eines brillianten Anwalts und eines hinreißenden akademischen Lehrers miteinander verband. Sinzheimer hatte maßgeblich den Grundrechtsteil der Weimarer Reichsverfassung gestaltet und war wie kaum ein anderer bemüht gewesen, die Ursachen des deutschen Zusammenbruchs aufzudecken.<sup>2</sup> Seine Berufung zum Reichsarbeitsminister scheiterte an der Borniertheit seiner sozialdemokratischen Fraktionskollegen.<sup>3</sup> Rückschauend wird klar, daß damit auch die damals realpolitisch greifbar nahe gesetzgeberische Umsetzung der Rätekonzeption der Weimarer Reichsverfassung (Art. 165 WRV)<sup>4</sup> vertan worden war. Enttäuscht hatte sich Sinzheimer von der Tagespolitik abgewandt und sich auf die Kodifikation des Arbeitsrechts konzentriert. Vor allem aber hatte er sich der neuen Disziplin, der Arbeitsrechtswissenschaft, zugewandt. Seine geniale einführende Skizze „Grundzüge des Arbeitsrechts“ (1921)<sup>5</sup> läßt die Konzeption erkennen, die damals auf Kahn-Freund bestimmend gewirkt hat, bestimmend nicht zuletzt auch durch die Ausstrahlungskraft der faszinierenden Persönlichkeit Sinzheimers. „Keiner“, stellt Kahn-Freund rückblickend über Sinzheimers Einfluß auf den Werdeprozeß seiner

<sup>1</sup> Zu dieser Seite Sinzheimers vgl. vor allem dessen Schrift „Völkerrechtsgeist“ von 1916 und Fraenkel, Zum Andenken an Hugo Sinzheimer, Mitteilungen der Akademie der Arbeit an der Universität Frankfurt, 13. Jg. 1958, S. 21 ff., wiederabgedruckt in Fraenkel, Reformismus und Pluralismus. Materialien zu einer ungeschriebenen Autobiographie, zusammengestellt und hrsg. von Falk Esche und Frank Grube, 1973, S. 131 ff.

<sup>2</sup> Eine Zusammenstellung enthält die Bibliographie Sinzheimers in dessen „Arbeitsrecht und Rechtssoziologie. Gesammelte Aufsätze und Reden“, hrsg. von Kahn-Freund und Ramm, 1976, Bd. 2., S. 323 ff.

<sup>3</sup> Vgl. dazu Susanne Müller, Die Bürde der Macht. Die deutsche Sozialdemokratie 1918–1920, 1978, S. 293. Sinzheimer, der vorher auch als Reichsjustizminister im Gespräch gewesen war, sollte Nachfolger Bauers werden. Ihm wurde dann Schlicker vorgezogen.

<sup>4</sup> Vgl. hierzu meinen Beitrag „Die Arbeitsverfassung der Weimarer Republik“ in diesem Band S. 225 ff.

<sup>5</sup> Diese Einführung ist eine abgeänderte Fassung von Sinzheimers Beitrag „Arbeitsrecht“ im Handwörterbuch der Staatswissenschaften, Bd. 1, 4. Aufl. 1923, S. 804 ff.

Schüler fest,<sup>6</sup> „konnte sich der Gewalt seines Wortes entziehen, und ein jeder war erwärmt von dem Feuer seines Willens zur sozialen Gerechtigkeit und zur Befreiung des Menschen.“

Soziale Gerechtigkeit und Befreiung des Menschen – dies wurden zwei Leitmotive des weiteren Lebenswegs von Otto Kahn-Freund. Es war die Freiheit für jedermann, die Weiterführung des Erbes der 1848er, die soziale Fortführung des Liberalismus.

Sinzheimer hatte die juristische Marschroute seiner Schüler zweifach negativ abgegrenzt: die Ablehnung des „Fetischs der Trennung von öffentlichem Recht und Privatrecht“, und seines „Zwillingsbruders“, des „kleineren Fetischs“ der ungerechtfertigten Differenzierung zwischen Arbeitnehmerkategorien; hierbei erwähnte Kahn-Freund besonders den „Beamtenfetisch“: das Haltmachen bei der Vereinheitlichung des Arbeitsrechts vor dem Beamtenrecht.

Als dritten Punkt hob Kahn-Freund in seiner Rückschau hervor: die scharfe juristische Schulung. Wie jeder gute Jurist sei Sinzheimer durch die dogmatische Durchdringung des Rechts hindurchgegangen: Er habe sie nicht umgangen und sei nicht in ihr steckengeblieben. Das gleiche habe er von seinen Schülern gefordert. Mit denjenigen in der heutigen jüngeren Generation, die sich vor der dogmatischen Schulung, vor dem „Denkenlernen“ aus Angst um die Stärke ihrer eigenen Überzeugung fürchten, habe er nichts gemeinsam gehabt, ebensowenig mit denjenigen, die aus ihrer eigenen sozialen Blindheit einen Kultus machten.

Diese Doppelfunktion zeichnete auch und gerade Kahn-Freund aus: Er lehnte das „mikro-juristische Denken“, den öden Spezialisten mitsamt seiner geistigen Isolierung ab. Er war aber ebenso bereit, die eigene Position und das eigene politische Engagement, jene Spontaneität, die ihn als Menschen auszeichnete und so liebenswert machte, der unerbittlichen juristischen Prüfung zu unterwerfen.

Verglichen mit den Freunden, denen er als Assistent Sinzheimers nachfolgte, Ernst Fraenkel und Franz Neumann, war Kahn-Freund am meisten Jurist. Hierfür zeugt auch seine Neigung zum internationalen Privatrecht als dem intellektuellsten und zugleich wertfreiesten Rechtsgebiet. Bestimmend war insoweit für ihn zunächst sein Frankfurter Lehrer Lewald. Zur selbständigen Entfaltung auf dem Gebiete des internationalen Privatrechts kam Kahn-Freund indessen erst in England.

Der Bejahung der juristischen Methode als rationaler kritischer Distanzgewinnung entspricht auch Kahn-Freund's Verhältnis zum Marxismus. Schon früh, kurz nach der Novemberrevolution und erneut als Dreiundzwanzigjähriger, hatte er sich intensiv mit der sozialistischen Literatur befaßt. Rückschauend, in einem Brief vom 20. 4. 1947 faßte er zusammen, was für ihn der Marxismus bedeutete: Er sprach von „jener eiskalten Analyse des Greifbaren in Vergangenheit und Gegenwart, die Marx befähigte, gerade durch seine wissenschaftlichen Erkenntnis des Gesellschaftlichen, den Weg zum Handeln zu finden.“

## II. Der Richter und der Kritiker des Reichsarbeitsgerichts

1. Anders als die Freunde hatte sich Kahn-Freund nach seiner Promotion bei Sinzheimer über den „Umfang der normativen Wirkung des Tarifvertrags und der We-

<sup>6</sup> In seiner Einführung zu Sinzheimers „Arbeitsrecht und Rechtssoziologie“, Bd. 1, S. 33.



derEinstellungsklausel“ nicht für die Anwaltstätigkeit, sondern für den Richterberuf entschieden. Vor dem Eintritt in den preußischen Justizdienst hatte er noch jeweils sechs Monate in den USA und in England verbracht und sich in Anwaltskanzleien mit dem angelsächsischen Recht befaßt. Nach einer einjährigen Tätigkeit beim Amtsgericht Berlin-Charlottenburg fand er als Richter am Arbeitsgericht Berlin den ihn innerlich befriedigenden Wirkungskreis und wurde, ein Zeichen hoher Anerkennung, von Georg Flatow zum Mitverfasser der 13., tiefgreifend veränderten, Auflage seines Kommentars zum Betriebsrätegesetz (1931) gewonnen – es war der führende Kommentar der Weimarer Zeit. Walter Kaskel hat ihm, wie er mir einmal erzählte, in dieser Zeit die Habilitation angeboten.

2. Aufsehen erregte Kahn-Freund mit seiner Schrift „Das soziale Ideal des Reichsarbeitsgerichts“ (1931). Diese Schrift steht in geistigem Zusammenhang mit der Diskussion um den Richter während der Weimarer Republik, die sich vor allem in der Zeitschrift „Die Justiz“, dem Organ des republikanischen Richterbunds,<sup>7</sup> spiegelt. Sie folgte auf die soziologisch-psychoanalytische Attacke Ernst Fraenkels („Soziologie und Klassenjustiz“ von 1927)<sup>8</sup> und den politischen Angriff Franz Neumanns („Die politische und soziale Bedeutung der arbeitsgerichtlichen Rechtsprechung“ von 1929)<sup>9</sup>. Mit ihrer positivistisch-exakten Zusammenfassung und Analyse der Urteile des Reichsarbeitsgerichts zum kollektiven Arbeitsrecht schloß sie eine Lücke in der bisherigen Argumentation der Sinzheimer-Schule. Aussagen wie die Franz Neumanns, die Arbeitsrechtsprechung müsse „ihren Teil zur Befreiung der Arbeiterklasse beitragen“<sup>10</sup> oder Sinzheimers, „Die Unterdrückung des Klassenkampfes führt zur Festigung einer einseitigen Klassenherrschaft“,<sup>11</sup> vermied Kahn-Freund. Allerdings war er von der letzteren Aussage bei aller Würdigung der „sozialen, fürsorglichen Einstellung“ des Reichsarbeitsgerichts für den Arbeitnehmer als Individuum, dessen Verständnis für den sozial Abhängigen und das Eintreten für sozialen Schutz,<sup>12</sup> nicht weit entfernt. Auch für ihn war, wie für Sinzheimer,<sup>13</sup> das Arbeitsrecht mehr als ein „etwas verbe sertes bürgerliches Recht“. Sein Vorwurf an das Reichsarbeitsgericht, es mißbillige die aktive Durchsetzung eigener Rechte der Arbeitnehmer im Betrieb,<sup>14</sup> drückt die Verwurzelung der kollektiven Selbstbestimmung im Freiheitsprinzip aus: Es sollen keine obrigkeitstaatlichen Vorstellungen auf das Arbeitsverhältnis übertragen werden.

<sup>7</sup> Die Zeitschrift erschien von 1925–1933, ihre von Sinzheimer und später von Fraenkel verfaßte Chronik wurde 1968 mit einer Einleitung von Otto Kirchheimer unter dem Titel „Die Justiz in der Weimarer Republik“ neu herausgegeben, 1976 erschien ein kompletter Nachdruck der Zeitschrift.

<sup>8</sup> Wiederveröffentlicht in „Zur Soziologie der Klassenjustiz und Aufsätze zur Verfassungskrise“ 1931–32, 1968 und in Reformismus (Anm. 1), S. 88ff.

<sup>9</sup> Wiederveröffentlicht in „Arbeitsrecht und Politik“, hrsg. von Ramm, 1966, S. 113ff.

<sup>10</sup> A. a. O., S. 125, vgl. auch S. 131.

<sup>11</sup> Gewerkschaftsbewegung und korporativer Gedanke (1936), Arbeitsrecht und Rechtssoziologie, Bd. 1, S. 307 (317) unter Bezug auf den Faschismus.

<sup>12</sup> Zitiert nach der Wiederveröffentlichung in „Arbeitsrecht und Politik“ a. a. O. S. 194.

<sup>13</sup> Sinzheimer, Die Krisis des Arbeitsrechts (1933), a. a. O., Bd. 1, S. 138.

<sup>14</sup> A. a. O., S. 187.

Kahn-Freund hat das soziale Ideal des Reichsarbeitsgerichts als sozialistisch gekennzeichnet: „Es gipfelt in dem Gedanken der Erhaltung der kapitalistischen Wirtschaft und des friedlichen Zusammenwirkens von Arbeitnehmer und Arbeitgeber im Interesse der nationalen Produktion“.<sup>15</sup> Kahn-Freund knüpfte an die aktuelle wissenschaftliche Auseinandersetzung um den Faschismus an, die vor allem von Beckerath und Hermann Heller geführt hatten. Damals, 1931, war der Faschismusvorwurf weitaus weniger diffamierend als nach dem Zweiten Weltkrieg; weniger dramatisch hätte man auch von der Übertragung des deutschen „Kriegssozialismus“ auf die Friedenswirtschaft sprechen können. Doch darf Kahn-Freunds überpointierende politische Zuspitzung<sup>16</sup> des Ergebnisses seiner exakten juristischen Analyse der höchstrichterlichen Rechtsprechung nicht darüber hinwegtäuschen, daß, juristisch gesehen, die Positionen keineswegs sehr weit auseinander waren. Sinzheimer rief später nach einem neuen Freiherrn von Stein<sup>17</sup> und ordnete, sogar die Zwangsschlichtung bejahend,<sup>18</sup> das kollektive Arbeitsrecht dem Staate unter. Entscheidend war – und hierum ging es Sinzheimer und allen seinen Schülern einschließlich Kahn-Freund – daß für die Gewerkschaften ein originärer Freiheitsraum erhalten blieb. Das Eintreten für die Gewerkschaften hatte auch erhebliche politische Bedeutung. Denn die Gewerkschaften waren damals die letzte intakte Kraft der Weimarer Demokratie, nachdem das parlamentarische System mit dem Ausscheiden der Sozialdemokratischen Partei aus der Regierungsverantwortung zusammengebrochen war.<sup>19</sup>

Kahn-Freunds politische Hoffnungen wurden enttäuscht. Im Gegenteil trug ihm seine Schrift die erbitterte Feindschaft des einflußreichen Gewerkschaftstheoretikers Clemens Noerpel – er wurde nach 1933 Referent im wissenschaftlichen Institut der Deutschen Arbeitsfront – ein und kostete ihn die mögliche Karriere im preußischen Handelsministerium.<sup>20</sup>

3. In einer meisterhaften knappen Abhandlung „Der Funktionswandel des Arbeitsrechts“ (1932),<sup>21</sup> die an Renners Schrift „Die Rechtsinstitution des Privatrechts und seine soziale Funktion“ (1929)<sup>22</sup> methodisch anknüpft und die Wechselwirkung zwischen ökonomischen und politischen Gegebenheiten und der Gestaltung des Arbeitsrechts vor dem Ersten Weltkrieg und in der Weimarer Republik untersucht, um-

<sup>15</sup> A. a. O., S. 205.

<sup>16</sup> Vgl. hierzu schon Sinzheimers methodische Bedenken, Chronik a. a. O., (Anm. 7), S. 332.

<sup>17</sup> A. a. O. (Anm. 13). Von kollektiver Selbstverwaltung sprach Franz Neumann (a. a. O. Anm. 9), S. 144, von kollektiver Demokratie Fraenkel 1929, a. a. O. S. 79ff. Die Auffassung lag durch Art. 165 WRV nahe.

<sup>18</sup> Vgl. seine beiden Abhandlungen „Zur Frage der Reform des Schlichtungswesens“ (1929) und „Die Reform des Schlichtungswesens“ (1930), wiederabgedruckt in Arbeitsrecht und Rechtssoziologie, Bd. 1, S. 226ff. und 236ff.

<sup>19</sup> Kurz vorher, bei der Bildung des zweiten Kabinetts Müller, scheint Sinzheimer ein zweites Mal zur Diskussion als Reichsarbeitsminister gestanden zu haben.

<sup>20</sup> Vgl. hierzu Martiny, Integration oder Konfrontation. Studien zur Geschichte der sozialdemokratischen Rechts- und Verfassungspolitik 1976, S. 34 Anm. 386, zur Kontroverse selbst S. 137ff.

<sup>21</sup> Wiederveröffentlicht in Arbeitsrecht und Politik (Anm. 9), S. 211ff.

<sup>22</sup> Es ist dies die neubearbeitete zweite Auflage des 1904 in Bd. 1 der Marx-Studien unter dem Pseudonym Josef Karner erschienenen Werks „Die soziale Funktion der Rechtsinstitute, besonders des Eigentums“. Sie wurde 1965 zusammen mit Kahn-Freunds Einleitungen und Anmerkung zur englischen Übersetzung von 1965 wiederveröffentlicht als Heft 4 der Arbeits- und Sozialrechtlichen Studien.



schrieb Kahn-Freund die Konfliktsituation der damaligen Zeit: „Auf der einen Seite erkennt die staatliche Rechtsordnung die Existenz von Klassen und von Klassengegensätzen, ja die Notwendigkeit einer kämpferischen Auseinandersetzung der Klassen, an. Auf der anderen Seite vermeidet es die Staatsgewalt, in diesem Kampf Partei zu ergreifen. Ist es möglich, in einer klassengespaltenen Gesellschaft den Klassenkampf rechtlich zu organisieren und zu einem Bestandteil der Rechtsordnung zu machen? Kann der Staat den Klassengedanken anerkennen und dennoch neutral bleiben? Muß nicht schließlich entweder der Kampf die rechtliche Organisation zersprengen oder die Rechtsordnung den Kampf erdrücken?“<sup>23</sup> Kahn-Freund beantwortete diese Frage nicht und sah die Antwort bei dem damaligen Zustand als unmöglich an. Nur die erneute Stärkung der Organisationskraft der Arbeitnehmerschaft könne lehren, ob das kollektivistische System bei einer veränderten Wirtschaftslage zu neuem Leben gelange.

Zwei Jahre zuvor hatte Kahn-Freund allerdings eine düstere Prognose gegeben. Er hatte von der geistigen Erstarrung des Arbeitsrechts gesprochen: „Die großen und teilweise neuen Ideen sind teilweise unverstanden geblieben und teilweise verwässert in das Bewußtsein der Juristenmassen übergegangen.“ In der Entpolitisierung der Arbeiterbewegung, in der rein ökonomischen Orientierung der Arbeiterschaft, der Arbeiterparteien, sah er eine Gefahr für die Demokratie und die politischen Parteien. Mit der sozialen Diktatur der Herrschaft des höheren Beamtentums habe man die soziologischen und psychologischen Voraussetzungen auch für die politische Diktatur geschaffen: „Es führen viele Wege zur Diktatur. Der nächste Weg zum Faschismus geht in unseren gesellschaftlichen Verhältnissen nicht über die Gewalt, sondern über die Anbetung von Ruhe und Ordnung, von Fürsorge und Disziplin und vor allem über den ideellen Einbau der kämpfenden Organisation in eine schemenhafte nationale Gemeinschaft“.<sup>24</sup>

4. Dem Juristen, der das erkannte drohende Unheil nicht abzuwehren vermochte, muß es nach der Machtergreifung Hitlers fast wie eine Erlösung vorgekommen sein, als Richter Stellung nehmen zu können. Kahn-Freund hatte über die Kündigung dreier Rundfunktechniker zu entscheiden, denen am Vorabend der Hitlerrede vom 9. 2. 1933 gekündigt worden war, weil sie nicht mehr die Gewähr für die Sicherheit des Rundfunks böten. Später war die Kündigung mit der Vermutung begründet worden, die drei Entlassenen gehörten der kommunistischen Partei an oder stünden ihr nahe. Das Urteil gab der Klage der drei Techniker statt. Seine Begründung ist exakt positivistisch und zeigt, welche Argumentationsmöglichkeiten damals zur Verteidigung des Rechtsstaats noch zur Verfügung standen: Am 9. 2. 1933 sei Art. 118 WRV, die die Meinungsfreiheit des Arbeitnehmers schützte, noch in Kraft gewesen. Überhaupt sei es streitig, ob durch die Verordnung vom 28. 2. 1933, die die Grundrechte vorläufig außer Kraft setzte, auch deren privatrechtliche Wirkung berührt worden sei. Doch Kahn-Freund begnügte sich nicht damit darzutun, daß die Rundfunkgesellschaft, die kein politischer Tendenzbetrieb sei, keinen Beweis für die Zugehörigkeit zur KPD erbracht habe: „Selbst wenn die Kläger der kommunistischen

Partei angehörten oder nahe ständen, konnte hieraus allein die Beklagte nicht auf die Bereitschaft der Kläger zu Sabotageakten schließen; wollte man das Gegenteil annehmen, so müßte man jeden einzelnen von den zahlreichen kommunistischen Wählern nur wegen seiner politischen Meinung verbrecherischer Anschläge für fähig halten, was eine wohl auch von der Beklagten kaum vertretene Ansicht wäre, mögen die Pläne der kommunistischen Parteileitung auch gewesen sein, was sie wollen.“

Nach diesem von der Presse stark beachteten Urteil war für den Richter Kahn-Freund kein Bleiben. Er war eines der ersten Opfer des Gesetzes zur Wiederherstellung des Berufsbeamtentums vom 7. April 1933. In größter Gefahr verließ Kahn-Freund Anfang Juni Deutschland. Es war der tiefe und endgültige Bruch mit jenem Land, für das sich der junge Kahn-Freund aus freien Stücken entschieden, dem er gedient und dessen politische Entwicklung er vergeblich mitzugestalten versucht hatte.

### III. Das dritte Reich und die Nachkriegszeit

1. Als reifer Jurist im Alter von dreiunddreißig Jahren begann Kahn-Freund das Studium des englischen Rechts. Die Entscheidung für den Neuanfang zeigte, wie endgültig er den Bruch mit Deutschland ansah, und drückte zugleich die tiefe Bedeutung des Juristenberufes für ihn aus. Franz Neumann und der freilich erst 1938 emigrierte Ernst Fraenkel wandten sich der politischen Wissenschaft zu.

In einem Brief vom April 1952 erklärte Kahn-Freund seine damalige Entscheidung, nicht in die Vereinigten Staaten gegangen zu sein. Die Vereinigten Staaten erschienen ihm sehr viel mehr vom Kontinent als von England geprägt, und zwar auch in der Kompromißlosigkeit des wirtschaftlichen und sozialen Kampfes. Seine tiefe innere Verbindung zu England begründete er mit der dort praktizierten „Kunst des menschlichen Zusammenlebens“ in der „sozialen Zivilisation“. Er führte dabei das Überleben „feudaler“ Überreste von Ideologien an und verglich die Radikalität des „Zu-Ende-Denkens“ mit der englischen „Tendenz, die Dinge in der Aura gedanklicher Unklarheit zu belassen und empirische Lösungen zu suchen“. In diesem Brief fiel auch das Schlüsselwort von den „Selbstverständlichkeiten“: saubere Administration, Anerkennung der Notwendigkeit, die kulturellen Bedürfnisse befriedigen zu können, auch wenn sie nur die einer Minderheit seien, Anerkennung, daß ein gewisses Mindestmaß in der Verteilung des Sozialprodukts bestehen muß, und daß der sinnlosen Verschwendung der gesellschaftlichen Aktivitäten Einhalt geboten werden muß, auch wenn beides auf Kosten der „Unternehmensfreiheit“ gehe.

Kahn-Freunds tiefe innere Beziehung zu England war mehr als die Dankbarkeit gegenüber dem Land, das ihm Zuflucht gewährt hatte. Sie wurzelte auch darin, daß Kahn-Freund in einer sicheren, historisch festgefühten Umgebung zu sich selbst zu kommen vermochte. Seine eigene Entwicklung verlief aus diesem Grund kontinuierlich, wenngleich, bedingt durch die Einarbeitung in ein grundverschiedenes Rechtsdenken, äußerlich sehr viel langsamer als es in Deutschland der Fall gewesen wäre. Die damals erfolgte Hinwendung zum akademischen Lehrberuf war in der Persönlichkeit Kahn-Freunds tiefst angelegt und in seinen wissenschaftlichen Ar-

<sup>23</sup> A. a. O. (Anm. 21), S. 246.

<sup>24</sup> A. a. O. (Anm. 12), S. 210.



beiten vorgezeichnet. Dies hatte, nach Kaskel, auch Hermann Heller erkannt, der ebenfalls bereit gewesen war, ihn zu habilitieren. Das wissenschaftliche Fundament wurde in England freilich breiter, da Kahn-Freund jedem Wunsche entsprach, der ihn zur tieferen Auseinandersetzung mit dem neuen Recht zwang. Die frühere Fixierung auf das Arbeitsrecht, dem freilich nach wie vor seine Liebe galt, wich der umfassenderen Rechtsbetrachtung.

2. Kahn-Freunds Einstellung zum Recht wurde in England tiefer und rationaler. In seiner letzten Schrift „Labour Relations. Heritage and Adjustment“ (1979) beschreibt Kahn-Freund es als Fluch und Segen für den Flüchtling zugleich, daß ihm das sonst in der Traumwelt der Kindheit und im beginnenden Jünglingsalter ohne bewußte Reflexion selbstverständlich Erworbene, das *Verstehen* im Sinne Diltheys, versagt und er auf das intellektuelle Erfassen, auf das *Begreifen* im Sinne Diltheys, angewiesen sei: „Wer niemals während seines Lebens die Umwelt wechselt, neigt zur Annahme, eine Institution, ein Lehrsatz, eine Übung oder eine Tradition sei zwangsläufig und allgemein, während sie in Wirklichkeit das Ergebnis der besonderen sozialen, historischen oder geographischen Bedingungen des Landes sind, in dem er aufgewachsen ist und lebt.“<sup>25</sup> Der Einwanderer bleibe vor dieser „intellektuellen Falle“ bewahrt. Es sei sein Schicksal, zwischen dem „Wesentlichen“ und dem „Zufälligen“ zu unterscheiden.

Das intellektuelle Begreifen des Rechts macht es durchschaubarer und schafft zugleich die Basis für die Rechtsvergleichung. Hierin liegt die Erklärung, weshalb Kahn-Freund ein Meister der Rechtsvergleichung geworden ist. Doch bleibt die Frage, ob die rationale Kategorie allein ausreicht und es nicht vielmehr Rechtsgebiete gibt, die des „Vorverständnisses“ zwingend bedürfen. Es scheint, daß der Biographie Kahn-Freunds die Antwort zu entnehmen ist: Seine Liebe galt auch dem zweiten großen Grenzgebiet des Rechts, dem Familienrecht. Das rational beherrschbare Ehevermögensrecht hat er in England mehrfach behandelt und entscheidend beeinflusst. Ein vor zehn Jahren schon zu drei Viertel fertiggestelltes Eherecht ist hingegen unvollendet geblieben.

3. Die Begegnung mit dem englischen Arbeitsrecht war weniger schwierig. Der Schüler Sinzheimer und Otto von Guericke konnte das englische „kollektive *laissez faire*“<sup>26</sup> als Ausdruck der Autonomie begreifen, als selbständige Rechtsetzung der Verbände, ohne Zuhilfenahme des Staates. Erst die deutsche Arbeitsrechtstheorie gab den Schlüssel zum Verständnis der englischen Rechtswirklichkeit und erklärte zugleich Kahn-Freunds Verhalten bei den Bestrebungen, das englische Arbeitsrecht zu reformieren. Sein Anliegen war es, die kollektive Autonomie zu erhalten. Nur vorsichtig korrigierend, zur Anpassung an veränderte soziale Umstände und zur Korrektur von Mißständen, sollte der Staat regelnd eingreifen.

4. Noch in einer anderen Weise hat Kahn-Freund das deutsche Erbe für England nutzbar gemacht: Noch während des Zweiten Weltkriegs hat er auf Bitten Karl

<sup>25</sup> S. 1f.

<sup>26</sup> Kahn-Freund benutzte diese Charakterisierung erstmals in *Labour Law, in: Law and Opinion in England in the 20th century*, hrsg. von Ginsberg, 1959, S. 1 (9 u. 11 ff.), wieder abgedruckt in Kahn-Freund, *Selected Writings*, 1978, S. 11f. (9 u. 11 ff.), vgl. hierzu auch die schöne Würdigung von B. A. Hepple in seiner Darstellung des englischen Arbeitsrechts in „*International Encyclopedia of Labour Law and Industrial Relations*“ 1977 Nr. 26.

Mannheims die englische Übersetzung von Renners Schrift „Die Institutionen des Privatrechts und ihre soziale Funktion“ eingeleitet und mit Anmerkungen versehen. Diese Ausgabe ist durch ihre Parallelen zwischen der englischen und der kontinentalen Rechtsentwicklung zur klassischen Doppelführung für den englischen Juristen ins kontinentale Rechtsdenken und für den kontinentalen Juristen ins englische Rechtsdenken geworden.<sup>27</sup> Kahn-Freund bezog den alten Kampf gegen die am Gesetz orientierte Begriffsjurisprudenz nunmehr auch auf den Rechtsprechungspositivismus. Sein Anliegen war dasselbe wie das Anliegen Renners oder das des kurze Zeit später veröffentlichten Buchs von Wolfgang Friedmann:<sup>28</sup> die bereits auf Grund des sozialen Wandels vorgenommenen Rechtsänderungen systematisch aufzuarbeiten. Die prinzipielle Aussage war auf das Privatrecht beschränkt: Unter der funktionalen Umwandlung von Rechtsinstituten verstand Renner den Vorgang, daß die Konnex-Institute, die vormals dem Hauptinstitut zugeordnet waren und ihm dienten, sich später verselbständigten und schließlich das Hauptinstitut beschränkten. Als Beispiele führte Kahn-Freund Darlehnsaktie, Miete, Pacht, Hypothek an. „Sie verursachen jene Mobilität der Kapitalfunktion, die es ermöglicht, eine ganze Anzahl von verschiedenen Normen sich beizuordnen, deren juristische Struktur nichts oder wenig gemein haben. Sie waren ursprünglich dazu bestimmt, der Institution des Eigentums zu dienen, aber schließlich zwingen sie es zur Abdankung von seiner herrschenden sozialen Stellung, die aber noch immer ihren Schatten in die Welt der Norm wirft.“<sup>29</sup> Politisch gesehen, war diese empirische Methode, diese Praktizierung der Rechtssoziologie, das Bekenntnis zur Evolution.

5. Während des „dritten Reiches“ hat Kahn-Freund unermüdlich und leidenschaftlich den Nationalsozialismus bekämpft und vor ihm gewarnt. Unter dem Decknamen Winner – er legte ihn sich zu, um die zunächst in Deutschland gebliebenen Familienangehörigen nicht zu gefährden – hielt er in gewerkschaftlichen Studiengruppen und Volkshochschulen Vorträge über Deutschland und Europa. Fernab jeder politischen Tagesagitation sah Kahn-Freund in Hitler keinen Unglücksfall, sondern spürte die historischen Wurzeln auf und umriß zugleich die Basis für eine künftige Kooperation mit Deutschland in Europa.

Die 1940 anonym veröffentlichte Skizze „Germany and Europe“<sup>30</sup> zeigt Kahn-Freunds Deutschlandbild. Danach war es Deutschlands Unglück, daß die aus ursprünglich slawischen Territorien entstandenen Staaten Österreich und Preußen die kleineren politischen Einheiten Westdeutschlands, „das Land einer älteren und liberaleren Zivilisation“, in Unterwerfung gehalten hätten. Bismarcks Schutzzollpolitik zu Gunsten der deutschen Landwirtschaft sei eine entscheidende Weichenstellung gewesen: Sie habe die aufkommende Industrie und besonders die Arbeiterklasse schwer belastet. Deshalb sei die deutsche Arbeiterklasse der britischen unterlegen geblieben, und die sozialen Kämpfe zwischen Kapital und Arbeit seien in Deutschland heftiger

<sup>27</sup> Vgl. den Nachweis in Anm. 22.

<sup>28</sup> *Law and Social Change in Contemporary Britain*, 1951, 2. Aufl. 1959 unter dem Titel „*Law in a Changing Society*“, revidierte deutsche Fassung „*Recht und sozialer Wandel*“, übersetzt von Monika Weis, 1968, mit einer Einleitung von Spiros Simitis.

<sup>29</sup> A. a. O., S. 37.

<sup>30</sup> *Workers Educational Association Study Outlines* Nr. 2.



wesen. Keine deutsche Regierung habe die Interessen des großen landwirtschaftlichen Sektors und der Industriebevölkerung zu versöhnen vermocht. Der soziale Unterschied zwischen dem adligen Gutsbesitzer und dem Landarbeiter im Osten Deutschlands sei unüberbrückbar gewesen. Den kleineren mittelständischen und bäuerlichen Betrieben der Milchwirtschaft sei der Zugang zum Weltmarkt mit den niedrigeren Getreidepreisen verwehrt worden. All dies habe das Aufkommen der Nationalsozialisten entscheidend gefördert. Die deutsche Industrie sei durch die schon zu Beginn vorhandene Konkurrenz vor allem mit Großbritannien zu einer größeren Kapitalinvestition gezwungen und zur Kartellierung veranlaßt worden: sie habe erwartet, daß die Regierung sie gegen die Arbeiterklasse und die Gewerkschaftsbewegung sichere und den Lohnspiegel gering halte. Als Trägerin des aggressiven Nationalismus sah Kahn-Freund die deutsche Mittelklasse an und erklärte ihre Anfälligkeit gegenüber dem Nationalsozialismus mit ihrer fast vollständigen Enteignung durch Inflation und Währungsreform. Zu den Ursachen der deutschen Aggressivität zählte Kahn-Freund auch die religiösen Kräfte, die Unterordnung des lutheranischen Protestantismus unter die landesfürstliche Autorität. Die deutsche Religionsgeschichte habe keine Fox und Wesley gekannt. Das Christentum sei keine lebendige Kraft mehr in den Großstädten des protestantischen Deutschlands. Damit erklärte Kahn-Freund die völlige Zerstörung der Werte und den Zynismus vieler Deutscher in Bezug auf die politischen Methoden. Die Wiederherstellung dieser moralischen Werte sah er als eine der schwersten Aufgaben an.

Kahn-Freund war auch an der Abfassung der Broschüre "The next Germany" vom Sommer 1943<sup>31</sup> beteiligt, die aus Gesprächen einer kleinen Gruppe deutscher Sozialisten in Großbritannien entstanden war. Sie wollten „Deutschland in Europa integrieren und so eines der Fundamente eines dauerhaften Friedens legen“. Dieses hochinteressante politische Dokument, das die Erfahrungen der Weimarer Republik verwertete, ist von großer Bedeutung für das Verständnis der alliierten Nachkriegspolitik, obschon seine Kardinalvoraussetzung für einen deutschen Neubeginn unerfüllt geblieben ist: die politische Erhebung, die Selbstreinigung vom Nationalsozialismus als Voraussetzung eines deutschen Neubeginns.

6. Im Januar 1947 sah Kahn-Freund Westdeutschland zum ersten Mal wieder, die „vertraute und doch so völlig fremd gewordene Umwelt“. Er fällt ein hartes Urteil über die Verdrängung des Nationalsozialismus. „Hat es Hitler eigentlich gegeben oder war er nur eine Phantasmagorie? Jedenfalls ist man physiologisch und psychologisch unfähig, dem Phänomen ins Gesicht zu sehen, seine Ursachen zu erkennen und neu anzufangen, mit ihm fertig zu werden“. Er rügte die deutsche Selbstbemitleidung mitsamt ihrer Berufung auf die eigene politische Unreife, die fehlende Bereitschaft zum Bessermachen, die Beschränkung auch der Besten, das Übel nur zu erkennen, statt zu handeln, Verantwortung zu übernehmen und praktische Probleme als praktische Menschen zu erörtern. Er sah seine Entscheidung von 1933 bestätigt: „In diesem Land werde ich nie mehr leben können“. Bei aller bitteren Enttäuschung war sich Kahn-Freund der „Emigrantentragödie“ bewußt, die er mit der Rückkehr Rip van Winkels aus dem Zauberberg verglich: instinktiv anzunehmen, die Geschichte des

Landes sei von dem Moment an still gestanden, an dem der Emigrant es verlassen habe.

7. Kahn-Freunds Verhältnis zur Bundesrepublik läßt sich mittelbar nachzeichnen. Der Enttäuschung über die ausgebliebene Auseinandersetzung und die Flucht in den Patriarchismus der Adenauer-Zeit, später die Skepsis gegenüber der Woge des Irrationalismus und der Re-Ideologisierung, zu der auch ein Stück der „Kahn-Freund-Renaissance“ gehört, standen positiv gegenüber die Bejahung der Demokratie, die Herstellung der Freiheitsrechte und des Rechtsstaats und die Bereitschaft zur Integration in Europa. Kahn-Freund hat diese Entwicklung „begriffen“. Er blieb gegenüber der Bundesrepublik rational distanziert. Hiervon zeugen seine arbeitsrechtsvergleichenden Schriften. Hat er indessen das Nachkriegsdeutschland „verstanden“, jenes rätselhafte Land, das sich nach dem Ersten Weltkrieg über die Dolchstoßlegende und die Verluste des Versailler Friedens zutiefst erregt hatte, nunmehr aber die Vertreibung von Millionen Deutschen und die Teilung Deutschlands hinnahm? Hat er den Entwicklungsprozeß gespürt, der sich unter der politischen Apathie und dem nach außen zur Schau gestellten „Wirtschaftswunder“ vollzog?

Kahn-Freunds Verhältnis zu Deutschland war eine niemals gänzlich verheilte Wunde, wenngleich die Zeit und die historischen Lektionen von Schuld und Versagen anderer Nationen nach 1945 das harte Urteil abgemildert haben mögen. Entscheidend war, daß sich Kahn-Freund nicht mehr in Deutschland engagieren wollte. Ich habe lange Zeit gebraucht, um zu verstehen, daß dies der Grund war, weshalb er den ihm angebotenen juristischen Ehrendoktor Gießens – es wäre der erste einer neu gegründeten und auf den Bruch mit der Vergangenheit bedachten Fakultät gewesen – fast schroff zurückwies. Kahn-Freund, der wie kaum ein anderer von einer tiefen Liebe zu Menschen besetzt und der in der deutschen Kultur zutiefst verwurzelt war, ein deutscher Gelehrter im echten und besten Sinn, hat im Grunde niemals verwunden, daß ihm das Land, dem er sich zugehörig gefühlt und für das er sich bewußt entschieden hatte, so brutal zurückgestoßen hatte.

Für den Deutschen bleibt dieser Stachel. Es war die Tragödie des „deutschen Juden“, die sich nicht auf Kahn-Freund beschränkt, sondern sich in vielfältigen Schicksalen gespiegelt hat. Verglichen mit dem Los anderer Emigranten ist Kahn-Freund vor manchem bewahrt geblieben. Er brauchte nicht den Verlust nächster Angehöriger zu beklagen. Schwer traf ihn indessen die Ermordung von Freunden und wissenschaftlichen Gefährten während des „dritten Reichs“. Er hatte vor allem das Glück, daß seine Frau die schwere Bürde mit ihm trug. Zu Otto Kahn-Freund gehört untrennbar Elisabeth Kahn-Freund, die, im Hintergrund bleibend, für ihn liebevoll sorgte, ihn abschirmte und ihm stets das Verständnis gab, das er brauchte.

8. In der Nachkriegszeit fand Otto Kahn-Freund die wohlverdiente Anerkennung in England – für ihn war es auch die mit Dankbarkeit, Freude und Stolz aufgenommene Bestätigung seiner Zugehörigkeit. Er suchte das politische Programm der Einigung Europas durchzusetzen, als Experte für die Anwendung der sozialen Grundrechte der europäischen Sozialcharta in den Staaten des Europarats und in seinem Wirken für den Beitritt Großbritanniens zur Europäischen Gemeinschaft. Wie kein anderer von Kahn-Freund fand den Brückenschlag zwischen den Wissenschaftlern der einzelnen Nationen bereitwillig aufnahmebereit, jüngere Kollegen ermutigend und in

<sup>31</sup> A Basis of discussion on peace in Europe. A Penguin Special.



nen Rat erteilend. Auch dies und nicht nur seine Schriften bilden ein Stück seiner Arbeit für die Rechtsvergleichung. Ohne Kahn-Freund wäre die erste, von Benjamin Aaron gegründete internationale Gruppe von Arbeitsrechtswissenschaftlern nicht zustande gekommen. Auch eine zweite, später gegründete Gruppe, die sich mit der Arbeitsrechtsentwicklung in den Staaten der Europäischen Gemeinschaft seit der industriellen Revolution befaßt, verdankt seinem Rat viel. Kahn-Freunds Engagement als Redner, als Diskutant, als ein Schriftsteller, der den sonst nur dem Redner vergönnten unmittelbaren Zugang zum Leser fand, galt der internationalen Verständigung der Wissenschaftler, der Befreiung aus der Enge nationalistischer Provinzialität und dem Wirken für den Frieden.

#### IV. Kahn-Freund und die deutsche Arbeitsrechtswissenschaft

Dem Höhepunkt seines Schaffens und Wirkens nach gehört Kahn-Freund zur englischen und zur internationalen Rechtswissenschaft. Hieran besteht kein Zweifel, und es ist nicht Sache eines Deutschen, in seiner Würdigung den Platz zu umreißen, den Kahn-Freund insoweit einnimmt. Er kann nur anmerken, daß Kahn-Freund den reichen Strom deutscher Kultur und Geistigkeit eingebracht hat. Vor allem hat er das Erbe Hugo Sinzheimers und Otto von Gierkes und das Werk Karl Renners an die englische Rechtswissenschaft weitergegeben und dort nutzbar gemacht.

Doch gehört Kahn-Freund mit seinen vor 1933 erschienenen Arbeiten auch der Geschichte der deutschen Arbeitsrechtswissenschaft an, der Schule Sinzheimers, der die volle Entfaltung in Deutschland nicht vergönnt war. Wie Kahn-Freund an die englische, gingen Franz Mestitz an die tschechoslowakische Rechtswissenschaft und Franz Neumann, Ernst Fraenkel und Hans Morgenthau an die Politikwissenschaft verloren. Am schwersten wog der Verlust Kahn-Freunds. Nach Sinzheimer, dem genialen Wegweiser des Arbeitsrechts, der der Pioniergeneration zugehört hatte, war Kahn-Freund dazu berufen, das freiheitlich-kollektive Arbeitsrecht zugleich als politisches Phänomen rational zu erfassen und es juristisch zu verarbeiten. Kahn-Freund war ein politischer Jurist, eine jener seltenen Synthesen von absoluter intellektueller Redlichkeit, juristischer Zucht und politischer Einsicht. Er hätte, dies zeigt seine Entwicklung in Großbritannien, über seinen Lehrer hinausgehend, die Positivierung des Arbeitsrechts vollziehen und doch dessen politische Grundsubstanz erhalten können. Mit der Weimarer Republik wurde diese wissenschaftliche Entwicklung zerstört.

Auch an dieser Stelle möchte ich Lady Elisabeth Kahn-Freund herzlich für ihre autobiographischen Mitteilungen und die Überlassung wichtiger Briefe Kahn-Freunds danken, die sein Verhältnis zu Deutschland betreffen.

Sehr dankbar bin ich Prof. Dr. Franz Mestitz, früher Preßburg, nunmehr Frankfurt/M., für seine kritischen Hinweise zu meinem Manuskript. Aussagen Kahn-Freunds über seinen Werdegang enthält der Anhang zu Bob Hepples Nachruf, "The study of labour law - some recollections", *Industrial Law Journal* 1979, S. 197 ff.



ang haben Werke geschaffen, die zwar  
chmal Widerspruch hervorriefen, aber  
wegen um so wichtiger sind.

für seine Verdienste um die Zeitgeschich-  
hat der österreichische Bundespräsident  
Kirchschläger im Jahr 1977 Bruegel den  
el "Professor" verliehen.

Zu seinem 80. Geburtstag wurde Dr. Brue-  
el vom PEN-Zentrum deutschsprachiger  
utoren im Ausland, dessen Mitglied er ist,  
efeiert. Seine zahlreichen Freunde hoffen,  
ass er noch viele Jahre in voller Gesundheit  
ätig sein wird.

**Fred Hahn**

## Guido Kisch gestorben

Unlängst erst forschten wir nach dem  
persönlichen Ergehen des hochbetagten, aber  
noch bis in die letzten Jahre wissenschaftlich  
aktiv gebliebenen Professors, eines Mannes  
von nie alternder Frische, da erreicht uns die  
traurige Nachricht, das Dr. Guido Kisch,  
Jurist, Historiker und Judaist in einer Person,  
am 7. Juli in seiner Wahlheimat Basel im  
Alter von 96 Jahren heimgegangen ist. Noch  
vor sechs Jahren hatte Kisch einen zweiten  
Sammelband mit dem Titel "Forschungen  
zur Rechts-, Wirtschafts- und Sozialge-  
schichte der Juden" herausgebracht (Jan  
Thorbecke Verlag, Sigmaringen 1979). Er  
war einer der Söhne des bekannten Prager  
Rabbiners Dr. Alexander Kisch (1948-  
1917); sein Lebensgang gleicht, wie der so  
mancher vertriebener Wissenschaftler, einer  
kleinen Odyssee. 1915 hatte er sich als  
Privatdozent für Rechtsgeschichte an der  
Universität Leipzig habilitiert. Von 1920 bis  
1933 war er, nacheinander, Ordinarius in  
Königsberg/Pr. und Halle/Saale. Von den  
Nazis aus dem Lehramt verdrängt, dozierte  
er bis 1935 gastweise am Jüdisch-Theologi-  
schen Seminar in Breslau jüdische Geschich-  
te, mit der er sich von früh an beschäftigt  
hatte.

Als Emigrant in Amerika, war er in New  
York zunächst Forschungsmitarbeiter an der  
"American Academy for Jewish Research",  
aber 1937/39 ergaben sich für einen nicht  
mehr so jungen Flüchtling nur beschränkte  
Arbeitsmöglichkeiten. Und so begannen für  
ihn 1949 Gastprofessuren und Gastdozentu-  
ren in Europa, hauptsächlich in Schweden,  
Holland und vor allem in der Schweiz  
(Basel), wo er ab 1959 Ehrendozent an der  
dortigen Universität war. Mehrere Jahre ge-  
hörte er auch zum ständigen Mitarbeiterkreis  
des *Aufbau*.

Kischs wissenschaftliche Arbeitsbereiche  
waren mittelalterliche Rechtsgeschichte,  
auch Rechtsgeschichte der Juden sowie Hu-  
manismus in Verbindung mit Jurisprudenz.  
Die Reihe seiner Einzelschriften, 14 an der  
Zahl, beschloss er 1975 mit seinen Erinne-  
rungen ("Der Lebensweg eines Rechtshisto-  
rikers").

Seine 1963 entstandene Gedächtnisschrift  
"Das Breslauer Seminar — Jüdisch-Theolo-  
gisches Seminar (Fraenkelsche Stiftung) in  
Breslau 1854-1938" bleibt eine Fundgrube  
für Historiographen der Wissenschaft des  
Judentums. **Ernst G. Lowenthal (Berlin)**





*Guido Kisch.*

Guido Kisch

DER LEBENSWEG  
EINES  
RECHTSHISTORIKERS

Erinnerungen



Jan Thorbecke Verlag Sigmaringen

1975



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## Geächtet und entrechtet

Nun galt es, sich mit der gegebenen Situation abzufinden und ihr gemäß das Leben als Staatsbürger zweiter Klasse einzurichten. Die Notwendigkeit, das ungastliche Land zu verlassen, wo wir uns eben erst ein schönes Haus gebaut hatten, trat noch nicht in den Gedankenkreis. Die Ausbürgerung kam erst später.

Im Sommersemester 1933 durfte ich nicht mehr Vorlesungen halten. Ich war vom Universitätsbetrieb vollkommen ausgeschlossen. Deshalb verwirklichte ich den seit dem Tode meines Vaters gehegten Plan und schrieb seine Biographie. Die folgenden Sätze aus dem vom 28. Juni 1933 datierten Vorwort der vollendeten Arbeit geben die Stimmung wieder, in der sie entstanden ist: »Mit der Arbeit an dem nachfolgenden Lebensbild sollte in dankerfüllter Erinnerung meine neue Arbeitsstätte, das eigene selbst-erbaute Haus, seine Weihe erhalten. Kaum war es im Frühjahr 1933 vollendet, ist finstere Nacht und schweres Leid über die Juden in Deutschland hereingebrochen. In einer Zeit tiefster seelischer Not, in welcher selbst die Hoffnung auf eine bessere Zukunft kaum aufkommen konnte, sind die folgenden Zeilen niedergeschrieben. In teuern Erinnerungen und in der geistigen Verbundenheit mit denen, an deren verklarte Gestalten sie sich knüpfen, suchte ich Sammlung und Stärkung.« Nach Fertigstellung der Biographie wandte ich mich der Bearbeitung des in den letzten Jahren gesammelten Archivmaterials zu, die nach zwei Jahren zur Veröffentlichung meines Buches »Die Prager Universität und die Juden 1348–1848« führte.

Neben diesen Arbeiten, die als Betäubungsmittel wirken sollten, mußten jedoch Vorkehrungen und Vorbereitungen getroffen werden, um das unter anderen Bedingungen neu zu gestaltende Leben möglich und einigermaßen erträglich zu machen. Natürlich fühlten sich die Juden in Deutschland höchst unbehaglich. Sie wurden dauernd mit verschiedenartigsten Angriffen und Mißhandlungen bedroht und verfolgt. Daß sich aber der Nazismus mit so großer Schnelligkeit zu jener massenmörderischen Bewegung entwickeln würde, welche die Überlebenden aus dem ihnen zur Heimat gewordenen Lande durch physische Vernichtung oder Versagen des Lebensraumes austreiben würde, konnte damals noch niemand voraussehen.

Nachdem die jüdische Jugend von allen Lehranstalten und die Erwachsenen von allen Bildungsmöglichkeiten ausgeschlossen waren, bemühten sich die Juden mit bewunderungswürdiger Energie um den »Aufbau im Untergang«. Unter den stets wachsamem Augen der Geheimen Staatspolizei wurden jüdische Schulen geschaffen, Vorträge gehalten, Konzerte, sogar Theateraufführungen veranstaltet. Im Anfang ihrer Herrschaft duldeten die Nazis noch all das, natürlich unter ständigen Schikanierungen.

Diese Veranstaltungen eröffneten für den abgesetzten Hochschullehrer, der früher populäre Vorträge gern seinen Kollegen überlassen hatte, eine Betätigungsmöglichkeit, sogar mit der Aussicht, sein kümmerlich bemessenes Ruhegehalt aufzubessern. In der Tat habe ich im Herbst 1933 und Frühjahr 1934, so wenig mir das lag, jüdisch-histori-



sche Vorträge in Köln, Chemnitz, Nürnberg (in der prachtvollen, 1938 von den Nazis niedergebrannten Synagoge, von der Kanzel aus), in Kassel, Prag (im prächtigen Vortragssaal des Bnei-Brith-Logenhauses) und in Breslau gehalten. Aus den Berichten der damals noch erscheinenden jüdischen Zeitungen geht hervor, daß das kulturell ausgehungerte Publikum die Vorträge beifällig und dankbar aufgenommen hat. Vorbereitung und Abhaltung waren immer schwierig, da man stets mit der offiziellen Anwesenheit eines Gestapobeamten oder mit der unoffiziellen eines Polizeispitzels rechnen mußte. So hat die Polizei einen für den 25. März 1934 im jüdischen Gemeindehaus in Halle vorgesehenen, lange vorher angekündigten Vortrag von mir kurzfristig verboten, ohne daß sie Gründe angab. Ich hatte mich in die neue, ungewohnte Aufgabe eines Wanderredners eingelebt, so daß mich mein Bruder Bruno einmal in einem Briefe dazu beglückwünschte, ein »Vortragslöwe« geworden zu sein. In jener schweren Zeit hat er sich hilfreich daran beteiligt, Pläne für neue, noch mögliche Betätigungen und Unternehmungen zu schmieden. Aber der Zwang der Verhältnisse hat natürlich alles vereitelt. Noch immer wartete ich auf einen Bescheid aus Berlin, ob meine Jahre im österreichischen Justizdienst vor 1914 anerkannt würden und ob dann vielleicht eine Reaktivierung zu erwarten sei. Anfangs September 1933 telefonierte Gerullis, die österreichische Beamteneigenschaft gelte nicht für Preußen. Damit war mein Schicksal endgültig besiegelt.

Überraschenderweise eröffnete sich eines Tages eine unverhoffte Aussicht. Die Post brachte einen Brief des Kuratoriums des Jüdisch-theologischen Seminars in Breslau, der Alma Mater meines Vaters, mit der ich nach seinem Tode durch Buchschenkungen seine Beziehungen fortgesetzt hatte<sup>87</sup>. Er enthielt die Einladung, Gastvorlesungen über Rechts- und Wirtschaftsgeschichte der Juden zu halten. Natürlich nahm ich sie gern an, zumal auch die Übernachtung — von solcher in Hotels waren Juden schon ausgeschlossen — nicht schwierig war, da ich bei meinen in Breslau wohnenden Schwiegereltern unterkommen konnte. So fuhr ich denn während des folgenden Winter- und Sommersemesters allwöchentlich für zwei Tage von Halle nach Breslau und hielt dort Vorlesungen, was meine Moral stützte. Bald wurde aber diese Anstalt, die mehr als achtzig Jahre segensreich gewirkt hatte, teils durch Auswanderung der Lehrkräfte und Studenten, teils durch die Verfolgungen der erstarkenden Nazigewalt in ihrer Existenz bedroht.

Die rapide fortschreitende Entwicklung der Verhältnisse zeigte jedoch je länger desto deutlicher, daß auch meines und meiner Familie Bleibens in Deutschland nicht mehr lange sein werde, wenn wir ein menschenwürdiges Leben führen wollten.

Mein erster Gedanke galt Palästina, wohin die Schwester meiner Frau, Else Freund, mit ihrem Mann und ihrer Familie am Tage des Judenboykotts bereits 1933 ausgewandert war. Ich verfaßte ein Exposé, in dem ich anregte, an der Hebräischen Universität ein Institut zum Studium der rechtlichen, wirtschaftlichen und sozialen Lage der Juden in der ganzen Welt zu gründen. Da der Versand eines solchen Dokuments auf dem Postwege bereits gefährlich war, nahm es gefälligerweise ein gerade nach Italien reisender Kollege zur weiteren Beförderung von dort aus mit. Eine Antwort habe ich nie erhalten. Den mir sehr aktuell und notwendig scheinenden Plan habe ich später noch bei meinem ersten Aufenthalt in Amerika weiterverfolgt. Ich bat den zufällig in New York anwesenden Norman Bentwich, Professor für internationale Beziehungen

an der Hebräischen Universität und einflußreich in ihrer Verwaltung, um eine Unterredung. Aber er hörte mich in einem Hörsaal der Columbia University auf dem Wege zum Rednerpult nur etwa zwei Minuten an und gab mir den eilfertigen, lapidaren Bescheid: »We have enough Jewish law at the University«. Er hatte nur halb hingehört und meinen Gedanken überhaupt nicht begriffen. Mehrere Jahre später wurde das jetzt unter der Leitung von Moshe Davis dort florierende Institut mit den von mir einst geplanten Aufgaben in Israel ins Leben gerufen.

Im Frühjahr 1934 entschloß ich mich zu Erkundungsreisen ins europäische Ausland in der (ebenfalls trügerischen) Hoffnung, dort vielleicht eine, wenn auch noch so bescheidene Wirkungsstätte auf meinem eigenen Gebiet der Rechtsgeschichte zu finden. Es geschah dies, obwohl mir schon früher mein Leipziger Freund, Paul Koschaker, mit dem ich die Situation besprach, zu verstehen gegeben hatte, daß nach seiner Ansicht im Ausland, das er besser kannte als ich, wenig Aussicht bestehe. Diese Vorhersage erfüllte sich. Trotzdem sollen die ergebnislosen Versuche kurz geschildert werden.

Die Reise ging zuerst nach Holland, wo ich in Amsterdam einige Bekannte hatte, die ich über etwaige Möglichkeiten konsultieren wollte, obwohl Briefe an die Rechtshistoriker A. S. de Blécourt in Leyden und an Harold Hazeltine in Cambridge enttäuschende, kalte Antworten gebracht hatten. Mein Bruder hatte mich an einen Freund, den Physiologen Professor Buytendijk in Amsterdam, empfohlen. Dieser wußte ebenso wenig mit mir und meinen Problemen anzufangen wie mein jüdischer Freund, der ausgezeichnete Privatgelehrte Sigmund Seeligmann, und ein entfernter Verwandter, Isaak Kisch, später Professor des internationalen Rechts und selbst ins Konzentrationslager Theresienstadt deportiert, wo seine Frau ein Opfer der Nazis wurde. Man ersieht daraus, welch allgemeine Ratlosigkeit in der Welt gegenüber den Ereignissen in Deutschland herrschte.

Noch zwei juristische Ordinarien besuchte ich, den Vertreter des Privatrechts, Paul Scholten, in dessen prächtigem Hause gerade eine Teegesellschaft mit Gesangsdarbietungen seiner Frau stattfand. Der Kontrast der Stimmung des Hilfesuchenden zu der dort herrschenden war besonders kraß. Scholten hatte für mich weder Zeit noch Interesse und fertigte mich ganz schnell im Vorzimmer ab, obwohl (oder vielleicht weil) er ein Gönner von Isaak Kisch war. Dieselbe Erfahrung machte ich mit meinem engeren Fachkollegen, Professor L. J. van Apeldoorn, der mich zwar in seinem Studierzimmer geduldig anhörte, aber nur mit der Frage reagierte: »Und was sagt zu alledem Mitteis?« Er schloß sich begeistert den Nazis an, so daß er, nach dem Kriege verurteilt, von seiner Professur ausgeschlossen blieb. Die anderen Kollegen, zu denen ich noch ging, fühlten sich anscheinend alle gar nicht bedroht in dem Gefühl der Sicherheit, das ihnen ihr Leben außerhalb Deutschlands noch einflößte. Sie ahnten nicht, daß ihnen in Kürze das gleiche Schicksal zuteil werden sollte, das mich nach Holland geführt hatte.

Ein ähnliches negatives, niederdrückendes Ergebnis hatte meine Reise in die Schweiz. Auch hier wendete ich mich — törichterweise — an meine Fachkollegen, zunächst an den Zürcher Germanisten Paul Mutzner. Er hörte mich freundlich an, wie der ebenfalls von mir aufgesuchte bedeutende Zivilrechtler August Egger. Auch nur einen Rat vermochte keiner zu geben. Mutzner wußte bloß von seinen Erlebnissen in Deutschland zu erzählen, wo er auf Ferienreisen wiederholt wegen seines Aussehens für einen Juden gehalten und dementsprechend in Hotels und Restaurants behandelt worden



war. Große Sympathie zeigte wohl Arthur Baumgarten in Basel, dessen aufrechte Haltung ihn freiwillig auf seine Professur in Frankfurt verzichten ließ. Er war alsbald in die Basler Juristenfakultät aufgenommen worden. Ich kannte ihn von einem internationalen Kongreß. Er war selbst ein Emigrant und deshalb verständnisvoll. Für mich sah er aber ebenfalls keine Möglichkeit. Einen besonders sympathischen Eindruck machte auf mich in Basel wegen seiner warmherzigen menschlichen Anteilnahme der bedeutende Philosoph Karl Joël, damals bereits ein schwerkranker Mann, den kurz nachher der Tod von seinem Leiden erlöst hat. Auf seinen Rat besuchte ich einige Prominente der jüdischen Gemeinde, lediglich um mich über die lokalen Verhältnisse zu erkundigen, falls ich mich entschließen oder gezwungen werden sollte, auch ohne eine Stellung in die Schweiz zu flüchten. Denn dies war das einzige mir durch frühere angenehme Ferienaufenthalte bekannte und sympathische Land, wo ich ohne sprachliche Schwierigkeiten, die mich von dem so gastfreundlichen England fernhielten, glaubte dauernd leben zu können. Mein Vater hatte dort in seiner Jugend als Zürcher Rabbiner mehrere glückliche Jahre verbracht, von denen er noch lange nachher begeistert zu erzählen pflegte. So wendete ich mich an den Rabbiner Dr. Arthur Weil, der mich zwei Tage auf eine »Audienz« warten ließ und dann an einen Hosenfabrikanten verwies, während mich der jugoslawische Konsul A. H. Guggenheim unangemeldet sogleich empfing und viel Sympathie bezeugte. Aber auch unter den Juden war noch keine Besorgnis vor einer etwaigen Bedrohung der Schweiz durch Hitler zu bemerken. Es war ja erst im Frühjahr 1934. Vielmehr waren sie über den Ausgang einer kantonalen Abstimmung beunruhigt, an deren Anlaß ich mich nicht mehr erinnere. So verließ ich denn höchst deprimiert auch die Schweiz, auf die größere Hoffnungen gerichtet waren. Schon im Jahre 1924 hatte ich mich mit Empfehlung meines Lehrers Wach um die in Zeitungsannoncen ausgeschriebene rechtsgeschichtliche Professur in Bern beworben. Selbstverständlich wurde mir jedoch der Schweizer Hans Fehr vorgezogen, der nach den in Deutschland verbrachten Kriegs- und Nachkriegsjahren Heidelberg zu verlassen und in seine Heimat zurückzukehren wünschte.

Nachdem auch die Bewerbung um eine ebenfalls in einer Zeitungsannonce ausgeschriebene Professur an der schwedischen Universität Lund, auf die mich ein Freund aufmerksam gemacht hatte, fehlgeschlagen war, da ich die Voraussetzung »des Bekenntnisses zu der reinen evangelischen Lehre« nicht erfüllen konnte, wendete ich mich schließlich noch in das heimatliche Prag. Dies geschah erst so spät, weil ich mir der geringen Aussichten bewußt war, da ich ja die feste Stellung an der dortigen Universität vor einigen Jahren freiwillig aufgegeben hatte. Trotzdem wäre es bei gutem Willen der Fakultät in Prag am ehesten möglich gewesen, mich wieder aufzunehmen. Aber meine einstigen Förderer und Freunde, Otto Frankl und Ludwig Spiegel, waren längst gestorben; aus jener Zeit gehörte nur der unfreundlich gesinnte San Nicolò noch der Fakultät an. Im folgenden Jahre wurde er nach München berufen, was alles sagt. Während sich Otakar Sommer in unwandelbarer Freundschaft und Treue bei der tschechischen Regierung für mich einzusetzen versprach, fürchtete wohl der einzige Kollege von der deutschen Universität, an den ich mich wendete, der unmittelbare Nachfolger in meine Professur, Otto Peterka, meine etwaige Konkurrenz. Ich hatte seinen langsamen Aufstieg von der Habilitation zum Ordinarius beobachtet, auch zu fördern vermocht, und wir waren stets gute Freunde gewesen, namentlich während

meiner Prager Universitätstätigkeit. Jetzt, da er in der Not die Freundschaft hätte beweisen können, versagte er vollständig. Noch klingt mir sein *ceterum censeo* in den Ohren, als ich ihn wiederholt bat, bei der Fakultät die Initiative zu ergreifen, auf welche die Regierung bereitwillig eingegangen wäre: »Ich bin doch kein Unternehmer« (!). Die jahrelange »freundschaftliche« Verbindung mit Peterka brach damit ab. Nach Kriegsende hörte ich, daß er, der sich während der Protektoratszeit in seiner Stellung gehalten hatte, 1945 beim russischen Vormarsch umgekommen sei. Für mich war es jedoch ein Glück, daß ich nicht durch eine Anstellung in Prag später in die Nazifalle geraten bin.



## Auswanderung

Nachdem sich alle Hoffnungen und Bemühungen, irgendwo in Europa Zuflucht und eine dauernde Bleibe zu finden, als trügerisch erwiesen hatten, zeigte sich ein Silberstreifen am Horizont. Das zweite unheilvolle Jahr der sogenannten Nationalen Revolution in Deutschland neigte sich dem Ende zu. Es war vor dem Lichterfest, Chanukkah. Da traf eines Tages eine offene Postkarte des befreundeten Professors Ismar Elbogen aus Berlin ein, der im Anfang der zwanziger Jahre Gastprofessor in New York gewesen war und gute Beziehungen nach den Vereinigten Staaten hatte. Mit Hinweis auf das Lichtwunder des Chanukkah begann seine Nachricht mit den Worten: »Es scheinen noch Wunder zu geschehen«. Elbogen teilte mir mit, daß ich die Einladung erhalten werde, mit einem Fellowship (Stipendium) nach New York zu kommen. Bald danach traf die Botschaft ein, ich solle unverzüglich als Stipendiat der American Academy for Jewish Research nach Amerika reisen. Ihr war im Sommer 1934 ein persönliches Interview durch den Sekretär, Professor Salo Baron, vorangegangen, der dazu seine Hochzeitsreise unterbrochen hatte und eigens von Wien nach Prag gekommen war. Die Unterredung in der Wohnung meiner Schwester scheint einen günstigen Eindruck bei ihm hinterlassen zu haben. Ich selbst versprach mir aber damals von ihr kaum einen Erfolg. Sie war dadurch veranlaßt, daß ich auf Elbogens Rat wie an mehrere andere jüdische Professoren ins Ausland auch an Baron geschrieben hatte.

Natürlich mußte das geplante Unternehmen, über dessen Bedeutung ich mir noch keine Vorstellung machen konnte, sorgfältig vorbereitet werden. Wir brachen daher unsere Zelte nicht sofort ab, da unser Kind gerade an Grippe schwer erkrankt war. Die Vorbereitungen beanspruchten etwa einen Monat. Ich war von einer Reise in einen fernen Kontinent, dessen Sprache ich nicht kannte und der mir so weit entfernt schien wie der Mond, keineswegs angetan oder gar begeistert, trotz der trostlosen, sich ständig verschlechternden Lage der Juden in Deutschland. Ich stellte mir auch nicht vor, die Reise dorthin könnte eine Lebensrettung bedeuten; denn ich war immer noch des Glaubens, der Hitler-Wahnsinn werde nicht lange anhalten können. Meine Frau dagegen war anderer Meinung. Ihre immer wieder zum Ausdruck gebrachte Überzeugung war: »Ein kleiner Sprung rettet uns nicht«. Sie war entschieden für Amerika und sollte recht behalten.

Als unsere bevorstehende Abreise durch die nun eingeleiteten Vorbereitungen bekannt wurde, zeigte sich, daß wir in der christlichen Bevölkerung Halles außerhalb der Universität bis dahin unbekannt sympathisierende Freunde hatten. Der Polizeibeamte in dem Paßbüro exponierte sich, indem er zu meiner Frau sagte: »Es ist doch eine Schande, daß ein Mann wie Professor Kisch ins Ausland gehen muß«. Eines Tages erschien ein evangelischer Pfarrer bei uns, der uns vorher nie begegnet und daher unbekannt war. Wir meinten, er wolle unsere Haushilfe aufsuchen. Er kam jedoch zu uns mit der Absicht, uns einen Kondolenz- und Trostbesuch zu machen. Eine ähnliche

Absicht führte auch meinen nationalökonomischen Kollegen Gustav Aubin zu uns, der als Demokrat von seiner Stellung als Rektor der Universität infolge der gegen ihn gerichteten Umtriebe der nationalsozialistischen Studenten schon früher hatte zurücktreten müssen. Doch konnte er die Frage nicht unterdrücken: »Warum mußten gerade Sie, Herr Kisch, ausgerechnet eine Ausgabe der Kulmer Handfeste [des Grundgesetzes des Deutschordenslandes aus dem Jahre 1233 bzw. 1251] machen?« Meine Antwort lautete: »Da siebenhundert Jahre lang kein Deutscher auf diesen Gedanken gekommen ist, habe ich mir erlaubt, es zu tun«.

So gingen die Reisevorbereitungen hastig weiter. Da unser Kind eben erst von seiner Krankheit genesen war, wollten wir es nicht der winterlichen Seereise aussetzen und in die unbekannt Fremde mitnehmen. Die Geschwister in Köln, die drei etwa gleichaltrige Kinder hatten, erboten sich, unseren kleinen Alexander für die Zeit unserer Abwesenheit, die wir als Orientierungsaufenthalt von etwa halbjähriger Dauer schätzten, in ihr Haus aufzunehmen. So geschah es auch. Er hat sich dort in der Gesellschaft der Kinder wohlgeföhlt und war gut aufgehoben. In unserem Hause in Halle blieb unsere langjährige, treue Haushilfe, Henny Rütgerodt, zurück. Am 19. Januar 1935 reisten wir über Köln, wo wir mehrere Tage blieben und meinen 46. Geburtstag »feierten«, nach Cherbourg. Dort nahm uns der in glanzvoller Abendbeleuchtung märchenhaft aussehende große Ozeandampfer Aquitania der englischen Cunard Line zur ersten Fahrt nach Amerika auf.



## Erster Aufenthalt in Amerika

Nach der winterlichen, durch Seekrankheit höchst unangenehmen Ozeanreise landeten wir »glücklich« am 29. Januar 1935 im Hafen von New York. Schlechtes Wetter und unser Zustand verhinderten den Anblick der von Tausenden von Einwanderern vor uns als Freiheit verheißendes Symbol ersehnten, erstmals erblickten, in ihrem Leben unvergeßlich gebliebenen Statue of Liberty. Das Hochgefühl beglückender Hoffnungsfreude, das die Statue in allen Neuankömmlingen weckt, konnte nicht aufkommen. Meine Frau und ich waren froh, die ungemütliche Reise auf der während der ganzen Zeit stürmischen See lebend ohne Gesundheitsschaden überstanden zu haben und wieder festen Boden unter den Füßen zu fühlen. In Amerika hatten wir keine Verwandten, die uns beim Eintreffen hätten Beistand leisten können. Wir wurden aber von Professor Baron und seiner jungen Frau sowie von dem Ehepaar Freudenthal, den Kindern des uns befreundeten Nürnberger Rabbiners Dr. Max Freudenthal, am Hafen erwartet, freundlich empfangen und in ein vorbestelltes Hotelzimmer gebracht. Ohne sich einige Tage auszuruhen und von der Reise zu erholen, begannen wir zunächst die Suche nach einer ständigen Unterkunft. Diese fanden wir nach einigen Tagen im »Residence Hotel« Butler Hall in der 117. Straße auf der Westseite, ganz in der Nähe der Columbia University und des Jewish Theological Seminary. In letzterem, dem Hauptquartier der Academy, sollte sich meine Arbeit abspielen.

In den ersten Tagen kümmerten sich unsere neuen Freunde höchst zuvorkommend um uns. Sie standen uns bei der Wohnungssuche und Einrichtung treulich zur Seite. Auch machten sie uns mit den Gelehrten des Kreises bekannt, zu dem wir von nun an Beziehungen haben sollten. Aus diesem zeigten sich von Anfang an, wie während der ganzen Dauer unseres Aufenthalts in Amerika, die Professoren Louis Ginzberg, Alexander Marx und Israel Davidson mit ihren Frauen sehr aufmerksam und hilfsbereit. Wir wurden mit der Stadt und ihrer uns unbekanntem Numerierung der Straßen, die besondere Straßennamen ersetzte und sehr zweckmäßig ist, bekanntgemacht, lernten auch die märchenhaft eingerichtete Public Library mit einer Judaica-Abteilung und die in einem prächtigen Gebäude untergebrachte große judaistische Bibliothek des Jewish Theological Seminary kennen. In letzterer wurde mir ein Arbeitsraum in Aussicht gestellt. Gleich in den ersten Tagen entdeckte ich dort eine bis dahin verschollen geglaubte Handschrift des Schwabenspiegels, über die ich 1937 in der Savigny-Zeitschrift für Rechtsgeschichte berichtet habe. Frau Baron erbot sich, mir bisweilen eine englische Unterrichtsstunde zu geben. Die aus England stammende Gattin des Professors der Pädagogik an der Columbia University, Mrs. Isaac Kandel, erteilte mir etwa ein halbes Jahr lang regelrechte Lektionen in der englischen Sprache. Das war natürlich eine große Hilfe. Von Barons und Davidsons wurden wir zu Kinovorstellungen eingeladen. Die Absicht, uns dadurch Zerstreuung zu bieten, war sehr freundlich. Aber in unserer Stimmung paßten wir nicht dorthin, und ich verstand ja noch kein Wort

Englisch. Wir waren und bleiben für alle diese Erweise der Menschenfreundlichkeit und Freundschaft, die wir damals und in den folgenden Jahren von den Genannten erfahren durften, stets aufrichtig dankbar.

Vom amerikanischen Leben und der amerikanischen Mentalität hatten wir bis dahin nicht die geringste Kenntnis oder auch nur eine entfernte Vorstellung. Hatten die trotz ihrer relativ kurzen Anwesenheit in New York bereits amerikanisierten Freunde die europäische Denkweise noch in Erinnerung, so war das bei den schon vor längerer Zeit Eingewanderten, die wir kennenlernten, nicht mehr der Fall. Das führte zu manchen unvorteilhaften Situationen, die niemand gewollt oder vorausgesehen hatte, die aber doch für alle Beteiligten unerfreulich waren. So setzte man bei mir Kenntnis der englischen und hebräischen Sprache als selbstverständlich voraus, wonach im Interview in Prag Professor Baron gar nicht gefragt hatte. Wohl besaß meine Frau einige Sprachkenntnisse, die sie sich bei einem früheren Aufenthalt in England erworben hatte. Die wenigen Sprachstunden, die ich während eines Monats vor der Abreise nehmen konnte, hatten bei mir jedoch noch keinerlei Wirkung hervorgebracht. Zu meinem ernstlich gemeinten Anerbieten, mich in meinem 47. Lebensjahr noch einmal auf die Schulbank zu setzen und im Theologischen Seminar nicht nur von Grund auf Hebräisch zu lernen, sondern auch, wie die jungen Studenten, das Rabbinatsdiplom zu erwerben, dessen Mangel man mir wiederholt vorhielt, meinte Baron, dazu sei es zu spät, die dafür erforderlichen Vorkenntnisse müsse man sich von Kindheit an im Cheder, der ostjüdischen Kinderschule, angeeignet haben. (Er war in Tarnow in Galizien geboren, hatte die traditionelle ostjüdische Erziehung erhalten und war erst infolge der Evakuierung vor den vordringenden Russen im Ersten Weltkrieg nach Wien gekommen, wo er dann jene durch das westliche Gymnasial- und Universitätsstudium ergänzen konnte).

Jedermann sagte uns, im Interesse unserer Zukunft im Lande müßten wir möglichst viele einflußreiche Persönlichkeiten kennenlernen. Schon in den ersten Tagen brachte uns Professor Baron mit einigen Professoren der Columbia University, an der er einen Lehrstuhl für hebräische Sprache und jüdische Literatur innehatte, zusammen. Während der Unterhaltung, ausschließlich in englischer Sprache geführt, saß ich mit unglücklichem Gesicht da, konnte kein Wort verstehen und sprechen, machte daher wohl einen unerfreulichen, wenn nicht gar erbärmlichen Eindruck. Das Gegenteil von dem geschah, was die in guter Absicht erfolgten Einladungen bewirken sollten.

Einen ähnlichen Mißerfolg mußten die verschiedenen persönlichen Besuche haben, die ich auf Anraten der neuen Freunde bei prominenten jüdischen Persönlichkeiten machte. Von diesen waren manche bereits in Amerika geboren, andere vor vielen Jahren aus deutschsprachigen Ländern eingewandert, oder sie hatten in Deutschland studiert. Dennoch war es äußerst schwierig, sich mit ihnen zu verständigen, obwohl meine Frau englisch zu dolmetschen bemüht war. Hinzu kam, daß die Rechtsgeschichte, noch dazu die deutsche, der ich bis dahin fast ausschließlich meine Arbeit gewidmet hatte, auch in akademischen Kreisen Amerikas, und gar in den jüdischen, eine völlige *terra incognita* war. Selbst Rechtsanwälte hatten während ihrer Ausbildung nicht einmal von englischer oder amerikanischer Rechtsgeschichte etwas gehört. Einmal in die Gesellschaft von Juristen zu einem Abendessen eingeladen und als europäischer Rechtshistoriker vorgestellt, sprach ich natürlich von meinem Fach. Da nahm mich ein



älterer Rechtsanwalt zur Seite und fragte treuherzig: »What at all does »legal history« mean?« Rechtsgeschichte hatte eben keinen Platz im Lehrplan der juristischen Fakultäten der amerikanischen Universitäten.

In ganz Amerika gab es damals überhaupt nur drei Professoren, die sich mit diesem Gegenstand beschäftigten: in Chicago John H. Wigmore, der bei seinen rechtsvergleichenden Studien auch die geschichtliche Entwicklung der verschiedenen Rechtssysteme der Welt berücksichtigte; in New York begann Arthur A. Schiller, sich mit viel Interesse und gutem Willen mit römischem Recht zu beschäftigen. Über den dritten Rechtshistoriker, Julius Goebel, wird noch zu berichten sein.

Natürlich war ich schwer enttäuscht, als ich schnell erkannte, mit meinen rechtsgeschichtlichen Kenntnissen weder theoretisch noch praktisch etwas anfangen zu können, um zu einer Existenz zu gelangen. Mit meiner wissenschaftlichen Vergangenheit zu brechen und etwa, wie es viel jüngere Juristen aus Deutschland taten, das Rechtsstudium mit dem Blick auf eine Anwaltstätigkeit von neuem zu beginnen, das heißt, sich in ein vom kontinentalen europäischen völlig verschiedenes, fremdes Rechtssystem einzudenken und einzuarbeiten, dazu hielt ich mich im siebenundvierzigsten Lebensjahr nicht mehr für fähig. Auch die mangelnden Sprachkenntnisse hielten mich selbstverständlich von diesem Schritt zurück. Außerdem war ich schon im Beginn meiner juristischen Laufbahn zur Überzeugung gelangt, daß mir die Eignung zum Anwaltsberuf fehle. So glaubte ich, das einst gewählte historische Gebiet nicht verlassen zu sollen.

Professor Baron, der uns in den ersten Wochen viel Zeit widmete und freundlich an meinen Problemen und Plänen Anteil nahm, riet mir, die ersten drei Monate von früh bis abend ausschließlich dem Studium der englischen Sprache zu widmen. Obwohl ich die Notwendigkeit einsah, möglichst bald der Landessprache mächtig zu werden, konnte ich mich auch dazu nicht entschließen. Denn der wissenschaftlichen Arbeit wollte ich, selbst in dieser prekären Lage, nicht gänzlich entsagen. Andere wohlmeinende Freunde brachten uns einen Radioapparat — bis dahin hatten wir keinen besessen —, mit dessen Hilfe wir Englisch lernen sollten. Auch davon Gebrauch zu machen, schien mir unmöglich. Aber ich stand täglich um fünf Uhr früh auf und büffelte englische Vokabeln, was jemandem, dem bis zu seinem sechsundvierzigsten Lebensjahr diese Sprache vollständig fremd geblieben war, wahrlich nicht leicht fiel.

Nach einigen erfolglosen Experimenten in verschiedenen Unterrichtskursen fanden wir in einem der vom öffentlichen Hilfswerk des Präsidenten Roosevelt (WPA Administration) für Einwanderer eingerichteten Sprachkurs eine ausgezeichnete, äußerst sympathische junge Lehrerin italienischer Abstammung, Ida Lidonnici mit Namen, deren Unterricht meiner Frau und mir sehr zusagte. Trotz unseres beschränkten Budgets engagierten wir sie zu zusätzlichen Privatstunden. Sie war nicht nur pädagogisch begabt, daher in ihrem Beruf erfolgreich, sondern verstand es auch, uns eine Vorstellung von Land und Leuten, von amerikanischer Lebensart und Denkweise zu vermitteln, was für die »Greenhorns« ebenso interessant wie nützlich war. Von ihr lernte ich auch die Bedeutung und Wahrheit des Satzes im amerikanischen Leben kennen: »It does not matter what you know, but whom you know« (Es kommt nicht darauf an, was du kannst, sondern wen du kennst). Ihr verdanke ich am meisten bei meinem Versuch, das Englische zu erlernen. Wie stolz war ich, als sie einmal zum Klassenunterricht nicht

erschien und ich diesen übernahm, damit die Schüler, meist ältere Leute wie ich, die Stunde nicht verlieren und unverrichteter Dinge nach Hause gehen müßten. So wurde ich nach und nach, wenngleich sehr langsam, mit der englischen Sprache einigermaßen vertraut, die beinahe drei Jahrzehnte mein Ausdrucksmittel im Verkehr mit der Umwelt und in meinem Beruf werden sollte. Sie hat jedoch bis heute meine Muttersprache nicht verdrängen können.

Nachdem wir uns in der völlig fremden Umwelt dürftig zurechtgefunden hatten, begannen wir, obwohl von den neuen Eindrücken noch ziemlich verwirrt, prominente jüdische Persönlichkeiten zu besuchen, wozu man uns geraten hatte. Von Walter Freudenthal erhielten wir eine Liste solcher Männer, mit denen wir, wie er sagte, würden deutsch sprechen können, um uns vorzustellen, unsere Situation zu schildern und Ratschläge zu erbitten. Es waren meist Rabbiner großer und reicher Gemeinden, unter ihnen Dr. Samuel Goldenson am Temple Emanuel; Dr. Jonah B. Wise an der Central Synagogue, die einst Auswanderer aus Böhmen gegründet hatten, was dieser jedoch nicht wahrhaben wollte; Dr. David de Sola Pool an der ältesten, schon im 17. Jahrhundert gegründeten Shearith Israel-Gemeinde (Spanish and Portuguese Synagogue) und Dr. Leo Jung, aus Ungarisch Brod gebürtig, am Jewish Center wirkend. Der Gedanke, mich zu diesen Persönlichkeiten zu senden, war sicherlich sehr gut gemeint, aber ebenso gewiß völlig abwegig, der Erfolg durchaus negativ. Wir (meine Frau begleitete mich meist auf diesen Schmerzenswegen) wollten ja keine Almosen, sondern den Rat, wie man, möglichst in meinem früher ausgeübten Beruf, eine neue Existenz im fremden Lande aufbauen könnte.

In seinem lesenswerten Memoirenbuch »Briefe an einen jungen Deutschen« hat der in Amerika wie in Europa sehr erfolgreiche Jurist Heinrich Kronstein den Verlauf ähnlicher für Emigranten üblicher Besuche, für die er den Ausdruck »Lottobesuch« geprägt hat, sehr zutreffend und wahrheitsgetreu geschildert: »In jenen Jahren hatte sich für die Emigranten in New York eine Art Lottospiel entwickelt, das auch ich einmal über mich ergehen ließ und das für mich überraschend gut endete. Gewöhnlich brachte der »Neue« eine Reihe von Einführungsschreiben befreundeter Amerikakenner mit, die für Anwälte, Bankleute und auch Universitäten bestimmt waren. Man meldete sich also zunächst bei Anwalt A, und je nach der Bedeutung des Briefschreibers wurde man empfangen oder vom Junior abgefertigt. War der Verfasser des Briefes besonders bedeutend, folgte eine Einladung zum Mittagessen, bei dem einige unklare Bemerkungen gemacht wurden, die einen Hoffnungsschimmer aufkommen ließen. Meist aber tat Anwalt A nicht mehr, als einen Brief an Anwalt B zu schreiben, der angeblich eine Kraft suchte, wie man sie selbst war. B übernahm es dann, den letzten Abwurf vorzunehmen — einen Einführungsbrief an Miss Rajewski, die von Hunderten belagerte Angestellte der Hilfsorganisation. Sie war dafür bezahlt, Leute zu empfangen, die solche Rausschmißbriefe erhalten hatten.«

Ähnlich, nur noch realistischer, lautet die Schilderung meines Bruders: »Es trug viel zu der unglücklichen Seelenverfassung der Eingewanderten bei, daß sie sich nicht abgewöhnen konnten, nichtssagende Redensarten für bare Münze zu nehmen und empört oder gekränkt und verletzt zu sein, wenn sie die Redensart eines amerikanischen Bekannten: »Ich rufe Sie heute noch telefonisch an« oder »Wir haben nächstens zusammen ein Lunch« ernst nahmen und nie wieder von ihm hörten. Mehr oder



weniger machten wir alle in Amerika drei Stadien durch. Das erste, kurz nach der Einwanderung, war rosig, voller Hoffnungen. Jedermann wünschte, uns persönlich kennenzulernen; denn der Durchschnitts-Amerikaner ist überdurchschnittlich neugierig, sensationslüstern und darauf aus, Bekannten in seinem Hause ein neu angelangtes Objekt, das er besaß, ein Möbelstück, eine Grammophonplatte oder einen zugereisten Immigranten vorführen zu können. Wir nahmen das alle für ein glückliches Zeichen, waren gewiß, daß man sich für uns interessierte. Man zahlte auch für uns in der Luncheonette, einem Mittelding zwischen Automatenbuffet, Stehbierhalle und kleinem Restaurant, die 50 oder 60 Cents, die der Lunch kostete. Freilich ahnten wir nicht, daß wir damit oft für den freundlichen Amerikaner erledigt und uninteressant geworden waren. Ich gebe gerne zu, daß es von diesem Typ auch viele Ausnahmen gab. Ich habe prachtvoll Menschen in Amerika kennengelernt, die vielen Immigranten sehr geholfen haben, wie Bernhard Baruch, und sich wirklich für sie interessiert haben, wie Professor Fulton, aber nicht jeder hatte das Glück, solche Menschen kennenzulernen. Ich rede auch ausdrücklich nur von dem mir bekannten Leben in New York; wie es in anderen Teilen der Vereinigten Staaten war, darüber habe ich keine Erfahrung. Im allgemeinen, das weiß ich von unzähligen eigener Bekannter, folgte diesem ersten optimistischen Lunch- und Redensarten-Zeitabschnitt der Einwanderung ein zweiter trauriger der Enttäuschung. Immer wieder sah man, daß die versprochene Einladung nie erfolgte, daß man auf die übliche Frage: »Wie geht es Ihnen?« die typische Antwort »Fine« erwartete, worauf der Amerikaner dann die Unterhaltung über das Wohlbefinden mit der ebenfalls täglichen Schablone »O, das ist gut« beendete. Fiel es einem aber etwa ein, statt der erwarteten Redensart »Fine« anzufangen, von den eigenen Sorgen oder Kümernissen zu reden, dann wurde das als eine langweilige Zudringlichkeit betrachtet, und der andere verabschiedete sich, so schnell er konnte. Das hat zu dem damals üblichen Scherzwort unter den Emigranten geführt, daß man auf die Frage des Bekannten: »Wie geht es Ihnen?« zu antworten pflegte: »Frag ich Sie?« Trotz dieser Scherze war diese zweite Etappe der Einwanderungszeit die schwerste. Man lernte mit schwerem Lehrgeld, daß in der Tat das Leben hier ganz anders sei, daß, wenn jemand von einem andern sagte, er sei sein guter Freund, das noch nicht zu bedeuten brauchte, daß er ihn auch nur halbwegs kannte. Wenn man in Europa jemanden beim Vornamen nennt, muß man schon recht befreundet mit ihm sein. Wenn ein Amerikaner den andern beim Vornamen nennt, so heißt das oft nur, daß er sich nicht einmal die Mühe nimmt, zu fragen, wie sein Familienname ist. All das mußte man mühsam lernen, und es waren nicht wenige, gerade unter den Intellektuellen, die zu diesem Umlernen nicht die Kraft fanden und lieber aus dem Leben schieden, als sich diesem neuen Leben einzufügen<sup>88</sup>.

Erfreulicherweise kann man jedoch sagen, daß für die meisten der Eingewanderten schließlich eine dritte Epoche begann, während der sie, besonders nachdem der Zweite Weltkrieg die Zeit der Dépression schlagartig beendet hatte, für sich ein kleineres oder großes Betätigungsfeld fanden, sich in die geänderten Verhältnisse schickten und schließlich in dem neugeschaffenen Beruf und der neuen Lebensform ein ganz glückliches Dasein führten. Dafür, daß jedem die Chance gegeben wurde, sich eine neue Existenz aufzubauen, muß jeder Immigrant Amerika aufs tiefste dankbar sein. Vielleicht am schwersten war diese Eingliederung für Juristen und für Künstler«.

Die amerikanische Erklärung für die geschilderte Haltung gegenüber den Immigranten und deren Wirkung auf sie geht dahin, daß es sich auf der einen Seite um nichts anderes als eine übliche freundliche Ermunterung handelte, die von der anderen Seite bloß mißverstanden wurde<sup>89</sup>.

Meiner Frau und mir erging es nicht wie in der von Kronstein geschilderten Weise, da wir gar keine Einführungsschreiben zu den genannten Rabbinern vorzuweisen hatten. Die Art der Aufnahme, hier nur ein Beispiel, ersparte uns deshalb zwar nicht Enttäuschung, wohl aber Zeit und weitere aussichtslose Besuche. Alle erwähnten Rabbiner waren sehr beschäftigt, ihre Tage und Abende mit Amtsgeschäften, Versammlungen und Sitzungen aller Art mehr als ausgefüllt. Es war schon schwierig, bei ihnen ein »Appointment«, einen Besuchstermin, zu erhalten. Sie hatten keine Zeit, auch kein Interesse, mich anzuhören, sich mit meinen Problemen vertraut zu machen oder sich gar in sie hineinzudenken. So spielte sich der »Empfang« bei Rabbi Sola Pool ab, indem er aus einer Sitzung zu den im Vorraum bereits eine Stunde lang Wartenden für zwei Minuten herauskam, um ihnen mit ein paar Worten zu erklären, daß er nicht die richtige Adresse sei, an die sie sich gewendet hatten. Bei unseren anderen Besuchen erging es uns, nur in kleinen Nuancen verschieden, ganz ähnlich.

Allein Rabbi Leo Jung machte eine Ausnahme. Obwohl auch sein Tagesprogramm schwer belastet war, ließ er mich nicht lange antichambrieren. Er behandelte mich nicht wie einen lästigen »Schnorrer«, der schnell abzuwimmeln war, sondern als einen schuldlös ins Unglück geratenen Landsmann. Man fühlte die Wärme seiner Anteilnahme, nicht wie bei den anderen das Verlangen, den unwillkommenen Besucher möglichst schnell loszuwerden. Bald wurden wir von ihm und seiner liebenswürdigen Gattin zu einem Freitagabend eingeladen. Er stand uns nach bestem Können mit Rat und Tat zur Seite, besuchte uns sogar, da er sich offenbar die Isolierung der Immigranten vorstellte. Um nur einen großen Dienst, den er mir erwiesen hat, zu erwähnen: Er beschaffte vom Präsidenten des Yeshiva-College, an dem er Religionsphilosophie dozierte, ein Affidavit, das nach dem Judenpogrom Hitlers im November 1938 die Rettung meines Bruders und seiner Familie aus der deutschen Hölle mit ermöglicht hat. Diesen und manche andere Erweise wahrer Hilfsbereitschaft, Menschlichkeit und Freundschaft, die bis auf den heutigen Tag andauert, werde ich Leo Jung, dem ich tiefe Dankbarkeit schulde, nie vergessen. Dagegen zeigte sich der vielgerühmte, sehr einflußreiche Präsident des Jewish Theological Seminary, Cyrus Adler, bei unserem Besuch völlig kalt und teilnahmslos, — im höchsten Maße enttäuschend.

Die zweite erfreuliche Ausnahme unter den jüdischen Persönlichkeiten, die nicht Rabbiner waren und die ich besuchte, war der ehemalige Inhaber des amerikanischen Zweiges des großen Bankhauses Lazard Frères, der aus Frankfurt stammende Paul Baerwald (1871—1961). Nach Erreichung des sechzigsten Lebensjahres zog er sich vom Bankgeschäft zurück und widmete sich ausschließlich der Philanthropie. Jahrelang war er eine der leitenden Persönlichkeiten der großen philanthropischen Organisation Joint Distribution Committee, die in ihre Wohltätigkeit die Juden in der ganzen Welt einschließt. Obwohl er, in jungen Jahren nach den Vereinigten Staaten gekommen, keine akademische Bildung genossen hatte, eigneten ihm, neben großen praktischen Kenntnissen und Erfahrungen, tiefe Herzensbildung und wahre Menschenfreundlichkeit. Vom ersten Augenblick meiner Bekanntschaft mit ihm zeigte er warmes Interesse



für meine Probleme, die zu bewältigen er mir nach besten Kräften half. Er war es, der jahrelang mein Fellowship bei der American Academy for Jewish Research dotiert und darüber hinaus teilnehmend meine Arbeiten begleitet hat, über die er sich von Zeit zu Zeit berichten ließ. Paul Baerwald erwies sich als wahrer, großzügiger Mäzen, durch dessen Munifizienz auch die Drucklegung meines Buches *The Jews in Medieval Germany* ermöglicht wurde. In seiner großen Bescheidenheit hat er zu meinem Bedauern die Widmung eines meiner Bücher nicht angenommen, weil er der Ansicht war, nur ein Gelehrter solle in solcher Weise geehrt werden. Leider erlebte er es nicht, daß jenes Werk nach zwanzig Jahren ohne jede Subvention in zweiter Auflage erscheinen konnte. Er starb kurz vor Erreichung des 90. Lebensjahres. Meine Frau und ich werden dem gütigen Menschen und väterlichen Freunde stets ein dankbares Andenken bewahren. Die humanitäre Tätigkeit dieses großen Philanthropen und ihre Bedeutung für die Gestaltung jüdischer Sozialarbeit ist meines Wissens noch in keiner biographischen Studie gewürdigt worden.

Das waren zwei höchst rühmens- und dankenswerte Ausnahmen, die wir nie vergessen werden. In der weitaus großen Mehrzahl der Fälle dagegen verliefen die Begegnungen mit potentiellen Helfern oder Wohltätern in der von Kronstein und meinem Bruder geschilderten Weise. Namentlich was mein Bruder geschildert hat, illustriert die Verhältnisse sehr gut, gibt die Einzelheiten wahrheitsgetreu wieder und analysiert sie psychologisch richtig.

Schließlich sei noch der sonderbare Verlauf des einzigen Kontaktes mit einer sehr gebildeten Frau erwähnt, die ihre Lebensaufgabe in sozialer Tätigkeit sah, mit der jung verwitweten Frau des gelehrten, jung gestorbenen Rabbiners Alexander Kohut, mit der — ebenso wie ihr Mann — aus Ungarn stammenden Mrs. Rebekka Kohut. Auf Professor Barons Veranlassung waren wir zusammen mit ihm und seiner Frau bei Mrs. Kohut zum Abendessen in ihrer vornehmen Wohnung eingeladen. Die Konversation drehte sich um allerlei persönliche und philanthropische Dinge. Wir hörten ohne Kenntnis und Verständnis stumm zu. Erst kurz vor dem Abschied wendete sich das Gespräch uns zu. Mrs. Kohut Meinung: Für Wissenschaft und geistige Arbeit, der ihr kürzlich gestorbener Sohn, George Alexander Kohut, als Privatgelehrter sein Leben gewidmet hatte, könne im Augenblick nichts getan werden. Viel dringender sei es, für die Kinder armer jüdischer Familien Schuhe zu beschaffen. Damit war sie gerade beschäftigt. Dieses damals in den jüdischen Kreisen Amerikas fast vollständig fehlende Interesse an der Förderung der Wissenschaft hat selbst Albert Einstein erkannt und darüber sein Bedauern geäußert.

Während mir erst, nachdem die zeitvergeudenden, schmerzlichen und erfolglosen Gänge vorbei waren, klar wurde, wie zwecklos sie gewesen sind, schienen die Besuche bei einigen Professoren Erfolg zu versprechen. Der Strafrechtler der Columbia University, Professor Jerome Michael, und der mittelalterliche Historiker, Professor Austin Evans, hatten mich anlässlich einer Abendeinladung bei Baron kennengelernt. Über die oberflächliche Vorstellung ging ihr Interesse nicht hinaus. Aber ich hatte zwei Empfehlungsschreiben an andere Persönlichkeiten. Das eine stammte von Professor Albrecht Mendelssohn Bartholdy, Ehrendoktor der Columbia University, und war an Professor James Shotwell, Direktor der Carnegie Foundation und Generalherausgeber der *Economic and Social History of the War* gerichtet, der einer der Urheber des

Kellogg-Pakts gewesen war, also ein sehr einflußreicher Mann. Nach den wie immer schwierigen Bemühungen um ein Appointment empfing er mich in seinem Büro mit der üblichen Freundlichkeit, hinter der sich nicht das geringste Interesse verbarg. Nach einem inhaltlosen, unpersönlichen Gespräch von wenigen Minuten sah ich ihn niemals wieder, hörte auch nie mehr von ihm. Wenigstens hatte er mir, auch nicht mit vagen Andeutungen, keine vergeblichen Hoffnungen gemacht. In seinen lesenswerten Erinnerungen »Als die Schatten fielen« (Frankfurt 1969, S. 256) charakterisiert George W. F. Hallgarten den Mann wie folgt: »... der Leiter der Carnegie Friedensstiftung, der sterile Völkerrechtler James Shotwell, der die Millionen des Stifters, statt zur Offenlegung und Bekämpfung der Kriegsursachen, zur Durchführung sachlich meist ganz abgelegener Projekte verwandte, widerlegte sich im Grunde selbst; meine Arbeit bestätigte das nur«. Ebenso wie bei Shotwell erging es mir bei dem Juristen Professor Karl Llewellyn, der erst kürzlich als Gastprofessor in Leipzig gefeiert worden war. An ihn hatte mich Paul Koschaker empfohlen. Trotzdem zeigte er nicht das geringste Interesse.

Ohne Empfehlungsschreiben suchte ich den germanistischen Rechtshistoriker der Columbia University, Professor Julius Goebel, auf. Er war »Director of the Foundation for Research in Legal History«, einer reich dotierten Stiftung zur Förderung rechtsgeschichtlicher Forschung an der Rechtsfakultät der Columbia University, verfügte also über erhebliche Mittel, die ausschließlich rechtshistorischen Studien gewidmet werden sollten. In einem langen Monolog erzählte er mir von seinem geplanten Buch über die Geschichte des mittelalterlichen Strafrechts und Strafprozesses, in dem er Brunners, Wildas und Liebermanns Lehre von der Friedlosigkeit und andere allgemein akzeptierte Theorien als falsch nachzuweisen beabsichtigte. Mich ließ er überhaupt nicht zu Worte kommen. Sonderdrucke meiner Arbeiten, die ich ihm überreichte, warf er, ohne sie anzusehen, in geschwungenem Bogen auf einen mit Büchern beladenen Tisch am anderen Ende seines geräumigen Office. Trotzdem wollte ich seine Vorlesung belegen. Nach Anhören der ersten Stunde, die er, auf dem Katheder sitzend (oder richtiger liegend) mit auf dem Tisch ausgestreckten Beinen, in Form eines Kolloquiums abhielt, kehrte ich in seinen Hörsaal nicht wieder zurück. Später erfuhr ich, daß er in Berlin gewesen sei, um einen Austausch amerikanischer und deutscher Studenten in die Wege zu leiten. Da ihn der Propagandaminister Hitlers, Goebbels, bei dem er zu diesem Zweck vorsprechen wollte, zu lange antichambrieren ließ, habe er den Raum unverrichteter Dinge ärgerlich verlassen. Man kann sich denken, was von einem solchen Nazifreund zu erwarten war. Leider habe ich von dieser seiner Einstellung zu spät erfahren.

Meine negativen Erfahrungen habe ich absichtlich ausführlicher geschildert (und werde das auch weiter tun), da man ähnliche Schicksale in anderen Memoiren von Emigranten kaum dargestellt findet. Sie vermeiden es, ein Mißgeschick überhaupt zu erwähnen, und ziehen es vor, persönliche Erfolge ins Licht zu stellen, um zu zeigen, wie ihre Qualitäten schon bei ihrem ersten Auftreten in Amerika zur Geltung kamen. Jeder emigrierte Referendar oder Assessor wollte in Deutschland bereits ein bekannter Professor gewesen sein. Gar manchem gelang es, wohlmeinende Amerikaner, die mit den europäischen Verhältnissen nicht vertraut waren, seine Märchen glauben zu machen. Bekannt ist die niedliche, damals erfundene Geschichte von dem Dachshund, der dem



amerikanischen Kollegen bei einer Begegnung erzählt, er sei zwar ein Dachshund, aber zu Hause sei er ein großer Bernhardiner gewesen. Nach meiner Überzeugung ist es richtiger, durch eine wahrheitsgetreue Schilderung die einzelnen Etappen des Leidensweges der Emigration darzustellen, als Erfolge, die einem glückliche Zufälle zuspielten, der eigenen Fähigkeit oder Tüchtigkeit zuzuschreiben.

Meine Erfahrungen lehrten mich, daß ich einen Weg in anderer Richtung einschlagen müsse, um zu dem erstrebten Ziel zu gelangen, ohne meine bisherige Lebensarbeit gänzlich aufzugeben. Die American Academy for Jewish Research hatte mich mit einem zum Teil von ihr, später von einem Hilfskomitee aufgebracht, zum Teil von dem bereits erwähnten privaten Mäzen Paul Baerwald dotierten Fellowship für ein Jahr nach Amerika eingeladen. Ich brauche nicht zu betonen, daß ich der Initianten dieser lebensrettenden Aktion mit aufrichtiger Dankbarkeit gedenke. Ich habe ihr später durch Zueignung eines Buches an die Academy auch äußerlich Ausdruck gegeben. Die Geschichte dieser wissenschaftlichen Gesellschaft, die damals in den Vereinigten Staaten führende jüdische Gelehrte vor anderthalb Jahrzehnten gegründet hatten, ist erst kürzlich geschildert worden<sup>90</sup>. Sie hatte sich, vermutlich nach europäischem Muster, zur Aufgabe gemacht, jüdische Wissenschaft zu pflegen und zu fördern. An ihrer Spitze stand viele Jahre hindurch der bedeutende Talmudgelehrte Louis Ginzberg. Ihr Programm galt ursprünglich nur der Bearbeitung hebräischer Quellenmaterials. Alljährlich herausgegebene *Proceedings* berichteten über die Tätigkeit und veröffentlichten gelehrte Abhandlungen der Mitglieder. In der genannten dokumentarischen Geschichte der Akademie ist jedoch eine äußerst dankenswerte, freilich zeitlich begrenzte Erweiterung ihrer Aktivität nicht berücksichtigt, die durch Hitlers Entrechtung und Vertreibung jüdischer Gelehrten zuerst nur aus Deutschland, dann aus ganz Europa, veranlaßt war. Diesen sollte geholfen werden, indem man ihnen die Möglichkeit zur Fortsetzung ihrer wissenschaftlichen Arbeit bot, bis es ihnen gelingen würde, sich selbst eine Position zu schaffen, die ihren Fähigkeiten entsprach. Zur Verwirklichung dieses Zweckes ließ die Akademie die Beschränkung auf hebräisches Quellenmaterial zeitweise fallen. In diese großzügige Erweiterung des Programms bin ich wohl als erster einbezogen worden. Mir wurde unter meinem Fellowship gestattet, meine jüdischen rechtshistorischen Forschungen weiter zu betreiben, über die ich durch gelegentliche Vorträge und Vorbereitung wissenschaftlicher Abhandlungen für die *Proceedings* Auskunft und Rechenschaft geben sollte. Solche jüdisch-historische Arbeiten hatte ich bereits in den zwanziger Jahren zu publizieren begonnen, als ich Mitherausgeber der *Zeitschrift für die Geschichte der Juden in Deutschland* und des *Jahrbuchs der Gesellschaft für Geschichte der Juden in der Tschechoslovakischen Republik* war. Ihnen die Richtung zu weisen und sie mit dem Programm der Akademie in Einklang zu bringen, wurde dem Sekretär, Professor Baron, überlassen.

Gleich nach Empfang der Einladung nach den Vereinigten Staaten hatte ich eine Abhandlung vorbereitet, die sich mit der beginnenden pseudowissenschaftlichen Produktion der Nazis auf den Gebieten der Geschichte sowie der Rechts- und Wirtschaftsgeschichte der Juden beschäftigte und diese kritisch zu beleuchten, auch zu widerlegen versuchte. Unmittelbar veranlaßt war sie von der unter der Patronanz des angesehenen Münchner Historikers Karl Alexander von Müller in gefälliger Aufmachung als Buch erschienenen Doktordissertation des nachmaligen Nazi-Propagandisten Wilhelm Grau

*Antisemitismus im späten Mittelalter. Das Ende der Regensburger Judengemeinde 1450–1519*<sup>91</sup>. Das Thema fand jedoch nicht Professor Barons Beifall. So mußte ich eine neue Studie beginnen, die einen Überblick über die Ergebnisse der Forschungen auf den Gebieten der Rechts- und Sozialgeschichte der Juden zum Inhalt haben sollte. Dabei bemühte ich mich, die bis dahin ungeklärt gebliebene Unterscheidung der auf biblischen und talmudischen Quellen beruhenden Rechtsgeschichte der Juden von dem »Judenrecht«, der von nichtjüdischen Autoritäten kreierten staatlichen Judengesetzgebung, herauszuarbeiten. Für die letztere mußte ich eine dem deutschen Ausdruck: »Judenrecht« entsprechende Bezeichnung, »Jewry Law«, schaffen, wofür es bis dahin in der englischen Sprache keinen äquivalenten Ausdruck gab. Sie hat sich seither in der Wissenschaft allgemein eingebürgert. Die natürlich in deutscher Sprache geschriebene Arbeit mußte ins Englische übersetzt werden, was infolge meiner Unkenntnis der Sprache nicht geringe Schwierigkeiten bereitete. Dankenswerterweise leistete dabei der Philosoph Professor Isaac Husik freundliche Hilfe. Die Abhandlung erschien als meine erste Publikation in Amerika in den *Proceedings* der Akademie. Ich habe sie zum Zeichen der Dankbarkeit Professor Baron gewidmet<sup>92</sup>.

Für die weiteren Arbeiten unter den Auspizien der Akademie in den folgenden Jahren nahm ich mir als Aufgabe eine umfassende Darstellung des mittelalterlichen europäischen Judenrechts vor, das seit den wertvollen Werken von Otto Stobbe, Johannes Scherer und Georg Caro weder jüdische noch christliche Gelehrte beachtet hatten. Der Zusammenhang mit meinen früheren rechtsgeschichtlichen Studien wurde dadurch hergestellt, daß ich zur Grundlage die in ihrer Gesamtheit für die jüdisch-historische Forschung noch nicht ausgewerteten bedeutenden, auf Gewohnheitsrecht beruhenden Rechtssatzungen der mittelalterlichen deutschen Rechtsbücher wählte. Um diese theoretischen Werke zu ergänzen, zog ich die Entscheidungen der hervorragendsten mittelalterlichen Gerichtshöfe Deutschlands heran, der Schöffenstühle, die ich bei meinen früheren Quellenstudien und Publikationen gesammelt hatte und deren judenrechtliche Urteile noch nie jemand bearbeitet und dargestellt hatte. Diese Rechtsquellen waren größtenteils unbekannt geblieben, da sie in handschriftlichen Urteilssammlungen verborgen waren, die bis dahin zum größten Teil durch Druckausgaben noch nicht ans Licht gekommen waren. Aus ihrem Studium gingen zunächst Vorarbeiten hervor, die in zwei umfangreichen Abhandlungen wiederum in den *Proceedings* der Akademie veröffentlicht wurden<sup>93</sup>. Wie diese anderthalb Jahrzehnte hindurch von mir betriebenen Forschungen ihren Abschluß und bleibenden Niederschlag gefunden haben, muß der späteren Darstellung vorbehalten werden.

Im ersten Jahre wurden sie unter denkbar schwierigen Verhältnissen ausgeführt. Von den unaufhörlichen psychischen Bedrängnissen infolge der politischen Entwicklung in Deutschland, der Sorge um die Angehörigen in Europa und um die eigene Zukunft soll hier nicht die Rede sein. Allein die Beschaffung des wissenschaftlichen Materials war schon sehr schwierig. Es war nur teilweise in den New Yorker Bibliotheken vorhanden, obwohl die Public Library und die Bücherei des Jewish Theological Seminary mit allgemeiner jüdisch-historischer Literatur gut ausgestattet waren. Für meine Arbeit bedurfte es aber einer Spezialliteratur, die bis dahin in Amerika kaum beachtet worden ist und die dort deshalb zum größten Teil nicht zu finden war. Es war mühevoll und zeitraubend, das zufällige Vorhandene aufzuspüren und zur Benutzung zu erhalten.



Für den europäischen Professor war es selbstverständlich, daß er die für seine Arbeit notwendigen Bücher nach Hause geliehen bekam. An das Arbeiten in den großen, meist überfüllten Lesesälen der Bibliotheken Amerikas mußte er sich erst langsam gewöhnen. Eine große Zahl von Büchern und namentlich die Zeitschriften wurden nicht ausgeliehen. Die wohlthätige, Zeit und Mühe sparende Einrichtung der Photokopie, heute ein selbstverständliches Hilfsmittel bei jeder wissenschaftlichen Arbeit, ohne das man nicht mehr auskommen kann, war noch unbekannt. Konzentrierte Arbeit in dem engen Hotelzimmer war geradezu unmöglich. Deshalb war die Überlassung eines kleinen Arbeitsraums durch den Bibliothekar des jüdisch-theologischen Seminars, Professor Alexander Marx, in seinem weiträumigen Bibliotheksgebäude eine sehr geschätzte, dankenswerte Wohltat. Auch die Benützung der reichen, in einem noch luxuriöseren Neubau untergebrachten Columbia University Library wurde mir gestattet. Anfangs erhielt ich sogar auch dort einen winzigen Studienraum, ein sogenanntes »cubicle«. Doch herrschte in dieser Bibliothek eine Art geheime Überwachung. Sie stellte durch ständig insgeheim ausgeführte Stichproben fest, ob der Inhaber das Räumchen von etwa drei Quadratmetern Fläche auch wirklich ständig benutzte. Da ich am Samstag nicht zu arbeiten pflegte, die Bibliothek am Sonntag geschlossen war, wurde meine zeitweilige Abwesenheit, zumal da ich doch dort den ganzen Tag nicht zuzubringen hatte, insgeheim ausgeforscht und mir ohne vorherige Warnung oder Mitteilung der Arbeitsraum einfach entzogen. Dazu kam bald die Einführung einer erheblichen Benützungsgeldgebühr für Nichtangehörige der Universität, die ich nicht zahlen konnte. Da alle Vorstellungen über die den amerikanischen Gelehrten in europäischen Universitätsbibliotheken gewährte Gastfreundschaft auf taube Ohren stießen, durfte ich die Columbia Library so lange nicht benützen, bis ich selbst, wenngleich nur in der losen Verbindung eines Research Associates, nach etwa zwanzig Jahren der Fakultät der Columbia-Universität angehörte.

Zur Schilderung der ersten Phase meines Lebens in Amerika gehört noch, etwas über die unmittelbare Umwelt zu sagen. Die ständige Umsorgung durch unsere neugewonnenen Freunde hörte naturgemäß bald auf, was Professor Baron richtig vorhergesagt hatte. Unsere Beziehungen zu ihm und seiner Frau, die uns namentlich im Anfang oft einluden und sich auch sonst um uns kümmerten, sowie zu den maßgebenden Persönlichkeiten in der Fakultät des jüdisch-theologischen Seminars, den Professoren Ginzberg, Marx und Davidson, blieben freundliche, ja sie wurden zu freundschaftlichen<sup>94</sup>. Dasselbe trifft für Rabbi Leo Jung und seine Frau zu. Kühler war das auch später nie warm gewordene Verhältnis zu dem jungen Assistenten des Seminarpräsidenten, Dr. Louis Finkelstein (der unter Schwierigkeiten in der Ehe litt, die schließlich zur Scheidung führten). Von eisiger Kälte war die Begegnung mit dem vielgerühmten, in jüdischen Kreisen hochangesehenen, einflußreichen Seminarpräsidenten Dr. Cyrus Adler, der kein Gelehrter, jedoch ein guter Organisator war. Seine Tätigkeit bestand, wie die aller amerikanischen College-Präsidenten vornehmlich darin, mit geschickter Propaganda Kontakte mit reichen Geldgebern herzustellen und für die Beschaffung der Betriebsmittel zum Unterhalt seiner Anstalten zu sorgen<sup>95</sup>. Diese seine Lebensaufgabe hat Cyrus Adler getreu und erfolgreich erfüllt. Auch in der jüdisch-amerikanischen Politik spielte er als Präsident des American Jewish Committee eine wichtige Rolle. Für Menschen außerhalb dieser Kreise und seiner Seminar-»Familie«,

namentlich für die zur Flucht aus Europa gezwungenen, in Bedrängnis geratenen Gelehrten hatte er nicht das geringste Verständnis oder Interesse.

Als Gegensatz zu dem bereits in Amerika geborenen, assimilierten Adler sei wehmütig und dankbar der Freundschaft eines aus bestem, freilich bedürftigem ostjüdischem Milieu stammenden Mannes gedacht, der, selbst aus dem zaristischen Rußland geflüchtet, mir schon bei der ersten Begegnung tiefes Verständnis und volle Sympathie entgegenbrachte: Dr. Isaac Rivkind (gest. 1968). Obwohl er in der hebräischen und jiddischen Literatur ein Gelehrter ersten Ranges gewesen ist, wurde er in der Eigenschaft eines »Cataloguer« im Personal der Bibliothek des Theologischen Seminars lange in untergeordneter, gedrückter Stellung gehalten. Tatsächlich nahm er alle bibliothekarischen Aufgaben für die große Hebraica-Abteilung der Seminarbibliothek wahr. Rivkind hat anerkannte bibliographische Abhandlungen und Bücher veröffentlicht. Unermüdlich und bereitwillig stellte er mir seine hebräischen Sprach- und Sachkenntnisse zur Verfügung. Unter den jiddischen Literaten der New Yorker Eastside hatte er zahlreiche Freunde und genoß große Hochschätzung, auch im PEN-Club dieser Gruppe. Besuchte ich ihn gelegentlich in seinem Büro, pflegte er mich den dort Anwesenden mit der Bemerkung vorzustellen, auf meinem Gesicht sei das tragische Schicksal und Leid der Galut (der Verbannung) zu lesen. Nur wer es selbst erlebt hat, konnte es so verstehen und mitfühlen wie Isaac Rivkind.

Wir waren froh und dankerfüllt, in dieses uns bis dahin fremde, in sich ghettoartig abgeschlossene Milieu aufgenommen worden zu sein. Seine Repräsentanten hatten sich selbst innerhalb des zur Zeit ihrer Einwanderung, am Ende des 19. und im Anfang des 20. Jahrhunderts, kulturell noch nicht weit vorgeschrittenen amerikanischen Judentums eine einzigartige, hochangesehene, ja dominierende Stellung geschaffen. Daß wir uns in dieser von Dünkel und Überheblichkeit nicht freien Gesellschaft auf die Dauer nicht wohlfühlen sollten, merkten wir trotz unverminderter Dankbarkeit erst viel später. Dieses Gefühl haben jedoch nicht die zuerst genannten, höchst ehrenwerten Freunde als vielmehr die jüngeren Mitglieder der Fakultät in uns hervorgerufen; sie hatten jene im natürlichen Wandel der Zeiten abgelöst.



## Emigrantenschicksal

Im Verhältnis zur Zahl der Jahre wird die Schilderung dieser Epoche viel kürzer ausfallen als die der vorangegangenen Lebensabschnitte.

Am Ende des Sommersemesters 1935 fuhren wir zurück nach Europa, wo sich die politischen Verhältnisse und die Lage der Juden in Deutschland ständig verschlechterten. Die nationalsozialistische Bewegung war in ungeahntem Anschwellen begriffen. Hitlers Machtposition wurde immer stärker, seine Anhängerschaft wuchs von Tag zu Tag. Rücksichtslose Gewalthandlungen unter dem Deckmantel der Gesetzlichkeit waren an der Tagesordnung. Gegner wurden schon früher durch Mord beseitigt, der nachträglich durch Erlaß von Spezialgesetzen formal als Rechtsakt der »Staatsnotwehr« legalisiert wurde (sogenannte Röhm-Revolution am 30. Juni 1934). Zwar war die Maske der Legalität auch sonst noch nicht gefallen, aber die zunehmende Brutalität kannte keine Grenzen. Täglich hörte man von geheimen oder öffentlichen Morden durch die Nazis. Obwohl ich immer noch glaubte, daß dieser Zustand zunehmender, wenn auch wohlgetarnter, verbrecherischer Rechtsbeugung und überhandnehmender Rechtlosigkeit sich nicht werde lange halten können, und obwohl die in Amerika winkenden Aussichten keineswegs rosig waren, gelangten meine Frau und ich zur Überzeugung, daß unseres Bleibens in Europa nicht mehr lange sein könne.

Die Vorbereitungen zur Auswanderung mit unserem noch nicht fünf Jahre alten Söhnchen, das sich in der Obhut meines Bruders und seiner Frau in der Gesellschaft ihrer drei Kinder während unserer Abwesenheit wohlgefühlt und gut entwickelt hatte, mußten eilig getroffen werden. Irgend eine Beratung stand uns nicht zur Verfügung, da keiner unserer Freunde die notwendige Erfahrung besaß. Wer hätte sie auch haben können? Die erforderliche Eile erzeugte Verwirrung. Man wußte nicht, was man von seiner Habe in Amerika werde brauchen können, sowohl an Möbeln und Hausrat als auch an Büchern und unfertigen Manuskripten, und was man zurücklassen sollte. Wertvolle und wichtige Sachen wurden derelinquiert, unwichtige, jenseits des Ozeans lediglich als Ballast wirkende mitgenommen. Von Möbeln wurden nur kleine und die notwendigsten Stücke verladen, die in Jahren liebevoll gesammelten antiken Einrichtungsgegenstände mußten zurückbleiben. Der Gedanke wollte nicht schwinden, die noch nicht voll entfaltete Barbarei werde sich doch nicht lange halten können, die Rückkehr werde in absehbarer Zeit möglich sein. Diese schwere Täuschung forderte schwere Opfer. So mußten wir unser schönes, neu gebautes Haus mit dem größten Teil des wertvollen Inventars, einschließlich großer Teile meiner wissenschaftlichen und der vollständigen schöngestigen Bibliothek verlassen und preisgeben. Die uns herzlich zugetane Haushilfe, die uns zehn Jahre lang betreut hatte und die wir schon zur Familie zählten, mußte ebenfalls zurückbleiben. Das prachtvolle Haus haben die Nazis geraubt. Eine Entschädigung erhielten wir auch nach Beendigung des Krieges nicht, da Halle in der russisch besetzten Zone Deutschlands gelegen war.

Nach Überwindung der Paß- und sonstigen Schwierigkeiten, nach einem herzzerreißenden Abschied von den zurückbleibenden nächsten Angehörigen ging es über Köln, wo uns unsere Geschwister, die sich selbst in keiner beneidenswerten Lage befanden, Mut zusprachen, nach Cherbourg. Ein von jüdischen Auswanderern überfülltes Schiff der Cunard Line brachte uns nach New York. Daß wir Europa so bald nicht und das schöne Haus überhaupt nicht mehr sehen würden, — es dauerte länger als ein Jahrzehnt, bis eine Reise nach dem alten Kontinent wieder möglich wurde, — kam uns damals nicht in den Sinn. Unsere Sinne waren benommen, wir wußten nicht, was uns geschehen war, was uns geschah und was auf uns wartete. Halle und das schwer erworbene, in einem sorgenvollen Jahr erbaute Haus haben wir nie wieder erblickt und werden es auch nimmermehr zu sehen bekommen.

Nach stürmischer Seefahrt wohlbehalten gelandet, richteten wir uns in einer kleinen, düsteren Dreizimmer-Wohnung kümmerlich ein, in der wir drei Jahre bleiben sollten. Das Ameublement bestand, bevor die wenigen mitgenommenen Sachen eintrafen, aus einem Bett, einer Couch und einem Kinderbett. Letzteres, eine Kommode, einen Stuhl und zwei kleine Tischchen erstanden wir antiquarisch für acht Dollar, dazu einen alten Küchentisch, der mir fünfzehn Jahre lang als Schreibtisch diente, für 3,50 Dollar. Dazu hatte uns die auch sonst sehr hilfreiche Bibliothekssekretärin Miss Anna Kleban verholfen. Jüdische Auswanderer aus Deutschland durften an Geld nur zehn Dollar für die Person mitnehmen. Unsere Aktien, Spar- und Bankguthaben waren gesperrt und blieben verloren. Dies ist hier nur zur Vollständigkeit des Bildes, nicht aus Selbstbemitleidung, mitgeteilt. Denn anderen ging es ebenso oder noch viel schlechter. Darüber kann man die ausführliche, wahrheitsgetreu-unübertreffliche Schilderung in Carl Zuckmayers Lebenserinnerungen »Als wär's ein Stück von mir« nachlesen. Ohne die Tüchtigkeit und Sparsamkeit meiner Frau hätten wir das neue Leben in diesem ungewohnten Stil nicht beginnen und jahrelang durchhalten können. Professor Isaac Kandel vom Teachers College der Columbia University verschaffte uns für unser Kind einen Freiplatz in dem von dieser Anstalt unterhaltenen Kindergarten. Dadurch war meine Frau für einige Stunden des Tages entlastet, sie konnte am Tag und abends auf der Schreibmaschine, die ich zu gebrauchen nicht gewohnt war, für mich Briefe und Manuskripte von Arbeiten schreiben. Das dauerte oft bis in die Nacht hinein und währte während der achtundzwanzig Jahre unseres Aufenthalts in Amerika. So sah der Anfang unseres neuen Lebens äußerlich aus.

Das Fellowship der Academy wurde für ein weiteres Jahr verlängert, während dessen die begonnene wissenschaftliche Arbeit fortzusetzen und Anstrengungen zu machen waren, auf eigenen Füßen zu stehen. Die Erfahrungen der Probezeit waren keineswegs ermutigend gewesen. Aber alle Bemühungen mußten weitergehen, nichts durfte unversucht gelassen werden. Die Möglichkeiten einer Tätigkeit auf jüdischem, juristischem und mittelalterlich-historischem Gebiet zu prüfen, war neben der laufenden Arbeit meine Beschäftigung. Meine Kenntnis der englischen Sprache, obwohl noch weit entfernt von ihrer Beherrschung, hatte sich doch gebessert, so daß ich mich mit Mühe verständlich machen und auch schriftlich ausdrücken konnte. Ich suchte Menschen kennen zu lernen, Kontakte zu gewinnen, meine Fähigkeiten durch Vorträge zu beweisen, meine Dienste anzubieten, um zu einem Ziel zu gelangen. Die Erfahrungen waren aber auch jetzt enttäuschend, alle Anstrengungen vergeblich. Kein Lichtblick



zeigte sich noch. Nur einige Beispiele sollen die Trostlosigkeit der Situation beleuchten, in der sich der einst von mehreren Universitäten begehrte ehemalige Professor der Rechte in seinem siebenundvierzigsten Lebensjahr befand.

Der Bekanntenkreis, bei dem die Bewerbungen begonnen wurden, war klein. Natürlich mußte ich zuerst an eine Lehrtätigkeit denken. Mittelalterliche und neuzeitliche Geschichte der Juden, über die ich mehrere Semester in Breslau vorgetragen hatte, kam zunächst in Betracht. Nach langen Bemühungen erhielt ich ein »Appointment« bei dem sehr mächtigen Präsidenten des jüdisch-theologischen Seminars, dem bereits erwähnten Dr. Cyrus Adler, der in Philadelphia wohnte und nur an bestimmten Tagen zur Erledigung der Geschäfte nach New York kam. Es war ein heißer Spätsommertag. Adler hatte eine schwache Stimme, die an sich schon schwer und für das an schnell gesprochenes Englisch nicht gewohnte Ohr dadurch noch schwieriger, wenn überhaupt, verständlich war, da er seinen auf dem Schreibtisch in Betrieb befindlichen elektrischen Luftkühlapparat nicht etwa abstellte, sondern ruhig seine lärmend surrenden schnellen Drehungen machen ließ. Und das, obwohl er merken mußte, mit welcher Schwierigkeit ich zu kämpfen hatte, um ihn auch nur teilweise zu verstehen. Als ich ihm meine Kenntnis der jüdischen Geschichte darzulegen versuchte, meine Lehrtätigkeit am Breslauer jüdisch-theologischen Seminar erwähnte, von dessen Existenz er vermutlich keine Ahnung hatte, und schließlich zu fragen wagte, ob ich nicht mit ein paar Unterrichtsstunden betraut werden könnte, da lautete seine fast höhnische Antwort, in die Frage gekleidet: »You want to teach?« Der scharfe Akzent auf dem ersten Worte wirkte niederschmetternd. Die ganze Unterredung dauerte kaum drei Minuten. Der Mann strahlte eine eisige Kälte, um nicht zu sagen Herzlosigkeit, aus. Er hat denn auch bloß einen einzigen deutschen Gelehrten, den ehemals Bonner Privatdozenten Alexander Sperber (1897–1970), in seine Fakultät aufgenommen, was nur auf dringende Empfehlung des bedeutenden christlichen Professors William Albright geschah. Aber auch er verlor nach einigen Jahren sein sehr bescheidenes Stipendium und wanderte zum zweiten Mal, nun nach Palästina, aus, wo er eine anerkannte wissenschaftliche Tätigkeit entfaltet hat. Ganz anders handelte der Präsident des liberalen Rabbinerseminars, des Hebrew Union College in Cincinnati, Dr. Julian Morgenstern, der ein großzügiges Rettungsprogramm für brotlos gewordene jüdische Gelehrte aus Europa entwarf und verwirklichte, indem er einer großen Zahl solcher Professoren rettende Unterkunft und eine würdige Arbeitsmöglichkeit an seiner Anstalt gewährte, welcher diese zugute gekommen ist<sup>96</sup>.

Eine ähnliche Behandlung wie von Adler habe ich nur noch einmal erfahren. Das war beim Besuch des als Wissenschaftler angesehenen Professors der Yale University, Erwin R. Goodenough, an den mich Professor Koschaker empfohlen hatte. Ich wollte ihn an seinem Wohnort in New Haven aufsuchen, doch empfing er mich lieber im Treppenhaus des Union Theological Seminary, wo er gerade der Jahrestagung der amerikanischen Bibelgesellschaft beiwohnte. Er hörte mich eine Weile sichtlich ungeduldig an, unterbrach mich bald und stellte mir ebenfalls eine Frage: »Wenn ich meine Stellung verloren hätte und zu Ihnen nach Europa gekommen wäre, hätten Sie für mich eine Stellung gesucht?« Wiederum war ich durch diesen Mangel jeglicher menschlicher Anteilnahme entwaffnet und sprachlos. Nicht einmal die Geistesgegenwart besaß ich, darauf hinzuweisen, daß nach der bolschewistischen Revolution manche flüch-

tige Professoren aus Rußland an deutschen Universitäten, zum Beispiel in Halle, Zuflucht und Brot gefunden hatten. Der menschenfreundliche Professor hatte diese Begegnung vermutlich vergessen, als er einige Jahre später eine sehr anerkennende Rezension über meine Ausgabe der pseudophilonischen *Antiquitates Biblicae* in der führenden Zeitschrift *Speculum* veröffentlichte. Es handelte sich um eine Handschrift aus dem Besitz seines Mäzens, Mr. Howard L. Goodhart, von der ich eine kritische Edition publiziert hatte.

Nicht besser erging es mir bei den Präsidenten der New Yorker städtischen höheren Schulen mit großen Schülerzahlen und einem starken Lehrbetrieb, dem City College, Brooklyn College, Hunter College, bei denen ich ebenfalls vorsprach. Nur wies man mich dort in urbaneren Formen ab. Ich erhielt gedruckte Bewerbungsformulare zum Ausfüllen und Einreichen. Die mehrere Seiten füllenden Personalfragen erforderten ein Studium von mehreren Stunden. Einen Bescheid, auch nur einen negativen, erhielt ich nie. Das gleiche Schicksal mußte ich bei meinen Bewerbungen in verschiedenen Departements der Columbia University erleiden. Sie alle reichte ich zu einer Zeit ein, als ich die englische Sprache bereits einigermaßen beherrschte und Hitler die an Deutschland grenzenden Länder noch nicht überfallen hatte, daher der Andrang der stellensuchenden Refugee-Professoren noch nicht groß war. Der Ordinarius für mittelalterliche Geschichte, Austin P. Evans, dessen Rat und Gutachten bei allen Stellenbesetzungen seines Faches an den verschiedenen Mittelschulen in New York und Umgebung eingeholt zu werden pflegte, war der Herausgeber der Sammlung *Records of Civilization*. An ihn hatte mich Professor Baron empfohlen. Er wollte mich zur Übersetzung einer mittelalterlichen Geschichtsquelle aus dem Lateinischen ins Englische veranlassen, ohne ein Honorar zu zahlen, angeblich damit mein Name in amerikanischen Gelehrtenkreisen bekannt werde. Vernünftiger- und glücklicherweise erklärte ich mich zu dieser Arbeit nicht bereit, die mich mindestens ein Jahr lang ohne irgendwelche positive Aussichten festgelegt hätte.

Die Erfolglosigkeit dieser Besuche bei den Historikern brachte mich auf den Gedanken, daß meine Kenntnis der tschechischen Sprache und slawischen Geschichte eher Aussicht bieten könnte, im Lehrfach verwendet zu werden. Ich begab mich zum Professor der slawischen Philologie an der Columbia Universität namens Clarence Manning, der mich in Gegenwart einiger Studenten mein Sprüchlein aufsagen ließ. Als ich geendet hatte, fragte er nicht etwa nach meiner philologischen Ausbildung und Lehrerschaft, sondern: »Are you Jewish?« . . .

Nirgendwo zeigte sich ein Interesse oder auch nur der geringste Hoffnungsschimmer. Der sehr wohlgesinnte und angesehene Professor der Pädagogik, Isaac Kandel, lud mich zu einem gesellschaftlichen Treffen mit einem Dr. Klapper ein, der kurz vorher Präsident des neueröffneten städtischen Queens College geworden und gerade mit der Rekrutierung seiner Fakultät beschäftigt war. Er sollte mich kennenlernen. Sicherlich war er vorher über den Zweck dieser Begegnung unterrichtet worden. In der lebhaften, abendfüllenden Konversation richtete er überhaupt kein Wort an mich.

So vergingen volle zwei Jahre. Man kann sich leicht vorstellen, in welcher Stimmung sich meine Arbeit über die Reditsgeschichte der Juden im mittelalterlichen Deutschland vollzog, denn auch andere Sondierungsversuche bei einzelnen einflußreichen Persönlichkeiten, die ich nicht mehr alle aufzählen möchte, hatten kein besseres Ergebnis. Nur



zwei der zahlreichen Bittgänge dieser Art seien noch kurz erwähnt, zu denen mich wohlwollende Mittelsmänner veranlaßten. Der ehemalige Botschafter der Vereinigten Staaten in der Türkei, Henry Morgenthau senior, den ich in seiner feudalen Wohnung auf der New Yorker Eastside, natürlich nach langen Vorverhandlungen wegen einer Audienz, besuchte, damit er für mich bei dem Präsidenten des Hebrew Union College in Cincinnati, einer Hochschule zur Ausbildung von Reformrabbinern, ein Wort einlege, erklärte mir: »Ich bin Amerikaner und kann mich mit jüdischen Angelegenheiten nicht befassen«. Das war wenigstens eine ehrliche Äußerung, die keine falschen Hoffnungen erweckte.

Der vielgerühmte Direktor der Rockefeller Foundation, Dr. Alfred Cohn, der natürlich über ausgezeichnete Verbindungen zur akademischen Welt verfügte, warf mich milde hinaus, indem er mir erklärte: »I will do nothing for you if you press me«. Vermutlich war ich in seinen Augen zudringlich gewesen. Selbstverständlich hätte er auch ohne meine angebliche Zudringlichkeit keinen Finger für mich gerührt.

Professor John H. Wigmore an der Northwestern University in Chicago, dem ich etwa zehn Jahre vorher auf seine briefliche Anfrage bibliographische Auskünfte über slawische Rechtsgeschichte gegeben hatte, bemühte sich verschiedentlich in dankenswerter Weise für mich. Auf seine Veranlassung erhielt ich von dem Herausgeber der *Modern Legal Philosophy Series*, einem Unternehmen der Association of American Law Schools, das Angebot, Gustav Radbruchs Grundzüge der Rechtsphilosophie (204 Seiten) und einen Aufsatz über das gleiche Thema von Emil Lask (54 S.) ins Englische zu übersetzen. Für diese Arbeit, die wohl mindestens ein halbes Jahr gedauert hätte, wurde ein Betrag von 250 Dollar geboten, dessen Zahlung nicht einmal zugesichert, sondern vom Eingang von Spenden abhängig gemacht wurde. Daß diese Honorierung unangemessen war, hat der Herausgeber selbst anerkannt: »The translator's interest in the work is supposed to give him an additional motive for whatever might seem inadequate«. Auch diesmal war ich klug genug abzulehnen. Wigmore empfahl mich seinem Kollegen Albert Kocourek in der juristischen Fakultät, der, nach dem Namen zu schließen, aus Böhmen stammte. Dieser riet mir, an möglichst zahlreiche College-Präsidenten Bewerbungsbriefe zu schreiben und ein Curriculum vitae beizufügen, was ich auch tat. Das Ergebnis dieser zehn bis fünfzehn Briefe: meist kamen überhaupt keine Antworten oder gedruckte Postkarten, die den Eingang meines Gesuches bestätigten, worauf nichts weiter geschah. Nur die University of Chicago verlangte eine Photographie von mir. Ich sandte das einzige in meinem Besitz befindliche Bild, das mich im Ornat des Dekans der Juristischen Fakultät der Universität Halle darstellte. Auch darauf kam keine Reaktion. Als ich nach einigen Wochen mein Photo zurückverlangte, wurde mir mitgeteilt, daß es nicht zu finden sei: »We hope you will thereby not be too much inconvenienced«.

Allen genannten Persönlichkeiten, die sich in einflußreichen leitenden Stellungen und wohlgeordneten Verhältnissen befanden, zum Teil sogar in fetten Pfründen saßen, ist zugutezuhalten, daß sie sich noch keine Vorstellung von der politischen Lage in Europa machten, die heraufziehende Weltkatastrophe nicht ahnten und sich in die Seele eines »Refugees« nicht einzudenken oder gar einzufühlen imstande waren. Treffend hat Thomas Mann, selbst »unter dem Eindruck der gleichgültig nachfragenden Ahnungslosigkeit der Welt«, die Situation in einem Aufsatz in der New Yorker Zeit-

schrift »Aufbau« vom 9. Juni 1944 so beschrieben: »Wir Flüchtlinge aus Hitler-Deutschland fanden, auch wenn wir individuell ehrenvoll aufgenommen wurden, geringes Verständnis in den Ländern, in denen wir Schutz suchten. Was wir erlebt hatten, was wir kommen sahen, wovor wir zu warnen versuchten, konnte oder wollte niemand begreifen. Eine Art von Selbstschutz hinderte die Welt am Verständnis.«

Mit tiefer Dankbarkeit sei aber abschließend der verständnisvollen Bemühungen einiger Leidensgefährten gedacht, denen selbst die Einordnung in die amerikanische akademische Welt bereits gelungen war. Sie suchten nach Mitteln und Wegen, um den von mir angeregten Plan zu verwirklichen, an einer westlichen Universität einen Lehrstuhl und ein Institut für Soziologie der Juden zu gründen, ähnlich den an der Harvard und Columbia Universität bestehenden Professuren für hebräische Sprache und Literatur. In dieser Richtung unternahm Professor Max Rheinstein (den 1960 die Basler Juristenfakultät mit dem Ehrendoktorat ausgezeichnet hat); unterstützt von den Professoren Wigmore und Kocourek, Schritte in Chicago. Ähnliches taten Professor Eduard Heimann, der sogar Albert Einstein für mich zu interessieren suchte, und Dr. Rudolf Littauer, der Neffe des großen Harvard-Mäzens Lucius Littauer, in New York. Professor Einstein war sehr hilfsbereit. In einem langen Brief mit drastischer Schilderung und scharfer Kritik der damals in den Vereinigten Staaten bestehenden Verhältnisse, den ich noch besitze, gab er seiner Sympathie und der Überzeugung Ausdruck, daß ich »ohne Zweifel schon an einer [amerikanischen] Universität angestellt« sein sollte. Dagegen bekundeten die Mitglieder des Obersten Gerichtshofs der Vereinigten Staaten, Benjamin N. Cardozo, Louis D. Brandeis und Felix Frankfurter, die Freunde ebenfalls für mich zu interessieren versuchten, kein Interesse.

Die Erfolglosigkeit auch dieser Bemühungen vermindert natürlich nicht meine Dankbarkeit für jene hilfreichen Freunde.



## Visiting Professor

Schließlich zeigte sich doch ein Silberstreifen am Horizont. Es war im Herbst 1937. Professor Baron, der sich auf einer Europareise befand, hatte seine frühere, eine Zeitlang neben der Professur an der Columbia University beibehaltene Dozentur für Geschichte der Juden am Jewish Institute of Religion aufgegeben. Eines Tages fragte mich der dort als Professor für mittelalterliche hebräische Literatur wirkende Shalom Spiegel, ob ich diesen »Unterricht« übernehmen könnte. Nach einigen Zweifeln und nach Beratungen mit den neuen Freunden sagte ich — nicht ohne Bedenken über meine Befähigung — zu. Den verlangten Beweis meiner Lehrbefähigung auf jüdisch-historischem Gebiet konnte ich erbringen, indem ich ein etwa fünfundzwanzig Jahre vorher in der Prager Talmud Thora-Schule erhaltenes Zeugnis von Rabbiner Nathan Grün vorlegte.

Das genannte Institut war eine Anstalt zur Ausbildung von Rabbinern, die ihrer religiösen Orientierung nach zwischen dem konservativen Jewish Theological Seminary und dem reformierten Hebrew Union College stand. Sie nahm Studenten beider Richtungen auf. Das »Institute« hatte der über New York und Amerika hinaus weit bekannte Rabbiner der von ihm ebenfalls ins Leben gerufenen Free Synagogue, Stephen S. Wise (1874–1949), gegründet<sup>97</sup>. Er war ein glänzender Redner, der seine Kanzel weniger zu traditionellen religiös-ethischen Diskursen als vielmehr zur Erörterung aktueller jüdisch- und allgemeinpolitischer Probleme und zur Verfechtung sozialer Ideen, ja geradezu zu politischer Propaganda, benützte. Reinhold Niebuhr, der bedeutende protestantische Theologe und Präsident des Union Theological Seminary, hat sich in einer eingehenden Besprechung von Wises Selbstbiographie darüber verwundert gezeigt, daß sie kaum etwas über seine rabbinisch-theologische Tätigkeit enthält.

Seine massenhaft besuchten Gottesdienste hielt Wise sonntags in dem damals größten Konzertsaal New Yorks, der Carnegie Hall. Seine politische Bedeutung und sein persönlicher Einfluß, namentlich vor Präsidentenwahlen, sind für europäische Anschauungen über Wirkungsbereich und Ansehen eines Rabbiners unvorstellbar. Durch die Gründung einer eigenen Rabbinerschule wollte er offenbar mit Hilfe der in ihr ausgebildeten Rabbiner seiner Auffassung des Rabbinats als eines politischen Mediums im ganzen Lande Verbreitung und seinen sozialpolitischen Ideen weitestmöglichen Rückhalt verschaffen. Er leitete als Präsident seine Anstalt und bestimmte ihren Wirkungsbereich sowie ihr Programm. Da er auch allein die Mittel für ihren Unterhalt aufbrachte, war er dabei vollkommen unabhängig. Er war, in Theodor Herzls ungarischer Geburtsstadt Budapest geboren, worauf er gern hinzuweisen pflegte, ein kraftvoller und mutiger Verfechter des Zionismus zu einer Zeit, als sich noch weite jüdische Kreise Amerikas dem Gedanken der Errichtung eines jüdischen Staates in Palästina verschlossen und ihn geradezu bekämpften. Für seine jüdisch-politischen, insbesondere die zionistischen Bestrebungen schuf er als wirkungsvolle Organisationen den American

Jewish Congress und den World Jewish Congress, die er lange Jahre als Präsident leitete und zu weltweiter Wirksamkeit und Bedeutung führte. Zweifellos war Stephen Wise eine der bedeutendsten jüdischen Führerpersönlichkeiten der ersten Hälfte des zwanzigsten Jahrhunderts, der segensreich für das Judentum in aller Welt, besonders auch während des Zweiten Weltkriegs, gewirkt hat.

Die religiöse Orientierung und die Einstellung seines Seminars zu den anderen Rabbinerschulen Amerikas waren mir unbekannt und unverständlich, als ich die Einladung, dort jüdische Geschichte zu lehren, annahm. Ich stellte mir eine Anstalt vor, deren Ziele und Wirkungsbereich denen des Breslauer jüdisch-theologischen Seminars ähnlich waren. Wenn auch der Lehrplan dem jener Anstalt einigermaßen glich, so war die Ausbildung der Studenten doch ganz auf das Praktische und Jüdisch-Politische ausgerichtet, wie es Wises Auffassung von der Aufgabe eines modernen amerikanischen Rabbiners entsprach. Die wissenschaftliche Seite fand keine Anregung oder gar intensive Pflege; mehr als ein Minimum des für den Rabbiner notwendigen Wissens erhielt er nicht dargeboten. Diese Beschränkung war auch schon durch die Qualität und Vorbildung der Hörschaft bedingt. Die Studenten, die aus orthodoxem Hause kamen, hatten meist eine Jeschiwah (jüdische Talmudschule) besucht, verfügten daher über Hebräischkenntnisse, die denen aus assimiliertem Milieu stammenden in der Regel fehlten. Diese sich möglichst schnell anzueignen, bildete daher eine wichtige Aufgabe im Lehrplan. Kenntnis klassischer Sprachen oder von modernen Fremdsprachen war kaum je anzutreffen. Überhaupt war das Niveau der Vorbildung mit dem eines europäischen Rabbinatskandidaten, der die Maturitätsprüfung abgelegt haben mußte und bisweilen schon Vorlesungen an der Universität gehört hatte, nicht zu vergleichen. Dem entsprechend mußte der Unterricht gestaltet werden. Dies fiel mir im Anfang schwer. Noch begriff ich nicht den Sinn der Worte, die der bedeutende amerikanische Philosoph und Soziologe, Horace Kallen, bei einem Besuch zu mir über die amerikanischen Rabbinerseminare — wohl etwas überspitzt — geäußert hatte: »They give them an inadequate education, and then call them rabbis«. Seither haben sich die Verhältnisse wesentlich zum Besseren geändert. Die rabbinischen Schulen in Amerika sind auf das Niveau von Hochschulen gestiegen. An zahlreichen Universitäten, sogar an katholischen, bestehen ferner Lehrstühle für Judaistik, und Gelehrte produzieren wertvolle wissenschaftliche Werke. Das ist jedoch eine Errungenschaft der letzten Jahrzehnte, durch die der damalige Zustand abgelöst wurde. Ich war bei meiner Lehrtätigkeit stets bestrebt, nicht ganz auf das Niveau der Schüler hinabzusinken, sondern sie zu meinem gewohnten heraufzuziehen, was keine leichte Aufgabe bildete. Aber die Tatsache, daß es mir gelang, mit ihnen sogar Seminare zu halten, in denen nicht nur, freilich ins Englische übersetzte, mittelalterliche Quellen gelesen, sondern auch Referate gehalten wurden, zeugt davon, daß meine Bemühungen nicht vergeblich waren. So lehrte ich mittelalterliche und neuere Geschichte der Juden, wobei ich nicht nur die politische Geschichte behandeln, sondern auch die Religionsgeschichte besonders berücksichtigen mußte. Selbst Prüfungsarbeiten (master's theses) über Themen aus diesen Gebieten wurden verfaßt, von denen ich einzelnen sogar zur Veröffentlichung verhelfen konnte<sup>98</sup>. Auf diese Weise das wissenschaftliche Niveau gehoben zu haben, gab mir das Bewußtsein, die mir anvertraute Aufgabe erfolgreicher Lösung zuzuführen.

Meine Lehrerfolge fanden jedoch wenig Beachtung, Anklang oder gar Anerkennung



bei den in der Schule maßgebenden Personen, weder bei Stephen Wise, der sich um solche Details nicht kümmerte, noch beim Dekan, der ihnen keine Aufmerksamkeit schenkte. Weder ideell noch materiell waren sie für mich von Nutzen. Das lag an der Organisation und an dem Betrieb der Anstalt sowie an der Zusammensetzung des Lehrkörpers. Neben dem notwendigen Hebräischunterricht mußte die englische Sprache intensiv gepflegt werden, da viele Studenten aus jiddischsprechenden Familien kamen, jedoch in modernen Reformgemeinden wirken sollten. Daß mein Englisch, das sich zwar schon hören lassen konnte, noch immer nicht perfekt wie das eines gebürtigen Amerikaners war, der dort die Schulen durchlaufen hatte, machte man gegen mich geltend, ebenso, daß ich in meinen Seminaren nicht hebräische Quellen behandelte. Bei meiner ersten Unterrichtsstunde horchte der »Dean«, Henry Slonimsky, an der Türe des Hörsaals, um sich von meinen englischen Sprachkenntnissen zu überzeugen. Er war überhaupt der *spiritus rector* der Anstalt, aber auch, nach meinem Dafürhalten, der böse Geist der Schule.

Stephen Wise war als Rabbiner, Redner und Politiker ein mit zahllosen Angelegenheiten viel beschäftigter Mann. Seine Frau pflegte ihn »the slave of the Jewish people« zu nennen. Oft befand er sich auf Reisen. Dem College konnte er daher bloß ein Minimum an Zeit und Aufmerksamkeit widmen, ganz anders, als das in den Jahren kurz nach dessen Gründung der Fall gewesen sein muß. Wenn er zu den seltenen Fakultätssitzungen erschien, legte er die Taschenuhr vor sich auf den Tisch und erklärte sogleich, die Diskussion müsse zeitlich beschränkt werden, denn er habe in einer halben oder dreiviertel Stunde bei einem Begräbnis zu fungieren oder eine andere Sitzung oder Verabredung wahrzunehmen. Daher wurde die Tagesordnung, deren Themen bisweilen eine ausgiebige Aussprache und ein eingehender Gedankenaustausch der Fakultätsmitglieder notwendigerweise dienlich gewesen wären, im Eiltempo erledigt. Zumeist traf der Präsident die Entscheidungen, denen die Fakultät dann selbstverständlich zustimmte. Anstellung und Entlassung von Lehrkräften sowie die Rekrutierung der Studentenschaft wurden in gleicher Weise erledigt. Dozenten erschienen und verschwanden, ohne daß die Fakultät gefragt wurde oder ein Wort hätte mitreden können. Dabei waren Initiative und Vorschläge des nicht etwa, wie an europäischen Hochschulen, alljährlich gewählten, sondern vom Präsidenten ernannten *Decanus perpetuus* von maßgebender Bedeutung. Praktisch leitete dieser somit die Anstalt, »he run the school«, wozu Wise bei seiner ungeheuren anderweitigen Inanspruchnahme einfach keine Zeit hatte. Ein unparteiischer Beobachter, der ehemalige Rabbiner, erfolgreiche und angesehene Schriftsteller Jacob Minkin, sagte mir einmal: »A man like he has no right to run a rabbinical school«.

Wises rechte Hand, Henry Slonimsky, war zwar ostjüdischer Herkunft, hatte jedoch in Deutschland studiert und bei Hermann Cohen in Marburg den philosophischen Doktorgrad erworben. Er war völlig assimiliert und stand der orthodoxen wie der konservativen religiösen Richtung feindlich gegenüber. Man erzählte sich, seine Einführung der neu eintretenden Rabbinatskandidaten bestehe darin, daß er sie gleich am ersten Tage zum Lunch in ein nicht rituell geführtes Restaurant in der Nähe des Instituts einlud. In der Tat habe ich ihn dort oft im Vorbeigehen von der Straße aus am Fenster sitzen und mit Studenten dinieren gesehen. Er war begabt, philosophisch gebildet, ein guter Dozent, bevaterte die jungen Studenten und war daher bei ihnen

beliebt. Wissenschaftlich hatte er sich jedoch trotz des Besitzes einer großen Bibliothek nicht auf der Höhe gehalten. Außer einem kleinen Aufsatz über Cohen, den zu schreiben ich ihn überredete und der in der von mir herausgegebenen Zeitschrift *Historia Judaica* erschien, hat er meines Wissens nichts publiziert. Literarische Arbeit von Kollegen schätzte er daher nicht, und solche, die sie pflegten, waren bei ihm nicht beliebt. Ich erinnere mich, in einer seiner alle Jahre am Gründungstag des Colleges (Founder's Day) gehaltenen Reden gehört zu haben, er sporne die Studenten nicht an, Kartotheken, »dry as dust«, zu wissenschaftlichen Studien anzulegen.

Es war während des Zweiten Weltkriegs, als junge, wehrpflichtige Rabbiner als Feldgeistliche benötigt wurden. Damit das von Studenten nicht gleich stark wie die anderen jüdisch-theologischen Lehranstalten frequentierte Institut nicht weniger Rabbiner für den Militärdienst stellte als diese, war Slonimskys *ceterum censeo* in den Fakultätssitzungen: »We must turn out rabbis«. Mit anderen Worten, er trat für eine möglichst beschleunigte Ausbildung ein. Deshalb hat er es auch nicht gern gesehen, daß ich als einziges Mitglied des Lehrkörpers, selbst in dieser Zeit, nicht aufhörte, Seminare zu halten, zu denen die Studenten oft von weither am Abend eigens in die Stadt kamen, da am Nachmittag sonst keine Vorlesungen stattfanden.

Einer derartigen Auffassung des jüdisch-akademischen Lehrberufs stand ich naiv und skeptisch gegenüber. Vom Breslauer Seminar, aus dem nicht nur bedeutende Rabbiner, sondern auch hervorragende Gelehrte, wie etwa David Kaufmann, Markus Brann und Ismar Elbogen, hervorgegangen sind, hatte ich eine andere Vorstellung von jüdischem Hochschulbetrieb und von der Aufgabe jüdischer Dozenten gewonnen. Ich glaubte anfänglich, Wises Anstalt wäre von ähnlichem Geist getragen und von dem gleichen Streben geleitet. Natürlich war ich glücklich und bin Stephen Wise bis auf den heutigen Tag aufrichtig dankbar dafür, trotz meiner unvollkommenen Sprachkenntnis an eine Lehranstalt gelangt zu sein, wo, wie ich meinte, »Wissenschaft des Judentums« im altüberlieferten Sinne gepflegt wurde und wo mir endlich die erste Gelegenheit geboten war, ein noch so bescheidenes Plätzchen nützlich ausfüllen zu können, obzwar ich nur »visiting professor« gewesen bin, dessen Anstellung bloß von Jahr zu Jahr verlängert wurde. In dieser Eigenschaft sollte ich übrigens nicht weniger als dreizehn Jahre belassen werden, ein Kuriosum in der amerikanischen Hochschulgeschichte.

In meiner Verblendung glaubte ich, meine Stellung werde sich wegen meines Lehrerfolgs und der Tatsache, daß ich trotz der Bezeichnung als Gastdozent lange schon die Pflichten eines vollamtlichen Professors versah, festigen und zu einer Dauerstellung führen. Mein bescheidenes Gehalt betrug nur die Hälfte eines Existenzminimums. Nach Erlöschen des Academy-Fellowships hatte es höchst dankenswerterweise das von Stephen Duggan geleitete *Emergency Committee in Aid of Displaced Foreign Scholars* ergänzt, dessen große Verdienste um die Rettung der vertriebenen und brotlos gewordenen Gelehrten nicht hoch genug veranschlagt werden können<sup>99</sup>. Aber auch diese Subvention mußte nach zwei Jahren aufhören, da der Zustrom von Hilfsbedürftigen aus dem von Hitlers Horden überrannten Europa immer stärker wurde. Andererseits wurde mein Gehalt beim Institut nicht aufgebessert, ja es blieb dreizehn Jahre unverändert, während die Lebenshaltungskosten ständig stiegen und alle anderen Gehälter in dieser Zeit wiederholt erhöht wurden. Ich dachte, dies vielleicht durch bescheidene Vorstellungen beim Dekan auch für mich erreichen zu können. Da fiel es



mir aber wie Schuppen von den Augen, als er mich anlässlich einer Fakultätseinladung in seinem Hause zur Seite nahm und mir in der taktlosesten Weise erklärte, ich könne die Stellung jederzeit aufgeben, wenn ich glaube, nicht genügend honoriert zu sein.

Nun meinte ich, eher zum Ziele zu kommen, wenn ich direkt zu Wise ginge. Monatelang versuchte ich vergeblich, bei dem in der Tat vielbeschäftigten Präsidenten ein Appointment zu bekommen. Nach den vielen Jahren, in denen ich ihn nie mit eigenen Angelegenheiten behelligt hatte, hätte er sich nach meiner Meinung für ein Fakultätsmitglied doch ein paar Minuten frei machen können. Wahrscheinlich hatte ihn aber der Dekan über den vermuteten Zweck meiner Vorsprache unterrichtet und auch sonst nicht zu meinen Gunsten beeinflusst. Bald war er zu beschäftigt, sagte man mir, bald weilte er angeblich nicht in der Stadt. So wurde ich monatelang, ja jahrelang, durch immer neue Vertröstungen und Verschiebungen von Wise ferngehalten. Ihm selbst scheint die unbequeme Situation, in die ihn mein etwaiger Besuch wohl bringen würde, auch unangenehm gewesen zu sein. Endlich wurde ich zu einer bestimmten Stunde in sein Office bestellt. Vom Juni 1943 bis zum November 1945 hatte ich auf diese Unterredung warten müssen. Sorgfältig überlegte ich alles und bereitete die konziseste Formulierung meines Vorbringens vor, um möglichst wenig Zeit zu beanspruchen. Kaum hatte ich meine Wohnung verlassen, als es ein wenig zu regnen begann. Da klingelte das Telephon, wie wir meine Frau später berichtete. Wises Sekretärin hatte den Auftrag, mir zu bestellen, er möchte mir den Weg im Regen nicht zumuten. Eine solche Besorgnis um mein Wohlbefinden hatte ich in all den Jahren von Wise nicht erfahren. Da ich jedoch das Haus bereits verlassen hatte, ließ sich mein Kommen nicht mehr verschieben oder abwenden. Wise hörte mich kurz an und verabschiedete mich freundlich mit der Frage: »What about will your next book be?« Irgend ein Ergebnis hatte der Besuch zunächst nicht.

Mrs. Louise Wise, Stephen Wises lebenswürdige Gattin, eine begabte Malerin, die aus einer um die Mitte des 19. Jahrhunderts aus Bayern eingewanderten Familie stammte, ließ mich eines Tages bitten, sie zu besuchen. Sie zeigte mir alte Korrespondenzen, Tagebücher und sonstige Manuskripte ihrer Onkel, Dr. Sigmund und Leopold Watermann, die sie nicht lesen konnte, da sie deutsch und in Kurrentschrift geschrieben waren. Ich sollte sie durchsehen und ihren historischen oder literarischen Wert prüfen. Das tat ich gern, da ich mich seit meinem ersten Eintreffen in Amerika für die Schicksale früherer Einwanderer interessiert hatte. Auf Grund ähnlicher Dokumente hatte ich schon vorher zwei Studien publiziert. Nach Sichtung des mir von Mrs. Wise anvertrauten Materials schrieb ich einen Aufsatz, »Two American Jewish Pioneers of New Haven«, biographische Skizzen und eine Würdigung der Bedeutung der beiden jüdischen Pioniere, die in meiner Zeitschrift *Historia Judaica* erschienen. Als Zeichen der Anerkennung für diese Arbeit, die meine ganzen Sommerferien ausgefüllt hatte, sandte mir Dr. Wise einen Scheck über zwanzig Dollar. Ich schickte ihn mit Dank zurück. Dies geschah nicht etwa wegen des geringen Betrags. Ich hätte ihn gut gebrauchen können. Vielmehr wollte ich für eine persönliche Gefälligkeit, die ich der Gattin des Mannes erweisen durfte, der mir eine Anstellung gegeben hatte, nicht honoriert sein. Aus dem gleichen Grund habe ich meinem verehrten Gönner und väterlichen Freunde Paul Baerwald einen Scheck über 200 Dollar zurückgegeben, den er mir für eine ähnliche, viel weniger Zeit und Mühe beanspruchende Arbeit gesandt hatte.

Von den Mitgliedern der Fakultät des Jewish Institute of Religion zu meiner Zeit seien erwähnt: Chayim Tchernowitz, ein gelehrter Talmudist, Senior der Fakultät, der aus Litauen stammte, in Odessa eine moderne jüdische Schule geleitet und später in Berlin bei Josef Kohler, dem Begründer der historischen Rechtsvergleichung, studiert hatte; Shalom Spiegel, ein Kenner der mittelalterlichen hebräischen Poesie, der bald als Nachfolger von Israel Davidson ans Jüdisch-theologische Seminar berufen wurde. Ralph Marcus, Erforscher des hellenistischen Judentums, später an die Universität Chicago berufen, wo er jung starb; Harry M. Orlinsky, kanadischer Herkunft, ein namhafter Bibelforscher; Eric Werner aus Wien, Erforscher der Geschichte der jüdischen Musik und Organisator der Ausbildung von Kantoren (die beiden zuletzt Genannten, mir eng befreundet, kamen erst später ans Institut); Michael Alper, vielversprechend für das Gebiet der jüdischen Pädagogik, der sich als Registrar erfolglos um Verbesserung meiner Stellung bemühte, eine gütige Seele, jung gestorben.

Obwohl das »Institute« bis zur Übernahme durch das Hebrew Union College, auf die noch zurückzukommen sein wird, in den einzelnen Jahrgängen nie mehr als zehn bis zwanzig Studenten hatte, »unterrichtete« ich, wie der technische Ausdruck lautete, während meiner nicht ganz fünfundzwanzigjährigen Tätigkeit an dieser Anstalt doch mindestens zweihundert Schüler. Unter ihnen befand sich immerhin eine Anzahl begabter, fleißiger, menschlich sympathischer und später in ihrem Beruf erfolgreicher junger Leute. Obwohl sich nicht wenige an meinen Seminaren beteiligten, ich sie auch am Ende des Semesters in meine Wohnung einzuladen pflegte, ist es zur Fortsetzung der persönlichen Beziehungen mit ihnen nicht gekommen. Solche waren an diesem Seminar nicht üblich, und dort hat sie auch niemand angeregt oder gefördert. Trotzdem erfreuten mich die Studenten, als ich später vor Ende des Sommersemesters nach Europa zu reisen pflegte, jedesmal mit einem kleinen »fair-well« Geschenk, um ihrer Zuneigung und Anerkennung meiner Bemühungen Ausdruck zu geben.



## Neue Anstrengungen

Paul Tillich beschreibt in seinen sehr lesenswerten, leider nur knappen »Autobiographischen Betrachtungen« sein Verhältnis zu der theologischen Hochschule, an der er zwanzig Jahre gewirkt hat, dem Union Theological Seminary in New York, wie folgt: »Mit 47 Jahren in den Vereinigten Staaten ein neues Leben anzufangen, ohne die geringste Kenntnis der englischen Sprache zu haben, war recht schwierig. Ohne die Hilfe der Kollegen und Studenten am Union Theological Seminary wäre dieser Beginn für mich wohl übel verlaufen... In erster Linie bot es mir Obdach, als meine Arbeit und meine Existenz in Deutschland zu Ende gegangen waren... Das Union nahm mich zuerst als ausländischen Gast, dann als Gastprofessor auf. Allmählich gehörte ich zur Gemeinschaft und wurde schließlich ordentlicher Professor. Das Union Seminary war nicht nur darum eine Zuflucht, weil es mir Stellung und Wohnung bot, sondern auch durch die Lebens- und Arbeitsgemeinschaft, die es gewährte. Es ist eine eng verbundene Gemeinschaft von Professoren und ihren Familien, Studenten, oft ebenfalls mit ihren Familien, und den Mitarbeitern. Die Mitglieder dieser Gemeinschaft treffen sich dauernd in Fahrstühlen und Gängen, bei Vorlesungen, in Gottesdiensten und bei gesellschaftlichen Veranstaltungen. Die Probleme wie die Vorteile solcher Gemeinschaft liegen auf der Hand. Für unser Einleben in die amerikanischen Verhältnisse war das alles von unschätzbarem Wert, und für mich war es auch bedeutsam als Gegengewicht gegen den extremen Individualismus der akademischen Existenz in Deutschland<sup>100</sup>.

Nur den ersten Satz dieser Darstellung kann ich auch auf mich beziehen. Bei aller aufrichtigen Dankbarkeit dafür, daß mir das Jewish Institute of Religion Gastfreundschaft gewährt hat, ist es doch nach der hier gegebenen getreuen Schilderung offenkundig, daß ein Vergleich von Tillichs mit meinem Lebensschicksal in Amerika sehr zu meinen Ungunsten ausfallen muß. Während sein Leben dort von Anfang an harmonisch verlief und er in seiner Tätigkeit wirksam werden und sie sogar ständig erweitern konnte, so daß sie ihm Resonanz und Anerkennung in seinen theologischen Kreisen und über diese hinaus brachte, war mir ein solcher Erfolg trotz gleichem Streben nicht beschieden. Natürlich kann und will ich meine bescheidenen Fähigkeiten mit den bedeutenden Tillichs, einer hervorragenden Persönlichkeit, nicht vergleichen. Aber der äußere Rahmen, in dem sich beider Tätigkeiten und Lebensschicksale abspielten, war doch sehr ähnlich.

Meine amerikanische »Karriere« war an einem toten Punkt angelangt. Da ich mich in den besten Mannesjahren voller Schaffenskraft und wissenschaftlichen Tatendrangs befand, wollte ich sie nicht in dem kalten, unfreundlichen Klima des Instituts, als ewiger Emigrant betrachtet, einfrieren sehen. Daher suchte ich, durch neue Anstrengungen allerlei neue Kontakte anzuknüpfen und durch persönliche wie schriftliche Bewerbungen aus der Sackgasse herauszufinden. Auch nach länger als zehnjährigem Einleben

in Amerika war das nicht leicht, obwohl ich nunmehr in englischer Sprache frei vorzutragen imstande war.

Natürlich dachte ich vor allem immer wieder an eine akademische Lehrtätigkeit möglichst auf meinem früheren Arbeitsgebiet, der Rechtsgeschichte oder der mittelalterlichen europäischen Geschichte, an einer Universität oder einem College. Aber zwei Hindernisse, ein altes und ein neues, standen im Wege. Noch immer war ich mit der amerikanischen akademischen Mentalität, namentlich mit den Mitteln und Wegen, seine Arbeit zur Geltung zu bringen, nicht genügend vertraut. Wissenschaftliche Publikationen von mir, die bereits in führenden amerikanischen Zeitschriften erschienen waren, ebenso Bücher, die anerkennende Besprechungen gefunden hatten, halfen in keiner Weise. Sie schadeten eher, so sonderbar dies dem europäischen Wissenschaftler erscheinen mag. Denn sie bekundeten eine gewisse Superiorität über einheimische Lehrkräfte, die nicht erwünscht war. Bis heute bin ich nicht dahinter gekommen, wie junge Referendare, die in Deutschland kaum je zu einer akademischen Laufbahn gekommen wären, an die sie wohl auch schwerlich gedacht hätten, es zuwege gebracht haben, jenseits des Ozeans erfolgreich eine solche Karriere zu beginnen. Mir fehlte die notwendige Courage und das selbstbewußt mutige, um nicht zu sagen präventöse, Auftreten. Niemals verließ mich eine gewisse Unsicherheit, mich auf dem ungewohnten Boden zu bewegen.

Das zweite Hindernis lag außerhalb meiner Person. Nach unserer Ankunft in der Neuen Welt waren die Nachbarstaaten Deutschlands von Hitler überfallen und geknechtet worden. Ein ungeheurer Zustrom vertriebener, brotlos gewordener Akademiker, besonders von Professoren, ergoß sich aus ihnen nach Amerika. Das Angebot an zum Teil bedeutenden Kräften auf allen Gebieten der Natur- und Geisteswissenschaften war ungemein gewachsen. Das mir mehrere Jahre hindurch von der American Academy for Jewish Research gewährte Fellowship war längst zu Ende gegangen. Nach der Lage der Dinge, die ich geschildert habe, war auf eine Erhöhung des so um eine Hälfte verminderten Einkommens beim Institute nicht zu hoffen, obwohl die Kosten der Lebenshaltung ständig stiegen und die erheblichen Auslagen für das Studium unseres Sohnes zu bestreiten waren. Deshalb durfte ich nicht tatenlos bleiben. Offenbar wurde mir jedoch die Aussichtslosigkeit meines neuerlichen Bemühens um eine Verbesserung meiner Situation sowohl in moralischer als auch in finanzieller Beziehung nicht klar. Sonst hätte ich mich wohl abhalten lassen, in dieser Richtung zahlreiche neue Schritte zu unternehmen, die Zeit und Energie erforderten und nur Enttäuschungen brachten.

Die neue Kampagne begann, was zahlreiche erbetene und freiwillige Ratgeber empfohlen hatten, mit meiner Anmeldung bei einer »Teachers Agency«. Das war ein Stellenvermittlungsbüro für Akademiker von der Art, wie man es in meiner Heimat nur für Haushaltshilfen oder kaufmännische Angestellte gekannt hatte. Die nach Tausenden zählenden amerikanischen Colleges bedienten sich, sagte man mir, dieser Einrichtung. Natürlich waren es nicht die großen Universitäten, die es nötig hatten, zur Rekrutierung ihres Lehrkörpers diesen Weg zu beschreiten. Ich stellte mich, weil erforderlich, in dem in der Fifth Avenue, der vornehmsten Geschäftsstraße New Yorks, gelegenen Büro persönlich vor und brachte ein früher schon von Professor Wigmore erhaltenes Empfehlungsschreiben mit, mußte noch drei Adressen angesehener Professoren angeben, die mich kannten und die direkt über meine Qualifikation befragt werden sollten,



gab auch eine Anzahl Photos ab und bezahlte bei der Anmeldung die geforderte Einschreibgebühr. Das Honorar für die Vermittlung einer Stelle betrug fünf Prozent des ersten Jahresgehalts, zahlbar bei Annahme der Stellung. Ich erhielt jedoch nie eine angeboten.

Diese Erfolglosigkeit ließ mich meine Sache wiederum, wie im Anfang meiner amerikanischen Laufbahn, persönlich mittels direkter Vorsprachen und schriftlicher Bewerbungen in die Hand nehmen. Der erste Gedanke galt der bereits florierenden Graduate Faculty der New School for Social Research, der berühmten Schöpfung des erst kürzlich im 96. Lebensjahr gestorbenen Professors Alvin Johnson, der sich nicht nur um die emigrierten europäischen Gelehrten hohe Verdienste erworben, sondern auch dem amerikanischen Hochschulwesen einen eigenartigen, wertvollen neuen Hochschultyp hinzugefügt hat<sup>101</sup>. Schon in meinem »Probejahr« hatte ich den wohl ersten an diese Anstalt berufenen deutschen Professor, den aus Böhmen stammenden bedeutenden Nationalökonom Emil Lederer, ehemals in Heidelberg, besucht. Es führte zu nichts. Ebenso ergebnislos waren meine späteren Besuche beim Dean Carl Meyer und dem College-Präsidenten Alvin Johnson selbst, der mir erklärte, Kisch sei ein »household name« in seiner Anstalt. Ich hatte dort nämlich einmal in einem Kursus über »Sozialgeschichte der Juden« gelesen, mit dessen Programmierung ein weder wissenschaftlich noch akademisch ausgewiesener ehemaliger Rechtsanwalt aus Wien betraut war.

Der Maxime meiner Englischlehrerin folgend: Um etwas zu erreichen, kommt es nicht darauf an, was man kann, sondern wen man kennt, glaubte ich, daß meine Aussichten günstiger seien, als Dr. Hans Simons, Sohn des Präsidenten des deutschen Reichsgerichts und von den Nazis abgesetzter Regierungspräsident aus Deutschland, Präsident der New School wurde. Vor fünfundzwanzig Jahren hatte ich ihn bei seinem höchst mittelmäßigen Doktorexamen in Königsberg geprüft und zusammen mit unserem gemeinsamen Freund Herbert Kraus vor dem Durchfallen gerettet. Er hatte nämlich im Strafrecht völlig versagt. Daran und sogar an die ihm damals gestellten Fragen erinnerte er sich bei unserer Aussprache noch sehr genau. Er ließ sich meinen Lebenslauf, verschiedene Sonderdrucke meiner Arbeiten und Empfehlungsschreiben amerikanischer Professoren schicken. Nach mehreren Wochen kam eine vorläufige schriftliche Absage, die natürlich definitiv war. Offenbar hatte er keinen Finger für mich gerührt. »Wie selten ist Dankbarkeit! Undank ist der Welt Lohn. Rousseau bekennt seiner Freundin Madame d'Epinaÿ, daß er die Menschen hasse, die ihm Gutes tun. Dank vom Haus Österreich! ruft Buttler (in »Wallensteins Tod«) aus. Dank vom Haus Hohenzollern! mag Bismarck ausgerufen haben. In den »Senilia« erzählt Turgenjew in seiner feinen poetischen Weise, wie der Wohltat im Himmel eine Gestalt sich nähert, der sie auf Erden nie begegnet war: es ist die Dankbarkeit.« So Joseph Unger in seinen »Bunten Betrachtungen und Bemerkungen: Mosaik«.

In den Tageszeitungen las ich regelmäßig die Nachrichten über die Gründung neuer wissenschaftlicher Institutionen und andere Mitteilungen, durch welche sich Möglichkeiten für mich eröffnen konnten, denen daher nachzugehen war. Ich bewarb mich in persönlichen Besuchen und mit schriftlichen Gesuchen, denen ich Lebenslauf und Sonderdrucke beilegte, bei den Professoren Charles McIlwain und Arthur Schlesinger (mittelalterliche Geschichte), Robert Ulich, dem Mann der berühmten schwedischen

Philanthropin Elsa Brandström, Ehrenmitglied der Universität Halle (Pädagogik), Karl Vietor (deutsche Literaturgeschichte), Sheldon Glueck (Strafrecht), Pitirim Sorokin (Soziologie), alle an der Harvard Universität. Ich hatte keinen Erfolg, ebensowenig bei den Präsidenten der großen New Yorker städtischen Lehranstalten, City College, Brooklyn und Hunter College, auch bei dem angesehenen Philosophen Morris Cohen in New York, der sich mit mir über Otto Gierkes Genossenschaftsrecht unterhielt, und bei dem Historiker Joseph Strayer in Princeton. Trotz ihren guten Beziehungen zu wissenschaftlichen Institutionen zeigten sie kein Interesse zu helfen.

Dagegen erwiesen sich bei diesen neuen Bemühungen besonders hilfreich zwei Persönlichkeiten: der berühmte Rechtsphilosoph und langjährige Dekan der juristischen Fakultät der Harvard Universität, Roscoe Pound, dessen Werke ich kannte und dem ich in Cambridge meine Aufwartung gemacht hatte, sowie der Professor der Pädagogik an der New York University, Emil Lengyel, aus Ungarn stammend, dessen vortreffliches Buch über Amerikaner ungarischer Herkunft ich ausführlich rezensiert hatte. Beide — Pound bereits im achtzigsten Lebensjahr, aber immer noch sehr aktiv — setzten sich persönlich wie schriftlich tatkräftig für mich ein. Daß sie dennoch nichts erreichten, mindert natürlich die Dankbarkeit, die ich für diese verständnisvollen Helfer hege, in keiner Weise. Wie enttäuscht er selbst darüber war, daß seine Interventionen vergeblich blieben, gab Pound in einem der letzten seiner zahlreichen Berichte, die er mir sandte, wie folgt zu erkennen: »I must confess that I have not been as lucky recently in assisting those who were seeking positions as I used to be. I am afraid that a generation has grown up that knows not Joseph«.

Mit der Schilderung der ähnlich verlaufenen Bewerbungen bei anderen Colleges und Bibliotheken in New York, Princeton und Chicago will ich den Leser nicht weiter ermüden. Erwähnt sei nur noch, daß selbst intensive Bemühungen meines Freundes Leo Jung bei der Yeshiva University, damals der einzigen nichttheologischen jüdischen Hochschule Amerikas, an der er selbst lehrte und als bedeutender Geldgeber großen Einfluß hatte, ebenso zu nichts führten. Hier war vermutlich mein Unterricht an einer der Reform nahestehenden Anstalt der Stein des Anstoßes. In Amerika standen die verschiedenen jüdischen religiösen Richtungen einander feindlicher gegenüber als in Deutschland Katholiken und Protestanten.

Als ich mich um ein Fellowship der berühmten Guggenheim Foundation bewerben wollte, empfing mich freundlich der Generalsekretär, Henry Allen Moe, der von persönlichen Beziehungen zu meinem Freund Albrecht Mendelssohn Bartholdy sprach und damit Hoffnungen in mir erweckte. Das von drei namhaften amerikanischen Gelehrten, dazu noch von dem hervorragenden Kunsthistoriker Erwin Panofsky warm befürwortete Gesuch wurde abgelehnt. Für das von mir vorgeschlagene Thema, »Recht und Gerechtigkeit in der Medaillenkunst«, hatten die Gutachter der Stiftung, deren Namen geheim gehalten wurden, nicht das geringste Verständnis. Nach Kriegsende hat die Heidelberger Akademie der Wissenschaften das von mir später ohne Subvention verfaßte Buch mit dem gleichen Titel veröffentlicht. Im Gegensatz zur Guggenheim Foundation förderte, freilich einige Jahrzehnte später, die von Benjamin Franklin gegründete American Philosophical Society in Philadelphia, damals wohl die einzige Akademie europäischen Stils in Amerika, großzügig meine Forschungen über die Jurisprudenz zur Zeit des Erasmus und über Melanchthons Rechtslehre.



Überall sonst verwies man mich, wenn es nicht gerade zu Ablehnungen kam, günstigstenfalls weiter, versprach mir vage, »to keep your application on file«, und ermunterte mich zu neuen, offensichtlich von vornherein aussichtslosen Bewerbungen mit detaillierten, speziell formulierten Schreiben. Diese umfangreichen Korrespondenzen, die ich sorgfältig vorbereiten und die meine Frau mit der Schreibmaschine nach des Tages Arbeit bis tief in die Nacht schreiben mußte, füllen zahlreiche dicke Aktenpakete, die ich noch aufbewahre. Wenn ich sie heute nach fünfundzwanzig Jahren rückblickend durchsehe, staune ich immer wieder, daß ich damals nicht verzweifelte.

Kaum je war einer so offen, mir zu sagen, warum er mein Gesuch ablehnte und es für zwecklos halte, mich weiter zu bewerben. Vielleicht steckte die gute, jedoch völlig abwegige Absicht dahinter, mich nicht zu entmutigen. Eine Ausnahme machte der mittelalterliche Historiker der Columbia Universität, Austin Evans, nach dessen Vorschlägen und Empfehlungen, wie bereits erwähnt, praktisch alle Stellen von Historikern an den New Yorker städtischen Mittelschulen besetzt wurden. Am Tage nach einem Vortrag von mir, den er mit angehört hatte, traf ich ihn zufällig auf der Straße. Während er sonst kühl und spröde war, blieb er diesmal stehen, um mir Komplimente zu machen, weil ich die englische Sprache so gut beherrschte. Er habe nicht gewußt, sagte er, daß ich der Sprache so vollkommen mächtig sei. »Nun können Sie mich bei Ihren Vorschlägen für Lehrstellen doch auch einmal berücksichtigen«, erwiderte ich spontan. Darauf klärte er mich über den wahren Grund seiner früheren und weiteren ablehnenden Einstellung zu mir ehrlich auf. »Sehen Sie«, sagte er, »Sie mit Ihrer europäischen Vergangenheit bilden eine Gefahr für unsere jungen Stellenanwärter, die wir in erster Linie versorgen müssen«. Das war wenigstens offen und nützlicher, als wenn er mir falsche Hoffnungen gemacht hätte, obwohl seine Begründung keineswegs stichhaltig war, wie amerikanische Gelehrte durch sorgfältige Untersuchungen für alle in Frage kommenden Gebiete nachgewiesen haben<sup>102</sup>. Dadurch wird auch die Situation beleuchtet, die es mir, wie manchen anderen Refugees, unmöglich machte, trotz Qualifikation und Leistung, die anerkannt wurden, in eine Fakultät eingegliedert zu werden und eine Dauerstellung zu finden. Nur wenigen von Glück oder Protektion Begünstigten ist das gelungen. In meinem Fall bildete mein spezielles Fach der mittelalterlichen Rechtsgeschichte, die bis in die jüngste Zeit weder als Lehr- noch als Forschungsgebiet an amerikanischen Hochschulen bekannt war, ein besonderes Hindernis.

So wird es verständlich, warum auch die Vorträge, die ich auf den Jahresversammlungen wissenschaftlicher Vereinigungen, der American Historical Association, Modern Language Association, Medieval Academy of America, Riccobono Seminar, hielt, nicht weiterhalfen. Bei diesen Veranstaltungen trafen sich meist vom Studium her alte Bekannte, die einander natürlich förderten. Es war schade um alle Mühe. Sie führte zu nichts.

Das gleiche enttäuschende Ergebnis zeitigten Briefe an bedeutende Persönlichkeiten, wie den Präsidenten der Harvard Universität, James Conant, und das aus Wien gebürtige Mitglied des Obersten Bundesgerichts, den ehemaligen Professor der Rechte, Felix Frankfurter, die sich öffentlich zugunsten der emigrierten europäischen Gelehrten ausgesprochen hatten, worüber die Tagespresse berichtete. Frankfurter hatte in einer Rede angeregt, jede amerikanische Hochschule solle mindestens zwei Flüchtlinge in ihren Lehrkörper aufnehmen. Als ich ihm deshalb einen Brief schrieb, antwortete er nicht,

obwohl ich mich auf die Freundschaft meines Vaters mit seinem Onkel, Hofrat Salomon Frankfurter in Wien, berufen konnte.

Eines Tages erhielt ich — auf wessen Veranlassung, blieb mir unbekannt, vielleicht war sie die Folge meiner jüdisch-historischen Publikationen — die Einladung, zum Präsidenten des Hebrew Union College in Cincinnati, Professor Julian Morgenstern, der sich tatkräftig und erfolgreich für die aus Deutschland vertriebenen jüdischen Gelehrten einsetzte, zu kommen. Er weilte gerade zum Besuch seiner Tochter in New York. Von ihm erfuhr ich, daß ich für die freigewordene Stelle des Bibliothekars seines Colleges in Betracht gezogen werde. Da ich mich stets für Bibliotheken und ihre Organisation interessiert, auch zwei große Seminarbibliotheken in Königsberg und Halle neu aufgebaut und jahrelang geleitet hatte, freute ich mich über diese Nachricht. Die Unterredung verlief offensichtlich zu beiderseitiger Zufriedenheit. Wochen und Monate vergingen jedoch, ohne daß ich aus Cincinnati etwas hörte, wo sich die mir freundschaftlich zugetanen, einflußreichen Dr. Hermann Hailperin, Dr. Solomon Freehof und Paul Baerwald energisch für meine Kandidatur einsetzten. Trotz Anerkennung meiner Qualifikation erhielt ich die Stellung jedoch nicht, von der ich eine glückliche Lösung meiner akademischen und finanziellen Probleme erhofft hatte. Ein für jene Aufgabe völlig unqualifizierter Rabbiner, ehemaliger Schüler des Hebrew Union College, wurde engagiert, der nach kürzester Zeit wieder ausschied. Der Entscheid war gegen mich wegen meiner konservativen religiösen Einstellung ausgefallen. Nach Jahren erst erfuhr ich vom Bibliothekar der jüdischen Abteilung der New York Public Library, Dr. Joshua Bloch, welches Mitglied der Fakultät des Hebrew Union College meine Berufung hintertrieben hatte. Zum Glück! Denn die administrative Leitung einer großen Bibliothek hätte mir, wenn überhaupt, wenig Zeit zu wissenschaftlicher Arbeit gelassen.

Ein einziger Erfolg war zu verzeichnen, der aber nicht das Resultat eigener Bemühungen gewesen ist. Ruth Kisch-Arndt, die Frau meines Bruders, eine in Europa bekannte Konzertsängerin, erteilte an der ältesten Musikschule New Yorks, dem New York College of Music, Gesangsunterricht. Nach amerikanischem Brauch werden die Opern europäischer Komponisten in der ursprünglichen Sprache aufgeführt, Lieder ebenfalls in der Originalsprache gesungen. Daher wurde und wird in den Musikschulen deutscher, französischer und italienischer Sprachunterricht erteilt. Meine Schwägerin empfahl mich der Leiterin jenes kleinen Colleges für den Unterricht in der deutschen Sprache. Gern übernahm ich die neue Aufgabe, durch die sich mein Einkommen ein wenig aufbessern ließ. Es war jedoch eine finanzschwache Privatschule, die kein festes Gehalt, sondern nur ein Stundenhonorar zahlen konnte. Aber die Aufgabe reizte mich, ich bemühte mich, meinen Mann zu stellen, und ersann eine Methode, um den zwar stimmlich begabten, sonst aber in der Regel mangelhaft, wenn überhaupt, vorgebildeten Schülern das für den Liedervortrag erforderliche Minimum an Sprachkenntnis sowie ein gewisses Verständnis der Dichtungen beizubringen. Das war keine kleine Aufgabe; zur Verfügung standen nämlich bloß zwei Wochenstunden für einen Anfänger- und ebensoviele für einen fortgeschrittenen Lehrgang, es fehlte zudem jede Sprachkenntnis, und die Vorbildung der Schüler war völlig verschiedenartig. Das Hauptgewicht mußte auf Phonetik und Diktion gelegt werden, Grammatik konnte aber nicht völlig beiseite bleiben. Die Vorbereitung des Unterrichts erforderte zwar im Anfang viel Mühe, die



Fahrten zum und vom auf der Ostseite New Yorks gelegenen College waren zeitraubend. Das ganze Unternehmen spielte sich aber gut ein. Bald meldeten sich auch Privatschüler. Ihr Lerneifer und die sichtbar werdenden Erfolge bereiteten mir Freude, obwohl ich natürlich bedauern mußte, daß diese Tätigkeit, die bis zu sechs Stunden wöchentlich allein an Unterricht beanspruchte, mich geistig in keiner Weise förderte und die aufgewendete Zeit für die wissenschaftliche Arbeit verloren war. Trotzdem erteilte ich den Deutschunterricht volle zehn Jahre. Zur zweihundertsten Wiederkehr von Goethes Geburtstag veranstaltete ich sogar eine Goethe-Feier, bei der namhafte Sängerinnen Goethe-Lieder gesungen und ich einen Vortrag über »Music in Goethe's Life« gehalten habe, den die Monatshefte für deutschen Unterricht, deutsche Sprache und Literatur veröffentlichten. Von meinem Erfolg zeugt es, daß mich bei Besuchen in New York noch nach zwanzig Jahren ehemalige Schüler, die mich zufällig auf der Straße trafen, ansprachen und meines Unterrichts, durch den sie in ihrem Beruf gefördert wurden, dankbar gedachten. Hier hatte sich das Handeln nach dem amerikanischen Prinzip »to make the best of it«, aus der Not eine Tugend zu machen, an mir bewährt.

Wenig befriedigend ging dagegen ein anderes Unternehmen aus: die von mir übernommene, einige Jahre geleitete Vorbereitung eines einbändigen, jüdischen Lexikons. Eine chinesische kulturelle Organisation, das Woo Chefee-Institute in New York, nach einem führenden chinesischen Pädagogen benannt, plante die Herausgabe populärer Handbücher auf wissenschaftlicher Grundlage mit Informationen über alle Länder und Völker in englischer Sprache. Dadurch sollten die Bestrebungen zur Befriedung der Welt nach dem Zweiten Weltkrieg gefördert werden. Nachdem ich als freier Mitarbeiter einige relativ gut honorierte Wortartikel für das Lexikon geliefert hatte, wurde ich aufgefordert, als Chefredakteur die Planung und Leitung dieses Handbuchs zu übernehmen. Ich hatte die Stichworte für die einzelnen Artikel anzugeben, kompetente Mitarbeiter zu gewinnen, auch selbst eine größere Anzahl von Wortartikeln zu schreiben. Diese Arbeit stand vor dem Abschluß, ein ungefähr eine Million Worte umfassendes Manuskript, das nur noch stilistisch zu bereinigen war, lag vor, als infolge des politischen (kommunistischen) Umsturzes in China die von dort kommenden Mittel versiegteten. Das Unternehmen mußte eingestellt werden. Jahrelange Arbeit erwies sich so als vergeblich. Das Institut verlor sein schönes, geräumiges Heim. Das umfangreiche Manuskript mit Beiträgen von namhaften jüdischen und nichtjüdischen Gelehrten, die zu gewinnen mir gelungen war, mußte in einem dafür ungeeigneten Kellerraum gelagert werden. Wohin es mit dem Geschäftsführer des Instituts verschwunden ist, habe ich nie erfahren.

Eine andere kleine Nebeneinnahme verschaffte ich mir, indem ich Samstag abends kurze Artikel für eine monatlich erscheinende, sehr verbreitete numismatische Zeitschrift schrieb, die mit je zehn Dollar honoriert wurden. Das Münzensammeln bildete in Amerika ein weitverbreitetes Hobby. Durch meine wissenschaftlich fundierten, aber populär gehaltenen Aufsätze suchte ich, das Interesse auf das dort noch kaum gepflegte Sammeln von Medaillen zu lenken. So habe ich solche »Schaumünzen« von allgemeiner Thematik, wie etwa die auf Hugo Grotius, den Begründer des Völkerrechts, oder die auf die Pockenimpfung geprägten oder zu spezifisch amerikanischen historischen Ereignissen ausgegebenen Medaillen, etwa die zur mehrmaligen Inauguration des Präsi-

denten Roosevelt, beschrieben, die Anlässe oder Persönlichkeiten historisch beleuchtet und abgebildet. Für einen größeren Aufsatz über die Erinnerungsstücke, die zur Errichtung und Einrichtung von amerikanischen Gefängnissen geprägt wurden, als ein Beitrag zur Geschichte des Strafvollzugs gedacht, erhielt ich sogar einen Preis für die in jenem Jahre als beste bezeichnete münzgeschichtliche Arbeit.

Alle diese Nebenbeschäftigungen, die lediglich meinen persönlichen finanziellen Status verbessern sollten, konnte ich erst aufgeben, als sich die Verhältnisse am Jewish Institute of Religion durch ein neues Regime zum günstigeren wendeten. Mit veranlaßt durch seine schlechte finanzielle Lage, kam nach langen Verhandlungen die Übernahme des Institutes durch die älteste jüdisch-theologische Lehranstalt Amerikas, das Hebrew Union College in Cincinnati, zustande. An die Stelle von Stephen Wise, der bald nachher starb, trat der viel jüngere, tatkräftige Präsident dieser Hochschule, Nelson Glueck, ein angesehener Gelehrter, der sich namentlich durch die archäologische Erforschung Palästinas einen internationalen Ruf erworben hatte. Von ihm war Verständnis für Wissenschaft und Gelehrtentum zu erwarten.

Die Hoffnung hat nicht getäuscht. Kurz nach seiner Amtsübernahme bat ich ihn um eine Unterredung, die er mir alsbald gewährte, obwohl Glueck in Cincinnati wohnte, dort auch arbeitete und nach New York immer nur zu längeren oder kürzeren Besuchen kam. In aller Kürze legte ich ihm dar, daß ich seit dreizehn Jahren den ganzen Pflichtenkreis eines »full professor« ausfülle, was bisher weder rangordnungs- noch gehaltsmäßig berücksichtigt worden sei. Glueck versprach, die Situation zu prüfen und unter seiner künftigen Leitung »decency«, Fairness, walten zu lassen. Sein Versprechen hat er gehalten, obwohl ihm die Verhältnisse gewisse Beschränkungen auferlegten. Ich war und bleibe dem kürzlich nach Erreichung des 70. Lebensjahres leider schon Gestorbenen dafür dankbar. Sein Nachfolger, Dr. Alfred Gottschalk, hat sich ebenfalls verständnisvoll gezeigt.

Gleich nachdem Glueck die Präsidentenschaft übernommen hatte, traf er für die Verwaltung der Anstalt und den Lehrbetrieb wichtige Entscheidungen: Dean Slonimsky wurde seines perpetuierlichen Dekanats enthoben und emeritiert; seine rechte Hand, ein völlig unwissender, selbtherrlicher Rabbi, dessen Name mir entfallen ist, wurde entfernt. Ein neuer Wind begann zu wehen. Der nur langsam vorsichgehenden Reorganisation durfte ich mich noch ein Jahrzehnt in aktiver Lehrtätigkeit erfreuen. Das Niveau und das Ansehen der Anstalt hoben sich zusehends. Aus dem »Visiting Professor« wurde ein »Research Professor«, dessen Gehalt nach und nach aufgebessert wurde. Den vollen Status hat er jedoch nie erreicht. Als ich bei Vollendung des 70. Lebensjahres emeritiert wurde, erhielt ich den Titel eines Ehrendoktors.

Im Jahre 1949 war meine umfangreiche Rechtsgeschichte der Juden im mittelalterlichen Deutschland, *The Jews in Medieval Germany: Their Legal and Social Status*, von der University of Chicago Press veröffentlicht worden. Im folgenden Jahre bat das israelische Verlagshaus Massadah, Teile des Buches ins Hebräische übersetzen zu dürfen. Sie sollten in die geplante zehnbändige Geschichte der Juden in der ganzen Welt aufgenommen werden. Wohl in Zusammenhang damit und kurz nach dem Umschwung der Verhältnisse am Institute erhielt ich aus Jerusalem die Einladung, als »Editor in Chief of the humanistic sciences«, also als Chefredakteur für die Gebiete der Geschichte und Soziologie des großen enzyklopädischen Unternehmens, mit einem



fünfjährigen Kontrakt nach Israel zu kommen. Dazu konnte ich mich aus den bereits angegebenen Gründen nicht entschließen. Ich habe es nicht bedauert. In meinem damaligen Alter traute ich mir nicht zu, eine neue Sprache zu lernen. Auch glaubte ich, der in »Hebrew Union College – Jewish Institute of Religion« umbenannten Anstalt nunmehr nicht untreu werden zu dürfen.

Das gleiche Gefühl und die Zurückweisung des Gedankens, nach Deutschland zu dauerndem Aufenthalt zurückzukehren, ließen mich später die sich eröffnende Aussicht einer ordentlichen Professur der Rechte an einer deutschen Universität nicht einmal in Erwägung ziehen.

## Freunde und Bekannte

Freundschaften pflegt man in der Jugend, in der Schulzeit oder während der Studienjahre zu schließen. In dem Alter, in dem ich mich bei der Auswanderung befand, gelingt dies nur selten. Im Gegenteil, man beginnt allmählich alte Freunde zu verlieren, ganz abgesehen von denen, die man in der Heimat zurücklassen mußte. So war es ein großer Gewinn und eine der wenigen ermutigenden Begleiterscheinungen der Emigration, eine Anzahl neuer Freunde im fremden Lande gefunden zu haben. Die Anlässe, die zu Freundschaften führten, waren verschiedene. Jene zu Freunden gewordene Persönlichkeiten, welche die Auswanderung ermöglicht und gefördert sowie unsere ersten Schritte in der neuen Welt begleitet haben, sind bereits erwähnt worden. Der Zwang, sich beruflich einzugewöhnen und anzupassen, sowie andere Gelegenheiten brachten neue Kontakte.

Als es notwendig wurde, vor allem sprachliche Hilfe zu finden, um die Ergebnisse der eigenen Arbeit an die wissenschaftliche Öffentlichkeit bringen zu können, kamen solche Verbindungen zustande. Es fanden sich junge Gelehrte, die sich mit rührender Hilfsbereitschaft zu dieser nicht leichten Aufgabe selbstlos bereitfanden. Aus den persönlichen Berührungen mit ihnen erwachsen zum Teil dauernde Freundschaften.

An erster Stelle verdient Dr. Solomon Grayzel in Philadelphia genannt zu werden. Nach seiner Ausbildung zum Rabbiner veröffentlichte er eine wertvolle Doktordissertation über die Stellung der Kirche zu den Juden im 13. Jahrhundert, die ich in der Zeitschrift für Geschichte der Juden in Deutschland besprochen habe<sup>103</sup>. Er war wissenschaftlich interessiert, seine Lehrer haben ihn jedoch in diesem Streben wenig gefördert. Auf sich allein gestellt, verfolgte er beharrlich seine Studien über das Thema »Päpste und Juden«, obwohl er bei seiner starken beruflichen Inanspruchnahme als Editor (Lektor) der Jewish Publication Society, eines großen jüdischen Verlages, dazu wenig Zeit und Muße hatte. In freundlichster Weise half er bei der Übersetzung meiner ersten Arbeiten ins Englische und versagte auch später niemals seine wertvolle Hilfe. Seine berufliche Tätigkeit führte ihn häufig nach New York, wo er mich regelmäßig in meinem Arbeitsraum zu besuchen pflegte. So entstand eine Freundschaft, die sich oft bewährt hat und bereits fast vierzig Jahre dauert. In sie wurden meine Frau, seine ebenfalls stets hilfsbereite Gattin und deren Familie, der New Yorker Rabbiner Elias Solomon mit Gattin, sowie dessen zweite Tochter Vivien Rous mit ihrem Mann eingeschlossen. Sie waren es, die uns nach dem ersten unerträglich heißen New Yorker Sommer<sup>104</sup> veranlaßten, den nächsten außerhalb der Stadt in den kühleren, landschaftlich reizvollen Catskill-Bergen zu verbringen. Mit ihrer Hilfe fanden wir ein sogenanntes »bungalow«, eine höchst primitive Holzhütte, im walddreichen Örtchen Tannersville, wenige Stunden von New York entfernt. Für einen mäßigen Preis konnten wir diese »Sommerwohnung« Jahr um Jahr mieten. Die Umsicht und Tüchtigkeit meiner Frau, welche die Wirtschaft ohne jede Hilfe allein besorgte und uns verpflegte, nach des Tages



Arbeit auch noch mein Diktat mit der Schreibmaschine zu Papier brachte, machten es möglich, daß wir dort fast zwanzigmal erholsame Sommermonate verbrachten. Zwischen zwei mächtigen Baumriesen an einem selbstgezimmerten Tisch, über den ein vor Sonne schützendes Dach aus alten Säcken gespannt wurde, konnte ich mitten im Walde arbeiten. Dort, in der Ruhe und Einsamkeit der Natur, habe ich alle meine amerikanischen Bücher geschrieben oder vollendet. Gegen Regen bot das primitive Dach jedoch keinen Schutz. An Regentagen kam unaufgefordert Frau Grayzel mit ihrem Auto gefahren, um mich in ihre etwa eine Meile entfernte, viel komfortablere, geräumige Sommerwohnung zu bringen, wo mir ein Zimmerchen zur Verfügung gestellt wurde, damit solche vom Wetter nicht begünstigte Tage für meine Arbeit nicht verloren seien. So bot Tannersville schon wegen der Nähe und Gesellschaft der guten Freunde eine angenehme Sommererholung, auf die wir uns das ganze Jahr freuten. Dr. Grayzel war es auch, der dort unseren Sohn zur Bar Mizwa (Konfirmation) vorbereitete und schließlich Jahre später, ausnahmsweise noch einmal als Rabbiner fungierend, den Ehebund unseres Alexander einsegnete. Die spätere Widmung eines meiner Bücher hat er sich reichlich verdient.

Höchst dankenswerte Übersetzungshilfe leistete ferner ein junger Rabbiner, Isidor Meyer, der ebenfalls diesen Beruf nicht ausübte, sondern Bibliothekar der American Jewish Historical Society war, deren Bibliothek sich im Gebäude des jüdisch-theologischen Seminars befand. Ebenso freundlichen Beistand gewährte der Professor für deutsche Sprache und Literatur am City College, Sol Liptzin, der später nach Israel auswanderte.

Freundschaft bis zu seinem Tode verband mich mit dem bereits früher erwähnten Schriftsteller Dr. Jacob Minkin. Ihn hatte ich auf sonderbare Weise kennengelernt. Als einmal mein Name bei der Bücherausgabe in der Bibliothek ausgerufen wurde, sprach mich der mir bis dahin Unbekannte mit der Frage an, ob ich vielleicht mit dem Prager Rabbiner Kisch verwandt sei. Als junger Rabbinatskandidat hatte er, um dem fünfundzwanzigjährigen Militärdienst im zaristischen Rußland zu entgehen, aus seiner Heimat geflüchtet, eine Zeitlang in Prag gelebt und studiert, regelmäßig die Predigten meines Vaters besucht, die nach seiner Erinnerung nicht nur inhaltlich, sondern auch sprachlich ausgezeichnet gewesen seien und von den Kandidaten, besonders um die deutsche Sprache zu erlernen, gern besucht wurden. Dr. Minkin war der einzige und letzte unter meinen amerikanischen Freunden, der noch meinen Vater persönlich gekannt hat. Er hat uns bei der zeitraubenden Schlußprozedur der Einbürgerung als Zeuge Beistand geleistet, was für ihn ein halber verlorener Tag war und wir ihm daher nicht vergessen.

Mit Dr. Herman Hailperin, Rabbiner einer großen Gemeinde in Pittsburgh, führten mich wissenschaftliche Interessen zusammen. Er wurde ein eifriger Förderer der von mir herausgegebenen Zeitschrift *Historia Judaica*, für die er unter seinen, der Wissenschaft des Judentums weniger zugetanen, Amtskollegen Gönner warb.

Meine Mitarbeit in einem tschechoslowakischen Flüchtlingskomitee brachte andere Freundschaften mit wertvollen Menschen aus der alten böhmischen Heimat. Ein solches Komitee wurde beim American Jewish Congress gegründet. Es hatte, wie die ähnlichen von anderen Landesgruppen, die Aufgabe, die Flüchtlinge aus den einzelnen von den Nazis besetzten Ländern zusammenzufassen und deren Vertretung zu bilden, um die Exilregierungen instanzzusetzen, die Rechte der vertriebenen Juden bei den dereinsti-

gen Friedensverhandlungen geltend zu machen und zu wahren. Eine andere Aufgabe dieses Komitees bildete die Betreuung der in Europa zurückgebliebenen Juden durch moralische und materielle Hilfeleistung, soweit dies durch Vermittlung neutraler Länder möglich war. In dem »Czechoslovak Jewish Representative Committee« beim American Jewish Congress gewann ich die Freundschaft zweier vortrefflichen »alten Prager«, die viel Zeit und Arbeit der guten Sache widmeten, obwohl sie, wie alle Emigranten, um ihre eigene Existenz zu kämpfen hatten: Professor Hugo Perutz, ehemals Direktor einer Mittelschule in Prag, ein Mensch voll Güte und Pflichttreue, der bessere Tage gesehen hatte, und Dr. Friedrich Fried, ein Prager Advokat, den ich einst im Doktor-examen geprüft hatte, ein ausgezeichneter Jurist, hingebungsvoller Sozialarbeiter und treuer Freund. Beide haben leider kein hohes Alter erreicht, sie starben kurz nach ihrem sechzigsten Geburtstag, mittelbare Opfer des Nationalsozialismus. Sie haben mich zum Eintritt in die in New York neu gegründete tschechoslowakische B'nei-B'rith Loge veranlaßt, wo die alte Prager jüdische Tradition in engem Freundeskreis weiter gepflegt wurde. Auch diese Loge hat unter schwierigen Verhältnissen eine humanitäre Tätigkeit von erheblichem Umfang entwickelt. In ihrem Kreise fanden sich noch andere neue Freunde, von denen nur der künstlerisch begabte Walter Kauders und der zuerst nach Australien ausgewanderte Rabbiner Dr. Hugo Stransky erwähnt seien.

Eine andere Freundschaft, die ebenfalls auf die Prager Heimat zurückging, bildete sich auf eigenartige Weise. Eines Tages erschien in meiner Studierstube ein Mann von unansehnlicher Gestalt, etwa sechzig Jahre alt. Er führte sich durch die Mitteilung ein, er habe einen Aufsatz von mir in einer Zeitschrift gelesen. Nun wolle er erfahren, ob ich der ihm aus Prag erinnerlichen Familie Kisch angehöre. Dabei erzählte er, daß er bereits in ganz jungen Jahren nach Amerika gekommen war. Er hatte in Prag das Gymnasium besucht, war ein guter Schüler gewesen. Sein Interesse galt besonders der Geschichte. Daher genügte ihm der in den gängigen Lehrbüchern gebotene Stoff nicht, weshalb er sich aus anderen Werken zu informieren pflegte. So kam er darauf, daß die Darstellung in den Schulbüchern häufig nicht objektiv, sondern zugunsten Österreichs in patriotischem Sinne gefärbt, ja geradezu verfälscht war. Dies erfolgte namentlich bei der Behandlung von Kriegen und Siegen. Bisweilen hatte er sich am Rande seines Geschichtsbuchs die Bemerkung erlaubt: »Stimmt nicht«, »falsch«, »Lüge«. Infolge eines unglückseligen Zufalls entdeckte der Klassenlehrer einmal diese Randnotizen. Das dadurch veranlaßte Disziplinarverfahren führte, der damaligen strengen Schuldisziplin gemäß, zur Relegierung des unpatriotischen Missetäters. Sie bedeutete den Ausschluß aus allen österreichischen Mittelschulen. So hatten ihn die Eltern nach Amerika geschickt.

Über seine Laufbahn und seinen Aufstieg im amerikanischen Geschäftsleben erzählte der Unbekannte, der sich als Fred Ascher aus Prag zu erkennen gab, nichts. Er bemerkte nur, daß er erfolgreich eine Druckknopffabrik betrieben habe und, seit einigen Jahren ins Privatleben zurückgezogen, lediglich seine literarischen Interessen pflegte, die er sich bewahrt habe. Er lebte in Chicago, reiste aber viel ausschließlich zu Bildungszwecken und um menschliche Kontakte zu finden und zu pflegen. Stets hatte er eine Anzahl kleiner Zettelchen bei sich, auf denen Personen oder Gegenstände verzeichnet waren, über die er sich in Bibliotheken oder durch persönliche Kontakte zu informieren suchte. Er kam ein bis zweimal im Jahre zu kürzeren oder längeren Aufenthalten



nach New York und machte Reisen nach verschiedenen Ländern, namentlich in Mittel- und Südamerika. So hatte er mich aufgespürt.

Die Unterhaltung bezog sich zunächst auf das alte Prag, das ihm trotz jahrzehntelanger Abwesenheit in lebhafter Erinnerung geblieben war, auch auf andere Gegenstände und Probleme seines weiten Interessengebiets. So schuf er sich einen großen Bekanntenkreis, dem ohne Aufdringlichkeit regelmäßige Besuche galten. Wir, meine Frau, ich und mein Sohn wurden in ihn eingeschlossen. Mr. Ascher lebte höchst bescheiden, pflegte in Hotels zweiten oder dritten Ranges zu logieren und bediente sich in New York der nicht gerade komfortablen Untergrundbahn. Auf diese Weise hatte sich infolge seines Wissensdrangs, durch gemeinsame Interessen und wegen seines Bemühens, literarische und humanitäre Unternehmungen zu fördern, über die er sich bei mir und anderen Auskunft einholte, eine Freundschaft entwickelt. Seine stets interessanten Besuche haben wir gern gesehen. Die Unterhaltungen hatten immer geistiges Niveau. Seine Reisen und Besuche erfolgten während mehr als zwanzig Jahren, bis sein Gesundheitszustand Fred Ascher zwang, dem rauhen Klima von Chicago zu entfliehen und in das viel mildere von Florida, anfangs nur für den Winter, zu flüchten, später sich dort dauernd anzusiedeln. Altersbeschwerden und langwierige Krankheit hinderten ihn in den letzten Jahren am Reisen, immerhin blieben wir in brieflichem Kontakt. Als anfangs 1973 sein Tod gemeldet wurde — er hatte das neunzigste Altersjahr überschritten —, erfuhren wir, daß er ein Vermögen von eineinhalb Millionen Dollars hinterlassen habe, die er letztwillig unter zahlreiche wissenschaftliche Institutionen, Universitäten, Krankenhäuser, jüdische und christliche, auch Neger-Gemeinden und gemeinnützige Anstalten verteilt hatte. Eine einsame, gütige Seele, eine typische Gestalt aus der guten alten amerikanischen Zeit, die in ihrer Art bemüht war, über den Tod hinaus wohlzutun und der Welt nützlich zu sein. Er ruhe in Frieden!

Nur zu flüchtiger Berührung kam es mit einem alten Prager Bekannten während seiner kurzen Anwesenheit in New York, mit Franz Werfel.

Im Rahmen der B'nei-B'rith Loge und mit Unterstützung der beiden Freunde Perutz und Fried entstand nach Kriegsende durch meine Initiative eine Einrichtung, die sich bis zur Gegenwart erhalten hat: eine alljährlich am Tage des ersten Massentransports tschechoslowakischer Juden in die östlichen Todeslager abgehaltene Gedächtnisfeier. Sie fand zuerst in von Jahr zu Jahr wechselnden New Yorker Synagogen statt, bis ihr das Hebrew Union College in seinem Auditorium eine bleibende Unterkunft gewährte. Rabbiner aller religiösen Richtungen hielten Gedächtnisreden, Kantoren verrichteten die üblichen Trauergebete. Im Anfang fanden sich zu diesen Gottesdiensten sechs- bis siebenhundert Menschen ein, unter ihnen solche, für welche diese Andacht für die Opfer des Hitler-Terrors, deren Todestag unbekannt war, die einzige Veranlassung im Jahre bildete, das Gotteshaus aufzusuchen. Obwohl sich die Zahl der Teilnehmer im Laufe der Jahre durch Tod und Wegzug verminderte, ist die Einrichtung geblieben.

Geistige Nothilfe mußte für jene Auswanderer geleistet werden, die wegen vorgerückten Alters nicht mehr in der Lage waren, die englische Sprache zu erlernen, daher einer bedauerlichen geistigen Isolierung ausgesetzt waren. Wohl fanden sie, wie alle Emigranten aus dem deutschen Sprachgebiet, in der von dem ausgezeichneten Journalisten Manfred George aus einem kleinen Vereinsblättchen zu ansehnlicher Höhe und

Bedeutung gebrachten Wochenzeitung »Aufbau«, die bald eine Auflage von dreißig- bis vierzigtausend Exemplaren erreichte<sup>105</sup>, ein ihnen sprachlich zugängliches Informationsmedium, das ihre Interessen vertrat. Aber das gedruckte Wort mußte durch das gesprochene ergänzt werden, das auch den persönlichen Kontakt unter den Entwurzelten aus verschiedenen Gegenden Europas vermitteln konnte. Zu diesem Zweck rief ich, unterstützt von dem Bibliothekar Dr. Kurt Schwerin, eine »Arbeitsgemeinschaft für Geschichte und Familienforschung der Juden Mitteleuropas« ins Leben. Der New World Club, unter dessen Auspizien der »Aufbau« veröffentlicht wurde, stellte ein bescheidenes Versammlungslokal zur Verfügung. Allmonatlich fand in deutscher Sprache ein Vortrag über Themen aus der Geschichte und Religionsgeschichte der Juden statt.

Der im Anfang kleine Kreis der aus weit entlegenen Gegenden der Weltstadt zusammenkommenden Teilnehmer an den monatlichen historischen Vortrags- und Diskussionsabenden ist im Laufe der Jahre gewachsen. Während im ersten Jahre die Familiengeschichte im Vordergrund stand, waren die Vorträge des zweiten Jahres der Geschichte der großen jüdischen Gemeinden gewidmet, die der Vernichtung zum Opfer gefallen sind. Im dritten Jahre wurde die Geschichte der geistigen Bewegungen im Judentum mit besonderer Berücksichtigung des letzten Jahrhunderts behandelt. Namhafte Redner hielten Vorträge, jeder ein Fachmann auf dem Gebiet seines Themas, alle natürlich auf freiwilliger Grundlage. Orthodoxes und liberales Judentum, Chassidismus und Mystik, Nationalismus und Zionismus, amerikanisches Judentum und Soziologie der Immigration wurden behandelt. Die Vorträge waren allgemein zugänglich und unentgeltlich. Sie haben zu ähnlichen Vereinigungen und Veranstaltungen an der Westküste und in Südafrika, wohin auch immer Juden aus Deutschland eingewandert waren, angeregt. Wenn sich leider die Hoffnung, aus dieser lebendigen Keimzelle eine Art jüdischer Volkshochschule zu entwickeln, nicht erfüllt hat, so haben die Veranstaltungen doch länger als zehn Jahre eine Anzahl geistig interessierter Menschen zusammengeführt, die wegen der Unkenntnis der englischen Sprache sich keine andere geistige Anregung zu verschaffen vermochten und so auch eine willkommene Gelegenheit fanden, mit Menschen des gleichen Schicksals in Berührung zu kommen. Das stärkte die innere Kraft und Moral der vom Schicksal Mißhandelten.

Durch die Vorverhandlungen mit vorgesehenen Rednern kam ich selbst in Berührung mit alten europäischen Bekannten. Bei der geschilderten und bei anderen Betätigungen, namentlich bei der Werbung von Mitarbeitern für die von mir gegründete Zeitschrift *Historia Judaica*, über die noch zu berichten sein wird, lernte ich Menschen kennen, die bisweilen Freunde wurden. Einige von ihnen, welche es Jahre hindurch gewesen und es teilweise bis heute geblieben sind, zähle ich in der zeitlichen Reihenfolge auf, in der sie in meinen Gesichtskreis traten: der ehemalige Rabbiner der großen liberalen Gemeinde in Köln, wohin ich oft zum Besuch meines Bruders gekommen war, Adolf Kober mit seiner Frau; der bedeutende jüdische Gelehrte Ismar Elbogen, Professor an der Hochschule für die Wissenschaft des Judentums in Berlin; der namhafte Handelsrechtler der Berliner Universität, Arthur Nussbaum mit Frau, dem es dank guter Beziehungen und glücklicher Fügung schnell gelang, als Research Professor an die Columbia University zu kommen; mein früherer Hallenser Kollege Paul Frankl, ein ausgezeichnete Kunsthistoriker, der, von Krankheit verfolgt, lange zu kämpfen hatte, bis er im Institute for Advanced Study in Princeton eine würdige Arbeitsstätte fand;



Paul Oskar Kristeller, der, ganz jung ins Land gekommen, am Anfang einer verheißungsvollen Laufbahn stand, heute als einer der führenden Renaissanceforscher international anerkannt ist. Mit ihm bin ich beim Besuch meines Freundes Frankl in Princeton bekannt geworden. Aus unserer ersten Unterredung ist mir seine Antwort auf meine Frage, was er denn in Deutschland gewesen sei, in Erinnerung geblieben. Sie lautete offenerzig: »Gar nichts« und stach wohlthuend von den Erklärungen der zahlreichen Dachshunde ab, die in Europa Bernhardiner gewesen sein wollten.

Zu den alljährlich am 17. März, St. Patrick's Day und Stephen Wises Geburtstag, unter großer Aufmachung abgehaltenen »Founder's Day Dinners« des »Jewish Institute of Religion« wurden prominente Gäste eingeladen, um festliche Reden zu halten. Der Zufall fügte es im Jahre 1944, daß mir ein Platz neben dem gerade zu Besuch in New York weilenden großen Geigenvirtuosen Bronislaw Hubermann (1882–1947) zugewiesen wurde. Schnell ergab sich ein freundschaftlich warmer Kontakt, da er meinen Vetter, Colonel Frederick Kisch (1888–1943), gut kannte, der »ein unvergeßlicher und unersetzlicher Freund«, als langjähriger Vorsitzender der Jewish Agency den Künstler Hubermann bei Gründung und Organisation der Palestine Symphony Orchestra, nachmals Israel Philharmonic Orchestra, unterstützt und ihm wesentliche Dienste geleistet hatte<sup>105a</sup>. Hubermann und ich hielten unsere Bekanntschaft aufrecht. Er berichtete mir bisweilen über seine Wirksamkeit für »sein« Orchester und sandte mir auch darauf bezügliche Publikationen und Manuskripte eigener Reden zu. [Über Hubermanns Wirken in Israel vgl. auch *Bruno Walter*, Thema und Variationen, S. 500.]

Ein besonders lieber und hilfsbereiter Freund wurde mir der erst nach Ende des Krieges aus England, wo er ein bedeutendes Bankhaus gegründet und geleitet hatte, eingewanderte böhmische Landsmann, Oskar Rabinowicz, ein Finanzgenie, dabei ein seriöser Gelehrter, der mehrere anerkannte Bücher zur neueren Geschichte der Juden, namentlich des Zionismus, geschrieben hat<sup>106</sup>.

Ein ganz großer Gelehrter auf dem Gebiet der Geschichte des römischen Rechts war der tief unglückliche, ebenfalls erst spät eingewanderte Adolf Berger (1882–1962). Er hatte an seiner Heimatuniversität Lemberg *sub auspiciis imperatoris* promoviert, sodann bei Ludwig Mitteis in Leipzig studiert. Doch war ihm infolge antisemitischer Umtriebe die Habilitation an seiner Heimatuniversität nicht geglückt. Aus einer Stellung als Professor an der Universität Rom war er während des Ersten Weltkriegs wegen seiner österreichischen Staatsangehörigkeit vertrieben worden. Nach Kriegsende war er Attaché der polnischen Gesandtschaft in Wien, was ihm die Fortsetzung seiner wissenschaftlichen Arbeit gestattete. In New York konnte er sich nur durch Stipendien kümmerlich über Wasser halten. In jahrelanger unermüdlicher Arbeit schuf er dort sein *Encyclopedic Dictionary of Roman Law* (1953), ein Standard-Werk. Ferner übersetzte er Jean Justers zweibändige rechtsgeschichtliche Darstellung *Les Juifs dans l'empire Romain* ins Englische, die er auch auf den neuesten Stand der Wissenschaft brachte. Leider ist dieses Werk, das Berger auf meine Anregung unter den Auspizien der American Academy for Jewish Research bearbeitete, obzwar vollendet, nach seinem Tode noch immer nicht veröffentlicht<sup>107</sup>.

Alle Genannten bis auf Kristeller weilen nicht mehr unter den Lebenden, auch nicht der Historiker Raphael Straus, der erst nach Kriegsende aus Jerusalem, wo er sich nicht

durchsetzen konnte, nach den Vereinigten Staaten eingewandert war. Ihm ist es auch dort nicht mehr vergönnt gewesen, Fuß zu fassen und seine Kenntnisse und Fähigkeiten auf dem Gebiet der mittelalterlichen Geschichte der Juden zur Geltung zu bringen. Eines Sonntagmorgens, als ich gerade die Wohnung verlassen wollte, kam ein telefonischer Anruf. Zu meinem Schrecken teilte mir sein Sohn mit, der Vater sei gestern gestorben, das Begräbnis finde um elf Uhr im Stadtteil Queens statt, seine Mutter lasse mich bitten, ihm einen Nachruf zu halten. Auf dem sofort eingeschlagenen etwa zwanzigminütigen Wege dahin in der Untergrundbahn hatte ich knapp Zeit zu überlegen, was zu sagen war, doch glaube ich, die traurige Aufgabe in angemessener Weise erfüllt zu haben.

Während meines amerikanischen Aufenthalts blieben meine wissenschaftlichen wie persönlichen Beziehungen mit einer Ausnahme ausschließlich auf jüdische Kreise beschränkt, da es nicht gelang, Kontakte mit anderen als den genannten Hochschulen herzustellen. Daher war es auch unmöglich, nichtjüdische Freunde zu gewinnen. Die Ausnahme war Professor Gray C. Boyce von der Northwestern University. Meine Teilnahme an der Diskussion bei einer Jahrestagung der Medieval Academy hatte seine Aufmerksamkeit auf mich gelenkt. Er sprach mich an, und aus dieser flüchtigen Begegnung entstand eine wissenschaftliche Korrespondenz, die trotz der räumlichen Entfernung zu freundschaftlichen Beziehungen führte.

Neue Bekanntschaften ergaben sich schließlich noch durch Kontakte mit Refugee-Leidensgenossen, nachdem sich in Deutschland die Nachricht von meiner Auswanderung und Ansiedlung in den Vereinigten Staaten herumgesprochen hatte. Ich erhielt Briefe von Bekannten und Unbekannten, die an mich empfohlen worden waren. Alle suchten Rat und Hilfe, da sie ebenfalls auswandern wollten. Nun war aber meine eigene Situation prekär, und sie blieb es durch viele Jahre, so daß ich beim besten Willen kaum wirksam helfen konnte. Trotzdem bemühte ich mich verschiedentlich um Beistand von dritter Seite für die gehetzten Menschen. Ich erreichte jedoch nichts. Es gelang mir nicht einmal, den in großer Bedrängnis befindlichen und gefährdeten Eltern meiner Frau zur Auswanderung zu verhelfen. Sie sind beide im Konzentrationslager umgekommen. Einzig für meinen bereits damals international als medizinisch-wissenschaftliche Autorität bekannten Bruder Bruno, ordentlicher Professor der Physiologie an der Universität Köln, konnte ich nach freundlicher Vermittlung von Rabbi Leo Jung das zur Einwanderung notwendige Affidavit und mit Hilfe von Professor John F. Fulton an der Yale University einen zeitlich beschränkten Forschungsauftrag erreichen, der infolge der Großzügigkeit des bedeutenden Finanzmannes und Präsidentenberaters Bernhard Baruch auch materiell fundiert war.

Für meinen alten Freund, Rabbiner Reinhold Lewin in Breslau, vorher in Leipzig und Königsberg, erlangte ich wohl ein Affidavit von Stephen Wise. Doch versagte der vermutlich nazistisch angehauchte amerikanische Konsul in Berlin seine Mitwirkung, indem er das notwendige Visum verweigerte. Er verlangte den Nachweis, daß für die rabbinische Hilfsstelle, die Lewin einnehmen sollte, kein amerikanischer Anwärter da sei. Natürlich ließ sich ein solcher Beweis nicht erbringen. Lewin kam mit Frau und zwei Kindern ins Konzentrationslager. Dort ist die ganze Familie umgekommen.

Dagegen konnte ich einem mir bis dahin unbekanntem Juristen auf seltsame Weise helfen. Eines Tages fragte mich Professor Ismar Elbogen, mit dem ich befreundet war,



ob ich nicht etwas für einen Herrn Hermann Schereschewsky tun könnte. Der Unglückliche, ein ehemaliger Rechtsanwalt in Königsberg, hatte, wie ich erfuhr, bei seiner Flucht alle Personalpapiere verloren, konnte daher seine akademische Ausbildung nicht nachweisen. Im New Yorker Geschäftsviertel verdiente er als Arbeiter beim Verladen von Warenballen bisher seinen Lebensunterhalt. Die ungewohnte physische Anstrengung hatte kürzlich zu einem Blutsturz geführt, und so lag er, zwar auf dem Wege zur Genesung, im Spital. Sollte er nachweisen können, daß er in Deutschland das Abitur bestanden hatte, wäre für ihn der Weg, wieder ein akademisches Studium zu beginnen, frei gewesen. Er behauptete, sagte mir Elbogen, in Königsberg meine juristischen Vorlesungen besucht zu haben.

Nun war nach dem ersten Weltkrieg die Zahl der Jura-Studenten lange Zeit so groß, daß man sich an einzelne nicht erinnern konnte, es sei denn, sie hätten ein Seminar besucht. Das traf aber bei Schereschewsky nicht zu. Natürlich wollte ich gern dem Manne helfen. Vielleicht hatte er Glück! An der Königsberger Universität bestand nämlich die Einrichtung, daß jeder Student dem Professor, dessen Vorlesung er hören wollte, eine Bescheinigung der Quästur über die Bezahlung der Gebühren überbringen mußte. Sonderbarerweise hatte ich die vielen Zettel nicht vernichtet, sondern sogar nach Amerika mitgenommen. Fand sich in dem großen Haufen eine Bestätigung des Herrn Schereschewsky, konnte ich ihm nicht nur bescheinigen, Rechtsstudent gewesen zu sein, sondern auch das Abitur gemacht zu haben, in Amerika Voraussetzung, um studieren zu dürfen. In der Tat fand sich der Zettel, und so wurde Schereschewsky auf Grund meiner Bescheinigung zum Studium an der Bibliothekarschule der Columbia University zugelassen. Nach dessen Abschluß fand er eine Stellung als Bibliothekar. Analog lag später der Fall eines ehemaligen Breslauer Rechtsstudenten, der mir vor Jahren noch in Deutschland seine rechtshistorische Dissertation übersandt hatte. Meine Bescheinigung verhalf ihm nach dem Krieg zur Anerkennung seiner Eignung als Dozent und damit zur Wiedergutmachung des erlittenen Schadens.

Das waren jedoch vereinzelt glückliche Ausnahmefälle.

## Wissenschaftliche Arbeit

Entstehung und Inhalt meiner wissenschaftlichen Arbeiten in den verschiedenen hier geschilderten Lebensphasen habe ich bei deren Beschreibung jeweils bereits kurz berührt. In seiner sinnreichen und gehaltvollen Ansprache bei der intimen Feier meines fünfzigjährigen Doktorjubiläums hat mein leider allzu früh dahingegangener Freund Hans Lentze, der eine mich ehrende und erfreuende Adresse der Wiener Juristischen Fakultät überbrachte, wozu er eigens nach Basel kam, zutreffend auf eine Erscheinung hingewiesen, die mir selbst bis dahin nicht recht bewußt geworden war. Der *genius loci* der verschiedenen Stationen meines Lebens und Wirkens, sagte Lentze, habe auf meine geistige Beschäftigung und Produktion eingewirkt. Den Anfang bildeten Studien zur Rechtsgeschichte meines böhmischen Heimatlandes. In Leipzig wurde ich zur Beschäftigung mit der Rechtsgeschichte der sächsischen Oberhöfe Magdeburg und Leipzig angeregt. In Königsberg folgte die Erforschung der Geschichte des Rechts im Deutschordenslande. In Halle widmete ich mich neben der sonstigen wissenschaftlichen Arbeit der Rechts- und Sozialgeschichte der dort seit Jahrhunderten bestehenden jüdischen Gemeinde. Der Aufenthalt in Amerika lenkte meine Aufmerksamkeit auf die Geschichte der Juden in der Neuen Welt. In der Stadt, die einst der europäische Mittelpunkt des Humanismus und der langjährige Aufenthaltsort des »Fürsten der Humanisten«, Erasmus, gewesen war, trat die Welt des Humanismus und seine Bedeutung für die Jurisprudenz in das Blickfeld meiner gelehrten Arbeit.

Nach dem Ausspruch eines Wissenschaftlers, dessen Name mir leider entfallen ist, bildet die beste Erholung von intensiver Arbeit eine andersartige Arbeit, also geistiger Stoffwechsel. Dieser Maxime habe ich, bevor ich sie noch kannte, instinktiv gehuldigt, indem ich die Beschäftigung mit Numismatik, insbesondere mit dem Thema »Recht und Gerechtigkeit in der Medaillenkunst«, zu meinem geliebten Hobby machte, dessen literarischen Ertrag ich in meinem Opus nicht missen möchte. Das gleiche gilt für die Rechtsgeschichte der Juden, welche ich einstmals nur nebenbei betrieb, die jedoch später Jahre hindurch zu meiner Hauptbeschäftigung wurde und zur Veröffentlichung umfangreicher Werke auf diesem Gebiete führte. Meine medaillengeschichtlichen Arbeiten fanden sogar eine äußere Anerkennung dadurch, daß ich anlässlich des hundertjährigen Jubiläums der französischen Numismatischen Gesellschaft zum Officier dans l'Ordre des Palmes Académiques ernannt wurde.

Bevor ich nun das noch Fehlende über meine Arbeiten während der beiden – letzten – Phasen meiner zweiten Lebenshälfte berichte, ein kurzes Wort über meine Arbeitsgewohnheiten und den Tagesablauf.

Zeitlebens bin ich ein Frühaufsteher gewesen. Wenn sich das bekannte Sprichwort, daß Morgenstunde Gold im Munde habe, an mir zwar nicht in seiner wörtlichen Bedeutung bewährt hat, so geschah es doch im übertragenen Sinne. Der Arbeitsbeginn um fünf Uhr früh, manchmal schon um halb fünf Uhr, in der Studentenzeit noch



früher, war freilich nur durch frühes Zubettgehen ohne gesundheitliche Schädigung möglich. Er hat die beste Konzentration bewirkt und produktives Schaffen vortrefflich gefördert. Diese fruchtbarsten Stunden des Tages mußten allerdings ein Jahr hindurch oder noch länger zum »Büffeln« englischer Vokabeln verwendet oder — wie es mir damals erschien — verschwendet werden. Das Ergebnis der für die wissenschaftliche Arbeit anscheinend verlorenen Zeit hat sich am Ende jedoch nicht als unproduktiv erwiesen. Diese Zeit nicht für die Wissenschaft verwendet zu haben, führte immerhin zur Beherrschung der englischen Sprache, die mir bis zum 46. Lebensjahr völlig fremd gewesen war. Ihre Kenntnis hat mir später auch wissenschaftlich manchen Nutzen gebracht.

Von Churchill habe ich gelernt, nicht zu der morgendlichen Stunde sogleich das Bett zu verlassen, wie ich es lange Jahre hindurch getan hatte, sondern liegend im Bett zu arbeiten. Die dazu notwendigen Bücher, Notizen und Manuskripte legte ich jeweils am Abend vorher auf dem Nachttisch zurecht. Zur frühen Tageszeit ist der Geist, durch die Nachtruhe erholt, am frischesten. Die Konzentration wird, weil Geräusche und Störungen fehlen, gegen die ich stets überempfindlich gewesen bin, im höchsten Maße gefördert, sie ist sonst während des ganzen Tages einfach nicht erreichbar. Die Gewohnheit, zeitig früh zu arbeiten, habe ich auch im Alter beibehalten.

Nach dem Morgengebet, für das ich zu Hause meist ebenfalls bessere innere Sammlung fand als in der Synagoge, wurde das Frühstück eingenommen, und nur mit kurzer Unterbrechung durch die Mahlzeiten sowie die Vorlesungen und andere berufliche und persönliche Verpflichtungen war der ganze Tag mit Arbeit, sei es in Bibliotheken oder Archiven, sei es zu Hause in der Studierstube, ausgefüllt. Erst in späten Jahren mußte ich auf ärztliche Anordnung einen einstündigen täglichen Spaziergang einlegen. So ergab sich vor der Gründung einer Familie und während der viele Jahre hindurch in Basel allein verbrachten Sommersemester eine tägliche Arbeitszeit von etwa zwölf bis vierzehn Stunden. Sie war (und ist) — obwohl jetzt eingeschränkt — keine Last, sondern eine Freude, die innere Befriedigung brachte.

In Amerika ließen die angespannte Unterrichtstätigkeit und die erforderliche Überwindung der großen Entfernungen, die oft zu körperlicher Ermattung führten, sowie das unaufhörliche Ringen um eine Position neben unausgesetzter wissenschaftlicher Arbeit für kulturelle Genüsse, wie Konzerte und Theater, so gut wie gar keine, für die Familie viel zu wenig Zeit. Obwohl ich das stets schmerzlich empfunden habe, war es einfach nicht zu ändern. Der Kampf ums Dasein, der geführt werden mußte, war zu hart.

Beim Nachdenken und Formulieren der Gedanken pflegte und pflege ich, auf und ab zu gehen. Auch Montaigne liebte das Gehen beim Arbeiten und meinte, daß »die Gedanken schlafen, wenn die Beine nicht in Bewegung sind«<sup>108</sup>.

Noch ein Wort über den Arbeitsplatz. Er ist für eine gedeihliche Tätigkeit von fundamentaler Bedeutung. In der geräumigen Wohnung des Elternhauses hatte ich ein kleines Stübchen allein für mich, ruhig, obwohl Tür an Tür neben der Küche gelegen. In der Junggesellenzeit bildete eine zweizimmerige »Bude« stets den größten Posten in meinem bescheidenen Budget. Später benötigte ich in Europa für meine wachsende Bibliothek einen zusätzlichen Raum. In dem raumbeschränkten New York war die Beschaffung eines als Arbeitsstätte geeigneten Studierzimmers, das auch der Unter-

bringung der geretteten Bücher zu dienen hatte, ein schwieriges Problem und mit großen Aufwendungen verbunden. In den luxuriösen Universitätsgebäuden der Vereinigten Staaten war jedem Professor ein Bureau (»office«) oder mindestens ein Studienraum (»study«) zugewiesen. Die Anstalten, an denen ich tätig war, hatten für den Visiting Professor kein Plätzchen. So war ich glücklich und dankbar, im Jewish Theological Seminary jahrelang eine kleine study benützen zu dürfen, da unsere Wohnung nur die wenigen notwendigsten Räume haben konnte. Auch mußte ich mich erst daran gewöhnen, wie bereits erwähnt, in den großen, namentlich im Winter oft stark besetzten Lesesälen der öffentlichen Bibliotheken zu arbeiten. Es war natürlich kein angenehmes Gefühl, Jahre hindurch bloß geduldeter Gast in einer Anstalt zu sein, an der ich nicht lehrend tätig war. Die finanziellen Verhältnisse erlaubten es aber nicht, mir in einem »office building« ein Zimmer zu mieten und auf die nicht immer freundlich dargebotene Gefälligkeit zu verzichten.

Die wissenschaftliche Arbeit selbst konzentrierte sich infolge meines Fellowship bei der American Academy for Jewish Research auf das judaistische Gebiet, das ich mit meinen früheren mittelalterlichen rechtsgeschichtlichen Studien zu verbinden und in Einklang zu bringen suchte. Diese Arbeiten, über die bereits gesprochen wurde, führten schließlich zu der ebenfalls schon erwähnten zusammenfassenden Darstellung der Rechtsgeschichte der Juden im mittelalterlichen Deutschland, *The Jews in Medieval Germany: Their Legal and Social Status*. Sie war von einem Band rechtshistorischer Quellenmaterials begleitet. Dieser wurde von der Academy selbst in ihrer Serie *Texts and Studies* veröffentlicht. Den 660 Druckseiten umfassenden Darstellungsband gab infolge günstiger Gutachten der Professoren Roscoe Pound von der Harvard-Universität und Richard McKeon von der University of Chicago eine der drei bedeutendsten amerikanischen Universitätspressen, die Chicago University Press, heraus. Das war im Jahre 1949<sup>109</sup>.

Außer zahlreichen Aufsätzen in wissenschaftlichen Zeitschriften waren diesen Werk aber noch zwei andere Veröffentlichungen in Buchform vorangegangen. Die Entstehung beider hat ihre eigene Geschichte.

Die Vorarbeiten zu meiner Rechts- und Sozialgeschichte der Juden im mittelalterlichen Deutschland hatten als Nebenergebnis mein erstes in englischer Sprache erschienenes Buch, *Sachsenspiegel and Bible*, mit dem Untertitel: »Researches in the Source History of the Sachsenspiegel and the Influence of the Bible on Mediaeval German Law«. Es war die Zeit, zu der sich der vermutete Todestag Eikes von Reggov. des Verfassers des bedeutendsten und verbreitetsten mittelalterlichen deutschen Rechtsbuchs, des Sachsenspiegels, zum siebenhundertsten Mal jährte. Dies nahm das nationalsozialistische Regime zum Anlaß, in dem von ihm beliebten Stil pompöse Feiern zu veranstalten, bei denen in Reden und Schriften die Behauptung aufgestellt und propagiert wurde, dieser hervorragendste deutsche Jurist des Mittelalters habe bereits im 13. Jahrhundert die Lehre von »Blut und Boden« zur Grundlage seines Rechtsdenkens gemacht. Demgegenüber suchte ich die aus zwanzigjähriger Beschäftigung mit jenem Rechtsbuch gewonnene Überzeugung streng wissenschaftlich und quellenmäßig nachzuweisen, daß es auf Grund der Vertrautheit seines Verfassers mit der Bibel durch das Alte und Neue Testament wesentlich beeinflusst worden ist. Dies war nicht Ungewöhnliches zu einer Zeit, in der das menschliche Leben von der Geburt bis zu



er die wertvolle alte Privatbibliothek der Grafen von Stolberg-Wernigerode, die zu meiner Zeit der Universität Halle angeboten worden war, die sie jedoch wegen Geldmangels in der Inflationszeit nicht kaufen konnte. Damals hatte ich bedauert, sie nicht benützen zu können. Durch eine merkwürdige Schicksalsfügung stand sie mir jetzt in New York bereit. Rockwell nun empfahl mich an einen privaten Liebhaber und Sammler mittelalterlicher Handschriften, den Neffen des Gouverneurs des Staates New York, Howard L. Goodhart, einen reichen ehemaligen Bankier, der privatisierte und nur seinem Hobby, dem Sammeln alter Manuskripte, lebte. Er hatte in Europa seine Buchhändler-Agenten, die für ihn kostbare Handschriften erwarben. Das war eine klug kalkulierte Kapitalsanlage. Er interessierte sich besonders für den jüdischen Theologen und Philosophen Philo von Alexandria, den Repräsentanten des jüdischen Hellenismus, von dessen Werken er die größte Privatsammlung kostbarer Handschriften besaß. Er hatte die abstruse Idee, seine Abstammung von Philo nachweisen zu können. Zusammen mit Professor Erwin R. Goodenough hatte er eine Philo-Bibliographie veröffentlicht<sup>112</sup>. Kurz vor dem sogenannten »Anschluß«, der Besetzung Österreichs durch Hitler im Jahre 1938, erwarb er aus dem Besitz der durch Jahrhunderte als Stätten bedeutender Kultur bekannten österreichischen Klöster Admont und Melk zwei Manuskripte eines fälschlich Philo zugeschriebenen Werkes aus dem Ende des ersten Jahrhunderts, *Liber Antiquitatum Biblicarum*, von denen das erste aus dem 11., das zweite aus dem 15. Jahrhundert stammte. Bei diesem Werk handelt es sich um eine sogenannte Historienbibel, deren Text von Adam bis zum Tode König Sauls reicht und zahlreiche interessante legendarische Zusätze zu dem originalen Bibeltext aufweist. Das Admonter ist eines der ältesten Pseudo-Philo-Manuskripte, das seit seiner frühen Entstehung bis zum Erwerb durch den neuen Eigentümer an seinem Ursprungsorte, dem steirischen Benediktinerkloster Admont, geblieben war, den Standort also nie gewechselt hatte.

Goodhart beabsichtigte nun, eine photographische Wiedergabe des Admonter Textes herstellen zu lassen und diese unter Beifügung einer Kollation mit dem der Erstausgabe, die der Humanist und Jurist Johannes Sichardus 1527 in Basel veröffentlicht hatte, in Buchform herauszugeben. Mir war die Ausführung dieser Textvergleiche zugedacht. Auf Dr. Rockwells Veranlassung wurde ich zur Prüfung der Manuskripte und Erörterung des Editionsplans in das vornehme »Residence Hotel« St. Regis auf New Yorks Eastside eingeladen, wo der verwitwete Howard L. Goodhart wohnte und seine Manuskriptsammlung nebst Bibliothek in einem eigenen feuersicheren Raum untergebracht hatte. Nach kurzer Begrüßung zeigte er mir vor allem an einem sorgfältig vorbereiteten Modell, wie er sich die äußere Ausstattung der geplanten Ausgabe dachte. Das Blindmuster des Buchrückens (»spine«) trug den Aufdruck »Goodhart-Kisch, Pseudo-Philo, Liber Antiquitatum Biblicarum«. Ferner legte er mir einen ebenfalls mit Sorgfalt entworfenen Revers zur Unterschrift vor, demzufolge die Ergebnisse der mit 500 Dollar zu honorierenden Arbeit derart in das Eigentum des Auftraggebers übergehen sollten, daß er sie in jeder ihm gutdünkenden Weise verwenden dürfe. Außerdem sollte ich mich verpflichten, in der von mir zu verfassenden Einleitung sowie in etwaigen anderen Publikationen das Werk von Montague Rhodes James, einem Freund von Goodhart, der 1917 eine englische Übersetzung der *Antiquitates* veröffentlicht hatte, in keiner Weise zu kritisieren oder unfreundlich zu erwähnen.

Der Entwurf sah ferner eine Klausel vor, derzufolge dem Eigentümer der Manuskripte durch ihre Veröffentlichung keinerlei Kosten erwachsen durften. Selbstverständlich lehnte ich unter Darlegung meiner Gründe die Unterzeichnung dieses Dokuments ab. Nach einer kurzen Auseinandersetzung wurde ich mit dem Segen: »Go to Hell!« (geh zum Teufel!) in Ungnaden entlassen.

Natürlich hatte ich selbst nach nur flüchtiger Prüfung der Manuskripte erkannt, daß mit der Ausführung des Goodhartschen Planes der Wissenschaft nur ein halber Dienst erwiesen worden wäre. Das Gegebene war vielmehr eine kritische Ausgabe des interessanten Werkes, dessen Text zum ersten und letzten Male vor mehr als vierhundert Jahren auf Grund zweier seither verlorenen Manuskriptvorlagen in einer originalen Ausgabe veröffentlicht worden war, von der später mehrere Nachdrucke gemacht worden sind. Da wegen der kriegsbedingten Unzugänglichkeit anderer in europäischen Bibliotheken aufbewahrten Handschriften eine Beschränkung auf die bis dahin noch nie bearbeiteten Manuskripte im Goodhartschen Besitz geboten war, konnte nur eine vorläufige — ich nannte sie — »Schulausgabe« ins Auge gefaßt werden, die sich immerhin als Vorarbeit für eine dereinstige endgültige Ausgabe nützlich erweisen konnte. Diesen Plan unterbreitete ich dem Dean der Graduate School der University of Notre Dame, Professor Philip S. Moore, der bereits durch Förderung meines Sachsenspiegel-Buches sein wissenschaftliches Verständnis und tatkräftige Hilfsbereitschaft bewiesen hatte. Der Plan fand denn auch bei ihm enthusiastische Aufnahme und großzügige Unterstützung. Er sicherte nicht nur die Veröffentlichung in den von seiner Universität herausgegebenen *Publications in Mediaeval Studies* zu, sondern stellte mir auch für die Dauer der Editionsarbeiten eine bescheiden honorierte Stellung als Research Associate in Aussicht.

Nachdem ich so wenigstens eine der von Goodhart gemachten Bedingungen zu erfüllen imstande war, daß ihn nämlich die Herausgabe des Werkes nichts kosten dürfe, ließ sich die durch seine Heftigkeit fast verfahrenere Situation wieder einrenken. Er stellte mir Photographien seiner Manuskripte zur Verfügung, deren Leihfrist alle halbe Jahre verlängert werden mußte. Die Arbeit dauerte sieben Jahre. Einsicht und Benutzung der Originalhandschriften wurde nicht gestattet. Doch ließen sich die Manuskripte mit dem Primärdruck mittels der Photokopien kollationieren, und auf dieser Grundlage konnte ich eine im Rahmen des damals Möglichen kritische Ausgabe des *Liber Antiquitatum Biblicarum* unternehmen. Bis zum Ende der Arbeit wurde ich von Goodhart immer wieder gefragt, ob ich Wert darauf lege, daß bei der Publikation auch mein Name genannt werde oder ob ich es vorziehe, ungenannt zu bleiben. Die Ausgabe erschien schließlich unter meinem Namen, mit einer von mir in englischer Sprache verfaßten Einleitung von mehr als hundert Seiten als zehnter Band der *Publications in Mediaeval Studies* im Jahre 1949. Sie fand den uneingeschränkten Beifall der maßgebenden Gelehrten, hat ihren Platz in der Wissenschaft bis auf den heutigen Tag behalten und diente mehreren gelehrten Publikationen über das aus Jesus' Zeit stammende Werk als Grundlage<sup>113</sup>. Auch Goodhart, dessen ich in meinem Vorwort, ohne die Vorgeschichte zu erwähnen, mit Dank gedachte, war mit dem Ergebnis zufrieden. Das umfangreiche Manuskript der tabulierten Kollation, deren Ergebnisse nicht vollständig in die Ausgabe aufgenommen werden konnten, befindet sich in der Bibliothek des Hebrew Union College in New York, der ich es geschenkt habe. Die schließlich in



meinen Besitz gelangten Photographien habe ich der Handschriftenabteilung der Basler Universitätsbibliothek übereignet.

Außer den zahlreichen Besprechungen des *Liber Antiquitatum Biblicarum* in wissenschaftlichen Fachzeitschriften erschien auch eine in der führenden, am meisten gelesenen Tageszeitung New Yorks, der *New York Times*, am 2. April 1950. Sie füllte zwei lange Spalten des großformatigen Blattes und lenkte die Aufmerksamkeit auch anderer Tageszeitungen in ganz Amerika auf das Buch, so zum Beispiel die der *Herald Tribune* in New York und der *Times-Herald* in Washington. Auf die Rezensenten scheint die Erwähnung einer angeblichen Tochter Adams namens Noaba im lateinischen Text der Historienbibel besonders Eindruck gemacht zu haben. Dem amerikanischen Bedürfnis nach sensationellen Nachrichten entsprechend gaben die Journalisten ihren Besprechungen in großer Aufmachung ergötzliche Titel wie: »Bible Historian Says Adam Had Daughter Noaba«; »Professor Discovers A Daughter of Adam«; »Newly-Found Text Reveals That Adam Was Quite A Guy«; »Adam's Daughter Noaba«. Als weitere Folge dieser durch das Buch, von mir ungewollt, hervorgerufenen »publicity« erhielt ich zahlreiche Briefe mit dem Ersuchen, Einzelheiten über Adams Tochter zu enthüllen, welche die der lateinischen Sprache unkundigen Briefschreiber in der Historienbibel vermuteten.

Über ein anderes, reich illustriertes Buch, das noch in Amerika entstanden ist, jedoch erst im Jahre 1955 von der Heidelberger Akademie der Wissenschaften veröffentlicht wurde, »Recht und Gerechtigkeit in der Medaillenkunst«, habe ich bereits berichtet.

Das letzte von mir in den Vereinigten Staaten geplante, redigierte und betreute Werk mit Beiträgen damals noch lebender, seither verstorbener Autoren in deutscher, englischer und hebräischer Sprache ist die Gedächtnisschrift für das durch die Vernichtung des deutschen Judentums untergegangene Jüdisch-theologische Seminar (Fraenckelscher Stiftung) in Breslau. Sie erschien unter dem Titel »Das Breslauer Seminar« im Umfang von 442 Seiten im Jahr 1963 in Tübingen. Anlaß zur Veröffentlichung bot die hundertste Wiederkehr des Tages, an dem die mehr als achtzig Jahre währende segensreiche wissenschaftliche und pädagogische Tätigkeit dieser in der Geschichte einzig dastehenden Pflanzstätte jüdischen Geistes angefangen hatte.

Neben der Lehrtätigkeit und wissenschaftlichen Arbeit ging volle dreiundzwanzig Jahre hindurch die Herausgeberschaft der von mir bereits 1938, als das Sterben der altangesehenen jüdisch-historischen Zeitschriften in Deutschland begann, gegründeten Zeitschrift *Historia Judaica* einher. Dem letzten Bande schickte ich eine Geschichte der Zeitschrift und einen historischen Rechenschaftsbericht des Herausgebers voraus, in den verschiedenartige Reminiszenzen aus seiner Tätigkeit eingestreut sind. Auch wurde dort mein Dank an alle freundlichen Helfer bei dieser Arbeit zum Ausdruck gebracht, namentlich der tatkräftigen Mitarbeit meiner Frau gedacht. Die Unmittelbarkeit und Lebendigkeit der bereits mehr als zehn Jahre zurückliegenden Darstellung würden durch die Übersetzung in die deutsche Sprache verblasen. Deshalb wird der ursprüngliche englische Wortlaut im Anhang zum vorliegenden Buche wiedergegeben. Er ließe sich nach Verlauf eines Jahrzehnts in mancher Hinsicht ergänzen, insbesondere durch Nennung der damals aus persönlicher Rücksichtnahme nicht erwähnten Namen gewisser Persönlichkeiten. Doch soll der Schleier des Vergessens über jene gebreitet

bleiben, die dem selbstlos im Interesse der Wissenschaft arbeitenden Herausgeber Unannehmlichkeiten bereitet oder ihn geradezu verfolgt haben. Nur kurz sei die Geschichte erzählt, wie es dazu kam, daß der Name der Zeitschrift, die sich Ansehen in der wissenschaftlichen Welt erworben hatte, mit dem der altbekannten, in Paris erscheinenden *Revue des Etudes Juives* verbunden wurde, und daß er daher auf dem Titelblatt dieses im 132. Jahrgang stehenden gelehrten Journals heute zu finden ist.

Nachdem ich 1961 beschlossen hatte, das Erscheinen von *Historia Judaica* einzustellen, schickte ich an alle Abonnenten, Gratisempfänger und Tauschpartner ein Rundschreiben, das diese Mitteilung enthielt. Unter ihnen befand sich jedoch nicht die *Revue des Etudes Juives*, die während des Krieges nicht erschienen war. Eines Nachts um ein Uhr, nachdem wir längst zu Bett gegangen waren, läutet das Telefon. Es meldet sich ein mir unbekannter Professor Clemens Heller, der sich als Vertreter der Geschäftsleitung der Sorbonne vorstellt. Er sei soeben von einer amerikanischen Tour im New Yorker Flughafen eingetroffen, müsse jedoch am nächsten Morgen zeitig nach Europa zurückfliegen. Er wünsche dringend mich zu sprechen und könne in einer halben Stunde in meiner Wohnung sein. Ich stimmte zu und hatte gerade Zeit, aufzustehen und mich wieder anzukleiden. Meine Frau dachte zuerst an eine Mystifizierung und war ängstlich. Aber der nächtliche Besucher traf prompt ein. Die Unterredung mit ihm drehte sich um die Verbindung von *Historia Judaica* mit der wiedererscheinenden *Revue* und dauerte bis halb drei Uhr morgens. Wie man in Paris die Tatsachen erfuhr und sich zur Fusion der beiden Zeitschriften entschloß, ist mir unbekannt geblieben. Auf meiner bald folgenden Europareise zum Semesterbeginn nach Basel machte ich Zwischenhalt in Paris, wo in einer Redaktionskonferenz die wissenschaftlichen Einzelheiten mit dem Chefredakteur, Professor Georges Vajda, und anderen Redaktionsmitgliedern besprochen und geklärt wurden. Die Zusammenarbeit mit diesem vortrefflichen Gelehrten vollzieht sich seither nun schon mehr als ein Jahrzehnt reibungslos, während die mit dem Administrator Clemens Heller wegen seiner Unzuverlässigkeit ständig zu Reibungen Anlaß gibt und noch nie glatt verlaufen ist. Trotz dieses unerfreulichen Dauerzustands bin ich froh, daß der Name meiner Zeitschrift, den ich mit großer Mühe und erheblichen Opfern zu Ehren gebracht habe, nicht aus der aktiven Publizistik verschwunden ist.

Noch eine andere Zeitschrift ist in Amerika auf meine Anregung ins Leben gerufen worden. Den europäischen Rechtshistorikern, Romanisten, Germanisten und Kanonisten, die jenseits des Ozeans Zuflucht gefunden hatten und sich bemühten, ihre Forschungen fortzusetzen, fehlte es an einem Publikationsorgan. Eine rechtsgeschichtliche Zeitschrift gab es in Amerika nicht. In Washington bestand aber das »Ricobono Seminar of Roman Law in America«, das der Catholic University angegliedert war. An diesem fanden regelmäßig Vorträge über Themen aus den Gebieten des römischen und kanonischen Rechts statt, zu denen auch emigrierte Gelehrte eingeladen wurden. Ein dort im Jahre 1942 von mir gehaltener Vortrag über »Rechtsgeschichtsforschung in Amerika« veranlaßte mich, die Herausgabe einer rechtsgeschichtlichen Zeitschrift anzuregen und dies später in einem ausführlichen Exposé zu begründen.

Der Gedanke fand enthusiastische Aufnahme<sup>114</sup>. Der seit einiger Zeit dort erscheinenden Vierteljahrsschrift *The Jurist*, die vornehmlich praktischen Fragen des Kirchenrechts gewidmet war, wurde ein »außerordentliches Heft« mit dem Namen *Seminar*



angegliedert, in dem ausschließlich rechtshistorische Themen behandelt und Bücher über Rechtsgeschichte besprochen wurden. Bereits im ersten Bande wurde mein Aufsatz »Nationalism and Race in Medieval Law« veröffentlicht. Dreizehn Jahre hindurch erschien diese erste rechtshistorische Zeitschrift Amerikas regelmäßig mit Beiträgen von amerikanischen und eingewanderten Gelehrten, unter ihnen waren Arbeiten von Adolf Berger, Eberhard Bruck, Hermann Kantorowicz, Stephan Kuttner, Ernst Levy, Fritz Pringsheim, Ernst Rabel, Fritz Schulz, Giorgio del Vecchio, Hans Julius Wolff. Erst als nach Kriegsende der wissenschaftliche Austausch mit Europa wieder in Gang gekommen war und auch andere historische Zeitschriften in Amerika, angeregt durch das Erscheinen des *Seminar*, ihre Spalten rechtsgeschichtlichen Abhandlungen öffneten, erwies sich die Aufgabe der neuen Schöpfung als erfüllt; sie konnte ihr Erscheinen einstellen. Bald (1956) folgte ihr das *American Journal of Legal History* nach, das freilich fast ausschließlich der amerikanischen Rechtsgeschichte gewidmet ist.

An der Gründung eines wissenschaftlichen Unternehmens im Jahre 1955, das sich seither erheblich ausgedehnt und Bedeutung erlangt hat, — gemeint ist das Leo-Baeck-Institut in New York —, war ich ebenfalls beteiligt. Es wurde mit dem Ziele ins Leben gerufen, »die wissenschaftliche Forschung auf dem Gebiet der Geschichte der Juden in Deutschland und anderen deutschsprechenden Gebieten seit der Zeit der Aufklärung zu betreiben, das dazu nötige Material zu sammeln und die Veröffentlichung entsprechender Darstellungen zu fördern. Das Institut trägt den Namen des Mannes, der die letzte repräsentative Erscheinung des Judentums in Deutschland vor dem Zweiten Weltkrieg gewesen ist.«

Ich habe an den Vorarbeiten und während der ersten sechs Jahre seines Bestehens an den Beratungen, Planungen und Arbeiten des Instituts ehrenamtlich lebhaft Anteil genommen und ihnen mehrere Stunden in der Woche gewidmet. Unter den ersten Veröffentlichungen des Instituts befindet sich eine Arbeit von mir. Die Zusammenarbeit mit dem Präsidenten, Rabbiner Max Grünewald, und dem Sekretär, Max Kreuzberger, gestaltete sich jedoch schwierig. Grünewald konnte als vielbeschäftigter Rabbiner, der auch in anderen Refugee-Organisationen tätig war und außerhalb New Yorks wohnte, dem Institut nur beschränkte Zeit widmen. Er kümmerte sich vornehmlich um die Organisation und Repräsentation und überließ fast alles andere dem Sekretär, der vor allem im Aufbau der Bibliothek und im Sammeln von Geld tüchtig war. Für die großen wissenschaftlichen Aufgaben, die sich stellten, brachte er wenig an Qualifikationen mit, versuchte jedoch ihre Lösung mit Hilfe sachkundiger Ratgeber so gut er konnte. Diesen machte Grünewald zwar in guter Absicht bisweilen Versprechungen sachlicher oder persönlicher Art, um deren Erfüllung er sich dann nicht kümmern konnte. An solchen Erfahrungen fehlte es auch mir nicht. Nur eine sei erwähnt. Ich hatte eine unter meiner Obhut und Förderung entstandene vortreffliche jüdisch-historische Doktordissertation, die auf Grund des Referats der beiden bedeutenden Berliner Historiker, der Professoren Hans Herzfeld und Wilhelm Berges, dem Verfasser, Werner Schochow, das Doktorat cum laude eingebracht hatte, zur Aufnahme in die Veröffentlichungen des Instituts empfohlen. Grünewald sagte sie verbindlich zu. Als die Arbeit, erheblich erweitert, druckfertig vorlag, wurde mir jedoch mitgeteilt, sie müsse erst von zwei Gutachtern des Instituts approbiert werden, bevor sie in die Veröffentlichungen aufgenommen werden könnte. Darauf zog ich meinen Antrag zurück und erklärte

meinen Austritt aus dem Vorstand (Board) des Instituts, da ich dieses Vorgehen als unfair gegenüber dem Autor sowie seinen Doktorvätern und als wissenschaftlich vollkommen unbegründet erachten mußte. Ich ließ mich jedoch durch eindringliche briefliche und mündliche Vorstellungen des von mir hochgeschätzten Vorstandsmitglieds, Professor Nathan Stein, zum Widerruf meines Rücktritts bewegen. Die Arbeit von Dr. Werner Schochow erschien dann unter dem Titel »Deutsch-jüdische Geschichtswissenschaft. Eine Geschichte ihrer Organisationsformen unter besonderer Berücksichtigung der Fachbibliographie« als dritter Band der »Veröffentlichungen der Historischen Kommission zu Berlin beim Friedrich-Meinecke-Institut der Freien Universität Berlin« im Umfang von 327 Seiten.

Spätere, noch weniger erfreuliche Enttäuschungen verursachten meinen endgültigen Austritt aus dem Vorstand des Instituts, an dessen Gründung und Aufbau ich wesentlich beteiligt gewesen war.

Habe ich früher die Einstellung und das Verhalten eines reichen Börsenmaklers, der nicht nur als Förderer der Wissenschaft anerkannt werden, sondern selbst als Gelehrter gelten wollte, geschildert so verdient vielleicht auch die Rolle, die bisweilen — wohl ausnahmsweise — Professoren einer berühmten Universität einem Refugee gegenüber wegen seiner Hilflosigkeit zu spielen vermochten und gespielt haben, erzählt zu werden.

Kurz nach Gründung der Zeitschrift *Jewish Social Studies* sandte mir die Redaktion ein gerade erschienenes Buch über die Juden im Westgotenreich und in Gallien zur Besprechung. Es war als zwölfter Band der von der angesehenen Mediaeval Academy of America veröffentlichten Serie von Monographien erschienen, deren Herausgeber Professoren der Harvard-Universität waren. Als ich das Buch durcharbeitete, merkte ich, daß der Verfasser, Solomon Katz, der an der University of Washington lehrte und dessen Doktordissertation die Arbeit darstellte, aufs größlichste andere Werke, vor allem Jean Justers *Les juifs dans l'empire Romain* und einen Beitrag desselben Verfassers zur Girard-Festschrift plagiiert hatte, was seinem Doktorvater ebenso wie den Herausgebern der *Monographs* entgangen war. An unbedingte Ehrlichkeit bei wissenschaftlicher Arbeit, natürlich auch sonst, gewohnt, hielt ich mich verpflichtet, in meiner Rezension ein solches Verfahren bloßzustellen. Ich wußte nicht, daß persönliche Machenschaften (»politics«), die ja dem akademischen Leben in Europa durchaus nicht fremd waren, im amerikanischen auch in die Wissenschaft getragen wurden. Der bloßgestellte Verfasser suchte sich mit lendenlahmen Ausflüchten in einer Erwiderung zu verteidigen, der ich den bis ins einzelne substantiierten Nachweis der von ihm ohne Quellenangabe gemachten Entlehnungen entgegenhalten konnte<sup>115</sup>. Mit dem Plagiator waren nicht nur der Doktorvater, sondern auch die im Vorwort erwähnten Förderer seiner Arbeit sowie die Herausgeber der Monographien bloßgestellt, die nun alle ihren Schützling decken und verteidigen zu müssen glaubten, anstatt ihr Versehen zuzugeben.

Mir ist die wissenschaftliche Ehrlichkeit jedoch schlecht bekommen. Zwar konnte niemand meinen Nachweis des Plagiats widerlegen, doch ermöglichte ihre starke akademische Position den eingeborenen »Autoritäten«, den arrivierten Refugee, der gewagt hatte, die Wahrheit an den Tag zu bringen, in ihren Kreisen zu diffamieren. Dessen wurde ich erst gewahr, als mich Ahnungslosen der Editor der angesehenen Zeitschrift *Speculum*, der Harvard-Professor Samuel H. Cross, während der Jahres-



tagung der Mediaeval Academy in Cambridge bei einem Höflichkeitsbesuch aufs rücksichtsloseste auf mein »crimen laesae maiestatis« ansprach und auf mich moralischen Zwang ausübte. Die Szene bleibt mir unvergeßlich, als mich Cross, der vorher anstandslos Aufsätze von mir in die Zeitschrift aufgenommen hatte, wegen meiner Kühnheit barsch zur Rede stellte: »Ihre Besprechung war sehr taktlos«, fuhr er mich in Gegenwart anderer Tagungsteilnehmer an. »Die Professoren Laistner und Caplan [Katz' Patrone] sind als ausgezeichnete Gelehrte bekannt. Wenn sie diese Dissertation angenommen haben, wird niemand der Behauptung Glauben schenken, daß sie ein Plagiat sei. In Ihrer Lage [als Refugee] können Sie sich nicht leisten, wichtige Persönlichkeiten zu Feinden zu haben. Sie dürfen die [von mir geplante] Replik auf Katz' Verteidigung nicht veröffentlichen. Sie wissen nicht, was Sie riskieren. Sie werden sehen, was geschehen wird. Sie sind gewarnt«. In der Tat haben mir Professoren, die ich zu jener Zeit überhaupt nicht kannte, meine »Taktlosigkeit« noch nach Jahren vorgehalten. Sie waren durch die von Katz und seinen Protektoren gegen mich entfaltete Propaganda beeinflusst. Im übrigen konnten diejenigen, die mich akademisch ohnehin nicht gefördert hätten, außer daß sie mich verunglimpften, nichts gegen mich unternehmen, was mir nachteilig geworden wäre. Dem Plagiator hat die Angelegenheit infolge des Schutzes seiner mächtigen Protektoren, die mit ihm sich selbst schützen mußten, in seiner Laufbahn nicht geschadet. Das Buch von Katz, obwohl später auch von anderen Kritikern, namhaften Historikern, höchst ungünstig beurteilt, wird aber bis auf den heutigen Tag in Amerika noch zitiert, weil es bequemer ist, auf dieses als auf die französisch geschriebene Quelle seines Plagiats zurückzugreifen.

Überhaupt dauerte das geringe Interesse für die Rechtsgeschichte im allgemeinen und ihren europäischen Zweig im besonderen in den Vereinigten Staaten von Amerika an. Deshalb fanden auch meine verschiedenen, zum Teil umfangreichen Abhandlungen, der Niederschlag oder Nebenergebnisse meiner Forschungsarbeit, die in wissenschaftlichen Zeitschriften veröffentlicht wurden, weder die erhoffte Beachtung bei Gelehrten, noch regten sie zu ähnlichen Studien auf den immer noch wenig beachteten Gebieten an. Um sie nicht in Vergessenheit versinken zu lassen und den europäischen Rechtshistorikern leichter zugänglich zu machen, regte der Inhaber des Jan Thorbecke Verlags in Sigmaringen, Herr Georg Bensch, ihre Zusammenfassung und Wiederveröffentlichung in einem Sammelband an, der demnächst erscheinen wird. Ohne Zweifel werden diese Arbeiten die ihnen in Amerika nicht zuteil gewordene Wirkung nunmehr in Europa, wo immer die Rechtsgeschichte noch gepflegt wird, ausüben.

## Reisen nach Europa

Nur langsam ging der Krieg seinem Ende entgegen. Erst im Jahre 1945 wurde die Welt von der Geißel Hitler und seinen verbrecherischen Kumpanen, Europa von der nationalsozialistischen Gewaltherrschaft befreit. Wohl hörten Furcht und Schrecken auf. Sie wandelten sich aber in Kummer und Trauer. Erst nach und nach trafen die schmerzlichen Botschaften über das Schicksal der armen Opfer der Terrors und der wütenden Raserei der entmenschten braunen Barbaren ein.

1942 war für unsere Familien ein Unglücksjahr. Es begann, indem uns am Morgen des ersten Tages die Nachricht vom plötzlichen Tode meines älteren Bruders erreichte, mit dem ich nach mehr als fünfundzwanzigjähriger Trennung in Amerika wieder zusammengetroffen war, wo er unter einem Pseudonym in deutscher und englischer Sprache eine literarische Tätigkeit entfaltet und einen Autographenhandel betrieben hatte<sup>16</sup>. Im selben Jahre sind die Eltern meiner Frau, die in östliche Konzentrationslager verschleppt worden waren, umgekommen. Während uns ihr Schicksal schon bald nach Kriegsende bekannt wurde, erhielten wir erst nach langem, aufregendem und aufreibendem Suchen auf allen verfügbaren Kommunikationswegen Gewißheit über die Ermordung meiner einzigen Schwester und ihres Mannes. Sie hatte nach dem Tode meiner Mutter unter der Obhut meines jüngeren Bruders in Köln gelebt, studiert, den juristischen Doktorgrad erworben und war nach ihrer Heirat mit dem Mitglied einer altbefreundeten Prager Familie in unsere Heimatstadt zurückgekehrt. Nach der Besetzung der Tschechoslowakei durch die Nazis war die Familie zur Flucht nach Paris gezwungen, wo sich Mizzi Kisch wie früher schon in Köln und Prag journalistisch betätigte. Nach dem Einmarsch Hitlers in Frankreich wurde sie wie ihr Gatte bei einer der von den Okkupanten periodisch veranstalteten Razzien auf Juden verhaftet, in das berüchtigte Frauengefängnis Drancy gebracht, während mein Schwager sogleich in ein östliches Todeslager deportiert wurde. Auch sie ist in einem solchen Lager grauenvoll des Lebens beraubt worden. Allein ihr kleines Töchterchen konnte bei einer menschenfreundlichen christlichen Familie versteckt und so am Leben erhalten werden. Erst nach jahrelangem Suchen gelang es durch die Hilfe unseres Freundes Paul Baerwald, das Kind zu finden.

In dem traurigen, von täglichen Aufregungen erschütterten Jahre 1945, das auch in meinem Beruf keine Erleichterung brachte, bildete den einzigen Lichtblick die günstige körperliche und geistige Entwicklung unseres Sohnes Alexander, dem das Lernen keine Schwierigkeiten bereitete. Er fand Aufnahme in gute Schulen, wo er im Genuß der fortschrittlichen amerikanischen Erziehung schnell vorwärtstam und namentlich bleibende Freude an der Musik fand, wenn er es auch in ihrer Ausübung nicht weit gebracht hat.

Wie sich mein Berufsleben weiter gestaltete und auch nach zehnjährigem Aufenthalt im Lande trotz emsiger Arbeit und unablässiger Bemühungen sich keine Aussicht auf eine gesicherte Stellung und akademische Eingliederung eröffnete, habe ich bereits ge-



schildert. Deshalb richtete sich nach Kriegsende das Augenmerk auf Europa, mit dessen Gelehrtenwelt — natürlich außerhalb Deutschlands — sich wieder wissenschaftliche Beziehungen anzubahnen begannen. Die Hoffnung belebte sich, dort vielleicht an einer Universität vollständig zur Pflege der Rechtsgeschichte zurückkehren zu können. In dieser Richtung ausgestreckte Fühler, namentlich nach Holland, wo das akademische Leben wieder zur Normalität zurückfand, und nach der Schweiz, wo es nie gestört worden war, zeitigten jedoch keinen Erfolg. An eine Rückkehr nach Deutschland dachte ich natürlich trotzdem nicht.

Nach dem Ende des »Tausendjährigen Reiches« hatte ich es mir zum Grundsatz gemacht, die Initiative, frühere Beziehungen mit ehemaligen Kollegen an deutschen Universitäten etwa wieder aufzunehmen, diesen selbst zu überlassen und darauf erst dann einzugehen, wenn meine Erkundigungen über ihr Verhalten während der Nazizeit zu meiner Zufriedenheit ausgefallen waren. Wie es zur Wiederaufnahme der alten freundschaftlichen Verbindung mit Paul Koschaker, die dieser veranlaßt hatte, gekommen ist, habe ich anlässlich der Veröffentlichung meines Briefwechsels mit diesem integren Gelehrten erzählt<sup>17</sup>. Als er zu einer Gastprofessur in Halle eingeladen war, unternahm er aus eigener Initiative ohne mein Wissen in freundlicher Absicht Schritte, um mich wieder auf den germanistischen Lehrstuhl zu bringen, von dem ich 1933 vertrieben worden war. Ich habe mich dazu nicht geäußert, weil eine Rückkehr nach Halle unter den obwaltenden Umständen für mich nicht in Betracht kam.

Umsommer bedauerte ich, daß sich mir nirgendwo anders, auch nicht in der Schweiz, eine Aussicht eröffnete. Von den Schweizer juristischen Kollegen war mir lediglich Hans Oppikofer, der Germanist in der Zürcher Juristischen Fakultät, bekannt, der nach mir in Königsberg gelehrt hatte und mir früher seine Abhandlungen, auch Bücher, mit freundlichen Widmungen zu senden pflegte, als ich in Europa noch in Amt und Würden gewesen war. Mein Brief an ihn, in dem ich ihn nur um Aufklärung bat, ob vielleicht irgendwo an einer Schweizer Universität eine Vakanz bestünde und sich eine Aussicht böte, blieb unbeantwortet. Infolgedessen wandte ich mich, ebenfalls lediglich zu Informationszwecken, an den bekannten Zürcher protestantischen Theologieprofessor Emil Brunner (der ein Buch über die Gerechtigkeit veröffentlicht hatte), als er zu Gastvorlesungen am Union Theological Seminary in New York weilte. Er gewährte mir freundlich eine ambulante Unterredung im Hofe dieser Anstalt. Da ich ihm natürlich persönlich und wissenschaftlich unbekannt war, mußte ich ihm kurz über mich berichten. Als er hörte, daß eine katholische Universität mein Buch »Sachsenspiegel and Bible« veröffentlicht hatte, wurde er ungeduldig, um nicht zu sagen unwirsch, und beendete schnell das Gespräch.

Ganz unerwartet entstand 1949 jedoch eine erste akademische Verbindung nach Europa mit — Schweden, dem Lande, wo ich mich 1935 erfolglos um eine vakante Professur beworben hatte. Das kam so. Im germanistischen Seminar der Universität Lund, wo man sich eifrig mit niederdeutscher Philologie beschäftigte, hatte mein Sachsenspiegel-Buch während eines Semesters als Klassenlektüre gedient. Auf Anregung des Privatdozenten, späteren namhaften Gelehrten und Professors der deutschen Philologie in Stockholm, Gustav Korlén, erhielt ich eine Einladung zu Vorträgen nach Lund, wo eine Gesellschaft für deutsche Sprachforschung eine rege Tätigkeit entfaltete. Nachdem ich zugesagt hatte, knüpfte Korlén für mich auch die Verbindung mit der juristischen

Fakultät an, der bedeutende Gelehrte wie Karl Olivecrona, Folke Schmidt, Erik Fahlbeck und Wilhelm Sjögren angehörten. Sie bot mir eine Gastprofessur an, die ich natürlich freudig annahm. Die Reise nach Schweden fiel mir umso leichter, als ich noch Schiffsfahrkarten zur Rückreise nach Europa besaß, die ich im Jahre 1936 in der verblendeten Hoffnung auf baldige Rückkehr gelöst hatte. Die englische Cunard-Line anerkannte selbst nach dreizehn Jahren ihre Gültigkeit, zumal da wir neue Karten, jetzt für die Rückfahrt nach Amerika, lösten.

So sahen wir alle drei — mit mir meine Frau und mein Sohn — nach beinahe andert-halb Jahrzehnten Europa wieder. Da die Vorlesungen in Schweden erst Mitte September beginnen sollten, beschlossen wir, vorher Ferien in der Schweiz zu machen. Im schönen Engelberg verbrachten wir, erstmals nach vielen Jahren, erholsame Ferienwochen. Auf dem Wege nach Lund machten wir auch einige Tage in Basel halt, wo ich in dem unter Leitung von August Simonius stehenden, vortrefflich ausgestatteten juristischen Seminar, das in dem jahrhundertealten ehemaligen Gerichtsgebäude mit idyllischem Ausblick auf den Rhein untergebracht war, meine wissenschaftlichen Vorbereitungen für Schweden beenden konnte. Wie immer jedoch, verließ mich auch bei dieser Gunst des Schicksals das Pech nicht. Meine Frau erkrankte und mußte in einem Hotel in Basel allein zurückbleiben, da der Vorlesungstermin in Lund festgelegt war und auch unser Sohn zum Beginn des Schuljahrs nach New York zurückkehren mußte. So war der Genuß der interessanten Reise und des beglückenden Aufenthalts in einem hochkultivierten, uns noch unbekanntem Lande Europas dadurch getrübt, daß meine Frau an der Reise nicht teilnehmen konnte.

Nach vielstündiger, beschwerlicher Fahrt in der Eisenbahn und zu Schiff — eine Luftverbindung gab es noch nicht — in Lund glücklich angelangt, nahmen mich die Kollegen der philosophischen und juristischen Fakultät außerordentlich freundlich auf. Während des ganzen Aufenthalts betreuten mich Korlén und seine Gattin aufs liebenswürdigste. Zum ersten Mal lernte ich eine nordische Stadt, die vom Krieg verschont geblieben war, und das alltägliche wie das akademische Leben in ihr kennen. Sprachliche Schwierigkeiten gab es nicht, da jedem gebildeten Schweden neben seiner Muttersprache auch die deutsche oder englische vertraut ist. Die Entstehung der in Mitteleuropa und Amerika wenig bekannten Stadt Lund, die damals nur 35 000 Einwohner hatte, heute etwa das Doppelte zählt, geht in das 11. Jahrhundert zurück, ihre großartige romanische Kathedrale von gewaltigen Ausmaßen, die jeder modernen Großstadt zur Zierde gereichen könnte, wurde 1123 konsekriert. Man muß wissen, daß es im 16. Jahrhundert in Lund 22 Kirchen und sieben Klöster gegeben hat. Die Universität wurde 1668 gegründet. Ihrem Gebäude gegenüber befindet sich das Standbild ihres größten Sohnes, des Klassikers der schwedischen Literatur, des Dichters, Professors und Bischofs Esaias Tegnér. Viele mittelalterliche Sehenswürdigkeiten sind noch in zahlreichen Museen erhalten. Am eigenartigsten erschien mir das Kulturmuseum, desgleichen ich nirgendwo sonst gefunden habe, es wohl auch nicht existiert: ein großer Komplex teils originaler, teils rekonstruierter Wohnhäuser aus verschiedenen Jahrhunderten, in denen man die Bauweise, das Interieur, die Wohnkultur und Lebensart des südlichen Schweden konserviert kennenlernen und studieren kann. Das Zentrum des heutigen Kulturlebens in Lund, dem geistigen Mittelpunkt Südschwedens, bilden die Universität und die Kathedrale. Das ungewohnte Klima, das herbe Stadtbild und das eigenartige



Leben in dieser nordischen Stadt machten auf den Historiker, der noch niemals Skandinavien besucht hatte, einen tiefen Eindruck.

Meine Vorlesungen wurden freundlich aufgenommen. Von den öffentlichen Vorträgen, bei denen fast alle Professoren der einladenden Fakultäten anwesend waren, wurden der für die Juristen bestimmte in englischer Sprache, der von der philosophischen Fakultät veranstaltete deutsch gehalten. Daß sie Anklang fanden, wird durch die Tatsache bezeugt, daß der Vortrag »Über Reimvorreden deutscher Rechtsbücher« in der in Lund erscheinenden Zeitschrift »Niederdeutsche Mitteilungen« veröffentlicht wurde, während der über die Pflege der Rechtsgeschichte in Europa und Amerika in schwedischer Übersetzung in der »Statsvetenskaplig Tidskrift« erschien. In englischer Sprache hat ihn im 19. Band die »Tijdschrift voor Rechtsgeschiedenis« aufgenommen<sup>18</sup>. Die beiden einladenden Fakultäten ehrten mich durch ein solennes Diner in dem prachtvollen Festsaal der Universität und durch Reden, während ich über das akademische Leben in Amerika erzählen mußte. Durch Wahl wurde ich Mitglied der Sällskapet for Lagtysk Forskning in Lund. Den Aufenthalt in Lund benützte ich noch zu kurzen Ausflügen nach Stockholm und Uppsala, wo ich die prächtige, zum Teil mit deutschem Beutegut von König Gustav Adolf bereicherte Bibliothek der Universität besichtigte, auch sein Grabmal im Dom gesehen habe. In der Universitätsbibliothek konnte ich den von den Schweden einst aus Prag entführten, dort in der Sage erhalten gebliebenen »Codex argenteus« bewundern, die mit silbernen Buchstaben auf purpurfarbenes Pergament geschriebene gotische Bibelübersetzung des Ulfilas, des ersten Bischofs der arianischen Westgoten, aus dem vierten Jahrhundert.

Der Aufenthalt in Schweden mit der angenehmen akademischen Erfahrung bildete mein erstes erfreuliches Nachkriegserlebnis in Europa, dessen ich gern und dankbar gedenke.

Beinahe drei Jahre vergingen, bevor sich — 1952 — von neuem die Gelegenheit zu einer Reise mit akademischer Betätigung nach dem alten Kontinent darbot.

Die Arbeit an der Edition von Pseudo-Philos *Antiquitates Biblicae* hatte mich zu eingehender Beschäftigung mit dem Basler Primärdruck dieses Werkes von 1527 und seinem Herausgeber, Johannes Sichardus, geführt, der von 1524 bis 1530 Professor in der oberrheinischen Universitätsstadt gewesen war. Konnte damals meine Untersuchung nur dieser Ausgabe, ihrem Verhältnis zu den Handschriften sowie der Editionstechnik ihres Herausgebers gelten, so war doch schon mein Augenmerk auf seine Persönlichkeit als Mitglied des Basler Humanistenkreises um Erasmus und auf seine Tätigkeit in der Basler Juristenfakultät gelenkt. Über diese Aspekte des Problems »Sichardus« hatte ich während meines kurzen Arbeitsaufenthalts im Basler Juristischen Seminar im Jahre 1949 mit August Simonius gesprochen, den ich als Vorsteher des rechtswissenschaftlichen Instituts ersuchen mußte, letzteres benutzen zu dürfen, wobei der Zweck der Arbeit anzugeben war. Die Wiederentdeckung des Sichardus und die bevorstehende vierhundertste Wiederkehr seines Todestags veranlaßten Simonius, seine Fakultät anzuregen, mich zu einer Gedächtnisrede und einem Forschungsaufenthalt in Basel für das Sommersemester 1952 einzuladen. Die Fakultät, die während des Krieges und unmittelbar nach seinem Ende mehreren jungen Gelehrten Studienaufenthalte in der von ungünstigem Schicksal verschonten, stillen alten Humanistenstadt ermöglicht hatte, billigte den Vorschlag. So durfte ich am 24. Juni 1952 in der Aula der Basler Universität einen Gedenkvortrag

über Sichardus halten, der durch eine von mir arrangierte Sichardus-Ausstellung ergänzt wurde. Die Forschungen in Basel ergaben ein reiches Material, mit dessen Hilfe ich meinen Vortrag erheblich erweitern konnte. Er wurde noch im gleichen Jahre unter dem Titel »Johannes Sichardus als Basler Rechtshistoriker« in den von der Fakultät herausgegebenen »Basler Studien zur Rechtswissenschaft« veröffentlicht.

Sichardus' Leben und vornehmlich seine Tätigkeit als Jurist in Tübingen von 1535 bis zu seinem Tode waren schon vor einem Dreivierteljahrhundert von dem Tübinger Professor Gustav Mandry erforscht und dargestellt worden. Aber seine Basler Jahre waren unaufgehellt geblieben. Dabei sind es gerade sie, in denen sich die Quelleneditionen dieses juristischen Humanisten als Ertrag einer leidenschaftlichen Sammler- und Herausgebertätigkeit zusammendrängen. Von den 24 Bänden mit nicht weniger als 113 verschiedenen Werken, die Sichardus aus Handschriften in Basel neu publizierte, enthalten mehr als zwei Drittel Schriften, die bis dahin überhaupt noch nicht herausgegeben waren, die er, um mit seinen eigenen Worten zu sprechen, »veluti ex orco« ans Tageslicht gebracht hat; mehrere sind nur durch seine Ausgaben erhalten geblieben. Er hat auch mit seinen juristischen Quellenwerken Pionierarbeit geleistet und zum erstenmal die gelehrte Welt mit den altgermanischen Volksrechten näher bekanntgemacht. Sichardus' Editionstechnik ging ganz neue Wege: Er gab nicht, wie die meisten seiner gelehrten Zeitgenossen, sklavisch eine handschriftliche Vorlage wieder, sondern bemühte sich, aus verschiedenen Handschriften eine richtige Textkonstitution zusammenzustellen. Diese methodische Arbeitsweise hat nachhaltig gewirkt und die Forschung wesentlich gefördert. Trotzdem hat sie die Fachwissenschaft des 19. Jahrhunderts, namentlich Rudolph Sohm, ungünstig, ja ungerecht, beurteilt, indem man die von Sichardus für seine Ausgaben angewendeten Grundsätze unter der Lupe moderner Editionstechnik betrachtete. Ihre Überprüfung hat zu einer davon wesentlich verschiedenen, gerechteren Würdigung der bedeutenden Gelehrtenarbeit dieses frühen kritischen Editors und der Basler juristischen Quelleneditionen geführt. Durch Vergleichung mehrerer Handschriften zwecks Herstellung des besten erreichbaren Textes war Sichardus einen noch ungewohnten und bislang unbetretenen Weg gegangen. So haben seine Arbeiten durch Methode und Inhalt epochenmachend gewirkt. Neben diesem Hauptergebnis der Untersuchung habe ich bis dahin unbekannte biographische Tatsachen aus den Quellen zutage gefördert, auf Grund deren ich Sichardus' Stellung in Basel, seine Lehrtätigkeit und seine Persönlichkeit in neues Licht rücken konnte.

Mit diesen Studien hatte sich mein Interesse einem rechtsgeschichtlichen Thema zugewendet, das in der »klassischen Periode« der deutschen Rechtsgeschichte, die unter Führung von Heinrich Brunner und Otto Gierke vornehmlich der Erforschung der fränkischen Zeit und der hochmittelalterlichen Rechtsentwicklung galt, kaum noch literarisch beachtet worden war: »Humanismus und Jurisprudenz«. Diesen Titel gab ich der Zusammenfassung der Ergebnisse weiterer Untersuchungen, die sich vorerst auf den Kampf zwischen dem *mos (docendi) italicus* und dem *mos gallicus* an der Universität Basel konzentrierten, nämlich die aus Italien übernommene traditionelle akademische Lehre und die wissenschaftliche Erforschung des in Mitteleuropa eindringenden römischen Rechts in ihrem Gegensatz zu der aus Frankreich sich verbreitenden historisch-philologisch-antiquarischen Richtung zu ihrem Gegenstand machten. Damit waren die großen Gestalten des goldenen Zeitalters der Metropole des europäischen Humanismus



in meinen Gesichtskreis getreten: Erasmus von Rotterdam, die Leuchte und der Mittelpunkt der *Sodalitas Basiliensis*, deren jedes einzelne Mitglied eine eigene geistige Kapazität repräsentierte. Als Juristen ragen Persönlichkeiten wie Bonifacius Amerbach und Claudius Cantiuncula hervor. Neben ihnen muß Ulrich Zasius genannt werden, der zwar nicht zum Basler Juristenkreis gehörte, mit ihm jedoch in engster freundschaftlicher Beziehung stand und erheblichen Einfluß ausübte. Mit diesen Gelehrten, ihrer Tätigkeit, ihren Werken und ihrer Zeit ist das Forschungsgebiet bezeichnet, dem meine Arbeit nunmehr schon seit zwei Jahrzehnten vorwiegend gilt. Ihre Ergebnisse sind in Monographien niedergelegt. Diese Periode und jene Persönlichkeiten wurden von mir auch in Vorlesungen und seminaristischen Arbeitsgemeinschaften behandelt. So wurde, was in aller Bescheidenheit gesagt werden darf, nicht nur in Basel das Interesse an derartigen Studien geweckt, sondern auch die Erforschung einer bis dahin in Dunkel gehüllten Epoche der juristischen Geistesgeschichte in Deutschland ebenfalls befruchtet. Auch in anderen Ländern Europas, namentlich in Italien und Spanien, schließlich selbst in Amerika, haben diese Studien die rechtsgeschichtliche Forschung angeregt.

Sie wurden dank der großzügigen Initiative der Basler Juristenfakultät ermöglicht und gefördert. Unter Führung von August Simonius beantragte sie seit 1953 alljährlich einen Lehrauftrag für mich bei der Basler Regierung. Er wurde von Jahr zu Jahr für das Sommersemester erneuert und 1956 auf den Zeitraum von vier Jahren ausgedehnt. Nachher erlosch er, weil ich inzwischen die Altersgrenze erreicht hatte. Simonius, der wiederholt das Dekanat der Basler Juristenfakultät bekleidete, hat die Korrespondenz, die wegen der Vorkehrungen im Lehrplan und der persönlichen Vorbereitungen notwendig war, aufs prompteste mit lebenswürdigster Anteilnahme geführt. Ich bewahre seine stets eigenhändig geschriebenen Briefe aus jener Zeit als liebe Andenken an den verehrten Freund auf. Die Zeiten, die ich im Basler Juristischen Seminar, einer für mich idealen Arbeitsstätte, während der Sommersemester verbringen durfte, im Durchschnitt täglich nicht weniger als zwölf Stunden, werden mir immer in dankbarer Erinnerung bleiben. Als äußeres Zeichen meiner Dankbarkeit widmete ich der Fakultät mein Buch »Humanismus und Jurisprudenz« (1955) und Simonius persönlich zu seinem 70. Geburtstag das über »Recht und Gerechtigkeit in der Medaillenkunst« (1955). Allwöchentlich traf ich mich im Juristischen Seminar zu gemeinsamer, gegenseitig befruchtender Arbeit mit dem hervorragenden Philologen und verdienstvollen Herausgeber der Amerbach-Korrespondenz, Dr. Alfred Hartmann, dessen ich aufrichtig dankbar gedenke. Nach dem allzu frühen Tode des verehrten Gönners und Freundes Simonius am Weihnachtsabend des Jahres 1957 hat die Fakultät die Förderung meiner Arbeiten fortgesetzt. Seine Nachfolger im Vorsteheramt des Juristischen Seminars und in der Lehrkanzel des römischen Rechts, die jungen Professoren Karl Spiro und Johannes Georg Fuchs, führten die von Simonius geschaffene Tradition treulich fort. Auch sie sind mir geschätzte liebe Freunde geworden.

So reiste ich Jahr um Jahr für das Sommersemester zu Schiff über den Ozean und hielt rechtsgeschichtliche Vorlesungen und Seminarübungen in Basel, die mich auch bei und mit den Studenten bekannt machten. Ihr Interesse wuchs stetig. Die anfangs kleine Zuhörerzahl erreichte auf der Höhe meiner Basler Lehrtätigkeit die Zahl von 60 bis 70, obwohl meine Vorlesungen nicht obligatorisch, sondern sozusagen ein Luxus für die Studenten waren, die sich auf die wichtigsten Fächer konzentrieren mußten, um ihr Studi-

um schnell zu absolvieren. Es fanden sich sogar vereinzelt Doktoranden ein. Ehemalige Teilnehmer an den Seminarübungen sind heute selbst wohlbestallte Professoren oder Privatdozenten, wie Hans-Rudolf Hagemann, Andreas und Adrian Staehelin, Pascal Simonius, Peter Saladin.

Selbstverständlich nahmen meine wissenschaftlichen Arbeiten zum Thema »Humanismus und Jurisprudenz« und zur Basler Rechtsgeschichte ihren Fortgang. An der jedes siebente Jahr in Basel stattfindenden Jahrestagung der schweizerischen juristischen Fakultäten durfte ich am 27. Juni 1953 auf Einladung der Fakultät den repräsentativen Vortrag über Gerechtigkeitsbilder auf Basler Renaissance-Medaillen halten, der in der Zeitschrift für Schweizerisches Recht veröffentlicht wurde. Als sich 1959 der Todestag des Hauptes der mittelalterlichen italienischen Kommentatoren des römischen Rechts, des großen Juristen Bartolus, zum sechshundertsten Male jährte, veranstaltete die Basler Fakultät unter dem Dekanat von Johannes Georg Fuchs auf meine Anregung eine Gedenkfeier, an der ich die Festrede über »Bartolus und Basel« hielt und eine Bartolus-Ausstellung veranstaltete. Während ich sie vorbereitete, entdeckte ich auf der Suche nach alten Bildnissen großer Juristen im Basler Kunstmuseum unbekannt Porträts von Bartolus, Baldus, Hotomanus, die verstaubt und vergessen jahrhundertlang unbeachtet im Magazin verborgen waren. Auf meine Anregung ans Tageslicht gebracht und restauriert, schmücken sie heute das Institut für internationales Recht und halten das Andenken an jene juristischen Größen lebendig.

Im Jahre 1962 kehrte der Todestag des um die Basler Universität einst hochverdienten langjährigen Professors des römischen Rechts, der bedeutenden Gestalt des Juristen, Freundes und Testamentsvollstreckers von Erasmus, Bonifacius Amerbach (1495–1562), zum vierhundertsten Male wieder. Aus diesem Anlaß wurde der in Basels Geschichte markanten Persönlichkeit in einem feierlichen Akt gedacht, wobei ich vor einem in grosser Zahl erschienenen Auditorium in der von historischen Erinnerungen erfüllten prächtigen Alten Aula der Universität die Gedenkrede halten durfte.

Außer den durch diese Feiern veranlaßten Publikationen erschienen von mir noch folgende Werke zur Basler Rechtsgeschichte in Buchform: Erasmus und die Jurisprudenz seiner Zeit: Studien zum humanistischen Rechtsdenken (1960); Die Anfänge der Juristischen Fakultät der Universität Basel (1962), dem Andenken Amerbachs gewidmet; Gestalten und Probleme aus Humanismus und Jurisprudenz (1969); Claudius Cantiuncula. Ein Basler Jurist und Humanist (1970); ferner eine Monographie über eine andere große Gestalt des Reformationszeitalters, deren geistige Verbundenheit mit dem Recht und der Rechtswissenschaft darin erstmals eingehendem Studium unterzogen ist: Melanchthons Rechts- und Soziallehre (1967). Seither noch: Consilia. Eine Bibliographie der juristischen Konsiliensammlungen (1970); Studien zur humanistischen Jurisprudenz (1972); Humanismus und Jurisprudenz (Festvortrag 1973); Die Basler Universität und das römische Recht im 15. Jahrhundert (1974); Die Schaumünzen der Universität Basel und Medaillen auf ihre Professoren (1975). Außerdem: Sachsenspiegel-Bibliographie (1973); Judentaufen. Eine historisch-biographisch-psychologisch-soziologische Studie (1973); Studien zur Medaillengeschichte (1975).

Meine Erinnerung muß noch einmal in das Jahr 1952 zurückkehren, das eine weitere glückliche Entwicklung meiner akademischen Tätigkeit und wissenschaftlichen Beziehungen zum alten Europa gebracht hat. Durch das nach neunjähriger Unterbrechung begin-



nende Wiedererscheinen der lange vor dem Krieg begründeten, ihr Ansehen erneuernden holländischen Zeitschrift für Rechtsgeschichte war ich mit ihrem neuen Herausgeber, dem jungen Utrechter Rechtshistoriker Robert Feenstra, in Verbindung gekommen. Seiner Initiative verdanke ich die Einladung zu Vorträgen an den Universitäten Utrecht, Leiden und Amsterdam. Anfangs März 1952, vor Beginn des Sommersemesters in Basel, verbrachte ich etwa zehn Tage in Holland. Dort wurden die Vorträge freundlich aufgenommen, ebenso ein weiterer Vortrag, den ich auf Einladung der Genootschap voor Joodse Wetenschap (Vereinigung zur Pflege der Wissenschaft des Judentums) in Amsterdam hielt. Die wissenschaftlichen Beziehungen zum Kollegen Feenstra, der bald an die durch alte Tradition wohl bedeutendste holländische Universität Leiden berufen wurde, gestalteten sich weiterhin angenehm und führten zu einer intensiven Mitarbeit an der *Tijdschrift voor Rechtsgeschiedenis* während der ersten Jahre ihres Wiedererscheinens nach dem Kriege. In Leiden durfte ich die Bekanntschaft mit dem bedeutenden Rechtshistoriker E. M. Meijers (1880–1954) machen, der glücklich aus dem Konzentrationslager Theresienstadt zurückgekehrt war.

Der alljährliche Aufenthalt in Basel brachte eine weitere Annehmlichkeit: ich konnte an wissenschaftlichen Kongressen teilnehmen, die durch Gedenktage großer Juristen oder aus anderem Grund veranlaßt waren. In ganz Europa machte sich damals das Bedürfnis geltend, die durch Jahre hindurch unterbrochenen wissenschaftlichen Beziehungen zwischen den Gelehrten wieder anzuknüpfen und zu beleben. An den alle zwei Jahre stattfindenden Tagungen der deutschen Rechtshistoriker konnte ich freilich nicht teilnehmen, da sie regelmäßig im Spätherbst abgehalten wurden. Da war ich bereits zu dem schon im September beginnenden Wintersemester nach Amerika zurückgekehrt. Die erste Gelehrtenversammlung, zu der ich zwecks Erstattung zweier Referate eingeladen wurde, war der Internationale Humanistenkongreß 1956 in Passo della Mendola im ehemals österreichischen, jetzt italienischen Trentino. Ihm folgte im Frühjahr 1959 der großartige Kongreß anlässlich der sechshundertsten Wiederkehr des Todestags des Hauptes der mittelalterlichen Kommentatoren des römischen Rechts, Bartolus de Saxoferrato, in Perugia, der Stätte seiner langjährigen Wirksamkeit. In dem splendid ganz mit weißem Marmor getäfelten Bibliothekssaal der Universität durfte ich den Schlußvortrag über das Thema »Bartolus und Basel« halten, den ich bei einer ähnlichen Feier in Basel stark erweitert wiederholt und als Buch veröffentlicht habe. Im vorausgegangenen Sommer 1958 konnte ich mit meiner Frau die Weltausstellung in Brüssel besuchen und ihr auf dem Wege dahin die holländischen Universitätsstädte zeigen, die dortigen Freunde wiedersehen und neue in Belgien gewinnen.

Das Jahr 1960 brachte reiche internationale wissenschaftliche Aktivität. Im Frühjahr hielt ich auf Einladung der Wiener rechts- und staatswissenschaftlichen Fakultät einen Vortrag über die humanistische Jurisprudenz in der ehemaligen Haupt- und Residenzstadt des kaiserlichen Österreich, die ich zuerst 1903, meinen seligen Vater auf einer Reise dahin begleitend, und zuletzt vor 45 Jahren gesehen hatte. Als bedeutendes Mitglied der Juristenfakultät traf ich dort meinen alten Leipziger Studienkollegen Karl Wolff, der als aufrechter Kämpfer die Naziverfolgung, von der er persönlich schwer betroffen war, überstanden hatte; ferner als Ordinarius in der philosophischen Fakultät den gelehrten Slavisten und Rechtshistoriker Heinrich Felix Schmid, der einst bei mir als Leipziger Privatdozenten die rechtsgeschichtlichen Vorlesungen gehört hatte. Mit ihm ver-

brachte ich einen angenehmen Nachmittag plaudernd und alte Erinnerungen auffrischend. Es war die letzte Begegnung vor dem zu frühen Tode dieses ausgezeichneten Gelehrten. Mit dem damaligen Dekan und Vertreter der deutschen Rechtsgeschichte, dem vielseitig interessierten Prämonstratenser Hans Lentze (1909–1970), schloß ich neue Freundschaft, die wir bis zu seinem ebenfalls frühen Tode persönlich und brieflich ständig pflegten. Kurz vor seinem Tode konnte ich ihm noch zum 60. Geburtstag eine kleine Schrift widmen<sup>119</sup>.

Während des Wiener Aufenthalts besuchte ich die glänzend ausgestatteten, durch die beiden Weltkriege unberührt gebliebenen Bibliotheken und Museen der Weltstadt, sah eine Vorstellung in der ehemaligen Hofoper und bewunderte die verblichene Pracht in der kaiserlichen Hofburg. Tief beeindruckt stand ich im ehemaligen Audienzsaal an derselben Stelle, wo mein Vater im Dezember 1899 die denkwürdige Audienz bei Kaiser Franz Josef gehabt hatte, in der der Monarch mit kraftvollen Worten den in Österreich und besonders in Böhmen wütenden Antisemitismus verurteilte<sup>120</sup>. *Tempi passati!*

Im Juni 1960 durfte ich mit meiner inzwischen aus New York, wo sie als Bibliothekarin bis zum Ende des Sommersemesters tätig sein mußte, eingetroffenen Frau an dem glanzvollen Fünfhundertjahr-Jubiläum der Gründung der Basler Universität teilnehmen, im August am internationalen Historikerkongreß in Stockholm, den wir jedoch unmittelbar nach meinem Vortrag vorzeitig verlassen mußten, da wir beide an Grippe erkrankt waren. Erst während des schon zur Tradition gewordenen Ferienaufenthalts im Berner Oberland, in dem idyllisch am Fuße der Jungfrau in der Höhe von etwa 1200 Metern gelegenen Wengen, konnten wir uns erholen, um gekräftigt das Wintersemester in New York beginnen zu können. Die befreundeten Eigentümer des Hotels Waldrand, das Ehepaar Plozza, sorgten wie alljährlich für unser Wohlbehagen.

Während der nur gastweise noch in Basel verbrachten Sommersemester folgte ich verschiedenen auswärtigen Einladungen zu Vorträgen. Den Anfang machte London. Im Frühjahr 1954 wendete sich von dort ein Komitee von jüdischen Juristen aus der Tschechoslowakei unter der Leitung von Dr. Oskar K. Rabinowicz an mich, im Frühsommer zu Vorträgen nach England zu kommen. Gern folgte ich der Einladung, vor den zahlreichen nach Besetzung der Tschechoslowakei dorthin geflüchteten Juristen zu sprechen. Einen weiteren Vortrag hielt ich vor der Society for Jewish Study. Was für eine Ehre für mich, daß mir Leo Baeck zuhörte, der Präsident dieser Gesellschaft, den ich vor 1933 in Berlin öfter besucht hatte! Bei einem Empfang der British Section of the World Jewish Congress behandelte ich das Thema »The Development of Jewish Authority in the Modern State«. Zu meiner Freude lernte ich den eigens dorthin gekommenen Sir Cecil Kisch kennen, den Sohn des ehemaligen britischen Postministers für Indien, Herman M. Kisch, deren aus Prag stammende Familie trotz der örtlichen Entfernung Generationen hindurch die verwandtschaftlichen Beziehungen zu dem in der Heimat verbliebenen Zweige aufrechterhalten hatte<sup>120a</sup>.

Während unseres einwöchigen Aufenthalts in London betreute uns aufs freundlichste und sorgsamste Dr. Oskar Rabinowicz, der alle Veranstaltungen in die Wege geleitet und mein Aufenthaltsprogramm bis in die kleinsten Einzelheiten ausgearbeitet hatte. Als ich mich beim Abschied für die genossene Gastfreundschaft herzlichst bedankte und dabei bemerkte, ich wisse nicht, wieso mir solch große Fürsorge zugewendet worden sei



und wodurch ich alle Aufmerksamkeiten verdient habe, erwiderte unser lebenswürdiger Gastgeber: »Wissen Sie denn nicht, daß ich während des Ersten Weltkriegs als Student in Prag bei Ihrer Mutter gewohnt habe, die mich in wahrhaft mütterlicher Weise betreut hat?« Das war mir in der Tat unbekannt, da ich damals nicht mehr in Prag, sondern in Leipzig lebte. So durfte ich die Früchte der von meiner Mutter erwiesenen Wohltaten noch nach ihrem Tode genießen. Die in London angebahnte Freundschaft mit dem vortrefflichen, gelehrten, genialen Dr. Rabinowicz setzte sich nach seiner Übersiedlung nach New York fort und dauerte bis zu seinem bedauernswert frühen Tode im Jahre 1969.

Als sich nach Kriegsende die Verhältnisse in Deutschland zu ordnen begannen und an den Universitäten die Lehr- und Forschungstätigkeit, nachdem die übelsten Nationalsozialisten eliminiert waren, wieder geregelte Bahnen einschlug, erhielt ich von mehreren Universitäten, denen offenbar meine Tätigkeit als Gastdozent an der Basler Universität bekannt geworden war, Einladungen zu einzelnen Gastvorlesungen. Aus begreiflichen Gründen lehnte ich eine solche, wenngleich nur vorübergehende Rückkehr nach Deutschland ab. Ich konnte mir auch nicht vorstellen, mittels einzelner Vorträge oder Vorlesungen auf die durch den Nationalsozialismus verseuchte akademische Jugend einwirken zu können. Dies allein hätte es gerechtfertigt, von meiner grundsätzlichen Einstellung abzugehen.

Diese Haltung änderte sich jedoch im Frühjahr 1955, als ich ein eindringliches, äusserst würdiges langes Schreiben des bedeutenden Soziologen Max Horkheimer erhielt, der als einer der ersten vertriebenen deutschjüdischen Universitätslehrer nach Deutschland zurückgekehrt war und damals die Würde eines Rektors der Universität Frankfurt bekleidete. Es begleitete die offizielle Einladung des Dekans der philosophischen Fakultät, für ein Semester als Gastprofessor nach Frankfurt zu kommen. Der Eda K. Loeb Fund in New York hatte nämlich seiner Fakultät Mittel gestiftet, um während fünf Jahren »historische, philologische, soziologische und religionsphilosophische Probleme, die mit ethnischen und religiösen Minoritäten und insbesondere auch mit dem Judentum zusammenhängen, in Lehre und Forschung zu pflegen«. »Wir haben beschlossen, die Stiftung dazu zu verwenden, um hervorragende Gelehrte des In- und Auslandes zu Gastvorlesungen einzuladen. Ich richte an Sie die Bitte«, so hieß es in dem Schreiben, »als erster Gastprofessor dieser »Loeb Lectures« für ein Semester zu uns zu kommen und über ein von Ihnen zu bestimmendes Thema an unserer Universität zu lehren«.

Das war nun eine Einladung, die sich von den vorangegangenen, welche sicherlich ebenso gut gemeint waren, sachlich wie persönlich unterschied. Die Möglichkeit, ein halbes Jahr mit der jungen Generation in Deutschland Fühlung zu haben und durch Behandlung eines jüdisch-historischen und juristischen Themas in Vorlesungen und Seminarübungen an der »Entnazifizierung« mitwirken zu können, eröffnete eine Aufgabe, der ich mich nicht entziehen zu dürfen glaubte. In dieser Meinung wurde ich durch Horkheimers Darlegungen bestärkt, in denen er die seinen Bestrebungen zuteil gewordene großzügige Unterstützung durch »die entschieden liberale Frankfurter Verwaltung und die fortschrittliche Regierung Hessens« ausführlich schilderte. »Sie sind auch jetzt«, so schrieb Horkheimer, »am Zustandekommen dieser neuen Einrichtung, durch die das Judentum in Deutschland wieder einen akademischen Ort gewinnen soll, aufs höchste interessiert«. Zu den sachlichen Gründen kam noch die persönliche Anerken-

nung, die ich darin sah, daß gerade mir die Eröffnung jener neuen akademischen Einrichtung zugedacht war. Diese war noch dazu von Amerika angeregt und ermöglicht worden. So sagte ich grundsätzlich zu.

Um der Einladung nach Frankfurt folgen zu können, mußte ich mich jedoch von meinen akademischen Verpflichtungen in New York für ein Semester beurlauben lassen. Als ich mich bei dem College-Präsidenten Dr. Glueck in Cincinnati darum bemühte, verließ mich auch diesmal mein gewohntes Pech nicht. Seine Antwort lautete, er stimme mit mir überein, daß ich die Einladung nach Frankfurt »at a proper occasion« (bei günstiger Gelegenheit) annehmen solle. Gleichzeitig aber erteilte er mir für das betreffende Jahr den zusätzlichen Lehrauftrag, für absolvierte Studenten (graduate students) und Doktoranden ein »Seminar für Vorgerückte« zu halten. Das bedeutete, daß Dr. Glueck die Annahme meiner Berufung nach Frankfurt, der ich wegen meiner Lehrverpflichtungen in Basel ohnehin nur im nächsten Jahr hätte folgen können, bei allem Wohlwollen praktisch unmöglich machte. Denn meine immer noch labile Stellung in New York durfte ich natürlich durch die etwaige Ablehnung des neuen Lehrauftrags wegen eines noch so gut honorierten Gastsemesters in Frankfurt nicht gefährden. Andererseits war die Frankfurter Fakultät genötigt, und sie wurde von dem amerikanischen Stiftungsrat dazu gedrängt, die Loeb Lectures bald anlaufen zu lassen. Als man mich daher bat, einen Ersatz für mich vorzuschlagen, riet ich, mehrere Dozenten einzelne aufeinander abgestimmte Gastvorlesungen halten zu lassen. Für die Eröffnung einer solchen Vorlesungsreihe schlug ich Dr. Leo Baeck vor und übersandte eine sorgfältig ausgearbeitete Liste von potentiellen Gastdozenten, die Theologen, Philosophen, Juristen und andere (auch Nichtjuden) enthielt. Mein Vorschlag wurde angenommen und ausgeführt. So kam Dr. Baeck aus London nach Frankfurt und eröffnete mit einem eindrucksvollen Vortrag die Vorlesungsreihe, in der auch andere Wissenschaftler Gastvorlesungen hielten.

Ich aber änderte später meine Haltung und lehnte Einladungen von deutschen Universitäten zu einzelnen oder mehreren Vorträgen nicht mehr ab. Eine der ersten kam wieder aus Frankfurt, diesmal von der juristischen Fakultät, veranlaßt von meinem engeren Fachkollegen Professor Adalbert Erler, der mir bis dahin persönlich noch nicht bekannt war. So hielt ich im Juli 1956 erstmals nach 23 Jahren wieder eine Vorlesung vor deutschen Studenten. Das Thema lautete »Recht und Gerechtigkeit in der Medaillenkunst« (mit Lichtbildern). Obwohl ich einleitend meinen Gefühlen bei der erstmals nur besuchsweise erfolgten Rückkehr nach Deutschland unverhohlen Ausdruck gab, nahmen die erschienenen Professoren und ein überfülltes Auditorium meine Ausführungen freundlich auf. Die Fakultät ehrte mich mit einem Diner, bei dem lebenswürdige Ansprachen gehalten wurden. Ein anderes erfreuliches Ergebnis dieses ersten Frankfurter Besuches war die Begegnung mit dem Kollegen Erler, aus der sich trotz der räumlichen Entfernung ein freundschaftliches Verhältnis entwickelte, das bis in die Gegenwart andauert. Bei einer späteren Begegnung anlässlich des Zasius-Jubiläums in Konstanz erzählte er mir von einer Arbeit über die Mainzer Stiftsfehde. Es war mir eine Freude, ihm ein von mir in einer Basler Handschrift entdecktes Rechtsgutachten im selben Rechtsstreit, das ich zu veröffentlichen beabsichtigte, zur Bearbeitung zu überlassen.

Nach meinem Frankfurter Vortrag erwartete mich vor dem Hörsaal, um mich zu begrüßen, die zarte Gestalt meiner ehemaligen Schülerin Eleonore Sterling, der ich auf Empfehlung von Dr. Leo Baeck bei ihren wissenschaftlichen Bestrebungen in New York



zu ihrer ersten Publikation in meiner Zeitschrift verholfen hatte. Sie war nun Assistentin des bedeutenden Politologen und Politikers Professor Carlo Schmid, arbeitete und publizierte in den folgenden Jahren fleißig und erfolgreich trotz ständiger Behinderung durch eine schwere Lungenkrankheit. Als Frucht ihrer Tätigkeit erreichte sie eine Professur an der Pädagogischen Hochschule in Osnabrück, der sie sich leider nicht lange erfreuen konnte. Wenige Monate nach ihrer Ernennung raffte sie der Tod in der Blüte ihrer Jahre dahin. Durch ihre wertvollen Publikationen wird ihr Name in der Wissenschaft der Soziologie und der Judaistik fortleben. Die Stadt Frankfurt ehrte Eleonore Sterling (1925–1968), indem sie eine Straße nach ihr benannte.

Über die außerhalb Deutschlands in den Jahren 1959 und 1960 stattgefundenen juristischen Gedenkfeiern, Kongresse und anderen wissenschaftlichen Veranstaltungen, an denen ich infolge meiner Anwesenheit in Europa während des Basler Sommersemesters mit Vorträgen teilnehmen konnte, habe ich bereits berichtet. Sie brachten mich mit alten Bekannten und den Gelehrten der jungen Generation in persönliche Verbindung und geistigen Austausch.

Dies geschah auch, als ich, nach der Frankfurter, Einladungen der juristischen Fakultäten der Universitäten Münster, Mainz, Freiburg sowie der theologischen Fakultäten der Universitäten Straßburg und Münster folgte und mit einem Referat an der Eröffnung des Instituts für Renaissanceforschung in Brüssel (später auch in Toronto) teilnahm. Einen Höhepunkt dieser ambulanten Vortragstätigkeit bildete für mich nachmals die Beteiligung an der dreizehnten Mediaevistentagung anlässlich der ausgezeichnet organisierten Ausstellung »Monumenta Judaica: 2000 Jahre Geschichte und Kultur der Juden am Rhein« im Herbst 1963 in Köln. Sie wurde mit meinem Vortrag über »Toleranz und Menschenwürde« eröffnet, der in dem nach der Kriegszerstörung wieder aufgebauten mittelalterlichen Festsaal kölnischen Bürgerstolzes, dem Gürzenich, vor einem nach Hunderten zählenden, aus dem In- und Ausland herbeigeströmten Publikum gehalten wurde. Zu meiner Freude befand sich auch mein Bruder mit seiner Frau unter den Zuhörern, ebenso mein Sohn, der eigens aus Glasgow, wo er sich zu Forschungszwecken aufhielt, im Flugzeug nach Köln herbeigeeilt war.

Mein Basler Lehrauftrag endete im Jahre 1960. Es war und ist ein von der Basler Regierung streng eingehaltener Grundsatz, beamteten Professoren, ebenso Gastdozenten, nach Erreichung der mit 70 Jahren festgesetzten Altersgrenze keinen Lehrauftrag mehr zu erteilen. Während die Erstgenannten ihre Lehrtätigkeit freiwillig fortsetzen dürfen, wäre mir als Gastdozenten dies nach Erlöschen meiner Lehrberechtigung nicht möglich gewesen. Die Grundlage akademischer Tätigkeit und wissenschaftlicher Arbeit in Basel wäre weggefallen. Meine Freunde in der Fakultät sahen das Eintreten dieses Zustands voraus. An meinem siebzigsten Geburtstag wurde ich durch ein Telegramm des Dekans Professor Johannes Georg Fuchs überrascht, der mir die Glückwünsche meiner Kollegen übermittelte und eine Ehrung ankündigte, welche die Fakultät zwar schon beschlossen habe, die Regierung jedoch noch bestätigen müsse. Es war die Wahl zum Ehrendozenten. Sie machte mich zum ständigen Mitglied der Fakultät und erteilte die Berechtigung, meine Lehrtätigkeit unbegrenzt fortzusetzen. Dies war eine Anerkennung meiner bisherigen Leistungen, die ich sehr hoch schätze. Besonders dankbar nahm ich sie an, da sie meine dauernde Verbindung mit der altberühmten Basler Juristenfakultät begründete. Aus dem Munde des Dekans vernahm ich später den Grund dieser für mich

so ehrenvollen Initiative der Fakultät: »Wir wollten Sie an Basel binden«. Hinzu kam noch sein persönliches Angebot, mir ein von ihm kurz vorher erworbenes Einfamilienhaus zu günstigen Bedingungen zu vermieten. Dies erleichterte nicht nur, sondern ermöglichte geradezu die Verwirklichung des bereits seit einigen Jahren erwogenen Planes, nach Basel zu übersiedeln. So konnte die schwere Entscheidung fallen und die schon lange währende Ungewißheit ihr Ende finden. Diese Lösung ermöglicht zu haben, dafür bleibe ich dem Kollegen und Freunde Fuchs immer in Dankbarkeit verbunden.





*Guido Kisch.*

0 ✓

# FESTSCHRIFT GUIDO KISCH

Rechtshistorische  
Forschungen

Anlässlich des 60. Geburtstags  
dargebracht von  
Freunden, Kollegen und Schülern

W. KOHLHAMMER VERLAG



FS

Guido Kisch

**D**IE rechtshistorischen Aufsätze, die in diesem Bande vorgelegt werden, sind einem Gelehrten gewidmet, der Freuden und Leiden des heutigen Daseins wie kaum ein anderer teilen mußte. Ein glänzend begabter Jurist, in Prag geboren, dort Student und Doktor beider Rechte, habilitierte sich, von Adolf Wach angeregt, 1915 in Leipzig, ging 1919, als man in Leipzig ihm eben ein Extraordinariat anbot, als Ordinarius nach Königsberg, 1922 nach Halle, wo er bis zur Amtsentsetzung durch die Nationalsozialisten blieb. Diese anderthalb Jahrzehnte erbrachten eine erste, reiche wissenschaftliche Ernte: Studien aus vielen Teilgebieten der mittelalterlichen Rechtsgeschichte, groß angelegte Quelleneditionen, Befruchtung der rechtshistorischen Forschung durch Herausgebertätigkeit, ungezählte Anregungen in Vorlesung und Seminar und Ausbau von Fachbibliotheken deutscher Universitäten. Dann folgt die Zeit der verhüllten Tage: Diskriminierung und Demütigung bis zur Auswanderung nach den Vereinigten Staaten 1935, Einlebenmüssen in eine andere Welt, Sorgen und Nöte mehr als genug, bis er 1937 als Gastprofessor, 1950 als Research-Professor am Hebrew Union College New York, 1942–46 zugleich als Research Associate an der University of Notre Dame, Ind. U. S. A., neue Tätigkeitsgebiete, Hilfe und Anerkennung in reichem Maße fand. 1949 Gastprofessor in Lund, 1952 Gastvorlesungen in Leiden, Utrecht, Amsterdam und Basel. Das Basel der Humanisten fesselte den Forscher, das Basel unserer Zeit holte den Gelehrten seitdem Jahr für Jahr zu sommerlichen Gastlehraufträgen. Amerika und Europa im Gelehrtenchicksal verbindend häufen sich die wissenschaftlichen Arbeiten. Jetzt stehen die Rechtsgeschichte der Juden im Mittelalter, Rechtsbücherstudien, Jurisprudenz der Humanistenzeit im Vordergrund und, wie bei allen echten Gelehrten, ein Thema zieht das andere, weiter ausgreifend und ergänzend, nach sich.

Was uns, die zu dieser Ehrengabe beitragen, gemeinsam bewegt, ist

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neben persönlicher Freundschaft und Wertschätzung die unbegrenzte Hochachtung vor dem unbeugsamen wissenschaftlichen Ethos des Gelehrten *Guido Kisch*. In ruhigen und geruhsamen Jahren fachwissenschaftliche Leistungen zu erbringen, ist verdienstlich, in Jahren der Bedrängnis und Not am Arbeitswillen unerschütterlich festzuhalten, aber bewundernswert. Dieser Band rechtsgeschichtlicher Beiträge versucht, dem Jubilar Dank zu sagen und ein Zeugnis der Verbundenheit zu geben. In diesen Kreis unverlierbarer Gemeinschaft sollen auch drei inzwischen Verstorbene einbezogen sein: Andreas B. Schwarz, der zum Kreis der Mitherausgeber dieser Festschrift zählte, Richard Horna, dessen Beitrag nochmals für ihn und für seine alte Freundschaft zum Jubilar zeugt, und Hans Planitz, den uns der Tod entriß, als diese Festgabe schon feste Gestalt angenommen hatte.

*Karl Siegfried Bader*

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tellrechte der Mitgliedstaaten. Schließlich beschäftigte er sich mit der Antinomie zwischen Urheberschutz und freiem Wettbewerb und betrachtete auch die Fragen der gemeinsamen Verkehrspolitik und Tarifgestaltung sowie der Freizügigkeit der Arbeitskräfte unter dem Generalaspekt der unverfälschten, freien Wettbewerbsentfaltung.

Beide Referenten verstanden es, die wertvollen Erfahrungen deutlich zu machen, die sich aus der Arbeit der EGKS-Organe ergeben haben. Ebenso wurde der Praxis der internationalen Wirtschaftsorganisationen sowie den einschlägigen zwischenstaatlichen Vertragsbeziehungen gebührend Raum gegeben. Die Diskussion war vom ersten Tage an außerordentlich lebhaft und ergiebig. Dabei zeigten sich kaum Divergenzen zwischen Theorie und Praxis. Die anwesenden Rechtsanwälte und Syndici wußten es vielmehr zu schätzen, daß die Referate vor allem praktische Gesichtspunkte in den Vordergrund stellten. Eine theoretische Vertiefung konnte bei diesem zeitlich begrenzten Gespräch auch kaum angestrebt werden. Angesichts des Umfangs und der Kompliziertheit der Vertragstexte, die vorerst nur einen — allerdings mit Programmsätzen und Zielbestimmungen vollgestopften — Rahmen darstellen, mußte das Ergebnis einer umfassenden Übersicht dankbar begrüßt werden.

Dr. Ernst-Werner FUSS, Hamburg

### Neugründung der Berliner Juristischen Gesellschaft

Bis in die Mitte der dreißiger Jahre hinein hat in Berlin eine Juristische Gesellschaft bestanden, die sich im Festsaal des ehemaligen Preußischen Oberverwaltungsgerichts zu versammeln pflegte. Ihre Zusammenkünfte erhielten jeweils durch Vorträge von angesehenen Vertretern des Rechtslebens Rang und Gepräge, sie fanden über die Juristenschaft hinaus Beachtung und Beifall im Reich.

Das Ziel, die Juristische Gesellschaft wieder erstehen zu lassen,

wurde in den Jahren nach 1945 von vielen Seiten angestrebt, zumal nachdem in Karlsruhe und in Kassel derartige Gesellschaften gegründet worden waren. Diese Bestrebungen haben nunmehr zum Erfolge geführt: Im November 1958 ist die Berliner Juristische Gesellschaft neu gegründet worden; sie soll ins Vereinsregister eingetragen werden.

Der Zweck der Gesellschaft ergibt sich aus § 2 der Satzung, der dahin lautet: „Zweck des Vereins ist die wissenschaftliche Behandlung aller das Recht betreffenden Fragen und die Zusammenarbeit mit ähnlichen Vereinigungen.“ Diesem Zweck sollen — wie früher und wie anderwärts — Vortragsveranstaltungen dienen. Sie werden nach bewährtem Herkommen in aller Regel in dem Gebäude Berlin-Charlottenburg, Hardenbergstraße 31, stattfinden, das seit mehreren Jahren das Bundesverwaltungsgericht beherbergt; hier befindet sich auch die Geschäftsstelle der Gesellschaft. Zum 1. Vorsitzenden ist der Präsident des Bundesverwaltungsgerichts, Prof. Dr. Werner, gewählt worden.

Über die Mitgliedschaft besagt § 3 der Satzung: „Mitglied des Vereins kann jeder Deutsche werden, der eine juristische Prüfung abgelegt oder einen juristischen akademischen Grad erworben hat. Andere an der Rechtswissenschaft und ihrer Förderung interessierte Personen können aufgenommen werden, wenn das zur Förderung des Vereinszwecks erwünscht ist.“ Bei der Juristischen Gesellschaft handelt es sich also nicht um eine Dachorganisation. Es hat vielmehr bei der Gründung der Wunsch bestanden, daß — unabhängig von einer etwa vorhandenen Mitgliedschaft bei anderen Vereinigungen vergleichbarer Art — alle diejenigen Juristen innerhalb und außerhalb der Hauptstadt die Mitgliedschaft der Berliner Juristischen Gesellschaft erwerben möchten, die den laufenden wissenschaftlichen Austausch untereinander auf einer gemeinsamen Plattform gerade in der Gegenwart für notwendig erachten.

Bundesrichter Dr. Martin BARING, Berlin

## GLÜCKWUNSCH

### Guido Kisch zum 70. Geburtstag

In Guido Kisch, der am 22. Januar 1959 seinen 70. Geburtstag in hoher und ungebrochener Frische begehen konnte, verehren und begrüßen die deutschen Rechtshistoriker nicht nur einen ihrer Besten, Kenntnisreichsten und Fleißigsten, sondern vor allem auch den Mann und Menschen, der trotz harten Schicksalsschlägen unentwegt dem Fach und der Wissenschaft überhaupt treu geblieben ist. Im Vorwort zur Festschrift, die 19 Gelehrte aus 10 Ländern — für einmal sogar den „Eisernen Vorhang“ durchbrechend: auch ein Zeichen der Reichweite seiner Arbeiten und des Ausmaßes allseitiger Wertschätzung — ihm 1955 darbrachten, habe ich diese Anerkennung in Worte gekleidet, die zum jetzigen Festtag wiederholt werden dürfen:

„Was uns, die zu dieser Ehrengabe beitragen, gemeinsam bewegt, ist neben persönlicher Freundschaft und Wertschätzung die unbegrenzte Hochachtung vor dem unbeugsamen wissenschaftlichen Ethos des Gelehrten Guido Kisch. In ruhigen und geruhsamen Jahren fachwissenschaftliche Leistungen zu erbringen, ist verdienstlich, in Jahren der Bedrängnis und Not am Arbeitswillen unerschütterlich festzuhalten, aber bewundernswert.“

Kischs Vaterhaus stand in Böhmen, in Prag. Herkunft, Landschaft, Elternhaus und Schule haben ihn geprägt. Mit Selbstverständlichkeit bekannte er sein Deutschtum, mit gleichem Ernst aber auch die Notwendigkeit, im österreichischen Vielvölkerstaat den Mitnationen gerecht zu werden. Noch heute steht er, der nach Abschluß seiner Prager Studien kurz vor dem ersten Weltkrieg, in einer Zeit der Weltgeltung deutscher Rechtswissenschaft und gerade der Leipziger Fakultät, hier die akademische Laufbahn betrat, auch bei den slawischen Nachbarn in hohem Ansehen. Sein Weg aber führte ihn ganz in die deutsche Gelehrtenwelt, zunächst nach Königsberg, wo er sich mit hohem Eifer um die ostdeutsche Rechtsgeschichte bemühte, von dort nach Halle, das in besonderem Maße Anlaß hat, seiner Forschertätigkeit zu gedenken: Nicht nur, weil er von dort aus zahlreiche eigene und Arbeiten seiner Schüler zur gesamten, vor allem aber zur mitteldeutschen Rechtsgeschichte in die Welt schickte, sondern auch weil in Halle ihn das Verdikt des nationalsozialistischen Ungeistes traf. 1935 gelang es ihm, nach den Vereinigten Staaten überzusiedeln und in mühevoller, zäher Arbeit seinen Platz auch in der wissenschaftlichen Welt des Neuen Kontinents zu erringen. 1937 wurde er Gastprofessor, 1950 Research-

Professor am Hebrew Union College New York; 1942—46 war er zugleich Research-Associate an der University of Notre Dame, Ind., USA.

Mit dem Zusammenbruch des „Dritten Reiches“ trat auch an Kisch die Frage der Rückkehr nach Europa heran. Wir haben volles Verständnis für all das, was einen in seinem Innersten, gerade in seinem Deutschtum Getroffenen, einen in hohem Maße sensiblen Menschen bewegte, als die neue Schicksalsfrage sich erhob, und wir freuen uns, wie er sie zu lösen vermochte: Es war die Nachbarstadt Basel mit ihrer der gesamten europäischen Geisteswelt verpflichteten Universität, die ihn — nach Gastprofessuren und -vorträgen in Lund, Leiden, Utrecht und Amsterdam — als Gastprofessor berief. Seit 1952 wirkt Kisch demnach, wie mancher seiner Leidensgenossen, an zwei Orten und in zwei Kontinenten. Jeden Sommer vertritt er in Basel vor einer auserlesenen Schar von Studenten und Hörern seine germanistischen Fächer. Aber weit mehr als dies: Mit wahrer Forscherleidenschaft wandte er sich dem Basel in seiner wissenschaftlichen Hochblüte, in der Zeit des Erasmus und der oberrheinischen Humanisten zu. Seitdem sind, in rascher Folge, die von einem fast unheimlichen Arbeitswillen zeugenden, bedeutenden Arbeiten zum Generalthema „Humanismus und Jurisprudenz“ erschienen. Nebenher gingen, teils auf älteren eigenen Vorarbeiten, teils auf neuen Forschungen beruhend, andere Studien: so diejenigen zur Rechts- und Sozialgeschichte der Juden in Deutschland während des Mittelalters, die ihn auch in Amerika ununterbrochen beschäftigt hatten; so, um hier nur noch ein weiteres Beispiel zu nennen, die nach Thema und Sachinhalt reizvollen Bücher und Aufsätze über Recht und Rechtswissenschaft in der Medaillenkunst, die uns zugleich den Rechtsarchäologen und feinsinnigen Sammler zeigen. Alle diese Arbeiten können hier, in einer Glückwunschadresse, nicht echt gewürdigt, sollen nur genannt werden\*. Für die deut-

\* Arbeiten von Guido Kisch seit 1952:

- Johannes Sighardus als Basler Rechtshistoriker. Basel: Helbing u. Lichtenhahn. (Basler Studien zur Rechtswissenschaft, 34).  
Gerechtigkeitsbilder auf Basler Renaissance-Medaillen. In: Zeitschr. f. Schweiz. Recht N. F. 72 (1953) S. 341—371.  
Recht und Gerechtigkeit in der Medaillenkunst. Heidelberg: C. Winter Univ. Verlag. 1955. 170 S. 8 Abb. u. XIII Tafeln. (Abh. d. Heidelberger Akad. d. Wissenschaften, phil.-hist. Klasse 1955/1).  
Humanismus und Jurisprudenz. Basel: Helbing u. Lichtenhahn. 1955. 170 S. 1 Tafel. (Basler Studien zur Rechtswissenschaft, 42).



schen und europäischen Rechtshistoriker sind sie längst Gemeingut des Wissens, für ein breiteres juristisches Publikum seien sie we-

- Summum ius summa iniuria. Basler Humanisten und Juristen über Aequitas und Epieikeia. In: Aequitas und Bona Fides. Festgabe für August Simonius. Basel: Helbing u. Lichtenhahn. 1955. S. 195—211.
- Forschungen zur Rechts- und Sozialgeschichte der Juden in Deutschland während des Mittelalters. Zürich: Europa-Verlag. 1955. 312 S.
- The Yellow Badge in History. In: Historia Judaica XIX No. 2, October 1957, S. 89—146.
- Die Aequitaslehre des Marsilius von Padua. In: Festschrift für Hermann Rennefahrt, Archiv d. Histor. Vereins d. Kt. Bern XLIV/2 (1959). S. 413—422.

nigstens erwähnt und in Erinnerung gerufen: ein Anlaß für uns alle, des Mannes und seines Werkes dankbar zu gedenken; Anlaß aber auch für alte und junge deutsche Juristen zur Selbsteinkehr angesichts von Haltung und Werk eines Mannes, dem in unseren Zeiten und in unserem Lande, wie Ungezählten seiner Art, so tiefes Unrecht geschah. Mögen die künftigen Jahre weiteren Forschens dazu beitragen, daß alte Narben verheilen — mögen es viele Jahre des Erkennens und Gestaltens in Gesundheit und Arbeitskraft sein!

Prof. Dr. Karl S. BADER, Zürich

Die „Festschrift Guido Kisch“ erschien 1955 im Verlag Kohlhammer, Stuttgart. Zum Inhalt vgl. JZ 56, 15\*.

## LITERATUR

Rabel, Ernst: Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung. 1. Bd. (unveränderter Neudruck der Ausg. von 1936). Berlin: de Gruyter. 1957. XXXII, 533 S. Lw. 56.-; 2. Bd. Berlin: de Gruyter, Tübingen: Mohr (Siebeck). 1958. XLII, 469 S. Lw. 58.-. (Beide Bände erschienen als Sonderveröff. d. Zeitschr. f. ausl. u. internat. Privatrecht [RabelsZ].)

Es gibt nur ganz wenige juristische Werke, die schon bei einem ersten Anlesen das Gefühl vermitteln, daß hier ein großer Wurf gelungen ist, und deren Studium uns dann mit Dankbarkeit gegenüber dem Autor erfüllt. Rabels „Warenkauf“ zählt zu ihnen. Wer selbst rechtsvergleichend gearbeitet hat, weiß, wieviel Fleiß und Arbeit aufgewendet werden muß und welche Kenntnisse fremden Rechts und Rechtsdenkens in der Regel erforderlich sind, um nur eine Frage aus einem anderen Recht zuverlässig beantworten zu können. Rabel packt in seinem scharf durchdachten System eine Vielzahl von Fragen des Kaufrechts an, vergleicht die Lösung eines Rechts mit der vieler anderer Länder und deckt das Für und Wider auf, um dann rechtsvergleichend die Summe zu ziehen. Sein Anliegen war, mit dem Werk die Vereinheitlichung des internationalen Kaufrechts voranzutreiben. Er will also primär geltendes Recht analysieren. Wo aber zum Verständnis der Grundlagen einzelner Institute eine historische Bemerkung angezeigt ist, findet sich auch eine gedrängte Skizzierung der geschichtlichen Entwicklung.

Die Veröffentlichung des 1. Bandes liegt mehr als 20 Jahre zurück. Dem Verfasser war nicht vergönnt, das Erscheinen des 2. Bandes noch zu erleben. Teil VII, der von der Gefahrtragung handelt, mußte vor der Drucklegung noch überarbeitet werden, ohne daß Rabel dafür sein Imprimatur geben konnte. Dieser Abschnitt ist aber von den Bearbeitern v. Dohnanyi und Käser mit großem Einfühlungsvermögen und Takt druckreif gemacht worden, so daß man wünschte, der noch unveröffentlichte Teil VIII über die Sicherungen des Verkäufers möge von ihnen in ähnlicher Weise für die Publikation vorbereitet werden. Wie dringend erwünscht in Deutschland eine rechtsvergleichende Darstellung dieser Materie ist, zeigt sich daran, daß hier die Problematik des Eigentumsvorbehalts in seinen verschiedenen Spielarten seit Jahrzehnten in zunehmendem Maße Lehre und Rechtsprechung beschäftigt, und, wie bekannt, im Ausland bedeutsame gesetzliche Regelungen aus neuerer Zeit vorliegen, die vielfältige Anregungen erwarten lassen.

Wer den 2. Band erwirbt, wird dankbar begrüßen, durch den unveränderten Neudruck des seit Jahren vergriffenen 1. Bandes Gelegenheit zu haben, sich das vollständige Werk anzuschaffen. Beide Bände bilden eine in sich geschlossene Einheit. Band I hat im übrigen rein technisch durch das in Band II enthaltene Sach- und Entscheidungsverzeichnis für beide Bände gewonnen. Der lange zeitliche Abstand zwischen den Veröffentlichungen hat zwar zur Folge, daß die zugrunde gelegte Rechtslage bei einzelnen Fragen des 1. Bandes durch Gesetzgebung oder Rechtsprechung überholt ist. Dölle weist in seinem Geleitwort zum unveränderten Nachdruck des 1. Bandes auf die wesentlichen Änderungen durch die Kodifikationen nach 1936 hin. Daß aber gleichwohl der 2. Band die Systematik des Vorangegangenen ohne irgendeinen ersichtlichen Bruch fortsetzen konnte, zeigt deutlich, daß Rabel über den aktuellen Bericht hinaus, der sich in seiner Arbeit niederschlägt, ein Werk schaffen konnte, dessen Methodik und Erkenntnisse, aus dem Material des geltenden Rechts gewonnen, einen zeitlos beständigen Wert haben.

Die im „Warenkauf“ rechtsvergleichend erarbeiteten Forschungsergebnisse haben Lehre und Rechtsprechung stets zur Fortentwicklung des heimischen Rechts angeregt. Ein Beispiel muß für viele genügen. In Band I Kapitel 7 behandelt Rabel den Inhalt des

Schadensersatzes und entwickelt die Grundzüge einer scharfsinnigen Theorie für die Berechnung des konkreten Interesses. v. Caemmerer vertieft diesen Gedanken in seiner Abhandlung über das Problem des Kausalzusammenhangs im Privatrecht (Freiburger Universitätsreden, N. F. H. 23), die der BGH in einer Entscheidung vom 22. 4. 1958 (BGHZ 27, 137 = JZ 58, 742 mit Anm. v. Boehmer) zur Frage der Begrenzung von Ersatzansprüchen aus § 823 I BGB berücksichtigt. Der BGH erinnert dabei an die Tatsache, daß Rabel auf Grund seiner Ausführungen im „Warenkauf“ letztlich ein entscheidender Anteil an der Fortentwicklung dieser Frage gebührt.

Der Kaufvertrag ist das Herzstück des besonderen vertraglichen Schuldrechts. Er konkretisiert — nach der deutschen Systematik — neben der Behandlung der speziellen kaufrechtlichen Probleme die allgemeinen Lehren des Schuldrechts, greift in vielen Beziehungen zum Sachenrecht hinüber und verlangt ständig eine Auseinandersetzung mit den Regeln des Allgemeinen Teils des bürgerlichen Rechts. Vergegenwärtigt man sich diese Zusammenhänge, so überrascht nicht mehr, daß der „Warenkauf“ trotz der besonderen Fragestellung immer wieder allgemeine, grundsätzliche Antworten gibt. Dabei werden die Gewichte wohl verteilt. Streitfragen, die nur theoretisches Interesse haben, wie etwa „Vertragstheorie oder Herstellungstheorie?“ im Zusammenhang mit der Wandelung und Minderung werden lediglich skizziert; der Leser, der sich eingehend unterrichten möchte, findet in Fußnoten reiche Hinweise. Andererseits werden etwa das Abstraktionsprinzip und die Lehre von der causa in den verschiedensten Spielarten — dem deutschen Traditionssystem mit der österreichischen Variante, dem französischen Prinzip des Realkaufs, dem anglo-amerikanischen System und der nur schuldrechtlichen Regelung der skandinavischen Länder — einander in dichtester Form gegenübergestellt, weil hier einer der Schlüssel zum Verständnis der jeweiligen Rechtssystematik liegt. Mit der Überlegenheit des großen Sachkenners beruhigt Rabel diejenigen, die an dieser Stelle wegen des in den einzelnen Rechtssystemen so verschiedenartigen dogmatischen Aufbaus des Kaufrechts daran zweifeln könnten, daß eine Vereinheitlichung des internationalen Kaufrechts überhaupt möglich ist. Bei einer solchen Gesamtkonzeption erscheint es fast selbstverständlich, daß etwa die Bedeutung der allgemeinen Geschäftsbedingungen und der Formularpraxis auf nationaler und internationaler Ebene, Probleme der Vertragsperfektion in ihren mannigfachen Erscheinungsformen oder etwa die Schadensliquidation im Drittinteresse in dem Werk einen Platz gefunden haben, weil alle diese Probleme mit dem Warenkauf aufs engste verflochten sind und, was ihren praktischen Wert anbetrifft, gerade bei ihm eine Bewährungsprobe zu bestehen haben.

Rabel meistert diesen ungeheuren Stoff nicht nur als Jurist, der das deutsche und ausländische Privatrecht überlegen beherrscht, sondern auch als Kenner soziologischer Hintergründe, die oft wichtiger sind als die geschriebenen gesetzlichen Regelungen. So stellt der Verfasser etwa zunächst aus juristischer Sicht dar, daß das anglo-amerikanische Recht wegen der Consideration-Theorie keine Bindung an die Offerte kennt, und daß auch über die Estoppel-Lehre keine Korrektur erfolgt; soziologische Forschung erhellt jedoch, daß in der Praxis genau die gleiche Bindung wie im deutschen Recht vorliegt, weil der Kaufmann tatsächlich zu seiner Offerte steht, um nicht unfair zu handeln und durch einen Bruch des gegebenen Wortes seine kaufmännische Ehre zu verlieren. Diese Bemerkung findet sich im 2., 1957 erschienenen Band, sie enthält also eine Beobachtung, die Rabel selbst während seines langen unfreiwilligen Aufenthalts in den Vereinigten Staaten machen konnte. Man möchte hoffen, daß solche Grundsätze der Geschäftsführung auch jenen Kaufleuten zum Vorbild werden, die Geschäfts-



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aus:

## Umerziehung und Wiederaufbau

Die Bildungspolitik der  
Besatzungsmächte in Deutschland  
und Österreich

Veröffentlichungen der Historischen  
Kommission der Deutschen Gesellschaft  
für Erziehungswissenschaft  
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gungen des Wiederaufbaues andererseits waren für die langfristigen Zielvorstellungen des „educational planning“ bestimmender als die spezifischen Details der Erziehungsplanung selbst.

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Henry Kellermann

## Von Re-education zu Re-orientation

Das amerikanische Re-orientierungsprogramm im Nachkriegsdeutschland

### 1 Einige grundsätzliche Betrachtungen

Der Historiker, der sich um eine Wertung der Bildungspolitik der Alliierten im Nachkriegsdeutschland bemüht, hat keine leichte Aufgabe. Vergleichsmöglichkeiten bestehen so gut wie keine. Diejenigen von uns, denen ausgangs der vierziger Jahre die Aufgabe gestellt wurde<sup>1</sup>, das sogenannte „Re-education“- oder „Re-orientation“-Programm zu entwerfen und durchzuführen, konnten sich an keine geschichtlichen Vorbilder anlehnen. Präzedenzfälle für geistige oder pädagogische Reparationen existierten nicht, schon gar nicht als Bestandteil eines Besatzungs- oder Befriedungsplans. Theorien über die Behandlung Deutschlands gab es in Hülle und Fülle. Aber ein offizieller Plan, der sich mit solch scheinbar esoterischen Begriffen wie Erziehungs- und Bildungsreform befaßte, stand nicht zur Verfügung. Re-education war ein Fall sui generis, ein erstmaliges und wahrscheinlich ein einmaliges Experiment.

Es verwundert daher nicht, daß die Einschaltung der Re-education in die alliierte Besatzungspolitik von Anfang an bedeutendes Aufsehen erregte und zugleich Gegenstand eines heftigen Meinungs austausches auf beiden Seiten des atlantischen Ozeans wurde. Kritiker, und durchaus nicht ausschließlich im deutschen Lager, rügten das Vorgehen der Alliierten als eine unzulässige Überschreitung völkerrechtlicher Normen, als eine Demonstration der „Arroganz der Macht“, als eine illegitime Einmischung in interne Verhältnisse oder auch als belanglos, naiv, voreilig und unrealistisch. Ein weiterer Vorwurf, der eine gewisse Popularität gewann, stützte sich auf die Vermutung einer moralisierenden Prose-lytenmacherei seitens der Alliierten und richtete sich insbesondere gegen die vermeintliche Absicht einer Neuausgabe Deutschlands nach amerikanischem Ebenbilde.

<sup>1</sup> Der Verfasser war Direktor der Abteilung im Department of State, die für den Entwurf und die Überwachung der Richtlinien und das Programm für kulturelle und Informations-Angelegenheiten von 1950–1953 verantwortlich war. Die Umwandlung der Re-education zur Re-orientation fiel in seine Amtsperiode.

Die Kritik war zum Teil verständlich, aber überwiegend unberechtigt. Man muß die Motive und die Genesis des alliierten Bildungsprogramms kennen, um diejenigen widerlegen zu können, die behaupten, das Siegerdiktat enthalte einen ideologischen Vierjahresplan, der auf einen geistig-kulturellen „unconditional surrender“ hinziele. In Wahrheit stellte das Re-education-Programm einen Kompromiß zwischen sozial-ethischen (humanitären), politischen und praktischen Erwägungen dar und war als solches das Ergebnis einer schrittweisen, stark experimentellen, ständiger Korrektur unterliegenden Strategie. Es war allen gegensätzlichen Behauptungen zuwider im Grunde genommen völlig unideologisch und bewußt pragmatisch<sup>2</sup>. Ohne Zweifel stand die Re-education und später die Re-orientierungspolitik ursprünglich im Zeichen moralischer Motive. Das trifft im besonderen Maße auf die Vereinigten Staaten zu. Die moralische Komponente ist nun einmal aus der amerikanischen Politik nicht herauszudenken. Der Kampf gegen den Nationalsozialismus wurde von weiten Teilen der amerikanischen Bevölkerung als ein Kreuzzug des Guten gegen das Böse verstanden. Die kriminellen Ausartungen des Nazi-Regimes und seiner Kriegsführung erhoben dann den moralischen Faktor zu einem Generalnenner der alliierten Politik und öffentlichen Meinung. Es war daher durchaus logisch, daß er sehr stark die Nachkriegspolitik der Alliierten bestimmte, zunächst in der Form der Kaltstellung und Bestrafung der Schuldigen und in weiterer Folge in der Gestalt einer Reform an Haupt und Gliedern.

Die Einbeziehung des Moralischen in das Re-education-Programm ist somit unbestreitbar. Als logische Begründung genügt dieser Hinweis nicht. Es wäre in der Tat eine grobe Vereinfachung der alliierten Politik, das Motiv der Re-education auf die moralische Funktion zu begrenzen. Vielmehr muß mit aller Klarheit betont werden, daß Re-education ab ovo als ein Instrument der politischen Neuordnung und des demokratischen Wiederaufbaus und als solches als eine Ergänzung der Politik mit nichtpolitischen Mitteln begriffen wurde, sozusagen als der lange Hebel am Besatzungsapparat.

Die Gründe sind einleuchtend. Das Ende des Krieges hatte die militärische Phase beschlossen und den Zusammenbruch des Nazisystems besiegelt. Mit der Beseitigung der äußeren Machtsymbole war jedoch die

<sup>2</sup> Es scheint notwendig, diese Komponenten zu betonen, um gewissen Behauptungen zu begegnen, die in einigen der Diskussionsbeiträge wiederholt erhoben wurden und die auf der Konferenz selbst zur Sprache kamen. Radikalvorschläge wie der des „Morgenthau-Plans“ fanden keinen Eingang in die Vorbereitungen des offiziellen Programms, die der Verfasser an zentraler Stelle leitete.



Bewältigung des ideologischen Nachlasses nicht garantiert. Man befürchtete das Wiederaufflackern eines untergründigen Widerstandes in der Form des „Werwolfes“ oder von Femebünden verschworener SS- und SA-Veteranen – Vermutungen, die sich auf Erfahrungen der Weimarer Republik stützten, aber sich dann nicht bestätigten. Auf jeden Fall glaubte man nicht, sich der Illusion hingeben zu dürfen, daß die militärische Entscheidung in einer spontanen Wiedergeburt eines demokratischen Staates resultieren würde. Die erste Phase war beendet. Die zweite, nicht-militärische der Befriedung Deutschlands stand erst am Anfang. Entnazifizierung und Entmilitarisierung waren die negative Seite der Medaille, Re-education oder Re-orientation war die positive. Die Rehabilitierung einer Bevölkerung, speziell der Jugend, die jahrelang unter dem Einfluß politischer Parolen gelebt hatte, erforderte eine weit tiefere Untersuchung und Revision nicht nur eines Erziehungssystems, das die einseitige politische Indoktrination zum Pflichtfach gemacht hatte, sondern darüber hinaus die Überprüfung der vornazistischen pädagogischen Traditionen, die sich als unfähig erwiesen hatten, die nötigen moralischen Widerstände in Lehrerschaft, Schülerschaft und Lehrstoff einzubauen.

Das Wagnis, eine ganze Nation „umzuerziehen“, d. h. zu einer moralischen und geistigen Katharsis zu bewegen, hat in der Geschichte, jedenfalls der Neuzeit, kaum seinesgleichen. Als ein rein moralisches Unternehmen mochte Re-education weder realistisch noch realisierbar erscheinen; als eine Art langfristiger Versicherung gegen eine Wiederholung der Ereignisse, die zum Nationalsozialismus und zum Zweiten Weltkrieg geführt hatten, nämlich durch eine systematische Beeinflussung herrschender Wertvorstellungen und Methoden der pädagogischen Praxis, bot sie Aussicht auf Erfolg.

Ein drittes Kennzeichen des Re-orientierungsprogramms war sein ausgesprochen pragmatischer Charakter. Er zeigte sich nicht allein in der Abwesenheit eines ideologischen und bis in alle Einzelheiten festgelegten Planes, sondern in der wiederholten Anpassung des Gesamtprogramms sowie der einzelnen Projekte an den raschen Wechsel der politischen Ereignisse, die zu Ende der vierziger und Anfang der fünfziger Jahre den Terminkalender der alliierten Politik bestimmten und enorm verkürzten. Der Terminwechsel, wie immerlich, entsprang nicht westlicher Initiative, er war im wesentlichen das Resultat des Zusammenbruchs der Viermächtekontrolle und des danach einsetzenden Kalten Krieges. Infolgedessen waren die ersten zehn Jahre der Nachkriegszeit Zeugen von mindestens drei grundsätzlichen Ziel- und Strukturänderungen. Das autoritäre System der Militärregierung, das sich durchweg und daher

auch im Bereich des Erziehungswesens der Methode der direkten Intervention bediente, wich der indirekten Einflußnahme durch den Hochkommissar, die eine stetig wachsende Mitverantwortung deutscher Kreise betonte. Mit der dann folgenden Normalisierung der deutsch-amerikanischen Beziehungen auf vertragsmäßiger Grundlage kam das Konzept der Partnerschaft auf der Basis der Gleichberechtigung und Gegenseitigkeit. Darüber hinaus erfuhr das Programm fortlaufende Veränderungen infolge der Maßnahmen der zuständigen Sachbearbeiter in Deutschland, denen die offiziellen Richtlinien weiten Spielraum zur Entfaltung eigener Initiativen ließen. Unter der Leitung von Persönlichkeiten wie Herman Wells, Shepard Stone und James Read auf amerikanischer Seite bemühte man sich, die verantwortlichen deutschen Stellen speziell mit pädagogischen Neuentwicklungen vertraut zu machen, die den deutschen Sachverständigen infolge einer zwölfjährigen Isolierung nicht zugänglich gewesen waren.

Zur Illustrierung kann die nachfolgende Beschreibung des Re-education-Programms unter OMGUS (Office of Military Government, US, Germany) und des Re-orientation-Programms unter HICOG (Office of the High Commissioner, US, Germany) dienen.

## 2 Die erste Phase: Potsdam, Kontrollrat und OMGUS

Die ersten Beschlüsse der Alliierten von 1945 maßen der Frage der Re-orientierung nur untergeordnete Bedeutung bei. Das Primat der militärischen, politischen und wirtschaftlichen Regelungen war unumstritten. Entmilitarisierung, Entnazifizierung und Reparationen nahmen den Vorrang ein. Das Protokoll der Potsdamer Konferenz erwähnte Erziehung erst als siebentes der „politischen Prinzipien“, die für die Behandlung Deutschlands in der unmittelbaren Nachkriegszeit für maßgeblich erklärt wurden. Die Anordnung war kurz bemessen. Sie beschränkte sich auf die Entfernung des nazistischen und militaristischen Lehrstoffs als Vorbedingung für die Entwicklung demokratischer Ideen (Department of State, S. 49). Die erste Direktive des amerikanischen Generalstabs an den Befehlshaber der amerikanischen Besatzungsmacht (JCS 1067) (ebd., S. 26), obgleich etwas detaillierter im Wortlaut, ging über den Beschluß der Potsdamer Konferenz nicht hinaus. Sie begnügte sich im wesentlichen mit der Zitierung der Potsdamer Formel, aber erhob zum ersten Male die Forderung nach einem „positiven Re-orientierungsprogramm“.

Es war der Staatssekretär Byrnes, der in seiner Stuttgarter Rede



(ebd., S. 3 ff.) im September 1947 das vorwiegend negative Konzept von Potsdam und JCS 1067 bedeutungsvoll erweiterte. Unter Berufung auf die positiven Vorschläge der Potsdamer Konferenz forderte Byrnes die aktive Mitwirkung der deutschen Bevölkerung am demokratischen Wiederaufbau eines freien und unabhängigen Staatswesens. Aber weder Byrnes Rede noch JCS 1067 enthielten irgendwelche genaueren Hinweise auf die kulturelle oder Bildungskomponente des Wiederaufbaus.

Die erste entscheidende Initiative kam von der Zivilseite der amerikanischen Regierung. Eine Gruppe von Experten unter dem Vorsitz von Archibald McLeish, damals Unterstaatssekretär für öffentliche und kulturelle Angelegenheiten im State Department, bestand darauf, daß Re-education zu einem integralen Bestandteil, ja in gewissem Maße zu einer Vorbedingung der Gesamtrehabilitation erklärt werde. Der von ihnen entworfene Vorschlag wurde im August 1946 von dem Koordinierungsausschuß der Staats-, Heeres- und Marineministerien als „Langfristige Richtlinie, SWNCC 269/5“ an OMGUS übermittelt. Er besagt ausdrücklich, daß „Re-education in Zusammenhang mit den politischen Richtlinien stehen müsse, die auf die Stabilität einer friedlichen deutschen Wirtschaft hinzielten und die Hoffnung auf eine endliche Wiederherstellung der nationalen Einheit aufrechterhielten“ (Kellermann, S. 20). Mit dieser Formulierung schlug SWNCC zum ersten Male die Möglichkeit einer Äquivalenz oder zumindest einer Korrelation zwischen den politischen, wirtschaftlichen und kulturellen Aspekten der amerikanischen Besatzungspolitik vor. Es bedurfte noch weiterer zwei Jahre, ehe dieser höchst unorthodoxe Gedanke in die Wirklichkeit umgesetzt wurde.

Historisch gesehen ging die Einführung der kulturellen Komponente – nicht lediglich als eine Zensurmaßnahme zur Ausmerzung nationalsozialistischer oder militaristischer Gedankengutes, sondern als Element eines schöpferischen Neuaufbaus – auf Vorschläge zurück, die bereits 1944 von einem Sachverständigenausschuß im State Department, dem Interdivisional Committee on Germany ausgearbeitet worden waren. Der Ausschuß warnte davor, daß ein rein negatives Programm nur im Chaos enden könnte, und er betonte zugleich, daß die Eliminierung ultranationalistischer und militaristischer Doktrinen nur zu erreichen wäre, wenn die Hitlerischen Perversionen durch konstruktive Wertvorstellungen und Zielsetzungen ersetzt würden, „die sich auf Elemente der besten deutschen Tradition stützten und der deutschen Bevölkerung die Möglichkeit böten, hoffnungsvoll in die Zukunft zu sehen“ (Department of State, S. 23).

Das Protokoll der Potsdamer Konferenz und JCS 1067 hatten die

positive Note aufgegriffen, aber sich grundsätzlich auf die Aufstellung gewisser Richtlinien, wie z. B. „die Entwicklung demokratischer Auffassungen“ beschränkt. Erst SWNCC 269/5 bemühte sich um eine Definition der Prinzipien, die der Re-education zugrunde zu liegen hätten. Der Katalog der sieben Prinzipien war keineswegs originell. Er war der Gedankenwelt eines humanitären Idealismus und dem Erfahrungsbereich der fortschrittlichen Erziehungsreformer entliehen und enthielt solche Forderungen wie das Universalgebot der Gegenseitigkeit der Verpflichtungen, die Menschen und Völker unabhängig von Rasse, Nationalität oder sonstiger Gruppenzugehörigkeit eingehen, Integrität und Freiheit des Individuums, Recht und Pflicht aller Staatsbürger zur verantwortlichen Mitwirkung an der demokratischen Verwaltung des Gemeinwesens, freier Meinungs- und Informationsaustausch und internationale Verständigung, und als die große Antithese zum Nationalsozialismus: Toleranz anderer Kulturen und Rassen. Darüber hinaus griff aber SWNCC 269/5 der These von Byrnes vor, indem sie bestimmte, daß die Reeducation sich soweit wie möglich geeigneter deutscher Quellen bedienen solle, da, wie es im Text heißt, „der kulturelle Wiederaufbau zu einem großen Teile das Werk der Deutschen selber sein müsse“. Schließlich verlangte die Direktive die baldige Wiederherstellung kultureller Beziehungen als eines sicheren Mittels zur Beendigung von Deutschlands Isolierung und seiner Wiedereinfügung in den Kreis der friedliebenden Nationen<sup>3</sup>.

Inhalt und Wortlaut der sieben Prinzipien verkörpern westliches Denken. Der amerikanische Einfluß wird in der Definition der Demokratie sichtbar, die im Sinne Deweys und gemäß amerikanischer Tradition nicht nur schlechthin als Staatsform oder Regierungssystem, sondern als praktischer Lebensstil verstanden wird. Die Betonung dieses Kriteriums erwies sich als eines der wichtigsten und grundlegenden Elemente der Reorientierung, und gelegentliche Beweise seiner Verwirklichung gehörten zu der Liste der sichtbaren Erfolge, die von amerikanischer Seite verbucht werden konnten.

Die dann folgende Rede von Byrnes verankerte das positive Motiv der deutschen Mitarbeit in der amerikanischen Außenpolitik. Sie gab gleichzeitig auf General Clays Initiative hin den Anlaß zu einer Revision von JCS 1067. Die im Juli 1947 erlassene JCS 1779 Direktive adoptierte zwar nicht den von SWNCC 269/5 vorgeschlagenen Katalog der sieben Prinzipien, aber sie akzeptierte Re-education als einen inte-

<sup>3</sup> Der genaue Text ist in U.S. Department of State: Germany 1947–1949 S. 541–542 zu finden.



gralen Bestandteil der Demokratisierungspolitik. Sie wies General Clay weiterhin an, deutsche Initiative und verantwortliche Teilnahme am kulturellen Wiederaufbau zu fördern, für die Herstellung internationaler kultureller Kontakte zu sorgen, die Einführung demokratischer Methoden, Institutionen, Programme und Lehrstoffe zu beschleunigen und die Ein- und Ausreise qualifizierter Personen zu gestatten und zu unterstützen (Department of State, S. 40/41).

Im Mittelpunkt der alliierten Erziehungsvorschläge stand die Reform des Schulwesens. Sie richtete sich im Kern gegen das herrschende „Klassensystem“, das den Zugang zu Universitäten und damit zu akademischen Berufen, dem höheren Beamtentum und der Diplomatie, in der Praxis für weniger als 10 % der Schülerschaft, nämlich für eine intellektuelle oder finanziell gesicherte Elite, meistens Mitglieder des gehobenen Mittelstandes, reservierte. Im Jargon der derzeitigen Schulreformbestrebungen in den Vereinigten Staaten könnte diese Art der Diskriminierung als „social segregation“ gekennzeichnet werden. Der Berliner Kontrollrat schlug statt dessen die Form der *Einheitsschule* („comprehensive educational system“) vor, in dem Volks- oder Grundschulen und höhere Schulen („elementary and secondary education“) zwei aufeinanderfolgende Stufen des Unterrichts anstelle zweier sich überschneidender und konkurrierender Systeme von unterschiedlicher Qualität bilden würden. Die Bestimmung war die logische Folgerung des im ersten Abschnitt der Direktive Nr. 54 verkündeten Prinzips der Gleichberechtigung aller im Erziehungswesen („equal educational opportunity for all“). Weiterhin bestand die Direktive auf Schulgeldfreiheit, kostenloser Verteilung der Schulbücher und anderer Lehrmittel, Betonung der Staatsbürgerlehre im demokratischen Sinne, Anhebung der Lehrvorbildung zu vollem akademischen Niveau, u. a. m. (Department of State, S. 550).

Die entsprechenden Erlasse der amerikanischen Militärregierung<sup>4</sup> entsprechen fast wörtlich den Anweisungen der Direktive Nr. 54, der JCS 1779 und SWNCC 269/5, aber detaillieren mit größerer Sorgfalt die Rolle der amerikanischen Autoritäten in der Überwachung und positiven Unterstützung deutscher Reformbestrebungen, namentlich in der Planung der Erziehungsziele und der Gestaltung des Lehrstoffs. Die verantwortliche Beteiligung kompetenter deutscher Stellen war ein Kriterium, das von Anfang an mit besonderem Nachdruck betont wurde.

So weit, so gut. Der Rahmen war gesetzt, die Prinzipien waren ge-

<sup>4</sup> „Military Government Regulations“ (US), Title 8, part 1 & 2, ebd. S. 541, 545 ff.

klärt. Aber die Ausführung war der Initiative der deutschen Sachverständigen und in weiterer Folge dem Ermessen von OMGUS überlassen. Es war insbesondere den zuständigen Regierungsstellen in den Ländern anheimgegeben, die erforderliche Gesetzgebung im Rahmen der von den Alliierten entwickelten Grundsätze, wie z. B. der allgemeinen Gleichberechtigung, der Einheitsschule, der Schulgeldfreiheit, der Staatsbürgererziehung, auszuarbeiten und der Militärregierung zur Genehmigung vorzulegen.

Das Ergebnis war, wie zu erwarten war, nicht durchweg befriedigend. Einige Länder mit liberaler politischer Vergangenheit wie Württemberg-Baden, Hessen und Städte wie Berlin, Hamburg und anfänglich Bremen adoptierten die Reformvorschläge ganz oder zum Teil. Andere, wie zum Beispiel Bayern, unter dem maßgeblichen Einfluß von Erziehungsminister Alois Hundhammer, leisteten entschiedenen Widerstand. Die Opposition entstammte nicht verhärteten oder verschleppten nationalsozialistischen Motiven. Sie beruhte vielmehr zu einem bedeutenden Grade auf der Auffassung, daß sich die Befugnisse einer Militärregierung nicht auf Gebiete erstrecken dürften, die sich nicht nur ihrer Kompetenz, sondern grundsätzlich der Einmischung Außenstehender entzögen. Die Eigengesetzlichkeit der kulturellen Traditionen sei und bleibe tabu. Speziell im Falle Deutschlands hätten die Errungenschaften der Wissenschaft, Philosophie, Literatur der vernationalsozialistischen Vergangenheit zur Genüge den zeitlosen Wert des Erziehungssystems bewiesen. Das System sei nicht schuldig. Vielmehr sei es selbst das Opfer politischer Vergewaltigung geworden.

Die Wortführer der Opposition waren zumeist konservative, zum Teil reaktionäre Elemente, die für eine Wiederherstellung des Status quo ante plädierten und damit eine im Grunde genommen restaurative Politik befürworteten. Sie verteidigten in der Tat ein System, das in seiner Glanzzeit zweifellos zum Weltruf Deutschlands als einer der führenden Nationen auf dem Gebiet der Wissenschaft und Kultur beigetragen hatte, das aber wenig Verständnis und kaum Respekt für die Institutionen der Demokratie oder für andere Kulturen erweckt hatte. Die Weimarer Republik erfreute sich, besonders bei der jüngeren Generation, keines großen Ansehens, und ihre Verfassung und Flagge waren Gegenstand unverhohlener Geringschätzung. Der Geschichtsunterricht in vielen Schulen endete „wegen Zeitmangels“ gewöhnlich mit der Beschreibung des Ersten Weltkrieges und des „Versailler Schanddiktats“.

Eine Rückkehr zu den bewährten Prinzipien der Weimarer Republik hätte daher die traditionelle Gleichsetzung von Erziehung und reiner Wissensvermittlung wiederhergestellt mit den herkömmlichen Methoden



der erforderlichen geistigen und körperlichen Disziplin, einschließlich der Prügelstrafe.

Es muß allerdings betont werden, daß die Reaktion auf die Schulreform nicht durchweg negativ war. Von seiten weiter Kreise der fortschrittlichen Lehrerschaft wurde sie lebhaft begrüßt. Kontrollrat-Direktive Nr. 54 wurde zum Beispiel von einigen als eine Verkörperung „der besten Ideen der deutschen Schulreformbewegung“ gefeiert. Aus ähnlichen Gründen wurde die Beendigung der alliierten Reformprojekte als „verfrüht“ bedauert<sup>5</sup>.

Der Vollständigkeit halber muß weiterhin berichtet werden, daß der Grund zu der zwiespältigen Reaktion auf die Reformvorschläge nicht allein bei der Opposition zu finden war. Er war vielmehr zu einem gewissen Grade auch in der ambivalenten Haltung der amerikanischen Stellen zu suchen. Die Position General Clays war nicht immer völlig klar und scheint verschiedentlich gewechselt zu haben. In seinem 520 Seiten umfassenden Bericht „Decision in Germany“ widmet Clay das 15. Kapitel dem „Appeal to the German Mind“ und darin etwa fünf Seiten dem Erziehungsprogramm (Clay, S. 298 ff.). Damit soll nicht gesagt sein, daß Clay die Rolle der Erziehungsreform innerhalb der Gesamtrehabilitation verkannte. Er selbst bezeichnete die Schulreform als eines seiner größeren Programmziele (ebd., S. 302). Aber in der Reihenfolge seiner Prioritäten trat sie hinter den politischen und wirtschaftlichen entschieden zurück. Das hatte seine Gründe. Der Winter 1946/47 war außergewöhnlich streng. Die deutsche Bevölkerung fror und hungerte. Demokratie, sagte Clay, kann nicht vor leeren Mägen doziert werden. Die zur Verfügung stehenden Gelder würden für die Einfuhr von Lebensmitteln benötigt, nicht für Holz und Papier zum Druck von neuen Lehrbüchern und Zeitungen. Der Etat für Erziehungsfragen war knapp. Die Sachbearbeiter waren z. T. gut ausgewählt, aber ihre Zahl war gering, und sie rangierten ziemlich weit unten in der bürokratischen Pyramide. Clay war nicht bereit, größere Beträge vom Kongreß zu verlangen. Er beschränkte die Erziehungsreform im wesentlichen auf die politische Reinigung der Lehrkörper und des Lehrstoffs und daneben auf pädagogische Beratung.

Erst die Ernennung von Herman B Wells, Präsident der Universität von Indiana, zum Erziehungs- und Kulturberater Clays schuf eine Wandlung. Dank Wells energischer und weitsichtiger Einwirkung wurde die Erziehungsstelle zur Abteilung erhoben, der Etat erhöht und das Austauschprogramm mehr als vervierfacht.

<sup>5</sup> Artikel von Dr. Karl Bungardt in der „Allgemeinen Lehrerzeitung“ vom 15. März 1952, zitiert auf Seite 51, Kellermann, a. a. O.

### 3 Die zweite Phase: Das Re-orientation-Programm des Office of the High Commissioner US, Germany (HICOG)

Die entscheidende Wende kam mit dem Übergang von der Militär- zur Zivilkontrolle durch das State Department und mit der Ernennung von John J. McCloy 1949 zum amerikanischen Hochkommissar. Die große Linie der Politik blieb die gleiche: ein demokratischer Aufbau auf der Basis der Gleichberechtigung und der gleichen Pflichten für alle. Aber Methode und Format veränderten sich, und zwar nicht nur in Nuancen, sondern in grundsätzlichen Aspekten. Das galt insbesondere für die Bildungspolitik. Aus Re-education wurde Re-orientation<sup>6</sup>. Der Unterschied war mehr als nur semantisch. Er bedeutete eine noch stärkere Beteiligung deutscher Elemente und zugleich eine Schmälerung der amerikanischen Funktionen durch grundsätzliche Begrenzung auf Beratung und Hilfeleistung („advise and assist“)<sup>7</sup>. Er bedeutete dagegen nicht die Preisgabe der Re-orientation als eines der Hauptziele der Besatzungspolitik oder, wie die Direktive an den Hochkommissar bestimmte, der „Demokratisierung der gesellschaftlichen Beziehungen und Institutionen, der Erziehung, des Informationswesens und des öffentlichen Lebens“ (ebd.). Clay war ebenfalls vom Wert der Re-education auf lange Sicht überzeugt gewesen, aber unter der Bedingung, daß sie so rasch wie möglich von deutschen Sachverständigen übernommen würde. Kurz vor seiner Abberufung war er bereit, die weitere Verantwortung völlig auf deutsche Stellen abzuwälzen.

Das State Department war anderer Ansicht. Es stimmte der Auffassung amerikanischer Erziehungskreise zu, daß demokratische Re-orientierung die längste und entscheidendste Aufgabe der Besatzungsmächte bleibe. Es erklärte fernerhin, daß die Regierung der Vereinigten Staaten die Hoffnung von Amerikanern und Deutschen auf dauernde Sicherheit

<sup>6</sup> Die Fortsetzung der Re-education mit anderen Mitteln wird verschiedentlich von Historikern und Kritikern übersehen, für die die Re-educationperiode im Jahre 1949 zu Ende ist und die sie daher nicht völlig zu Unrecht als eine Verfehlung bezeichnen. Diese Zäsur ist historisch unzulässig und die Kritik unberechtigt. Das Programm des Hochkommissars in den folgenden 4-5 Jahren auf dem Gebiet der Re-orientation sicherte nicht nur die Kontinuität des kulturellen Wiederaufbaus, die der Erziehungsreform zugrunde lag, sondern erweiterte und vertiefte die reformistischen Bestrebungen, die unter der Militärregierung begonnen worden waren. Entscheidende Veränderungen im Bildungswesen und darüber hinaus im Gesellschaftswesen der Bundesrepublik lassen sich auf die Auswirkungen des Re-orientationsprogramms zurückführen.

<sup>7</sup> Policy Directive to the High Commissioner, 6. Februar 1950.



zerschlagen würde, wenn sie diese Aufgabe mit der Einsetzung einer demokratischen Regierung als erfüllt betrachte und davon Abstand nähme, die deutsche Bevölkerung in der Ausübung ihrer neugewonnenen demokratischen Rechte zu unterstützen<sup>8</sup>. Anstatt das Programm zu beenden oder zu verkürzen, sollte die Re-orientation zu einer Zentralfunktion des Amtes des Hochkommissars erhoben werden – auf gleicher Ebene mit den politischen und wirtschaftlichen Ämtern –, und das Programm, das Budget und der Beamtenapparat sollten entsprechend vergrößert werden. Die offizielle Bezeichnung der Stelle, die sich des Re-orientierungsprogramms unter HICOG annahm, war Amt für öffentliche Angelegenheiten. Es umfaßte den Erziehungs- und Kulturdienst, den Austauschdienst, den Informationsdienst mit drei Tageszeitungen, Zeitschriften, Pressedienst, Rundfunkstationen, einschließlich RIAs, die sogenannten „Amerikahäuser“ und Bibliotheken u. a. m. Der Austauschdienst allein schickte innerhalb der folgenden zehn Jahre 14 000 Personen auf die Reise.

Hinter dieser massiven Struktur verbarg sich ein wichtiges politisches Motiv. Diejenigen von uns, die sich der Vergangenheit erinnerten, waren überzeugt, daß einer der Gründe des Zusammenbruchs der Weimarer Republik der Mangel an Verständnis und Unterstützung war, den die Alliierten des Ersten Weltkrieges gegenüber denjenigen Elementen in Deutschland gezeigt hatten, die sich um einen echten demokratischen Aufbau bemühten. Eine Wiederholung mußte unter allen Umständen vermieden werden. Diesmal war den demokratischen Kräften die materielle, politische und intellektuelle Hilfe zu gewähren, die ihren Vorgängern in den zwanziger Jahren versagt worden war.

OMGUS hatte ähnliche Ziele im Auge. Aber es hatte ermahnt und befohlen. Viereinhalb Jahre nach Ende des Krieges waren diese Methoden nicht mehr brauchbar. An die Stelle des Willens der Militärregierung trat nun die gesteuerte und schließlich die geteilte Initiative, d. h. eine profilierte und großzügige Unterstützung gemeinsam ausgearbeiteter Pläne und Projekte, in gewissem Sinne ein kultureller Marshallplan. Das bedeutete u. a. die Bewilligung öffentlicher Gelder durch den Kongreß.

Unter Clay hatte sich der Haushaltsplan für das gesamte Bildungswesen auf \$ 1,025.433 belaufen. Jetzt wurde er auf \$ 48,000.000 erhöht,

<sup>8</sup> Brief des stellvertretenden Secretary of State an Dr. Zook, Präsident des American Council on Education, und Dr. Wells, 6. Juni 1949: s. Germany – 1947–1949, S. 544/545.

d. h. auf fast die Hälfte des Gesamtetats für HICOG. Unter OMGUS umfaßte das jährliche Austauschprogramm ursprünglich 50 und nach Wells Ankunft 157 Personen; unter HICOG umfaßte es 3.415 Personen. Die erforderlichen Gelder in Höhe von \$ 6–7.000.000 kamen zumeist aus amtlichen Kassen, aber erfuhren eine weitere Ergänzung durch Beiträge, die von Privatorganisationen für bestimmte Programme (z. B. „teenagers“) zur Verfügung gestellt wurden.

Die wahre Bedeutung des HICOG-Re-orientierungsprogramms kann jedoch statistisch allein nicht erfaßt werden. Sie lag vielmehr in der engen Verflechtung des Bildungsprogramms mit dem Gesamtprogramm des demokratischen Wiederaufbaus, d. h. in einer sorgfältig geplanten Koordinierung der politischen, sozialen und pädagogischen Reformprojekte. Das Re-orientierungsprogramm war nicht ein Bildungsprogramm im eigentlichen Sinne; es beschränkte sich nicht auf das Erziehungswesen, sondern umfaßte fast alle reformbedürftigen Gebiete des öffentlichen Lebens. Eines seiner ersten Projekte war z. B. die Unterstützung einer Initiative des Bundestags, die Unabhängigkeit der gesetzgebenden Körperschaft gegenüber der Bundesregierung bei der Vorbereitung von Gesetzesvorlagen zu sichern und damit die verhängnisvolle Tradition des „gouvernementalen Gesetzgebungsdienstes“ zu brechen (Lohmann, S. 127/128). Eine Studienreise von Bundestagsabgeordneten, die den sogenannten „Legislative Reference Service“ der Kongreß-Bibliothek in Washington eingehend in Augenschein nahmen, führte dann zur Errichtung der Wissenschaftlichen Abteilung des Bundestags. Das Projekt war ein typisches Beispiel für ein weiteres Kennzeichen des HICOG-Programms, nämlich einer stark differenzierten Mischung amerikanischer und deutscher Beiträge zu einem Prozeß der Selbsthilfe und Selbstrehabilitierung. Deutsche Mitarbeiter saßen in der Redaktion der „Neuen Zeitung“ und des RIAs und waren an der Auswahl der Austauschprojekte und der Austauschler maßgeblich beteiligt. Der Austausch wurde in der Tat das Kernstück des Bildungsprogramms. Die Beobachtungen und Eindrücke, die sogenannte „leader“, d. h. prominente Vertreter des öffentlichen Lebens, Spezialisten aller Art und Studenten von ihrem Aufenthalt in den Staaten oder europäischen Ländern heimbrachten, ergänzten und ersetzten die Beratungsvorschläge amerikanischer Sachverständiger und die des HICOG-Stabes und, so hoffte man, würden die Initiative für freiwillige, eigenständige und daher dauerhaftere Reformen liefern, eine Hoffnung, die sich im späteren Verlauf als nicht unberechtigt erwies.

Ein weiteres Merkmal der großen Differenzierung des Programms war seine scharfe Ausrichtung auf die Erfassung von Persönlichkeiten und



Gruppen, die zur Übernahme entscheidender Funktionen im politischen, wirtschaftlichen und kulturellen Leben berufen schienen. Ein zukünftiger Bundespräsident und Bundeskanzler, Mitglieder des Kabinetts, des Bundestags und des Verfassungsgerichts, Universitätspräsidenten, Bürgermeister, prominente Vertreter der Polizei und des Strafvollzugs, der Gewerkschaften, Parteien und vor allem des Erziehungswesens nahmen an von langer Hand gründlich vorbereiteten Spezialprojekten teil. Um dem Vorwurf zu begegnen, die Elite zu bevorzugen, wurde das Programm auf alle Schichten der Bevölkerung ausgedehnt, d. h. ohne Rücksicht auf den Rang in der bürokratischen oder akademischen Hierarchie, das Alter oder die gesellschaftliche Stellung umfaßte es Lehrer, Geistliche, Anwälte, besonders Referendare, Landwirte, Sozialarbeiter, Vertreter von Frauengruppen, Jugendführer, Studenten, Praktikanten und „teenager“.

Von besonderer Bedeutung war die Konzentrierung auf die bereits erwähnten „Spezialprojekte“, eine Methode, die schon von OMGUS ins Auge gefaßt worden war, aber dann in den Anfängen steckenblieb. Es bedeutete, daß wichtige Austauschgruppen unter dem Gesichtspunkt eines gemeinsamen Interesses an Problemen zusammengestellt wurden, die in Deutschland Gegenstand akuter Untersuchung und etwaiger Reform waren und für deren Bewältigung die Beobachtung amerikanischer Erfahrungen Vergleichs- oder Lösungsmöglichkeiten zu bieten in der Lage war. Ein gutes Beispiel liefert der Besuch des Sicherheitsausschusses des Bundestags, der unter der Leitung des Vizepräsidenten das neue Wehrpflicht- und Soldatengesetz vorbereitete. Der Besuch des Ausschusses galt vornehmlich einem eingehenden Studium der Handhabung der Zivilkontrolle über das Militär in den USA.

Darüber hinaus ermöglichte die Umstellung des Re-orientierungsprogramms auf eine gelenkte Selbsthilfe in ausgewählten Bildungsbereichen die Einführung oder Neubetonung von Lehrstoffen, Lehrfächern und Einrichtungen, die zuvor nie oder nur ungenügend behandelt oder während der Zeit des Nationalsozialismus unterdrückt worden waren. Zu diesen Neuerungen gehörten die Einführung der Politologie als einer selbständigen akademischen Disziplin, die Gründung von Hochschulen für Politik, die Rehabilitierung der Sozialwissenschaft, die Umgestaltung der Bibliotheken, um nur einige der vielen Bereiche anzuführen. Auf nicht-akademischem Gebiet wäre die Reformierung des Polizeiwesens und des Strafvollzugs, die Einschaltung der Individualinitiative in die Politik, besonders die Lokalpolitik, die modernisierte Kinderfürsorge durch die Schaffung von „child guidance clinics“ und die Anerkennung der „mental hygiene“ als eines wissenschaftlich begründeten Experiments in der Gestaltung zwischenmenschlicher Beziehungen zu erwäh-

nen. Jede dieser Reformen war das Werk der Heimkehrer von Austauschbesuchen oder das von Experten, die nach Deutschland geschickt wurden.

#### 4 Fazit

Die Frage nach Erfolg oder Mißerfolg des alliierten und amerikanischen Bildungsprogramms ist bisher nicht zufriedenstellend beantwortet worden. In den fünfziger Jahren wurde sie vom Kongreß gestellt, der die Bewilligung weiterer Gelder vom Nachweis der erfolgreichen Verwendung der gewährten Mittel abhängig machte. Der Beweis wurde Jahr für Jahr erbracht, und Mitglieder der verschiedenen Ausschüsse fanden nie Anlaß, die beantragten Beträge zu kürzen oder zu verweigern. Eine systematische Untersuchung, die sich mit den Auswirkungen des Programms auf weite Sicht befaßt, existiert dagegen nicht. (Mein Buch über den deutsch-amerikanischen Kulturaustausch befaßt sich, wie der Titel besagt, mit Teilaspekten.)

Das einschlägige Material, das uns zur Verfügung steht, ist unvollständig und fragmentarisch. Wichtige Anhaltspunkte liefern die Ergebnisse der Meinungsumfragen, die von OMGUS und HICOG durchgeführt wurden. Aber wie alle Meinungsumfragen bestätigen sie zu meist nur die unmittelbaren Effekte der Einflußnahme; über langfristige Auswirkungen sagen sie wenig aus. Relativ aufschlußreich sind Untersuchungen, die sich mit Teilnehmern an diesem Austausch befassen. Der Eindruck, den die Aussagen der letzteren hinterlassen, ist überwiegend positiv. Der Kontakt mit Amerikanern und der amerikanischen Umgebung mündete im allgemeinen in eine Verbesserung des amerikanischen „Image“ und ein besseres Verständnis der amerikanischen Politik, Kultur, des Lebensstils usw. Bisweilen gab es auch negative Resultate. Gewisse Schwierigkeiten ergaben sich im Studentenaustausch, da gelegentlich Unterschiede in der Auffassung akademischer Rechte und Pflichten zu Mißverständnissen und Auseinandersetzungen führten. Die deutschen Studenten sahen in der „test“-Disziplin des amerikanischen College eine Unterdrückung der akademischen Freiheit, und die amerikanischen Studenten, die nach Deutschland fuhren, wußten oft mit ihrer Wahl- und Entscheidungsfreiheit nichts anzufangen und verbummelten ihre Semester. Das waren jedoch Ausnahmen. Im großen und ganzen erfreute sich das Austauschprogramm unbestrittener Beliebtheit, sowohl in Deutschland als auch in den Staaten. Vertreter der amerikanischen wie der deutschen Öffentlichkeit, einschließlich der Hochkommissare,



des Kongresses, des Bundespräsidenten, des Bundeskanzlers, des Bundestags und anderer Autoritäten, haben das wiederholt bestätigt.

Der besondere Wert des Austauschprogramms erwies sich aber in seinem Beitrag zur Einführung beständiger Reformen. Es schuf zunächst die psychologischen Vorbedingungen zur Normalisierung und später zu einer positiven Gestaltung der deutsch-amerikanischen Beziehungen. Die direkte Folge dieser Entwicklung war der Abschluß des Fulbrightabkommens von 1952 und der Kulturvereinbarung von 1953, der ersten bilateralen diplomatischen Nachkriegsübereinkommen. Weiterhin erweckte das Studium amerikanischer Einrichtungen, Praktiken und Lebensweise in vielen Besuchern das Interesse, ihre Beobachtungen und Erfahrungen aus den Staaten in den deutschen Bedürfnissen gemäß Neuerungen umzusetzen. Diese Reforminitiativen wurden auf fast allen Gebieten des öffentlichen Lebens entfaltet und resultierten in wichtigen strukturellen und praktischen Änderungen<sup>9</sup>. Es ist daher durchaus berechtigt, die deutschen Teilnehmer am Austauschprogramm gegen Ende der HICOG-Periode als Mitträger der Bildungsreform zu betrachten. Bemerkenswerterweise nimmt die gegenwärtige Literatur, die sich mit der Frage der Bildungsreform befaßt, von den Reformbemühungen der unmittelbaren Nachkriegszeit kaum Notiz. Die Tendenz ist unverkennbar, den Beginn der heutigen Bestrebungen zur Bildungsreform auf den Gründungstag des Deutschen Bildungsrats im Jahre 1965 zu verlegen. Ein Bericht der Inter-Nationes z. B., der 1974 erstattet wurde, enthält so gut wie keinen Hinweis auf die Bildungsprogramme der Alliierten, sondern erklärt statt dessen, daß die ersten 10 bis 15 Jahre nach Beendigung der Feindseligkeiten der Wiederherstellung der Schulgebäude und der Beseitigung des Lehrermangels gewidmet waren<sup>10</sup>. Nach anderen Berichten waren Reformen des Lehrstoffes den Vorbildern des Weimarer Systems entlehnt (Littmann). Gelegentlich findet man eine Andeutung, derzufolge gewisse Neuerungen, wie zum Beispiel die der Einheitsschule, dem Einfluß des Austauschprogramms der „angelsächsischen“ Länder zuzuschreiben sei.<sup>11</sup>

Natürlich ist es schwierig, nach einem Vierteljahrhundert, in dem über das Thema kaum irgendwelche Akten geführt worden sind, die Veränderungen in der Substanz und der Struktur des deutschen Erziehungs- und

<sup>9</sup> Bedauerlicherweise gibt es keinen vollständigen Katalog dieser Reformen. Einige Beispiele sind in meiner Beschreibung des Austauschprogramms auf Seite 216 f. zu finden.

<sup>10</sup> Inter Nationes, 1974, zitiert in: *Bildung und Wissenschaft*, 3-74, „The School System in the Federal Republic of Germany“.

<sup>11</sup> Ebenda.

Bildungswesens mit Bestimmtheit auf die Maßnahmen der Besatzungsmächte zurückzuführen. Es kommt hinzu, daß in den sechziger Jahren eine systematische Reformbewegung einsetzte, die frühere Bemühungen gleicher Art einfach überschattete. Es ist daher durchaus verständlich, wenn heutzutage von deutscher Seite Anspruch auf die Urheberschaft der entscheidenden Reformen erhoben wird. Erfolge sind in der Tat zu verzeichnen. Die Zahl der deutschen Hochschulen hat sich ungefähr verdreifacht. Im Jahre 1977 immatrikulierten sich 18,4 % eines Altersjahrgangs. Damit wurde dem bisher höchsten Prozentsatz junger Menschen der Zugang zu akademischen Berufen, der höheren Beamtschaft, der Diplomatie und dem industriellen Management ermöglicht. Die Politologie und die Sozialfürsorge sind vollwertige akademische Lehrfächer geworden. Mehr als 200 Gesamtschulen bestehen, in denen die traditionellen Schulformen unter dem gleichen Dache eine Harmonisierung der Lehrgänge und des Lehrstoffs anstreben.

Das sind unbestreitbar Zeichen bedeutenden Fortschritts auf dem Weg zu einer Neuordnung des deutschen Bildungswesens. In ihrer heutigen Gestalt sind sie das Verdienst deutscher Fachleute und Politiker und keineswegs ein Abklatsch englischer, französischer oder amerikanischer Vorbilder. Die Absicht dieser Untersuchung ist daher nicht, die Eigenständigkeit der deutschen Bildungsreform in Frage zu stellen oder auch nur zu schmälern. Sie soll vielmehr nur an gewisse Vorgänge erinnern, die heute bereits der Geschichte angehören, die aber möglicherweise nicht ohne Einfluß auf die gegenwärtige Entwicklung blieben. Als Mitbeteiligter an den Reformbestrebungen der unmittelbaren Nachkriegszeit kann der Verfasser nun einmal nicht der Versuchung widerstehen, Spuren der Vergangenheit in den heutigen Bestrebungen zu entdecken und die Genugtuung über erzielte Erfolge zu teilen. Er überläßt das letzte Wort jedoch dem Historiker.

## Quellen und Literatur

### *Literatur*

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*Andere nicht direkt zitierte Quellen*

DIVO-Institut  
Foreign Affairs Document and Reference Center, U.S. Department of State,  
Washington, D.C.  
General Archives Division, Washington National Records Center, Suitland,  
Maryland  
History Files, Bureau of Educational and Cultural Affairs, U.S. Department  
of State  
National Archives, National Archives Building, Washington, D. C.



Frank Mecklenburg  
532 West 111th Street, apt. 75  
New York, N.Y. 10025  
(212) 662-7579

Mr. Henry J. Kellermann  
5428 Roosevelt Street  
Bethesda, Maryland 20817

New York, 10/2/87

Dear Mr. Kellermann,

Regarding our phone conversation of today I am sending you two papers describing my research project on German immigrant jurists in the USA after 1933. All my current writing on this topic is in German since I receive my funding from the West-German Deutsche Forschungsgemeinschaft. The book will first be published in Germany. But I am sure, that you don't mind.

The report dated May 1987 was to lay out the results of my research at the time and gives a fairly good impression about the scope of the research project. The second paper is an expose written recently proposing the outline of the book to come being most detailed about the first chapter.

I hope you will find this project interesting and I am most anxious to hear any comment from you. I will then get in touch with you and hopefully we can arrange a meeting.

Very sincerely

Frank Mecklenburg



HENRY J. KELLERMANN  
5428 ROOSEVELT STREET  
BETHESDA, MARYLAND 20817

May 19, 1984

Dear Ernst:

it was very good to hear from you after all these years - I counted about forty - and I find your confidence in trusting me with a review of the transcript very flattering. Naturally I cannot possibly do justice to what seems to me a rather comprehensive compilation of the record of former German jurists in the States. I am familiar with some of it having collaborated or otherwise touched base with quite a few of them, but I could not possibly pass judgement on the accuracy of the data except in cases where I happen to know the facts from personal contacts and experience.

It so happens that Hans Speier whom you mention (p.10) is a close friend of mine and presently my house guest in Bethesda. The corrections I made concerning his record are therefore authentic. Hans, as you know, is not and in fact never was a jurist but is one of the leading sociologists in this country. He was recently honored, as you may have read in the NYT, at a ceremony sponsored at the 50th anniversary of the University in Exile as the only surviving member of the illustrious original Graduate Faculty and as one of its most meritorious ones. It was a most impressive convocation. The school was able to rescue over 170 scholars and their family from Europe, including the legal scholar Hermann Kantorowicz, my former professor in Freiburg, and indirectly thousands more by prodding other American universities and colleges to extend the benefits of fellowships, scholarships and regular tenure to them. I feel that the New School of Social Research deserves an honorable mention in your discourse. Incidentally, the School contributed the talents of some of its most distinguished faculty members to serve as members of the President's Council of Economic Advisers.

But coming back to Hans Speier who, as I said, was not a jurist, you are right that he worked in his earlier days as a book editor in the Ullstein publishing firm, although that was a minor episode. He was also on the faculty of the Deutsche Hochschule für Politik in Berlin having passed his doctor exam under Karl Mannheim summa cum laude. In the United States he became, as I



mentioned a member of the Graduate Faculty of Political and Social Science of the New School of Social Research and the University in Exile. In Washington he was first the chief of the German and later of the Central European Section of the Foreign Broadcast Intelligence Service of the FCC and later Chief of the Division for Occupied Areas in the State Department. He then joined the the RAND Corporation and later had a chair at the University of Massachusetts. He was quite amused by the epithet you gave him as the "anti-Goebbels". It fits. Hans was not only instrumental in shaping some of our counter-propaganda but did some pioneering work in developing new methods of propaganda analysis. He was my immediate superior twice while in government.

I also worked with Franz Neumann who was my boss and with Otto Kirchheimer who with many other refugees from Germany and Central Europe were my colleagues in OSS days. In fact, for a while I shared my desk with Herbert Marcuse, member of the unholy trinity of Marx, Mao and Marcuse, but then still rather tame.- Later when I was office director in the State Department I sent Franz Neumann to Berlin to set up the Politological Institute of the Free University which he did.- Ernst Fraenkel whom I knew from way back when he was a young assessor in the law practice of my uncle Eduard Lehmann in Saarbrücken, was then professor at the Free University where they gave him a hard time - the students, that is - that led, I believe to a heart infarct. When he went to Korea, he did not only everything you said he did, but to the best of my knowledge also helped draft the new constitution. (You may want to check that out.)- Of course, a number of our old professors resumed teaching in the States despite the significant differences in concepts and methods between European and Anglo-Saxon-American law and legal training. You mentioned Ernst Levi and Ernst Rabel, the Roman law experts; but there must be many more. <sup>Lawyer</sup> Kurt Braun from Berlin taught for many years at Howard University. And there is, of course, Rhein-stein.

Far more information should be available through Herbert Strauss who has spent the last decade compiling biographical data on German refugees and, I am sure, should be willing to open his files for you. As I believe I mentioned to you, he came to interview me and I gave him all the information that seemed to me relevant concerning my own record. He did not use it very skilfully, though. But you told me that you had doubts about his judgement. His information might be adequate inspite of his own bias. Did you see the documentary that he made with his wife? It was quite touching.



Now one more word about the third paragraph on page 9, where you make a blanket statement about the unteachable and untrained jurists who entered government service from 1939 to 1946. You say, among other things, that their work had little influence; that they never penetrated to the top; that they performed "Maulwurfs- und Kaerrnerarbeit", and that they disappeared after the war, more or less noiselessly. In my considered judgement, your conclusion is not correct nor is it quite fair.

Take my own example. I joined the government service in 1942 as a propaganda analyst of the FBIS. In the course of my public career I later joined the Foreign Service and climbed to the status of senior service officer, class I. During the war we did important intelligence work which was channeled directly to the White House, to the Department of State, to the War and Navy Departments and to the intelligence community in general. After the war, when, as you said, most of us refugees quit, I was ordered to prepare guides for the U.S. occupation forces in Germany and thereafter was asked to draft the preliminary trial briefs against the Amtswalter of the Nazi Party, the SS, the SA and the Hitler Youth in preparation for the war crimes trial at Nürnberg. I was subsequently sent to Nürnberg as a member of the U.S. prosecution team together with other members of OSS, including several former German refugees, including Franz Neumann, John Herz, et al. Later, still in Nürnberg, I was appointed Chief of Research and Consultant to the Office of Chief of Counsel for the Prosecution of Axis Criminality. - What Nürnberg accomplished is partly a matter of record and partly one of conjecture. Its three principal purposes were: to punish the guilty, to document the record of Nazi criminality and to create new international law. All of it was achieved to a degree. The principles of the Nürnberg Charter, as you know, were affirmed by the General Assembly of the United Nations in a resolution of December 10, 1946, which also affirmed the judgement of the Tribunal.

After having lent a hand in the punishment of the guilty, I devoted the following years in the Department of State to the rehabilitation of what was left of Germany or, more precisely, to the kind of democratic reconstruction effort that went first under the title of re-education and later of re-orientation program. As a member of the responsible policy office in the State Department I first participated and later as the Director of the Office of German Public



.. 4 -

Affairs I developed and directed the policy that governed the cultural and information aspects of the U.S. High Commissioner's program in Germany and supervised the execution of the program. As a member of the directorate of the Bureau of German Affairs in the State Department I furthermore took part in decisions concerning other parts of U.S. policy for Germany. Nor was I the only German refugee involved in German or Austrian affairs. I am enclosing copy of a paper that I delivered in 1979 in Bielefeld and that will give you a synopsis of the type of work that we did in the post war period.

Following my work in the German Bureau I was sent to Paris as the U.S. Permanent Representative to UNESCO, a position that has now been given the title of ambassador. In this capacity I represented the U.S. Government at various international conferences and of course in the high councils of UNESCO proper. While an ambassador's responsibilities by definition do not involve policy making assignments, they give the incumbent frequent opportunities to submit to his government proposals that may be incorporated in official policy positions.

The same applies to my assignment in Switzerland where I first served as Deputy Chief of Mission but eventually, pending the appointment of an ambassador for the better part of two years, as *Chargé d'Affaires*.

Finally, as special assistant for environmental affairs in the State Department and as a chairman of an interagency committee on international environmental problems, I had a chance to make a direct contribution to the development of national policy and legislation (the National Environmental Policy Act).

These are only a few but probably the most important examples in my own career that may show you that German refugees were not entirely without influence on the policy level and all that long after the end of World War II. I am equally sure that I am by no means the only one. There were others in the State Department, including my assistant Richard Straus, in USIA and in other agencies of the government who may have a story to tell.

'nough for now, though.

Hope this will be of some use to you

*With the best Henry*

P.S.

I did not write you the above megillah about myself to have you include it in your statement but just to bring you up to date on yours truly and, if you will, to modify your evaluation at the bottom of page 9.

H.  
*[Signature]*



Kellermann, Henry J. , Cultural Relations as an Instrument of U.S. Foreign Policy. The Educational Exchange Program Between the United States and Germany 1945 - 1954. (Washington, D. C. : Department of State Publication, 1978), pp. 67 - 68, p. 71 footnote 38.

Die 'American Bar Association', die 'Association of American Law Schools' und die 'International Bar Association' unterstützten und überwachten im Rahmen der Arbeit der 'Commission on the Occupied Areas' (COA) . 'Ihre Aufgabe war es, inter alia, Kontakte und wechselseitige Beziehungen mit korrespondierenden Organisationen in den besetzten Ländern zu ermutigen, staatlichen Institutionen und privaten Gruppen Richtlinien, Programme und Projekte vorzuschlagen, das Funktionieren von Programmen zu beurteilen, plazieren und darin zu assistieren, und in manchen Fällen Austauschprojekte zu leiten.' (p. 68)



Henry Kellermann

## Von Re-education zu Re-orientation

Das amerikanische Re-orientierungsprogramm im Nachkriegsdeutschland

### 1 Einige grundsätzliche Betrachtungen

Der Historiker, der sich um eine Wertung der Bildungspolitik der Alliierten im Nachkriegsdeutschland bemüht, hat keine leichte Aufgabe. Vergleichsmöglichkeiten bestehen so gut wie keine. Diejenigen von uns, denen ausgangs der vierziger Jahre die Aufgabe gestellt wurde<sup>1</sup>, das sogenannte „Re-education“- oder „Re-orientation“-Programm zu entwerfen und durchzuführen, konnten sich an keine geschichtlichen Vorbilder anlehnen. Präzedenzfälle für geistige oder pädagogische Reparationen existierten nicht, schon gar nicht als Bestandteil eines Besatzungs- oder Befriedungsplans. Theorien über die Behandlung Deutschlands gab es in Hülle und Fülle. Aber ein offizieller Plan, der sich mit solch scheinbar esoterischen Begriffen wie Erziehungs- und Bildungsreform befaßte, stand nicht zur Verfügung. Re-education war ein Fall sui generis, ein erstmaliges und wahrscheinlich ein einmaliges Experiment.

Es verwundert daher nicht, daß die Einschaltung der Re-education in die alliierte Besatzungspolitik von Anfang an bedeutendes Aufsehen erregte und zugleich Gegenstand eines heftigen Meinungs-austausches auf beiden Seiten des atlantischen Ozeans wurde. Kritiker, und durchaus nicht ausschließlich im deutschen Lager, rügten das Vorgehen der Alliierten als eine unzulässige Überschreitung völkerrechtlicher Normen, als eine Demonstration der „Arroganz der Macht“, als eine illegitime Einmischung in interne Verhältnisse oder auch als belanglos, naiv, voreilig und unrealistisch. Ein weiterer Vorwurf, der eine gewisse Popularität gewann, stützte sich auf die Vermutung einer moralisierenden Prose-lytenmacherei seitens der Alliierten und richtete sich insbesondere gegen die vermeintliche Absicht einer Neuausgabe Deutschlands nach amerikanischem Ebenbilde.

<sup>1</sup> Der Verfasser war Direktor der Abteilung im Department of State, die für den Entwurf und die Überwachung der Richtlinien und das Programm für kulturelle und Informations-Angelegenheiten von 1950-1953 verantwortlich war. Die Umwandlung der Re-education zur Re-orientation fiel in seine Amtsperiode.

Die Kritik war zum Teil verständlich, aber überwiegend unberechtigt.  
Man muß die Motive und die Genesis des alliierten Re-orientation Programms

~~Kellermann~~ Henry Joseph Jan 1910 Berlin

1942-44 Foreign Broadcast Information Service

1944-46 OSS

Vorber New York Times

1949 Mitglied der US Delegation

American War Relief Paris

1953-56 Advisor to AASS

Secretary for Europe Affairs  
State Dept

1962-1967 - Chargé d'Affaires  
US Embassy Bonn



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kennen, um diejenigen widerlegen zu können, die behaupten, das Siegediktat enthalte einen ideologischen Vierjahresplan, der auf einen geistig-kulturellen „unconditional surrender“ hinziele. In Wahrheit stellte das Re-education-Programm einen Kompromiß zwischen sozial-ethischen (humanitären), politischen und praktischen Erwägungen dar und war als solches das Ergebnis einer schrittweisen, stark experimentellen, ständiger Korrektur unterliegenden Strategie. Es war allen gegensätzlichen Behauptungen zuwider im Grunde genommen völlig unideologisch und bewußt pragmatisch<sup>2</sup>. Ohne Zweifel stand die Re-education und später die Re-orientierungspolitik ursprünglich im Zeichen moralischer Motive. Das trifft im besonderen Maße auf die Vereinigten Staaten zu. Die moralische Komponente ist nun einmal aus der amerikanischen Politik nicht herauszudenken. Der Kampf gegen den Nationalsozialismus wurde von weiten Teilen der amerikanischen Bevölkerung als ein Kreuzzug des Guten gegen das Böse verstanden. Die kriminellen Ausartungen des Nazi-Regimes und seiner Kriegsführung erhoben dann den moralischen Faktor zu einem Generalnenner der alliierten Politik und öffentlichen Meinung. Es war daher durchaus logisch, daß er sehr stark die Nachkriegspolitik der Alliierten bestimmte, zunächst in der Form der Kaltstellung und Bestrafung der Schuldigen und in weiterer Folge in der Gestalt einer Reform an Haupt und Gliedern.

Die Einbeziehung des Moralischen in das Re-education-Programm ist somit unbestreitbar. Als logische Begründung genügt dieser Hinweis nicht. Es wäre in der Tat eine grobe Vereinfachung der alliierten Politik, das Motiv der Re-education auf die moralische Funktion zu begrenzen. Vielmehr muß mit aller Klarheit betont werden, daß Re-education ab ovo als ein Instrument der politischen Neuordnung und des demokratischen Wiederaufbaus und als solches als eine Ergänzung der Politik mit nichtpolitischen Mitteln begriffen wurde, sozusagen als der lange Hebel am Besatzungsapparat.

Die Gründe sind einleuchtend. Das Ende des Krieges hatte die militärische Phase beschlossen und den Zusammenbruch des Nazisystems besiegelt. Mit der Beseitigung der äußeren Machtsymbole war jedoch die

<sup>2</sup> Es scheint notwendig, diese Komponenten zu betonen, um gewissen Behauptungen zu begegnen, die in einigen der Diskussionsbeiträge wiederholt erhoben wurden und die auf der Konferenz selbst zur Sprache kamen. Radikalvorschläge wie der des „Morgenthau-Plans“ fanden keinen Eingang in die Vorbereitungen des offiziellen Programms, die der Verfasser an zentraler Stelle leitete.



HENRY J. KELLERMANN  
5428 ROOSEVELT STREET  
BETHESDA, MARYLAND 20817

May 19, 1984

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Hope this will be of some use to you.

*Walter Herbert Perry*

P.S.

I did not write you the above megillah about myself to have you include it in your statement but just to bring you up to date on yours truly and, if you will, to modify your evaluation at the bottom of page 9.

H.  
*[Signature]*



DR. HENRY KELLERMANN :

Dear Kommitonen, Ladies and Gentlemen, dear ex-Berliners :

I am a Berliner, and that is one spot that does not come out in the wash, nor do I care to have it come out. "Germany" is something else again, but nearly 50 years have gone by since I departed from the Anhalter Bahnhof for good, for better or for worse. Now I am always glad to go back to Berlin and I expect to be back again in a few weeks for a conference to which I have been invited. I am looking forward to take a taxi once again, and I am looking forward to "shooting the breeze" with a Berlin cabbie, the world's greatest philosopher. I have many good memories of them. One of the best I share with Fritz Kortner, the great phenomom of the German stage, who told me when he came back to Berlin after the war (which he had spent in London), he too took a cab at Tempelhof Airport, and the next I will tell in Berlinisch, because the cabbie turned to him and said: "Na, wieder mal im Lande, Herr Kortner ?" And Kortner, very surprised, said: "Sie kennen mich ?" And the cabbie said: " Na jewiss doch, ick hab Sie doch immer zum Studio jefahren. Ja, da sind Se wohl ne ganze Weile weg jewesen." And Kortner said : "Na, was ist denn hier inzwischen passiert ? " - Pause - and then the cabbie said : "Ick sag Ihnen was: versaeumt hab'n Se nischt."

And I remember another, even more profound statement by a taxi driver: I took a cab from Tempelhof Airport, shortly **after the** death of Ernst Reuther, the Governing Mayor of Berlin, whom I consider one of the greatest Germans after World War II. He had died, and I was going to Berlin to express my condolences to his widow, and I said to the cab driver: "Ich verstehe, jetzt haben Sie wieder Wahlen, Sie werden einen neuen Regierenden Buergermeister waehlen." "Nee," said he, " einen Buergermeister werden wir waehlen - der Regierende Buergermeister ist tot."

It says a lot about the common sense of the Berliner, things like that, he was dead right. Reuther was an extraordinary man. I had a private "Bierabend" with him in one of his last years when we swapped stories. He told me when he left Germany and I told him when I left Germany. He had left in 1933 for Ankara where he taught at the university. He said: " When did you leave Berlin ?" and I said: "In 1937," and he said: "In 1937 ? Sie koennen doch kein anstaendiger Mensch sein ! "

I had my reasons for leaving late, not all voluntarily, I can assure you. Some of your may remember, and Peter obviously does, that I was in charge of a very large Jewish youth organization and I did not feel that I could let those kids starve and just take off and leave. I had some work to do. That was one reason.

The second reason was that I wanted to finish my doctor exam. I got special permission to do so, and I must have been the last Jew in Germany to do it. I made it in June 1937 in the Aula of the Berlin University under swastika flags. I was sworn in by one of the greatest antisemites and nazis, the dean of the law faculty, and my opponents (you had to appoint opponents for the defense of your thesis) were among others Rabbi Gunther Plaut, now a rabbi in Canada, and some other friends. The whole mischpoche was sitting



in the first row. This was a totally Jewish affair except for the dean who was completely out of place. That was a very late affair, and shortly after that I took off. Another reason was, I had and still have a secret love affair with Berlin. And that's why I like to go back from time to time.

We all have found ourselves at times at odds with history, all history that is, and most of the time the odds have been against us. We have been the objects but very rarely the makers of history. For centuries that has been an unbearable and I will say an unacceptable proposition. What can you do about it, if you can do anything? I submit that there are four options left to us how to come to terms with history. This is what my address is about.

First of all, you can simply forget or ignore or suppress; secondly, you can criticize it, you can debunk it, you might even betray it. Thirdly: you can simply succumb to it, accept it, make peace with it, suffer it. Fourth: You can correct it or fight it.

Number One is the option least acceptable: to forget it. We all remember Santayana's statement that those who do not remember their past will be condemned to repeat it. This has been true many times in history. I don't suppose that anyone in this room has forgotten it, ever. Now, to add insult to injury - and this is my thesis - many of our new neighbors in this country or fellow citizens and, I must add, our fellow Jews have seen to it that we won't forget it. They have made sure, they have actually pressed charges against us which I find equally irritating, unfair and basically unhistoric.

But let me say from the very beginning: I do not claim that these charges are made necessarily with malice. They are just made with what I believe is a profound lack of understanding of historic realities. They are now made with increasing frequency and often by serious scholars in a rash of publications that deal with two specific subjects. Number One: the Weimar experience, and Number Two: the German-Jewish experience; and it seems to me that these two charges require an authentic reply. "Charge Number One": How could you German Jews be so utterly foolish and blind not to see the handwriting on the wall? There is a sub-charge: How could you make common cause with the people who did not want you in the first place, and once you did, why did you not cancel your association earlier? Why did you wait so long? To save the family silver?

There are many answers to these questions, and we are not going into details. One answer applies to all ethnic and religious minorities who, like the Quakers and Huguenots, were torn from the national body along with millions of other refugees of today and thrown out by the authority and command of their country. Why had we not seen the danger coming? Actually many of us did, and many of us left earlier than I. As to the rest: We were fooled to a certain extent, we admit, but so were others. How



many of us remember a book by Feuchtwanger that appeared in the Twenties, titled "Erfolg", which dealt with Alois Kuptzner, actually Adolf Hitler, who saw his dreams come to dust and ashes. Then there was a book about Mussolini which predicted that Mussolini was a man who had his future behind him. They were declared literally dead, both Hitler and Mussolini, in the mid-Twenties by two literary geniuses. And I remember something else: My boss, Robert Murphy, who later became Undersecretary of State and Ambassador to Japan, told me that when he was a young counsel he was stationed in Munich at a time when Cardinal Pacelli was representing the Church in Munich. Pacelli later one became Pope Pius XII. Murphy said he and Pacelli had a number of very interesting discussions and Pacelli invariably pooh-poohed the whole Hitler spook as something not to be taken seriously, he simply dismissed it. "Never will anything become of it." That was Pacelli in the Twenties. After he became Pope, Murphy asked for an audience and he said to me: "I could not help myself but I could not let the occasion go by without reminding His Holiness of our discussion in Munich." And Murphy said: "Holy Father, do you remember our discussion in Munich?" And the Pope said: "I remember it well." - "Now", said Murphy, "do you remember what you predicted?" And the Pope said: "I remember it well but, mind you, in those days I was not infallible."

The more interesting episode is that of General Schleicher whom you will remember as one of the men who finally brought down the Weimar Republic. Two weeks before Hitler was appointed by Hindenburg to become chancellor he had a discussion with Schuschnigg - this is recorded - in which Schleicher predicted that Hitler's chances were over, that there was not the slightest possibility that he would be appointed chancellor. That was a man who moved in the highest circles, who himself was chancellor, who should have known better. So we were not the only ones who were fooled.

Let's remember something else : The Nazis did not come to power all of a sudden. They were a creeping phenomenon. They didn't reach their success until pretty late in the game. They had many setbacks, there were enormous pockets of resistance, and don't forget that until the very end they remained a minority party, they never reached majority in Germany. Even in the election after they had seized power, they could not attain more than 44% of the vote. So it was not altogether so out of the way to say that there might have been prospects for a change.

My thesis is that politically and historically Weimar's doom and the Nazi Reich were not inevitable, certainly not the latter, particularly if the victorious allies would have acted differently after World War I. But the point in fact was that the policy of reparations, and above all the failure of practically all Western powers to give adequate support to the democratic forces and democratic institutions of the Weimar Republic, to the extent in which we did it after 1945, sealed the fate of the Weimar Republic. I am not saying that it is the only one and I am far from blaming the Allies for what happened in Germany but it surely was one of the factors that contributed to the downfall of the Republic.



Charge Number Two : That is almost more serious and out and down right outrageous. It is levelled in its most articulate form by scholars of note as Peter Gay, Professor in Princeton. His book has the give-away sub-title "Weimar Culture - The Outside as Insider". It lumps German Jews with leading scholars, artists, politicians, liberals, democrats, intellectuals, in general, most of the Weimar period as wholly unrepresentative of the German people and character which in itself, he said, remained conservative, tradition-bound, caste-conscious and hostile to any kind of political, social and cultural reform. Weimar culture, Gay says, was a creation of "outsiders, propelled by history into the inside for a short, dizzying, gradual moment." So much for Walter Rathenau, Max Liebermann, Max Reinhardt, Stefan and Arnold Zweig, Jakob Wassermann, Bruno Walter, Ernst Cassirer, Walter Gropius, Elisabeth Bergner, Ernst Deutsch, Fritz Kortner etc. etc. - all outsiders worming their way into the inside ! But what about Thomas and Heinrich Mann, Gerhart Hauptmann, Friedrich Heinecke, Max, Alfred und Marianne Weber, Gustav Stresemann, Friedrich Ebert, Wilhelm Furtwaengler, Richard Strauss, Käthe Kollwitz, Emil Nolde, to name just a few of those who gave greatness and glamour to the Twenties in Germany and helped particularly Sprec-Athen to become what somebody called the new Periclean Athens.

Were they also outsiders ? Obviously, there is something very, very wrong with Dr. Gay's topography. For who is representative of an era, of a nation ? Was Goethe, Germany's greatest literary genius who lived in a stuffy principality, the typical exponent of his society ? Was Schiller, one of Germany's freest spirits, representative of his time ? Today they are the classical symbols of German culture, but "Germany" did not even exist in those days.

What then assures representativeness ? Mass support ? Popularity ? Or the dictate of one government ? Now I submit that compared with the classic period, the cultural exponents of the Weimar period, the Jews included, were as much representative of their time, if not more so, and had as much of a following, if indeed not a larger one, than those of any other significant era in German history. Thanks to Weimar it was the new democracy, the Weimar Republic, that opened the doors to all, that encouraged the untrammelled pursuit by all of science, scholarship, the arts and culture in all its manifestations with access and participation by and including Jews.

And I conclude: the distinction between inside and outside is false. It is a beguiling rationalization by latter-day critics, themselves outsiders, it is in fact pure and simply "Nazi doctrine". This is exactly what the Nazis said, precisely the rationale of book burning, of "leichschaltung", of programs. Weimar then was not a bust, it was not without flaws, to be sure, or not all the time, and we as German Jews should not take on that hangdog look when they chide us for having been late, foolish or fooled; we owe nobody an apology for that, nor do we owe regret. We may have been mistaken up to a point, but we certainly were not the only ones. This is my answer to that particular charge.



Now one more word about what is the meaning of "option" : How can you correct, how can we correct history ? This may sound a little presumptuous, arrogant. My first title of a lecture which I submitted to Peter was more realistic. I wanted to talk about "Footnotes to History". But let me give you some examples of what happened where perhaps we were able to "corriger la fortune", correct history, up to a certain point. Nuernberg was a case in point. I was assigned to the American prosecution. I was chief of research and documentation. I did this in my capacity as a member of OSS, the Office of Strategic Services which in itself was a remarkable assortment of geniuses of all sorts and of all walks of life. There were people like Franz Neumann, the famous and then ill-fated Herbert Marcuse, whom you may remember, Arthur Schlesinger, Otto Kirchheimer, to name a few. I participated in some intelligence operations on the then moribund Nazi-Germany, helped prepare for the post-war occupation and for the war crimes trial in Nuernberg.

I was given the not very flattering title of "hangman". In fact, I was put into a special room where the noose was fastened on my door and access was interdicted. I was sitting behind the door, preparing pre-trial briefs against the Nazi Amtswaltung, the SS, the SA and the Hitler Youth.

Finally I was in Nuernberg for the beginning of the trials. The arrival in Nuernberg was quite an experience for a Jewish refugee. It was the first time I set foot again into Germany after I had left it eight years earlier. It was not the same Germany and not the same Nuernberg. I had known Nuernberg as one of the most magnificent relics of the Middle Ages, architecturally and culturally and esthetically. Now it was just a heap of ashes, twisted structures, a miserable view and a total picture of destruction. Mass migration, people coming and going, nobody apparently knowing where to go, the station walls full of thousands of paper clips asking about relatives - a miserable, pathetic picture. But the opera was going at the same time at full speed. They did not lose a moment to open the opera, the roof was not mended, we were sitting in seats with the rain dripping on us in early October, but the opera was going - no doubt about it - culture had to continue !

The Court was very impressive. Some of you may have seen the picture "Judgement at Nuremberg". This is the authentic place where the trial was held: the bench with two British, two French, two American, two Russian judges; the prosecution also subdivided into four groups, - and then the defendants. They looked like a very sorry lot there. They were all there : all those people you had been seeing on the front pages of newspapers for the past 14 years, and there they were, in tattered uniforms, in very shabby civilian clothes, nothing heroic left about them. Goering was leading the lot, he looked the most impressive of all, and Hess, of course, faking insanity and keeping it up for quite a while, and when he found one day that he had no audience he gave it up from one day to the next.



We had an interesting experience. The defendants looked pretty much like one lump of clay but they were individuals, that became apparent when we showed the picture "The Deathmills" - "Die Todesmuehlen" - in the courtroom. You might remember it as the first documentary of the concentration camps. Those were authentic pictures, part of them were taken in Warsaw, showing the Jews being driven from their homes, with that pathetic little boy opening the parade there - unforgettable pictures. We showed that in the courtroom. We darkened the room except that we kept a light in front of the faces of each of the accused, and it was remarkable to watch their individual reaction to it. There they broke down into different characters. The whole play suddenly became very dramatic. Goering refused to look at the screen at all. He looked straight ahead, showing his total unconcern. Hess equally looked straight ahead. Frank, the butcher of Warsaw and Poland, broke into jeers, and so did Sauckel. The generals showed some military bearing but they were obviously shaken, there was no question about it. Streicher was the only one who was absolutely fascinated by what was going on. He never took his eyes off the screen. He was the Number One antisemite, and he was not to be deprived of his last testimonial to what he had initiated. He obviously liked the show. Interesting was Hjalmar Schacht who was, as you know, acquitted. Hjalmar Schacht turned his back to the screen and folded his arms over his chest and looked straight ahead at the press, indicating that he had nothing to do with it. It occurred to me later on that he took exactly the kind of posture that many Germans took during the Nazi period when they turned their backs and did not look at what went on in front of them. Schacht was more typical of Germany at that time than any of the other accused, - and he was acquitted.

Now, talking about "correction of history", what did we do? The purpose of a trial is threefold: We intended to punish the guilty, we tried to document before all the world the record of the Nazi regime, notably its criminality, and we tried to create new international laws.

All three objectives have become subject to heavy controversy, although the second one, documentation of Nazi history, is probably the one which is least disputed. Many important documents of one of the worst times, of the "Endloesung" in particular, were located much later, after the trial. The substance of the Nuernberg charter, the international law, and the proceedings have come under very close scrutiny from a political and from a legal point of view, particularly at the time of the My Lai trial. It should be remembered that the principles of the charter were affirmed by the United Nations in a resolution adopted by the General Assembly on December 10, 1946, which also affirmed the judgement of the tribunal and directed member states to codify offenses against peace and security of mankind on these principles. Of course, unfortunately, this has not happened, or only in very few cases. The three objectives of the Nuernberg trial were valid objectives, even if they were not carried out in all cases. The Nuernberg trial has been vindicated or will be vindicated over a period of time. This trial is an example how we can correct history, how we can do something about it, even about things that happen to you personally.



ly thesis is that we have no cause to lie down and roll over when we are faced with charges such as the ones which I cited. History is not something which is to be read in books only and put away to be forgotten. It is something which each one of us, if his moment comes, can do something about even on his minor, modest, individual level. Some have a better opportunity than others, to be sure, and I am glad that I was given a little bit of it.

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K. PETER LEKISCH on YOM HASHOA - Sunday, April 29, 1984

This day, April 29th, has been set aside as a Day of Remembrance for the Jewish Martyrs and Jewish Heroes, it is the day when we, too, remember the Six Million People who lost their lives during the Holocaust.

As we pause to remember them, our thoughts go also, and particularly this morning, to all the members of our group and to their families who perished as a result of the events which started some 51 years ago. As we think of them with gratitude, we think also of those, from amidst our ranks, who died under normal circumstances - in Europe as well as here. We remember especially those who were responsible for the ingathering of our brothers and sisters after the last big War. Without their labor, this - and our previous international gatherings - would not have been possible. We realize that for the past 40 years we have lived under the shadow of another World War, this time with a terror which would be more destructive than any we have seen previously. It has been for want of learning past lessons that we are faced with this situation today whose end we cannot see - nor comprehend.

Without those who came before us, we would never have had the Max Mainzer Memorial Foundation whose help is being willingly given to our brothers and sisters in need, wherever they may be.

It is only right that I single out this morning our late Kartell-brother Siegbert Bornstein and his wife who thought of us in such a benevolent manner in their Last Will and Testament.

The KC and the Max Mainzer Foundation own no buildings. We have no bricks or stone to express our thanks to them for allowing us to help and assist those of our group who, through no fault of theirs, find themselves in need of sustenance. It is due to the thoughtfulness of people like the Bornsteins that we are able to extend our helping hand, here and across the seas.

The Foundation, under whose auspices we meet here, is a living memorial to them and to all of us who have and are allowing us to do this. In mentioning them by name, I am no less grateful to others who have thought of the Foundation in their Last Will and to those many others from amongst us who regularly stand by us at happy as well as sad events. The Foundation is what I would like to call "the living KC", and as such will, we hope, be able to function until the needy from amongst us have indeed been taken care of.



Our minds are full of memories. They are vividly with us when we meet, as we did here during these last few days - memories of a pleasant nature, tragic memories, sad memories and happy ones as well. They, my friends, made us strong and allowed us to become the people which indeed we are.

It is important that we always remember who we are - where we came from, and to remember what history and our own upbringing taught us. If there is any melancholy in us, it is due to the awareness that sometimes all of this can and will end. Yet our history will be here for all to see, for all to see if anyone cares, with all the accomplishments, if you wish, and also with all the mistaken ideas and faults of the past, one thing will always be standing out and will be given to posterity, and that is our Max Mainzer Memorial Foundation, and the good it does - yesterday, today and tomorrow.

On this special day, we also think of the soldiers and fighters in Erez Israel once again, deserving our thanks, our admiration and our appreciation. They, in their way, are the descendants of the Founding Fathers of the KC who, in their own way, fought so that liberty should prevail. They fought for equal rights, they fought for liberty as we did, and hopefully, our children will be ever watchful so that these inalienable rights shall prevail here and be recognized elsewhere as well.

As we remember those who are no longer with us, I would like to recite a poem which I had used at a previous occasion, which embodies to me our thoughts, especially on this Day of Remembrance.

As long as we live, our brothers and sisters will live -  
We remember them at the rising of the sun and at its going down.  
We remember them  
At the blowing of the wind and in the chill of winter,  
At the shining of the sun and at the warmth of summer,  
At the rustling of the leaves and at the beauty of autumn.

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WIR GRATULIEREN

Nachtraeglich zum

90. Geburtstage

Kurt Kreutzberger  
Madero 1808  
1638 Vicente Lopez  
Prov. de Buenos Aires  
Argentinien  
am 23. Maerz 1984

\*\*\*\*\*

Zum

85. Geburtstage

Fred Marz  
2175 Hudson Terrace  
Fort Lee, NJ 07024  
am 1. Mai 1984

Alfred Goldberger  
401 East 74 Street  
New York, NY 10021  
am 21. Mai 1984

Alfred Hollander  
3535 First Ave.No.12 C  
San Diego, Cal. 92103  
am 20. Mai 1984

Hans Hirschfeld  
109-20 71 Rd.  
Forest Hills, NY 11375  
am 17. Juni 1984

Herbert Rummelsburg  
71 Michelangelo St.  
Amsterdam-Z Holland  
am 24. Juni 1984

Erhard Weltman  
375 Lafayette Ave.  
Cincinnati, Ohio 45220  
am 2. Juli 1984

Frederick Adler  
6 Franklin Str. Extension  
Danbury, Conn. 06810  
am 22. August 1984

80. Geburtstage

Herbert White  
9 Belmour Lodge  
Bournemouth BH 4 8DM  
England  
am 13. April 1984

Richard Schiff  
68 Isaac Smith Str.  
Kingsford NSW 2032  
Australien  
am 26. April 1984

Luis Mayer  
Santa Rosa 2980  
1602 Florida FCNGBM  
Argentinien  
am 26. April 1984

Kurt Schreiber  
27 Elihu Street  
Hamden, Conn. 06517  
am 8. Mai 1984

Alfred Judd  
10 Armdale Crescent  
Mount Lawley, W.A. 6050  
Australien  
am 6. Juni 1984

Herman Silversmith  
Hotel Adams  
2 East 86 Street  
New York, NY 10028  
am 1. Juli 1984

John Spanier  
4201 Massachusetts Ave. NW  
Washington, DC 20016  
am 26. August 1984

Berichtigung : Kb. Julius Gummers (Glasgow) feierte am 18. Maerz 1984 seinen 80. Geburtstag, nicht, wie irrtuemlich im vorigen Bulletin angegeben, seinen 75. Geburtstag .

Nb. Fritz Cohn, dessen 75. Geburtstag wir im vorigen Bulletin erwachten, wohnt nicht in Natanya, sondern in Naharia.



Zum 75. Geburtstage

Gad Alon  
14 Caspi Street  
Jerusalem Israel  
am 28. April 1984

Erich Seligmann  
4401 Gulf of Mexico Dr.  
Longboat Key, Fla. 33548  
am 7. Mai 1984

Wilhelm Mainzer  
Kupat Holim  
Kerem Naharal - Haifa  
Israel  
am 13. Mai 1984

Fritz Caspari  
Rua Filadelfia 32  
Sao Paulo-Brooklin Novo  
Brasilien  
am 26. Mai 1984

Gerald Jonas  
50 Chumasero Dr.  
San Francisco, Cal. 94132  
am 27. Mai 1984

Kurt Stanner  
12 Koresh Street  
P.O.Box 337 Jerusalem  
Israel  
am 30. Mai 1984

Helmut Schreiber  
Ranelagh Dr.  
Edgware, Mddx. England  
am 22. Juni 1984

Hans Schein  
Charlton NY R.D. 3  
Ballston Lake, NY 12019  
am 24. Juni 1984

Klaus Dror  
22 Gideon Street  
52314 Ramat Gan Israel  
am 25. Juni 1984

Hans Wetzler  
3 Decoy Avenue  
London, NW 11 England  
am 27. Juni 1984

Paul Hagen  
2309 Palo Fierro  
Palm Springs, Cal. 92262  
13. Juli 1984

Herbert D. Klein  
Im Roetel 10 A  
Zug Schweiz  
am 14. Juli 1984

Ernst Reichmann  
Georg Speyer St. 82  
6 Frankfurt/Main  
Deutschland  
am 26. Juli 1984

Gerard Steinitz  
R.D. # 3 Box 82  
Fulton, NY 13069  
am 12. August 1984

Heinz G. Michael Lewin  
6 Shaked Street  
Rishon Le Zion  
Israel  
am 12. August 1984

Alphons Silbermann  
Eisenborner Str. 19  
Koeln 41 Deutschland  
am 11. August 1984

Hans Wertheim  
Chlodwigstr., 94 III Apt. 51  
4 Duesseldorf Deutschland  
am 16. August 1984

Zum 70. Geburtstage

Kurt F. Sheridan  
Croft House  
Princess Rd. - Lostock  
Bolton, Lancs. England  
am 7. Mai 1984

Felix Salier  
2655 W. Lunt Avenue  
Chicago, Ill. 60645  
am 26. August 1984

WIR GRATULIEREN

Ernst und Ditha Gans, Mich., zum 60. Hochzeitstage am 21. Juli 1984  
Grete (Curt) Ettinghouse, NY, zur Heirat ihrer Enkelin  
Kb. und Ks. Federico (Fritz) Marx, Argentinien, zur Goldenen Hochzeit



ALBERT PHILIPP - 85 Jahre

Waehrend des Washington KC Treffens fand zu Ehren von Albert Philipp eine Cocktail-Party seitens der Max Mainzer Memorial Foundation statt, bei der wir nochmals Dank sagten fuer die von ihm geleistete Arbeit sowohl fuer den KC, aber vor allem auch fuer unsere Foundation.

Nach einleitenden Worten von K. Peter Lekisch sprachen Kurt Braun, sein aeltester Freund, und Hilda Levy :

Lieber Albert :

Vor mehr als 60 Jahren standen wir am Ufer der Spree, mit dem Glas in der Hand, und damit begann unsere lange Freundschaft.

Heute stehen wir am Ufer des Potomac, erfreulicherweise wieder mit dem Glas in der Hand. In der Zwischenzeit bist Du 85 Jahre alt geworden und hast alles gelernt. Dein einzig uebrig gebliebenes Problem ist, wie fuer jeden von uns auch, Dich an alles zu erinnern.

Das fuehrt uns zu der Frage, was hast Du eigentlich waehrend der vergangenen 60 Jahre getan ? Du warst und bist immer noch ein richtiger KCer, der, wo er auch lebt, tatkraeftig fuer die Ideale taetig ist, fuer deren Durchsetzung unser Verband einst gegruendet worden ist. Du gehoerst nicht zu denen, die diese Ideale durch persoenliche Freundschaften und gelegentliches Zusammentreffen mit alten Bekannten ersetzen zu koennen glauben. Deine emsige Arbeit fuer den Max Mainzer Memorial Fonds ist eines der vielen Beispiele fuer Deine alte Treue zum KC.

Ich moechte aber noch ganz kurz zwei Beispiele fuer Deine Taetigkeit auf ganz anderen Gebieten erwaehnen. Ich denke dabei an den Nachmittag vor vieler, vielen Jahren, an dem Dein Onkel Gustav und ich dringend aufgefordert wurden, sofort in die Wohnung von Alice's Eltern zu kommen. Es handelt sich um Albert. Als wir in das Treppenhaus kamen, wurden wir gewarnt, sehr vorsichtig weiterzugehen, es war "frisch gestrichen". Darauf sagte Onkel Gustav ahnungsvoll : "Ich weiss, hier wird Albert kleben bleiben !" Und so geschah es. Er klebt immer noch fest und treu mit seiner Alice zusammen.

Nicht ohne Zusammenhang mit diesem Ereignis, zeigt das Vorhandensein von zwei huedschen Toechtern und fuenf Enkelkindern, dass Albert auch ausserhalb seines Geschaeftes recht produktiv gewesen ist.

Das ist die vollstaendige, bisherige Lebensgeschichte von Albert und Alice in leicht verkuerzter Form.

Ich schliesse jetzt mit einem Wunsch. Ich schliesse mit dem Wunsch fuer die zukuenftige Fortsetzung der Lebensgeschichte. Moegen wir in fuenf Jahren, mit dem Glas in der Hand, wieder an dem Ufer eines interessanten Flusses stehen (unter keinen Umstaenden aber des Styx) und moegen alle, die heute hier versammelt sind, mit mir auf das Wohl von Albert und Alice trinken mit dem traditionellen Ruf "PROST !"

Kurt Braun



Dear Albert :

When it was decided that this cocktail party will be in honor of Albert Philipp for all he did for furthering the IC Fraternity and the Max Hainzer Memorial Foundation, we decided to add a word or two which we missed to say at your birthday party on the fifth of March.

Shy as my Fritz is to make a public speech, he uses me as a mouthpiece as I feel less inhibited but quick to the point, according to enough other Kartellbrothers.

Of course, following a speaker like Kurt Braun whose close friendship with you goes back to your student days is difficult, not to say presumptuous, and impertinent. But nevertheless, we want to express our love and admiration to you which includes, of course, your Alice as an integral and important part of you.

We came to know each other rather late in life, only on this side of the Atlantic. Even so, our acquaintance became, over the past 20 years, a close friendship. The basis for this was, of course, our belonging to the IC and with that a common ground in thinking and acting. This does not preclude different opinions but means mutual respect for each other's viewpoint in discussion of timely burning problems in politics, American policy, Israel, Zionism, and not at least the purpose and future of our Fraternity, the IC.

We cherish our evenings with you, tasting the delectable meals your Alice concocts and the well-selected wines you serve.

One thing I have to mention which shows the real nature of Albert, his innermost humanity and readiness to help. Twelve years ago, when our acquaintance had not yet grown into a full friendship, you and your Alice were at my side helping me over the dark days when my Fritz's sudden serious illness struck me like a thunderbolt, and I was besides myself. This was our first experience with your moral commitment to help wherever help is needed. You both are true "Kuemmerers", and the commitment does not confine itself to your family and friends but also to all in need of comfort, if at all possible.

You, Albert, found a wonderful partner in Alice. We also admire your closeness to your family which manifests itself in the fact that your daughters and grandchildren do not only respect you as parents and grandparents but also as their best friends.

We wish you that you can enjoy this love of your family and your many friends and admirers in happiness and in good health for a long, long time, and for ourselves; the Levys, we wish to be able to call you friends for many years to come.

Hilda Levy

---

Albert Philipp dankte am Schluss fuer diese Ehrung

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Ludwig (Luis) Mayer --- 80 Jahre !

Mein lieber Ludwig :

Aus Deinem Brief vom 31. Januar 1984 entnehme ich die wahre Tatsache, dass es schliesslich schon 62 Jahre her sind, dass wir uns in Heidelberg kennenlernten. Du fuegstest hinzu, dass alte Freundschaft nicht rostet. Dem ist auch so. Seit 62 Jahren sind wir befreundet - im Wintersemester kamst Du zu uns in die Bavaria als krasser Fuchs. Diese Freundschaft hat seit dieser Zeit bis heute bestanden, und so soll es auch weiter bleiben.

Du muesstest ja alle Tage an mich denken, denn den Schmiss, Folge einer Saebelpartie, verdankst Du letzten Endes mir, da Du als mein Testant gleich dem Sekundanten Toni Benedik in eine weitere Saebelpartie verwickelt wurdest. Als Gegenpartie fuer diesen Schmiss stelltest Du mir meine liebe Lotte vor. Die Folgen sind Dir - und erst recht mir - wohl bekannt. Deine liebe Yvonne hatte ich auch kennengelernt und zwar in der Zeit, als wir beide noch taetige deutsche Anwaelte waren - Du in Ludwigs-hafen und ich im benachbarten Mannheim. Deine fast alltaegliche Frage war, wieviele neue Mandate ich taeglich hatte.

Unsere Freundschaft besteht heute noch im gleichen Maasse wie frueher und wir freuen uns jedes Jahr, wenn Du und Deine liebe Yvonne Eure argentinischen Winterferien zu Sommerferien in Europa macht. In Gstaad bist Du jaehrlich zu Gast, um Deine alten Freunde, deren Kreis leider immer kleiner wird, zu treffen.

Dir wuenschen Lotte und ich zu Deinem 80. Geburtstage alles Gute. Unsere Wuensche gehen auch zu Deiner lieben Yvonne, auf die Du bestimmt sehr stolz sein darfst.

Wir waeren ja gerne zu Deinem Freudenfest nach Buenos Aires gekommen, aber wir bzw. Du und ich haben beschlossen, die Goldene Hochzeit im Maerz 1986 zusammen auf einer fernen Insel im Ozean - wahrscheinlich in Baden-Baden - zu feiern. Zur Vorbereitung dieses einmaligen Festes sehen wir uns ja noch.

Fuer heute Euch beiden und als Geburtstagskind besonders Dir, lieber Ludwig, unsere besten Wuensche.

Lotte und Ludwig (jetzt Louis) Braun gen. Petz



From the English KC Bulletin :

Willy Mansbach - 75 years old - November 12, 1983

It was far away and long ago since we met in Berlin when as proud students and in couleur and bandolier of the Sprevia we strutted the streets of the grand metropole. Glorious times, for a short while at least which Fate allowed us before the avalanche of hatred engulfed us and hurled us in different directions.

But hard as I may try to remember, only distorted and fragmented memories come back to my mind. I recall our "Steh-Convents" in the University, after which you had to rush to "Springer" and I to "Anatomie". Later the channels of our different faculties led us different ways. Then the Nazi-catastrophe struck and all cohesion seemed to be smashed; yet, the fraternal bond held fast, and we met up once more later on. I found you again in London when you already held a position as insurance broker in the City.

The the war caught up with us and the Armed Forces claimed us, posting and dispersing us to distant lands. Once again we lost contact. However, you made your way, led a happy family life and successfully pursued a career, reaching the pinnacle coveted by every financial wizzard by becoming a Lloyd's Underwriter.

Now you have attained the venerable age of 75, a measurement in time of a distance travelled, of experience collected and of wisdom gathered, all of which will serve well for a still long and enjoyable journey ahead. May good fortune stay with you.

Yours, Ferry Gross

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Fred Bernstein - 80 Jahre alt

Am 7. November 1983 feierte Fred Bernstein seinen 80. Geburtstag. Im KC Adressbuch von 1929 war er als Med.Praktikant in Kassel, wo sein Vater Arzt war, aufgefuehrt, als AH der Visurgia Goettingen. Er hatte die akademische Laufbahn als Dermatologe gewaehlt.

Fred gehoerte zu den ersten Einwanderern in England und brachte bald auch seine Mutter und Schwester heraus. Er war einer unserer ersten Freunde. Wir trafen ihn zuerst bei Katzens, die alle paar Wochen die KCer, die ja alle in primitiven Boardinghausern wohnten, zum Tee mit Leberwurstbrotten einluden. Fred wurde unser Hausarzt und hat nach und nach drei Generationen Hallgartens betreut.

Fred war einer der ersten, die naturalisiert wurden, und als der Krieg ausbrach, trat er in die Armeee ein und kurierte bald Soldaten und Eingeborene in Nordafrika von den ausgesuchtesten Krankheiten. Wir sahen uns wieder nach seiner Rueckkehr nach London. Fred traf und heiratete Doktor Ellen aus Mainz, und ich war stolz, dass ich als "best man" fungieren sollte. Ich mag wohl nicht sein bester Mann geblieben sein, wohl aber gluecklicherweise oder ungluecklicherweise einer seiner besten Patienten ! Wie oft war es, dass sein guter Rat mich auf den Operationstisch befoerderte, aber auch wieder hinunter ! Ihm habe ich es zu verdanken, dass ich heute noch zwei Nieren habe.

Unsere Freundschaft mit den beiden, die ja besser als jeder andere unser Herz(und anderes im Innern) kennen, ist dieselbe geblieben ueber die vielen Jahre. Die beiden haben eine grosse Praxis aufgebaut und sind beliebte und



vielbegehrte, und noch immer volltaetige Aerzte. Wie erfolgreich die doppelte Partnerschaft ist, ergibt sich aus den zahlreichen Bildern auf dem Kamin : drei Soehne (Robert Arzt, Anthony Chartered Accountant, Geoffrey nach erfolgreichem Studium der Physik ist heute Actuary). Wie alle Bernsteins haben sie sich huebsche Frauen ausgesucht, und was die Enkel angeht, kommt die Geburt mehrerer gewoehnlich zusammen. Sie sind natuerlich gluecklich, dass sie alle in Northwest London wohnen, so ist es leicht, sich oft zu sehen.

Fred und Ellen haben die reizendsten "bedside manners". Sie haben letztlich versucht, die Zahl der Patienten zu verringern, aber wir zwei sind nicht die einzigen, die den leise geaeusserten Wunsch, doch einen anderen Hausarzt zu finden, ignorieren. Keine Krankheit, noch nicht einmal ein gewoehnlicher Schnupfen wuerde jemals dasselbe sein ! Moege er noch lange praktizieren, mit Weisheit und Humor, und zusammen mit Ellen unsere so guten Freunde bleiben.

Fritz und Friedel Hallgarten

Herbert White - 80 years old

A few years ago, on one of our short holidays in Bournemouth I phoned Herbert and Sally White. We met and became friends. Invited to their charming and hospitable home whenever we came to Bournemouth it has become part of our holiday. There is only one regret - that the Whites are not living in London. Herbert's undiminished interest in the KC would have much contributed to London KC life.

Looking forward to many more meetings with the Bournemouth KCers, I wish Herbert good health and many more years to come together with his dear wife Sally.

Lothar Nelken

Ludwig Gunz - 80 years old

It must be about sixty years since we became friends in the good old carefree days ! I remember when I carried the flag of our beloved Rheno Silesia through the streets of Bonn, I remember when we courted and sometimes shared our girlfriends. I remember the hospitality in your old house in the Remigius Strasse and the many times we burned the midnight oil playing Skat. Perhaps, if we had devoted less time to Skat and more to study we might even be professors today !

In recent years you have had your share of illness but thanks to your good constitution and the lovong care of your Susan you have conquered. And now you are 80 years old although you do not look it. We wish you all the best, many more years of good health and contentment !

C.H. Rothschild

Ronald Stent - 70 years

You made it; you reached the age of old Nestor - the wise man of the Greeks. We have known each other a long tine, we have different ideas about a large variety of attitudes, but we have one thing in common - we both do not like to grow up in our different ways.

We met in 1932 in Bonn and our ways parted one year after that. We found each other in London - Kew Gardens it was - strangers at first due to different experiences - but soon firm friends. The friendship lasted all



these years. We still love in our conversations to disagree with each other, but our regard for each other is undiminished. Your rise to success in business was a great comfort to you, your globe-trotting from London - North America - South Africa and back to London and into the circle of your friends was a great delight to me.

You always regretted the loss of academic achievement, the search for truth, the world of the ivory tower, where you could research the theories which were encompassed in your brain. - Yet at a riper age, despite full activities in business, in hours, sorely missed by sleep, you studied, worked through the instrument of extra mural activities -- and became an expert in history. My admiration and esteem rose several points and when finally you got your M.Phil. I was as proud as yourself. I thought : Ronnie has fulfilled himself - he has arrived; great odds and difficulties were overcome and it was a terrific achievement.

After your retirement those loves and special studies were rewarded by the educational authorities. They gave you a place in their organization. You were given the privilege to educate the younger and older generation; they benefited from your very hard work.

Ronnie, it is a marvellous achievement and I congratulate you on your tenacity, willpower and zest. Carry on the important task, impart your knowledge, and -- do not grow up -- entirely.

Many happy returns and a long life with your Gabi, your children and grandchildren.

Heinz Lieser

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January 8, 1889

January 8, 1984

Walter Dux was delighted and overwhelmed by the great number of friends who remembered his 95th birthday recently, which he spent in excellent health and spirits with his family. He is most grateful for your congratulations and sends you his thanks and best wishes.

Liebe KC Freunde und Kartellbrueder :

Allen denen, die mir zu meinem 95. Geburtstage geschrieben haben, meinen herzlichsten Dank. Schwer kann ich mir vorstellen, dass ich als krasser Fuchs als junger Viadrine auf der Kneipe mit zwei alten Breslauer Viadrinen zusammengesessen habe. Aber das ist das Schicksal, das ich als aeltester KCer nun tragen muss. Ich wuensche allen Kartellbruedern und -schwestern von Herzen alles Gute und bin wie immer

Euer nun sehr alter Walter Dux

Viadrinae Darmstadt 1907

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IN MEMORIAM

SALLY SANDELOWSKY (Vn.) im November 1983 in Schweden

HAROLD E. SPITTELL (Vn.VdD) im September 1983 in Australien

JULIUS GRUENEBERG (Bd.H., GH.) im November 1983 in California

KARL BIER (Nss.) im Januar 1984 in New York

SIEGFRIED SAENGER (Bd.H.) im Januar 1984 in Israel

GEORGE HUGO HAGEN (St.) im Maerz 1984 in Indiana

HELMUTH WITTNER (Th.Gh.) im April 1984 in Florida

IRMA (FRED S.) WEISSMAN im Dezember 1983 in New York

ANNIE (MARTIN) ZUCKER im Februar 1984 in California

FRIEDEL (HEINZ) LACHMANN im November 1984 in Israel

KITTY (JOACHIM) WOLFF im Maerz 1984 in Colorado

CHARLOTTE (RUDOLF) STEINHARTER im April 1984 in Ohio

WILLIE MANSBACH im Mai 1984 in London

Unser herzliches Beileid :

Edith (John) Elton zum Tode ihrer Mutter

Otto Grausz, Ariz., zum Tode seines Bruders

Walter Fleck, NY, zum Tode seines Bruders

Bertel (Martin) Mayer, NY, zum Tode ihrer Mutter

Frau Sylvia Scherz, Gstaad, zum Ableben ihres Mannes, Ernst Scherz,  
Inhaber des Palace Hotels in Gstaad, Schweiz.



GEORGE HUGO HAGEN (Kleimenhagen) (Eulogy given at the funeral services)

As a brother-in-law and as a good friend and Fraternity Brother, I wish to bid a last farewell to our dear Hugo.

Hugo and I met first in Hamburg sixty years ago and soon became good friends - several years before he married his beloved Lilo, my sister, who unfortunately passed away after only seven years of marriage.

Dear Gunter and Ann, your father loved you so very much and he was so proud of both of you and your achievements. Every year in January, he visited with you for his vacation and to celebrate in your company your and his own birthday.

He himself was an excellent physician and established a great practice in Hamburg. After his forced emigration he was soon again successful in New York, beloved by his patients. He acquired many good friends, and he will be missed by everyone who had the good fortune of knowing him.

I am here not only as Hugo's friend and brother-in-law but also as the representative of the American Jewish KC Fraternity. Our fraternity is an organization of friends who came from Jewish fraternities on German universities and formed again a group of close friends after their immigration.

And a good friend and brother Hugo has been, indeed, a man who believed in friendship and pursued it all his life. Hugo was a faithful member of his KC for 65 years, always very interested and participating in all its activities. He contributed again and again to our welfare fund, the Max Mainzer Memorial Foundation.

After his retirement and moving to his sister in Indianapolis, Ilse, with sisterly love devoted herself selflessly to his well-being and was with him every day after he became ill.

On behalf of the president of the KC and all its members I wish to offer our sincerest condolences to you, dear Gunter and Ann, and to all members of the Hagen family.

We in the KC will always cherish his memory and we shall never forget him. May all that was good and strong in him give strength and peace to those who love him still.

Walter Loewenstein

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KC CEMETERY IN WOODBRIDGE, NEW JERSEY

New agreement with Beth Israel Cemetery !

Thanks to the patient and skillful negotiations of Kb. Howard John Fields we reached a new agreement with the cemetery association, which should not only be satisfactory to all of us but also simplify matters henceforth. As we had no request for the sale of additional grave sites for a number of years, we returned to the cemetery association 94 grave sites which had not been sold. The cemetery association undertakes from now on the perpetual care of the graves for which we had taken responsibility.

Furthermore, it has been agreed upon :

- a) The cemetery association will undertake the general maintenance of the area where the KC graves are located;
- b) All formalities of burials, including the issuance of permits etc. will be handled by the cemetery administration upon request of families or representatives of the deceased.
- c) The care of the individual graves continues to be the responsibility of the families of the deceased.

The telephone number of the cemetery association is 201 634-2100, the address is : US Highway No. 1, Woodbridge, NJ 07095.

The cemetery administration has a complete list of names with the numbers of the assigned graves.

If members of the KC or their spouses and/or their families are interested to buy additional graves, the cemetery will endeavor to make such graves available in the parcels where our grave sites are located and will sell these at the rates prevalent at that time.

We nominated Ernest Bial, Esq., son of our late Kb. Louis C. Bial, to represent us if necessary, vis-a-vis the cemetery but we beg our members to use his services only in matters of real importance (Ernest Bial c/o Kurzman, Karelsen & Frank, 230 Park Avenue, New York, NY 10169. We also wish to thank at this time Mr. Bial for his invaluable assistance and advice in formulating and finalizing this agreement.

Carlos Doernberg

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For a book on United States immigration policy toward European Jewry, 1933-45, I would appreciate hearing from anyone with personal experiences of German Jewish refugees who obtained visas from American consulates in Berlin, Hamburg or Stuttgart. I especially wish to hear from those who met the Berlin consul Raymond Geist.

ALAN M. KRAUT  
Department of History  
The American University  
Washington, D. C. 20016



KC NACHRICHTEN AUS ALLER WELT

Great Britain

Although over the years our ranks have inexorably thinned out, the British KC is still very much alive and as active as ever. We now consist of 43 Kbrs., mostly living in and around London as well as 59 Ks.

Our separate Northern Branch also maintains regular contact between the remaining members, although because of the distances involved they are no longer able to have regular meetings.

However, here in the metropolis we do have our regular social get-togethers, mainly in the private homes of our members where there are rarely fewer than 25 persons attending these functions. We had seven such meetings in 1983 and also published seven Bulletins so that those Brothers and Sisters who for one reason or another are not able to attend these meetings are kept in touch with events.

Our finances are in a healthy state and we do make our regular contributions to worthy causes. Lothar Nelken continues to be our chairman and is supported on our board by the other Kbrs. : H.G. Francken, R. Boyden and R.W. Stent.

Ronald Stent

Kb. Lothar Nelken informs us that an International KC Meeting in Israel is planned for 1985. He thinks that about 20 Kbrs. and Ks. from Great Britain would be willing to participate.

For further details please contact the KC in Great Britain, Lothar Nelken, Chairman, 17 Tenterden Drive, London NW 4 1EA.

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Dr. Gerhart Berger, Hausen, Westdeutschland, hat sich an Kb. Nelken mit der Bitte um Information ueber die Verbindungen "Bavaria Heidelberg" und Badenia Heidelberg" gewandt.

Herr Dr. Berger ist Mitarbeiter an einer Festschrift fuer das 600jaehrige Jubilaeum der Universitaet Heidelberg.

Kb. S. F. Hallgarten, 20 Bracknell Gardens, London NW3 7ED, hat sich bereit erklaert, Informationen ueber die Gruendungsmitglieder, Verbindungsheim, beruehmte Mitglieder beider Verbindungen, Gruendungsdaten, Namensnennung, Schikane und Uebergriffe seitens der Nazis, Aufloesungsdatum etc. an Dr. Berger weiterzugeben.

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KC Group Chicago

On November 6th, 1983, the Chicago KC Group met at the home of Kb. Felix Salier.

It was a most enjoyable meeting. Kbs. Fred Lang and Kurt Loewenstein, who have been absent for a long time, were able to join us, and they were so very welcome.

It was so nice to be together to celebrate Kb. George Glaser's 90th birthday. We all sang "Happy Birthday" to George, and Eva, his wife, cut the cake.

The Max Hainzer Memorial Foundation was not forgotten and we are enclosing a total of \$ 140.-- from the Chicago KC Group.

All the best to all our KCers around the world !

Felix Salier

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KC Treffen in Gstaad vom 15. Juli - 3. August 1984

Die Preise im Palace Hotel sind wie folgt festgesetzt :

	Tagespreis fuer 7 Naechte	Tagespreis fuer kuerzeren Aufenthalt
Einzelzimmer m/Bad, Norden	Sfr. 150.--	Sfr. 170.--
Einzelzimmer m/Bad/Dusche Sueden	Sfr. 170.--	Sfr. 190.--
Doppelzimmer m/Bad/Dusche, Norden	Sfr. 270.--	Sfr. 300.--
Doppelzimmer m/Bad, Sueden	Sfr. 310.--	Sfr. 340.--

Fuer den Service, saemtliche Taxen sowie fuer den freien Zugang zum Hallen- und Freiluftbad wird kein Zuschlag berechnet.

Hauptveranstaltung : 26. und 27. Juli 1984

Anmeldungen an das Palace Hotel, Gstaad 3780, Schweiz



Wir gratulieren :

Kb. Ludwig Rosenthal, Guatemala, dem von der Latein-Amerikanischen Sektion des World Jewish Congress ein Ehrendiplom in feierlicher Zeremonie uebergeben worden ist. Es ist in Farben auf Pergament gemalt und der spanische Text lautet uebersetzt :

" Die juedischen Gemeinden von Latein-Amerika ehren Dr. Ludwig Rosenthal in Anerkennung und Respekt fuer ein Leben, das den geistigen Werten und der juedischen Kultur geweiht wurde auf den Gebieten der historischen Untersuchungen, der Buecher und der Belehrung.

gez. Juedisch Latein Amerikanischer Kongress  
Guatemala auf dem 11. Treffen der FEDECO  
Januar 1984 "

(FEDECO ist die Abkuerzung fuer Vereinigung der Juedischen Gemeinden von Zentral-Amerika und Panama.)

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Kb. und Ks. Frederick Adler, Conn., deren Tochter Renate Adler ein Buch "Pitch Dark" geschrieben hat, das von der New York Times Book Review, Washington Post Book World etc. ruehmend rezensiert wurde.

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Das Informationszentrum Berlin (Gedenk- und Bildungsstaette, Stauffenbergstr. 14, Berlin 30) gab in seiner Schriftenreihe ueber den Widerstand in Berlin 1933 - 1945 eine Broschuere heraus, die sich u.a. mit dem Arbeiterviertel "Wedding" beschaeftigt. ("Widerstand in einem Arbeiterbezirk" von Hans-Rainer Sandvoss).

In einem Kapitel "Verfolgung der Juden" wird dabei auch unseres ersten Praesidenten Fritz Aron gedacht, wobei insbesondere seine Taetigkeit als Vorsitzender der "Kassenaerztlichen Vereinigung Wedding" anerkannt wird. Seine Verdienste um die Emigration und Rettung von Juden, insbes. von Aerzten wird auch an anderer Stelle betont.

Die Broschuere ist auf Anfrage von der oben genannten Stelle zu erhalten.

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| Albert Philipp, NY, nach einer Operation  
| wiederhergestellt, dankt auf diesem Wege  
| den zahlreichen Freunden im KC fuer ihre  
| guten Wuensche und bittet um Verstaendnis  
| dafuer, dass er sie nicht einzeln beant-  
worten kann, so gerne er es tun wuerde.



" A typical - and much appreciated letter "  
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I do not know if there will be space in the "paper" for my thank-you - there will be more important reports to print. But, anyway, I want to express it.

I want to thank all those who worked for the affair in Washington - it was just wonderful. Many of the KC widows do not join these occasions - they find it depressing - "everybody got so old, and so many are missing". I see it differently. I think it is amazing how these people keep up the friendship and work together for the well-being of those in need.

I myself had always a soft spot for the KC, not only because I met my husband among them and we met the Springers on our honeymoon -- in 1948 we have been in Paris, transit from Israel, waiting for our visa for the United States, there was no possibility to work and we had very little money - the KCers sent us Care packages. Then in 1954 my husband died in South Dakota. I came alone to New York and not only the Springers took care of me - Fritz Aron gave me advice about the restitution. Arriving in Berlin, there was a KCer, I think his name was Fraenkel, Apotheker. Grete Bernhardt, widow of the "Saebel-Bernhardt", had sent him to the airport; he took my suitcase on his shoulders to the bus, a taxi would have been too much of a luxury.

Last year I had an accident, was in the hospital for four weeks, it was winter and all my close friends were in Florida - but Robert Wachen came every day to look after me and the Philipps called daily and brought fruit and flowers - I want to thank them all. May the KC exist for many many more years !

Minnie Liebert

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Bruno Bobrecker, NY, schreibt :

In der Anlage ist die Abschrift des Beschlusses der Friedrich Wilhelm Universitaet Berlin vom 3.10. 1922, die Verbindung Silesia aufzuloesen. Die "Grunde" :

Am 18. 1. 1922 - der Tag der Reichsgruendungsfeier der Weimarer Republik - marschierten die Chargierten der Verbindungen zur Aula und ueberquerten die Strasse Unter den Linden. Als die Burschenschaft hinter der Silesia einen groesseren Abstand machte, drehte sich der CC der Silesia herum und fragte nach dem Grund. Der CC der Neo-Germania antwortete : "Wir wollen damit zeigen, dass wir mit Juden nichts zu tun haben !" Kaum waren die Worte ausgesprochen, als der 2. Chargierte Elkeles ihm eine klebte. Nachher folgte die Neo-Germania brav und treu ohne Abstand zur Aula.

Nach ein paar Tagen reichte die Burschenschaft eine Klage bei der Universitaet ein. der Erst-Chargierte war Lennhoff, der spaeter in der Ostsee ertrank. Ich war Dritt - Chargierter, nahm aber an dem Umzug nicht teil, da ich Werkstudent war und arbeitete. Meinen Platz uebernahm Auerbach (nicht Richard). Muendlich wurde Lennhoff und mir angedeutet, die Universitaet zu verlassen. Elkeles ging nachher nach Muenchen.



Friedrich-Wilhelms-Universität.

Berlin O 2, den 10. März 1922  
Kaiser Franz Joseph-Platz

J.-No. 4.28 U

Auf den Bericht der Verbindung über die Vorgänge am 18. Januar d. Js. und das übrigens im ungehörigen Ton abgefaßte Schreiben vom 1. März d. J. eröffnen wir der Silesia folgendes:

Die von dem Studierenden **Elkeles** am 18. I. d. J. verübte Ausschreitung, die vom akademischen Senat inzwischen mit der Strafe der Entfernung von der Universität geahndet ist, wird durch die Ausführungen des Berichts in keiner Weise gerechtfertigt oder auch nur erklärt. Ob der Abstand der Verbände 3-4 oder 1-2 m betrug, war für die Öffentlichkeit belanglos; in der Öffentlichkeit erschien die nach der Auffassung der Silesia von der Neo-Germania in beleidigender Absicht vergrößerte Abstandnahme durchaus nicht als Beleidigung; sie ist sicherlich von niemand als solche wahrgenommen. Deshalb war auch das Vorgehen des stud. Elkeles in keiner Weise notwendig, um sich für eine etwa öffentlich empfangene Kränkung auch öffentlich Genugtuung zu verschaffen. Es war vielmehr Sache der Silesia, die Angelegenheit später zum Austrag zu bringen; zur Selbsthilfe hatte stud. Elkeles keinerlei Recht oder Anlaß. Der Bericht, der in völliger Umstellung des Sachverhaltes und des Verschuldens der Beteiligten und noch dazu in ungehörigem Ton unter Hinweis auf mögliche Presseveröffentlichungen die Bestrafung der Neo-Germania fordert, läßt erkennen, daß, wie auch das Eintreten des ersten Chargierten gelegentlich des Angriffs von Elkeles auf Wolff bezeugt, die Silesia sich mit dem Verhalten ihres Mitgliedes identifiziert. Es bedarf keiner Ausführung, daß Ausschreitungen solcher Art noch dazu auf belebtester Straße und gelegentlich einer allgemeinen Universitätsfeier nicht bloß die Studentenschaft arg bloßstellen, sondern auch die akademische Disziplin im besonderen Maße gefährden. Wenn es diesmal nicht zu einer allgemeinen Schlägerei gekommen ist, so ist dies lediglich der Ruhe und und Besonnenheit des Angegriffenen zuzuschreiben. Eine Verbindung, die ein Verfahren wie das des stud. Elkeles entschuldigt und deckt, läßt die Besorgnis begründet erscheinen, daß sie nicht diejenigen Grundsätze vertritt, die erforderlich sind, um Zucht und Ordnung in der Studentenschaft aufrecht zu erhalten.

Das Bestehen der Verbindung Silesia gefährdet hiernach die akademische Disziplin; die Silesia wird deshalb gemäß Senatsbeschluß vom 10. März nach § 41 der Vorschriften für die Studierenden auf die Dauer eines Jahres verboten.

Rektor und Richter

gez. Harnst Dr. Wollenberg

An

die Studentenverbindung  
Silesia



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Gerard Steinitz  
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Tel. 315 598-3087

Erhard Weltman  
375 Lafayette Ave.  
Cincinnati, Ohio 45220

Ruth (Charles) Wolf  
108-37 71 Avenue Apt. 14 C  
Forest Hills, NY 11375

Berichtigungen :

Durch ein postalisches Versehen sind uns die Adressen von Ks. Charlotte Horwitz und Ks. Ilse Goldschmidt als geaendert mitgeteilt worden und wir haben sie dementsprechend im vorigen Bulletin veroeffentlicht. Die Adressen sind aber unveraendert :

Charlotte (Henry) Horwitz  
3825 Centre Street  
San Diego, Cal. 92103

Ilse (Paul) Goldschmidt  
3335 - I E Punta Alta  
Laguna Hills, Cal. 92653



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William Wolf, NY, an seinem 80. Geburtstage		80.--
John Wurttemberg, Pa., zum 80. Geburtstag von Herman G. Kaiser		80.--



We record gratefully the legacy of our late Kb. JULIUS WEINBERG in favor of the Max Mainzer Memorial Foundation in the amount of \$ 5,000.-- , and the legacy from the estate of Ks. S. NEUMARK in the amount of \$ 2,850.24.

-----

A letter from someone who is being assisted by the Max Mainzer Foundation :

"It is about time to thank you and the wonderful organization for the monthly checks which are a blessing to us and, believe me, we could not do without them, with everything going up and up. What would we do, does it ever end, I am sure that is on everybody's mind: the rent, the telephone, gas and electricity, and on and on and on.

But you were kind enough to want to know how we are. Well, here it is : my husband is the same - in the home now for 20 months, he is up about two hours a day, his mind is still good, he is a very patient man, but sometimes the situation gets to him too, and it is heartbreaking that one can't do anything about it.

Myself, I finally got over the by-pass operation, it took a year, and I was in the hospital again. I am not doing so badly right now, and should an emergency arise some day, it is still time for an operation. My husband's wonderful daughter and my own wonderful granddaughter make life bearable for us.

Thank you again. "



HENRY J. KELLERMANN  
5428 ROOSEVELT STREET  
BETHESDA, MARYLAND 20817

May 19, 1984

Dear Ernst:

it was very good to hear from you after all these years - I counted about forty - and I find your confidence in trusting me with a review of the transcript very flattering. Naturally I cannot possibly do justice to what seems to me a rather comprehensive compilation of the record of former German jurists in the States. I am familiar with some of it having collaborated or otherwise touched base with quite a few of them, but I could not possibly pass judgement on the accuracy of the data except in cases where I happen to know the facts from personal contacts and experience.

It so happens that Hans Speier whom you mention (p.10) is a close friend of mine and presently my house guest in Bethesda. The corrections I made concerning his record are therefore authentic. Hans, as you know, is not and in fact never was a jurist but is one of the leading sociologists in this country. He was recently honored, as you may have read in the NYT, at a ceremony sponsored at the 50th anniversary of the University in Exile as the only surviving member of the illustrious original Graduate Faculty and as one of its most meritorious ones. It was a most impressive convocation. The school was able to rescue over 170 scholars and their family from Europe, including the legal scholar Hermann Kantorowicz, my former professor in Freiburg, and indirectly thousands more by prodding other American universities and colleges to extend the benefits of fellowships, scholarships and regular tenure to them. I feel that the New School of Social Research deserves an honorable mention in your discourse. Incidentally, the School contributed the talents of some of its most distinguished faculty members to serve as members of the President's Council of Economic Advisers.

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I also worked with Franz Neumann who was my boss and with Otto Kirchheimer who with many other refugees from Germany and Central Europe were my colleagues in OSS days. In fact, for a while I shared my desk with Herbert Marcuse, member of the unholy trinity of Marx, Mao and Marcuse, but then still rather tame.- Later when I was office director in the State Department I sent Franz Neumann to Berlin to set up the Politological Institute of the Free University which he did.- Ernst Fraenkel whom I knew from way back when he was a young assessor in the law practice of my uncle Eduard Lehmann in Saarbrücken, was then professor at the Free University where they gave him a hard time - the students, that is - that led, I believe to a heart infarct. When he went to Korea, he did not only everything you said he did, but to the best of my knowledge also helped draft the new constitution. (You may want to check that out.)- Of course, a number of our old professors resumed teaching in the States despite the significant differences in concepts and methods between European and Anglo-Saxon-American law and legal training. You mentioned Ernst Levi and Ernst Rabel, the Roman law experts; but there must be many more. <sup>Lawyer</sup> Kurt Braun from Berlin taught for many years at Howard University. And there is, of course, Rhein-stein.

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Now one more word about the third paragraph on page 9, where you make a blanket statement about the unteachable and untrained jurists who entered government service from 1939 to 1946. You say, among other things, that their work had little influence; that they never penetrated to the top; that they performed "Maulwurfs- und Kaerrnerarbeit", and that they disappeared after the war, more or less noiselessly. In my considered judgement, your conclusion is not correct nor is it quite fair.

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*With the best regards,*

P.S.

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H. 



HENRY J. KELLERMANN  
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*Will be best Henry*  
H.



ERNST C. STIEFEL

ATTORNEY AT LAW

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May 24, 1984

Dr. Henry J. Kellermann  
5428 Roosevelt Street  
Bethesda, Md. 20817

Dear Henry:

I am very touched and grateful for what you said in your letter of May 19.

1. As far as Henry Kellermann is concerned, the biography in Herbert Strauss' compilation does not do justice to you. In the light of what I now learn your example alone is proof that my conclusion on "Maulwurfs- und Kaerrnerarbeit" is too harsh.

2. I have hundreds of materials on emigré jurists who are not mentioned in the text you have seen and I have a fat file on the enormous contribution of Alvin Johnson and his School. I am in constant touch with Fanton, the present president.

3. Nuernberg is a very sensitive subject and I feel that Kempner's book published in 1983 is less erudite and correct than the critical stance which Rheinstein took in 1959 in his preface to Knieriem's "The Nuremberg Trials". You mentioned as refugee contributors "Franz Neumann, John Herz, et al.", aside from you. Where can I find the "et al."?

I am enclosing some correspondence which elaborates on my present interest. More important, I look very much forward to see you again.

All the best,

ECS:irn



(301) 530-4778

ERNST C. STIEFEL

ATTORNEY AT LAW

PAN AMERICAN BUILDING

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200 PARK AVENUE

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May 11, 1984

Dr. Henry Kellermann  
5428 Roosevelt Street  
Bethesda, MD 20817

Dear Heinz:

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As ever and with kindest regards to your family,

Yours,  


ECS:irn



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May 11, 1984

Dr. Henry Kellermann  
5428 Roosevelt Street  
Bethesda, MD 20817


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3/22 KRONSTEIN, HEINRICH 1967-1989

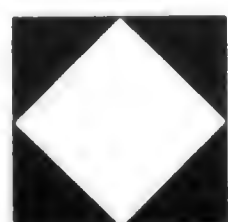


Bernhard Diestelkamp/Michael Stolleis (Hrsg.)

# **Juristen an der Universität Frankfurt am Main**

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## Heinrich Kronstein (1897-1972)

von *Eckard Rehbinder*

HEINRICH KRONSTEIN war von 1951 bis 1955 Honorarprofessor an der Frankfurter Juristischen Fakultät, nachdem er dort bereits zuvor mehrmals Gastprofessor gewesen war. Im Jahre 1956 wurde er als Nachfolger WALTER HALLSTEINS auf den Lehrstuhl für Handels- und Wirtschaftsrecht, Bürgerliches Recht, Rechtsvergleichung und Internationales Privatrecht berufen, den er bis zu seiner Emeritierung im Jahre 1965 innehatte. Zugleich war er Mitdirektor des von WALTER HALLSTEIN begründeten, der Universität angeschlossenen Instituts für ausländisches und internationales Wirtschaftsrecht. Von 1965 bis 1967 vertrat KRONSTEIN seinen eigenen Lehrstuhl, so daß er insgesamt 12 Jahre in Frankfurt hauptamtlich lehrte. Neben seiner Professur in Frankfurt war KRONSTEIN zugleich Professor of Law am Georgetown University Law Center in Washington, D.C., wo er jedes vierte Semester (sowie zum Teil in den Semesterferien) lehrte und – am Institute for Foreign and International Trade Law, einem »Schwesterinstitut« des Frankfurter Instituts – forschte. KRONSTEIN gehört im Hinblick auf seine rechtswissenschaftliche Methode, die man als Verbindung von Rechtsrealismus und Naturrechtslehre bezeichnen kann, seine Tätigkeitsschwerpunkte im Wirtschaftsrecht, seine Praxisorientierung und seine Internationalität sicherlich zu den Professoren, die das Gesicht der Frankfurter Juristenfakultät in den fünfziger und sechziger Jahren geprägt haben. Sein wissenschaftliches Werk, das sich fast gleichgewichtig auf deutsch- und englischsprachige Arbeiten verteilt, ist gut zugänglich; die wichtigsten seiner Aufsätze von 1926 bis 1961 sind in seinen »Ausgewählten Schriften«<sup>1</sup> wieder abgedruckt.

### I.

KRONSTEINS wechsellvoller Lebensweg ist in seiner Autobiographie »Briefe an einen jungen Deutschen«<sup>2</sup> im einzelnen geschildert. KRONSTEIN wurde im Jahre 1897 in Karlsruhe als Sohn jüdischer Eltern geboren. Nach dem

<sup>1</sup> Ausgewählte Schriften - Selected Essays, eingeleitet von F. BÖHM und B. A. McGRATH, S.J., herausgegeben von K. H. BIEDENKOPF, Karlsruhe 1962.

<sup>2</sup> Briefe an einen jungen Deutschen, München 1967.





Heinrich Kronstein (1897-1972)

Ersten Weltkrieg, den er als Verwundeter beendete, studierte KRONSTEIN von 1919 bis 1921 Rechtswissenschaft zunächst in Heidelberg und dann in Bonn. Seine akademischen Lehrer in Bonn waren so verschiedenartige Gelehrte wie ERICH KAUFMANN, JOSEPH PARTSCH und MARTIN WOLFF. Als PARTSCH und MARTIN WOLFF einen Ruf nach Berlin annahmen, folgte KRONSTEIN ihnen nach Ablegung der Referendarprüfung. Er wurde für kurze Zeit Assistent von PARTSCH. Seine Dissertation über ein Thema aus dem Heimstättenrecht (1924) schrieb er bei MARTIN WOLFF. An der Berliner Fakultät beeindruckte ihn neben dem Kirchenrechtler ULRICH STUTZ besonders RUDOLF SMEND im Hinblick auf die von ihm vertretene Bindung des Juristen an überpositive Werte.

Nach Referendarzeit und Assessorexamen in Karlsruhe (1922-1924) war KRONSTEIN als Gerichtsassessor in Mannheim tätig. Schon 1926 ließ er sich dort zusammen mit WILLY ZUTT als Rechtsanwalt nieder. In der Praxis, aber auch durch eine Assistententätigkeit bis Anfang 1930 bei KARL GEILER, Honorarprofessor an der Universität Heidelberg und bekannter Wirtschafts-anwalt, konnte KRONSTEIN tiefe Einblicke in die Organisation der deutschen Wirtschaft, die instrumentelle Rolle der großen Wirtschaftsanwälte und die in der Wirtschaft vorherrschende Geisteshaltung der Stabilisierung, die KRONSTEIN nicht akzeptieren mochte, gewinnen. In dieser Zeit entstanden erste Arbeiten über Wirtschaftsrecht, Steuer- und Aufwertungsrecht, internationales Privat- und Kartellrecht, die auf diesen Erfahrungen aufbauten und KRONSTEINS frühes Interesse für das Phänomen der privaten Macht sowie Ansätze einer realistischen, aber wertgebundenen Methode zum Ausdruck brachten.

KRONSTEINS Wunsch, sich an der Heidelberger Fakultät mit seiner Arbeit über die »Abhängige juristische Person« zu habilitieren, scheiterte im Jahre 1930 unter ungeklärten Umständen. Die Arbeit wurde aufgrund eines Gutachtens eines Rechtshistorikers der Heidelberger Fakultät abgelehnt, der sich auf den knappen rechtshistorischen Teil der Arbeit konzentrierte, aber die seinerzeit neuartige Fragestellung nach den Grenzen der Aufspaltung eines Unternehmens in mehrere formal selbständige juristische Personen nicht für bedeutsam hielt. KRONSTEIN selbst führte die Ablehnung auf seine Belastung wegen seiner jüdischen Herkunft sowie auf Einflußnahmen aus Wirtschaftskreisen zurück, wo die von ihm befürwortete weitgehende Einheitsbehandlung des Konzerns in seinen Außenbeziehungen im Rahmen der Vertragsauslegung sowie des Deliktsrechts als gefährlich angesehen worden sei. Offen haben diese Gründe, wie zuverlässige Zeitzeugen berichten, jedenfalls keine Rolle gespielt. KRONSTEIN mußte die Arbeit im Jahre 1931 als »bloße« Monographie veröffentlichen. Nach Unterdrückung in der Zeit des Nationalsozialismus und Ignorierung in der Anfangszeit der deutschen Diskussion über den Durchgriff bei juristischen Personen hat sie



später ihren Weg gemacht, wurde 1973 neu gedruckt<sup>3</sup> und kann noch heute als Klassiker des Konzernaußenrechts gelten. KRONSTEINS Ansatz ist von mehreren neueren Arbeiten wieder aufgenommen worden und hat auch Eingang in die Entscheidungspraxis des Bundesgerichtshofs gefunden.

Mit der Machtübernahme durch die Nationalsozialisten schoben sich schlagartig andere Probleme - die Organisation des eigenen Überlebens und des der jüdischen Freunde, aber auch vieler anderer verfolgter Juden - in den Vordergrund. KRONSTEIN hatte früh erkannt, daß der Gedanke der Integration der Juden in die deutsche Gesellschaft gescheitert war und daß deshalb die Auswanderung der einzige Ausweg war. Im Gegensatz zu den meisten Freunden wanderte er mit seiner Familie nicht nach Palästina, sondern - im Jahre 1935 - nach den Vereinigten Staaten aus und ließ sich in New York nieder. In diese Anfangszeit in den Vereinigten Staaten fiel eine folgenschwere persönliche Entscheidung - die Konversion zum Katholizismus. KRONSTEIN hatte, wie er in seiner Autobiographie schreibt, bereits Anfang der dreißiger Jahre, vorbereitet durch die Einflüsse seiner Mutter und die Begegnung mit der katholischen Soziallehre als Student, die innere Hinwendung zum Christentum vollzogen, was auch die Auswanderung gerade in die Vereinigten Staaten motiviert hatte. Die Konversion war nur der folgerichtige Abschluß dieser Entwicklung. KRONSTEIN ist Zeit seines Lebens ein praktizierender Katholik geblieben. Natürlich sind ihm die üblichen Konflikte des christlichen Juden nicht erspart geblieben; man darf vermuten, daß manche kritische Stellungnahme zu seiner Autobiographie<sup>4</sup> hierin ihre Wurzel hat.

Von 1936 bis 1939 studierte KRONSTEIN mit knapp 40 Jahren ein zweitesmal Rechtswissenschaft - diesmal amerikanisches Recht an der Columbia University Law School. Dem folgte ein Postgraduiertenstudium an der Georgetown University Law School, das er im Jahre 1940 mit dem Doctor of Juridical Science (SJD) abschloß. Hingezogen fühlte er sich in Columbia vor allem zu KARL LLEWELLYN, den er bereits in Berlin kennengelernt hatte. LLEWELLYNS realistische Rechtsauffassung, aber auch allgemein das amerikanische Rechtsdenken in Fällen kamen KRONSTEINS Auffassung insofern entgegen, als dieser von Anfang seiner juristischen Laufbahn an der Rechtstatsachenforschung besondere Bedeutung in der Arbeit am Recht zugemessen hatte, wengleich das nur eine Komponente seines Rechtsdenkens war. Nach dem Universitätsexamen wurde er zunächst als Übersetzer und Gutachter, nach dem 1941 abgelegten Barexamen als Special Attorney

3 Die abhängige juristische Person, München, Berlin und Leipzig, 1931, Neudruck Berlin 1973.

4 Vgl. z.B. F. A. MANN, Memoiren eines Rechtsanwalts. Was ein alter Professor heute jungen Deutschen zu sagen hat, ZEIT Nr. 13 vom 29. 3. 1968, S. LIT 17.

im Department of Justice hauptberuflich tätig. Daneben lehrte er als Teilzeitprofessor (Adjunct Professor) in Georgetown.

Die Erfahrungen, die KRONSTEIN in seiner beruflichen Arbeit mit der Abwicklung von Feindvermögen aus dem Ersten Weltkrieg und - unter J.J. BERLE als stellvertretendem Justizminister und THURMAN ARNOLD als Leiter der Antitrust Division - mit der Behandlung internationaler Konzerne im Krieg machte, die Einblicke in das Innere internationaler Konzerne und Kartelle bildeten die Grundlage zahlreicher Veröffentlichungen über internationales Kartell- und Konzernrecht, Vertragsrecht, Patentrecht und Recht der Schiedsgerichtsbarkeit. Weitsichtige Überlegungen über die Zukunft Europas und besonders Deutschlands nach dem Kriege, die auf Versöhnung beider Völker, demokratischen Wiederaufbau und schrittweise Errichtung eines offenen Marktes in Europa unter übergangsweiser Nutzung der vorhandenen Kartellorganisation ausgerichtet waren und die Idee einer europäischen Wirtschaftsgemeinschaft schon vorwegnahmen, veranlaßten KRONSTEIN zu intensiver Beschäftigung mit den deutschen Kartellen und Patenten und den Erfolgen und Mißerfolgen der Mißbrauchsaufsicht nach der Kartellverordnung von 1923. Dies fand seinen Niederschlag in weiteren Veröffentlichungen über deutsches Kartellrecht. Die Denkrichtung von J.J. BERLE, THURMAN ARNOLD und HEINRICH KRONSTEIN konnte sich freilich nicht durchsetzen. Insbesondere nachdem 1944/45 die Schreckensmeldungen über die Massenvernichtung der Juden im nationalsozialistischen Deutschland durch die Vereinigten Staaten gingen, gewannen diejenigen die Oberhand, die auf Zusammenarbeit mit Sowjetrußland setzten und die kompromißlose Zerstörung Deutschlands anstrebten. KRONSTEIN widersetzte sich aus christlicher Verantwortung diesen Bestrebungen und dem Gedanken der Kollektivschuld der Deutschen; dafür nahm er unerschrocken seine völlige Isolierung, ja Verfemung in der Behörde in Kauf.

Im Jahre 1946 konnte KRONSTEIN das Department of Justice verlassen und eine Professur an der Law School der führenden Jesuitenuniversität Georgetown in Washington D.C. übernehmen. Er war dadurch in einer Position, seine Idee eines Brückenschlags zwischen den Vereinigten Staaten und dem besiegten Deutschland im akademischen Bereich, mit Ausstrahlungen selbst auf die Politik, in die Tat umzusetzen. HELMUT COING hat KRONSTEINS Entschluß, das entsetzliche Schicksal des Vertriebenwerdens, der Emigration - hinzuzufügen ist: auch angesichts des Traumas der Massenvernichtung der Juden - ins menschlich Gute, in Versöhnung zu wenden, treffend als »die entscheidende menschliche Tat« in seinem Leben bezeichnet<sup>5</sup>. Georgetown gehörte zu den ersten Universitäten, die in der unmittelbaren Nachkriegszeit deutsche Gäste einluden, z.B. EBERHARD GÜNTHER, den spä-

5 Ausgewählte Schriften (Anm. 1), Vorwort 5.



teren ersten Präsidenten des Bundeskartellamts, aus Frankfurt WALTER HALLSTEIN, HERMANN MOSLER, HELMUT COING und FRANZ BÖHM.

In den Jahren 1949 und 1951 lehrte KRONSTEIN auf Veranlassung von FRANZ BÖHM als Gastprofessor und von 1951 bis 1955 als Honorarprofessor in Frankfurt. In dieser Zeit wurde zusammen mit WALTER HALLSTEIN sowie THURMAN ARNOLD, der nach seinem Ausscheiden aus dem Department of Justice eine Anwaltspraxis begründet hatte, dem Freund WALTON HAMILTON und ARNOLDS Mitarbeiter MILTON FREEMAN die Idee einer institutionalisierten Verbindung zwischen Frankfurt und Washington durch Austausch von Studenten und Professoren und gemeinsame Forschung geboren und ansatzweise in die Tat umgesetzt. In seiner wissenschaftlichen Arbeit setzte KRONSTEIN seine Beschäftigung mit dem Machtphänomen, insbesondere im internationalen Wirtschaftsverkehr, fort. Aufsätze über internationales Kartell- und Privatrecht und ein Lehrbuch (zusammen mit J.T. MILLER, 1953) über amerikanisches Wettbewerbs- und Kartellrecht, das (unter anderem Titel und einem weiteren Coautor) zwei weitere Auflagen erlebte (1958 und 1965), bezeugen dies. Zugleich begann KRONSTEIN aber mit Veröffentlichungen in deutscher Sprache zum amerikanischen Recht einen neuen Abschnitt seiner wissenschaftlichen Laufbahn, nämlich als Brückenbauer zwischen amerikanischem und deutschem Rechtsdenken, als Interpret moderner amerikanischer Rechtsentwicklungen und Wegweiser für Rechtsfortbildung und Rechtsreform in der Bundesrepublik.

Den Höhepunkt seiner wissenschaftlichen Laufbahn bildete die Zeit zwischen 1956 und 1967, als KRONSTEIN als Nachfolger WALTER HALLSTEINS Lehrstuhlinhaber an der Frankfurter Juristischen Fakultät war und zugleich am Georgetown University Law Center lehrte. Es gelang ihm, das Institut für ausländisches und internationales Wirtschaftsrecht in Frankfurt (das er zusammen mit HELMUT COING, später GÜNTHER JAENICKE und HANS-JÜRGEN SCHLOCHAUER leitete), und das Schwesterinstitut in Washington, das Institute for Foreign and International Trade Law, auszubauen und in den Dienst der Idee des akademischen Brückenschlags durch Organisation eines ständigen Austauschprogramms zu stellen. Zahlreiche deutsche Juristen waren im Austausch in Washington; viele Amerikaner kamen nach Frankfurt. Für die dauerhafte Finanzierung des Austauschs konnte der deutsche Industrielle WILHELM SCHULTE ZUR HAUSEN gewonnen werden; erst viel später - ab 1968 - ging die Aufgabe auf eine Fördervereinigung (mit weiterhin maßgeblicher Beteiligung von SCHULTE ZUR HAUSEN) über.

In der nunmehr besonders umfangreichen wissenschaftlichen Arbeit legte KRONSTEIN weiterhin den Akzent auf die Bewältigung wirtschaftlicher Macht durch das Recht. Er wandte sich aber auch Fragen des europäischen Gemeinschaftsrechts zu. Mehrere Beiträge befassen sich mit der Auslegung des EWG-Vertrages im Lichte amerikanischer Rechtserfahrungen. Dabei

trat KRONSTEIN für eine »dynamische« Auslegung der Verträge entsprechend den Fortschritten der europäischen Integration ein. Gegen Ende dieser Zeit wurde eine erhebliche Skepsis gegenüber der Leistungsfähigkeit von Wirtschaftsrecht zur Kontrolle von Macht und eine Hinwendung zu institutionellem Denken im Zivilrecht deutlich. Einen krönenden Höhepunkt bildete KRONSTEINS magnum opus »Das Recht der Internationalen Kartelle« (1967), in dem dieser, gestützt auf eine einzigartige Faktensammlung, eine umfassende rechtsvergleichende Auseinandersetzung mit dem Phänomen der Macht im internationalen Wirtschaftsverkehr, dem - wie wir heute sagen würden - »Rechtsversagen« des internationalen Wirtschaftsrechts und dem Zerfall der Institutionen des Privatrechts durch »wertfreie« Instrumentalisierung, unternahm.

Schließlich waren die Jahre von 1956 bis 1967 auch KRONSTEINS große Zeit als Vermittler zwischen amerikanischem und deutschem Wirtschaftsrechtsdenken und Förderer deutscher Reformbemühungen. Große, einflußreiche Konferenzen über Kartellpolitik und über internationales Kartellrecht wurden von den beiden Instituten in den Jahren 1960 in Frankfurt und 1962 in Washington organisiert. Insbesondere zur Aktienrechtsreform hat KRONSTEIN Wesentliches aus dem amerikanischen Recht beigetragen. Auch seine Arbeiten zum EG-Recht haben hiervon profitiert. Im Jahre 1967 wurde KRONSTEIN zu seinem 70. Geburtstag mit einer Festschrift geehrt<sup>6</sup>.

Nach 1967 war KRONSTEIN bemüht, den Fortbestand seines Lebenswerks, des institutionalisierten Brückenschlags zwischen den Vereinigten Staaten und der Bundesrepublik, durch Errichtung einer Fördervereinigung sowie Reorganisation des Washingtoner Instituts zu sichern. Die Fördervereinigung ermöglichte ihm die Fortsetzung seiner Forschungstätigkeit in Frankfurt, während sich die Verhältnisse im Washingtoner Institut, dessen Direktor DON WALLACE geworden war, schwieriger gestalteten. 1968 legte KRONSTEIN der Organisation for Economic Cooperation and Development (OECD) eine große Untersuchung über internationale Wettbewerbsbeschränkungen vor. 1971 konnte er noch den Entwurf des Abschlußberichts einer Studie über Hemmnisse für deutsche Direktinvestitionen in den Vereinigten Staaten abschließen (der 1973 vom Washingtoner Institut veröffentlicht wurde). Im Herbst 1972 ist KRONSTEIN in der Schweiz verstorben.

6 K. H. BIEDENKOPF/H. COING/E. J. MESTMÄCKER (Hg.), Das Unternehmen in der Rechtsordnung, Festgabe für Heinrich Kronstein, mit einem Vorwort von H. COING und M. V. FREEMANN, Karlsruhe 1967.



## II.

KRONSTEINS Rechtsanschauung und seine juristische Methode enthalten scheinbar Unvereinbares. Einerseits ist er Rechtsrealist, andererseits ist er, von der katholischen Naturrechtslehre geprägt, ein Anhänger einer wertgebundenen Auslegung und Fortbildung des Rechts.

Dieser Gegensatz löst sich jedoch auf, wenn man seine Auffassung von Rechtsrealismus näher betrachtet. KRONSTEIN hat seine juristische Laufbahn als Praktiker des Wirtschaftsrechts begonnen, und er ist Zeit seines Lebens mit der Praxis verbunden gewesen. Abstrakte Rechtsprobleme interessierten ihn nicht, die systematisierende-interpretierende Arbeit des herkömmlichen Rechtsprofessors am Recht blieb ihm fremd. Bereits in frühen Aufsätzen hat KRONSTEIN die Bedeutung der Rechtstatsachenforschung betont. Die Erfahrungen mit der amerikanischen Fallmethode, die er als Student in Columbia, als Special Attorney im Department of Justice und als Professor of Law sammeln konnte, haben ihn in seiner Auffassung bestärkt, daß Rechtsprobleme nicht im luftleeren Raum abstrakter Theorien entstehen und gelöst werden können, sondern nur, wenn man ein klares Bild von der Lebenswirklichkeit, insbesondere der wirtschaftlichen Wirklichkeit gewonnen hat. Ihm ist es selbstverständlich, daß Rechtsbegriffe mit der Veränderung der gesellschaftlichen Wirklichkeit einen Bedeutungswandel mitmachen, daß die Auslegung der Rechtssätze daher notwendig Wandlungen unterworfen sein muß, daß alte Entscheidungen nur bedingten Wert als »Präjudizien« besitzen. Von Bedeutung für ihn sind aber nicht nur die gegenwärtigen Rechtstatsachen, die das rechtliche Problem (neu) konstituieren, sondern vor allem auch die Rückwirkungen einer bestimmten Gesetzesauslegung oder Neuregelung auf das Verhalten der Normadressaten. Insofern kann man KRONSTEIN als Vertreter der Rechtstatsachenforschung, der Lehre von der Folgenabschätzung, der funktionalen Methode bezeichnen, wengleich er hierzu keine ausgearbeitete Theorie entwickelt hat.

KRONSTEINS Rechtsrealismus hat aber noch einen anderen Aspekt: die Einsicht in das begrenzte Leistungsvermögen des Rechts angesichts der Macht der Interessen in der Lebenswirklichkeit, aber auch seine Ablehnung einer »Kolonisierung« der gesellschaftlichen Entwicklung durch das Recht. Gesellschaftliche Macht und gesellschaftliche Veränderung sind für ihn nicht per se gefährlich oder bedrohlich, sondern erfüllen in einer freiheitlichen Gesellschaft nützliche Funktionen. Das Recht muß sie nur kanalisieren. Bereits in seinem Buch über die abhängige juristische Person hatte KRONSTEIN einen »gesunden Mittelweg zwischen Einheit und Verschieden-

heit« im Konzernrecht angestrebt<sup>7</sup>, weil er der Auffassung war, daß die Konzernbildung in der deutschen Wirtschaft wirtschaftlichen Notwendigkeiten entspreche; zugleich aber hatte er die Aufgabe des Rechts darin gesehen, dem Konzern Grenzen zu setzen. In seinem Aufsatz »Recht und wirtschaftliche Machtentfaltung«<sup>8</sup> sagt KRONSTEIN: »In einer modernen Wirtschaft ist wirtschaftliche Macht eine Gegebenheit, die wir akzeptieren müssen. Die Grenzen, innerhalb deren sich die Macht bewegen kann, müssen eng genug gezogen werden, um unsere Rechts- und Wirtschaftsordnung zu sichern, und weit genug sein, um auch dem mächtigen Unternehmen Gelegenheit zu geben, seine Funktion innerhalb unserer Ordnung zu erfüllen«. Zur privaten Rechtssetzung durch Verbandsmacht meint er im gleichen Jahr, daß nur eine Diktatur in der Lage sei, die »pluralistischen Mächte« vorübergehend zu beseitigen. Im übrigen habe die pluralistische Entwicklung auch ihre guten Seiten; es könne allein um Machtbegrenzung gehen<sup>9</sup>. Und schließlich bezeichnet er in seinem Buch über »Das Recht der internationalen Kartelle«<sup>10</sup> die Kooperation mehrerer Unternehmen in der technologischen Forschung und Entwicklung als die oft »betriebswirtschaftlich einzig mögliche und volkswirtschaftlich einzig sinnvolle Methode des technologischen und wirtschaftlichen Fortschritts«; wiederum macht er aber auf die hiermit verbundene Gefahr der Vermachtung der Märkte aufmerksam. KRONSTEINS Rechtsrealismus ist also keineswegs als Abdankung des Rechts, sondern vielmehr als Kunst des Möglichen im Rahmen der Leistungsgrenzen des Rechts zu verstehen. KRONSTEIN tritt entschieden gegen die Einseitigkeit der soziologischen Rechtsschule und des Behaviorismus ein, denen er Kapitulation vor der normativen Kraft des Faktischen und Desinteresse gegenüber dem Recht vorwirft. KRONSTEIN sieht das Verhältnis zwischen gesellschaftlicher Wirklichkeit und Recht vielmehr dialektisch, nämlich als »die Gestaltung der Rechtswirklichkeit durch den Rechtssatz, aber auch die Anpassung des Rechtssatzes an die Rechtswirklichkeit«<sup>11</sup>.

Die Frage bleibt, nach welchen Maßstäben sich die Gestaltungsaufgabe des Rechts gegenüber der gesellschaftlichen Realität richten soll. KRONSTEIN vertritt hier eine Lehre der Wertjurisprudenz, die stark von der katholischen Naturrechtslehre geprägt ist. Bausteine dieses antipositivistischen Rechtsdenkens sind die teleologische Auslegung, die Einordnung der Rechtsinstitute und Rechtssätze in eine höherrangige Gesamtordnung und die Anerkennung einer Hierarchie der Werte. Für KRONSTEIN ist Recht eine

7 Briefe an einen jungen Deutschen (Anm. 2), 123 f.

8 Ausgewählte Schriften (Anm. 1), 93.

9 Ausgewählte Schriften (Anm. 1), 111 f.

10 Das Recht der internationalen Kartelle, Berlin 1967, 33.

11 Ausgewählte Schriften (Anm. 1), 90.



Ordnung, die den Kampf der Interessen und allgemein die gesellschaftliche Entwicklung begrenzt und ordnet, weil sie auf höheren Werten beruht. Mit diesem methodischen Instrumentarium versucht KRONSTEIN der Instrumentalisierung der Rechtsinstitute Vertrag, Schiedsgerichtsbarkeit, Patent und Korporation durch private Interessen, »dem Sieg der privaten Ordnung mit Hilfe der Institute der staatlichen Ordnung«<sup>12</sup> entgegenzuwirken, wobei er die historischen Zwecke der Rechtsinstitute betont. Dabei nähert er sich stark LUDWIG RAISERS institutioneller Betrachtungsweise an.

Rückschauend betrachtet fällt freilich auf, daß es KRONSTEIN schwerfällt, Genauerer über den Inhalt der »hierarchischen Ordnung« und der in ihr wirkenden Grundwerte zu sagen. KRONSTEIN scheint unter »Gesamtordnung« zunächst einmal den »horizontalen« Zusammenhang der Rechtsinstitute und den sich aus der Gesamtschau der Rechtsordnung ergebenden Ordnungsrahmen verstanden zu haben. In diesem Sinne wendet er sich wiederholt gegen eine isolierende, nur auf den einzelnen Rechtssatz abstellende Rechtsauslegung. In zweiter Linie ist »Ordnung« gleichbedeutend mit der »vertikalen« Bindung an die »Grundwerte«. KRONSTEIN selbst sieht - im Gegensatz zu den Neoliberalen - die Wettbewerbsordnung nicht als ranghöchsten Grundwert an. Vielmehr nennt er für das Wirtschaftsleben die Freiheit der Person und des Eigentums, die Freiheit des Unternehmers am Markt, gesellschaftlichen Pluralismus, den Schutz des Schwächeren, die Einordnung der Person in die Gesellschaft und schließlich die Gerechtigkeitsidee. Ein erheblicher Rest von Unklarheit bleibt bestehen, zumal mit der Nennung einzelner oberster Werte noch längst nicht die schwierige Aufgabe gelöst ist, sie zu definieren und im Konfliktfall zur Geltung zu bringen. Hierzu hat KRONSTEIN praktische Lösungswege für eng begrenzte Einzelfälle, aber keine ausgearbeitete Theorie entwickelt. Im »Recht der internationalen Kartelle« lehnt er es ausdrücklich ab, »Patentlösungen« anzubieten<sup>13</sup>. Insofern ist er mehr ein Mahner als ein Reformier.

### III.

KRONSTEIN hat kein geschlossenes System des Wirtschaftsrechts entwickelt. Sein einziger Aufsatz, der dem Wirtschaftsrecht als eigenständiger Rechtsmaterie gewidmet ist, stammt aus dem Jahre 1928, also beinahe dem Beginn seiner wissenschaftlichen Arbeit und der Entwicklung des Wirtschaftsrechts zu einer selbständigen Teildisziplin des Rechts überhaupt. KRONSTEIN ist an das Wirtschaftsrecht nicht mit einer systematischen Frage-

12 Internationale Kartelle (Anm. 10), 509.

13 A.a.O. (Anm. 10), 510.

stellung, sondern problemorientiert herangegangen. Seine Wirtschaftsrechtskonzeption läßt sich aus dem zentralen Thema erschließen, um das letztlich alle seine Veröffentlichungen kreisen, nämlich das Problem der Begrenzung privater Macht. Unter diesem Gesichtspunkt hat er sich vor allem mit dem Kartellrecht, dem Recht der juristischen Person, dem Konzernrecht, der Schiedsgerichtsbarkeit und dem Patentrecht befaßt. KRONSTEIN sieht private Macht, wie bereits angedeutet, als notwendiges Ergebnis gesellschaftlicher Veränderungsprozesse, die zu immer stärkerer Durchdringung von Staat und Gesellschaft und zum Aufkommen neuer intermediärer Gewalten mit quasi-öffentlicher Herrschaftsgewalt führten. Insoweit durchaus der soziologischen Rechtsschule verhaftet, sieht KRONSTEIN in den Regelungen der Kartelle, Konzerne und Verbände gegenüber Dritten echte Normen, deren Bindungswirkung denen staatlicher Normen gleicht. Frühzeitig schon haben - bei gleicher Fragestellung - die parallelen Entwicklungen auf internationaler Ebene, die tendenzielle Entmachtung der Staatengemeinschaft durch eine durch internationale Kartelle und transnationale Unternehmen konstituierte Weltwirtschaft seine besondere Aufmerksamkeit gefunden. Arbeiten zur Staatsangehörigkeit juristischer Personen, zum internationalen Kartellrecht, zum Internationalen Privatrecht, zur internationalen Schiedsgerichtsbarkeit, allen voran sein Werk über »Das Recht der internationalen Kartelle« zeugen von diesem Interesse.

KRONSTEINS Stellungnahme zum Problem nationaler und transnationaler privater Macht beruht auf zwei zentralen Wertungen: dem naturrechtlich fundierten Postulat der Freiheit der Person, des Schutzes des Schwächeren und von Pluralismus und Transparenz in der Wirtschaft als oberste Werte des Wirtschaftsrechts, und dem aus den negativen Erfahrungen mit einer statisch-bürokratischen Wirtschaftsgesinnung der Weimarer Zeit gewonnenen Glauben an wirtschaftliche Entwicklung, Innovation und Dynamik. Seine Auffassung von Wirtschaftsrecht ist auch aus diesem Grunde - und nicht nur als Erkenntnis der Wirkungsgrenzen des Rechts - ein Kompromißkonzept: Aufgabe des Wirtschaftsrechts ist die Begrenzung wirtschaftlicher Macht und die Verhinderung staatlicher Planwirtschaft; aber die Grenzen müssen weit genug gesteckt sein, damit auch das mächtige Unternehmen seine Funktion in der Wirtschaftsordnung erfüllen kann. Verbindungslinien zu führenden Wettbewerbstheorien führen weniger zur deutschen neoliberalen Schule als zu amerikanischen Theoretikern eines dynamischen Wettbewerbs, allen voran zu SCHUMPETER, aber auch zu CLARK, BAIN und EDWARDS. KRONSTEIN hat sich ausdrücklich vom Neoliberalismus seines Freundes FRANZ BÖHM distanziert. Er meint, Ziel der Wettbewerbsgesetzgebung sei nicht die Abschaffung privater Macht und privater Normsetzung als eines Fremdkörpers im Privatrechtsverkehr, sondern die bloße Erhaltung des wirtschaftlichen Pluralismus. Immerhin glaubt KRONSTEIN, daß die



Gemeinsamkeiten mit BÖHM in der kritischen Analyse der ordnungswidrigen Verwendung privatrechtlicher Rechtsinstitute und in der Fragestellung nach dem Verhältnis von Staat und Gesellschaft wichtiger als diese Unterschiede sind<sup>14</sup>.

Fragt man danach, auf welche Instrumente zur Machtbegrenzung KRONSTEIN setzt, so wird bei ihm eine wachsende Skepsis gegenüber dem Kartellrecht und den Kartellbehörden deutlich. In frühen Arbeiten hat KRONSTEIN bereits die Ineffektivität einer auf dem Mißbrauchsprinzip aufgebauten Kartellgesetzgebung nachgewiesen. Aber auch hinsichtlich der modernen - deutschen, europäischen und amerikanischen - Gesetzgebung stellt er, gemessen an der fortschreitenden Organisation der Wirtschaft, einen Aushöhlungsprozeß im Kampf gegen wirtschaftliche Macht fest, der das Kartellrecht auf nationaler wie auf internationaler Ebene zunehmend außerstande setzt, private Macht wirksam zu begrenzen. Ganz unschuldig ist KRONSTEIN an dieser Entwicklung - die vielleicht etwas überzeichnet ist, weil es zum Teil nicht um Rechtsversagen, sondern um politisches Versagen geht - nicht, da er selbst in seinen Arbeiten zur extraterritorialen Anwendung des Kartellrechts stets eine recht restriktive Auslegung des Auswirkungsprinzips vertreten hat. Immerhin hat seine Analyse das Bundeskartellamt veranlaßt, zunehmend auch internationale Wettbewerbsbeschränkungen aufzugreifen.

Wie dem auch sei, KRONSTEIN hat schon frühzeitig erkannt, daß es für die Begrenzung privater Macht nicht nur auf das Wirtschaftsrecht i.e.S., sondern auch auf die Auslegung und Fortbildung der Institute des allgemeinen Privat- und Gesellschaftsrechts - des Vertrages, der juristischen Person, der Schiedsgerichtsbarkeit und der gewerblichen Schutzrechte - ankommt. Zahlreiche Veröffentlichungen sind dieser Thematik gewidmet. Ihre Tendenz geht regelmäßig dahin, durch ordnungskonforme Interpretation, Fortbildung oder Neuregelung dieser Institute einen Beitrag zu einer offenen Wirtschaftsgesellschaft zu leisten. Zu nennen sind die Einschränkung der Parteiautonomie im Internationalen Privat- und Zivilprozeßrecht, die Ablehnung der Gründungstheorie und die Bestimmung der Nationalität juristischer Personen nach ihrer Verbindung zu einer bestimmten Wirtschaftsordnung im internationalen Privatrecht der juristischen Person, die Einheitsbetrachtung des Konzerns in seinen Außenbeziehungen und die Anwendung öffentlichrechtlicher Grundsätze auf die Ausübung von Verbandsgewalt. Insbesondere in seinem »Recht der internationalen Kartelle« scheint KRONSTEIN seine ganze Hoffnung auf eine derartige Interpretation und Rechtsfortbildung und damit auf eine aktive Rolle der Gerichte im Kampf gegen private Macht zu setzen. Er muß aber selbst zugeben, daß sol-

14 Ausgewählte Schriften (Anm. 1), 112; Internationale Kartelle (Anm. 10), 507 f.

che institutionelle Sichtweise den tatsächlichen Entwicklungstendenzen des Privatrechts kraß zuwiderläuft: Recht als Diener, nicht als Grenze privater Wünsche, so analysiert KRONSTEIN selbst in seinem Buch die tatsächliche Entwicklung der Institute des Privatrechts. Und diese Tendenz ist ungebrochen. Die mahnenden Worte KRONSTEINS in »Arbitration is Power«<sup>15</sup> vor einer Instrumentalisierung der Schiedsgerichtsbarkeit im amerikanischen Recht sind letztlich ungehört verhallt. Der amerikanische Supreme Court hat im Jahre 1985 im Fall Mitsubishi<sup>16</sup> die Entscheidung kartellrechtlicher Streitigkeiten durch private Schiedsgerichte ausdrücklich zugelassen.

Würde KRONSTEINS »Recht der internationalen Kartelle« heute, über 20 Jahre nach seinem Erscheinen, noch einmal geschrieben, so würde man zwar die Akzente etwas anders setzen. Statt den Schwerpunkt auf die Kartelle zu legen, würde man sich auf die transnationalen Unternehmen konzentrieren; staatliche Kartelle wie die Organisation erdölexportierender Staaten, internationale Rohstoff- und Investitionsverträge zwischen transnationalen Unternehmen und Entwicklungsländern, der Wettbewerb auf den Kapital- und Dienstleistungsmärkten, private internationale Rechtsharmonisierung durch internationale Normungsinstitutionen und Wirtschaftsverbände wären einzubeziehen; die partielle Öffnung ehemals national regulierter Märkte für ausländische Anbieter, aber auch der drohende Zerfall des freien Welthandels durch Bilateralisierung internationaler Handelsbeziehungen wären zu analysieren. Aber in der Konzeption und in den Grundaussagen behält das Buch seinen Wert. Bei alledem darf freilich nicht vergessen werden, daß Wirtschaftsrecht sich nicht in der Begrenzung privater Macht erschöpft und daß die per saldo kaum zu bestreitenden (relativen) Mißerfolge des Wirtschaftsrechts bei der Erfüllung dieser Aufgabe für sich noch kein abschließendes negatives Gesamturteil rechtfertigen. Dies schmälert aber nicht die Bedeutung von KRONSTEINS Werk.

#### IV.

Neben der Forschung spielte KRONSTEIN auch eine starke Rolle in der Rechtspolitik. Seine Praxisorientierung, seine guten Kontakte zu Wirtschaft, Administration und Politik - er war ein gefragter, aber stets unabhängiger Gutachter -, und seine problembezogene rechtsvergleichende Methode setzten KRONSTEIN wie kaum einen anderen in die Lage, die Probleme aufzubereiten, Lösungen aus der Sicht besonders des amerikanischen Rechts darzustellen und ihre sozialen und ideengeschichtlichen Hinter-

15 New York University Law Review 38 (1963), 661-700.

16 473 U.S. 614 (1985).



gründe zu beleuchten. Für die Akzeptanz seiner Vorschläge kamen ihm - neben der nicht geringen Faszination des amerikanischen Rechts in den sechziger Jahren - vor allem seine Vorliebe für einen gesunden Mittelweg sowie die Fähigkeit zugute, die Lösungen des amerikanischen Rechts zu relativieren und so einer platten Übernahme in das deutsche Recht entgegenzuwirken. Insbesondere zur Aktienrechtsreform lieferte KRONSTEIN durch die rechtsvergleichende Untersuchung über »Publizität und Gewinnverteilung im neuen Aktienrecht«<sup>17</sup> entscheidende Beiträge. Daneben ist in diesem Zusammenhang das Buch über die nennwertlose Aktie<sup>18</sup> zu erwähnen. Jedoch machen die in Veröffentlichungen sichtbaren Beiträge zur Rechtsreform nur einen Teil von KRONSTEINS rechtspolitischer Tätigkeit aus.

Als akademischer Lehrer war KRONSTEIN in jeder Hinsicht unkonventionell. Seine Lehrmethode war nicht die der Frankfurter Kollegen, und seine Beziehungen zu seinen Studenten und Schülern waren nicht die der Ordinariatsuniversität der fünfziger und sechziger Jahre. In der Lehre verband er in glücklicher Weise fall- und problembezogene mit systematisch-dogmatischen Aspekten. So wie ihm im zweiten Studium an der Columbia Law School das systematische Denken des deutschen Rechts bei der Erarbeitung des amerikanischen Fallrechts geholfen hatte, so brachte er den deutschen Studenten das amerikanische Denken in Fakten und Problemen zum Begreifen des deutschen systematisch orientierten Rechts nahe. Jedenfalls bei längerfristiger Sichtweise haben die Frankfurter Studenten hiervon ungemein profitiert, mögen sie auch manchmal den unmittelbaren Nutzen für die nächstliegende Übung nicht gespürt haben. KRONSTEINS Seminare waren stets aktuellen rechtspolitischen oder rechtsvergleichenden Themen gewidmet. Für zahlreiche Studenten war die Teilnahme am Seminar der Beginn einer späteren engen Zusammenarbeit mit KRONSTEIN als Doktorand, wissenschaftliche Hilfskraft oder gar Assistent. Drei seiner Assistenten haben bei ihm habilitiert, KURT BIEDENKOPF, UDO KORNBLUM und der Verfasser; viele andere konnten wichtige Positionen in Wirtschaft, Verwaltung und Anwaltschaft einnehmen. Die enge Verbundenheit der Schüler zu KRONSTEIN, aber auch untereinander, kommt darin zum Ausdruck, daß sich nach seinem Tode ein Kreis seiner Freunde und Schüler gebildet hat, der mehrmals zusammengekommen ist. Eine eigentliche »Schule« hat KRONSTEIN freilich nie begründet.

Über die Lehre und wissenschaftliche Betreuung junger Juristen hinaus liegt KRONSTEINS großes Verdienst im Verhältnis zu den Frankfurter Studenten und Schülern in der Organisation des Brückenschlags zwischen

17 H. KRONSTEIN/C. P. CLAUSEN, Publizität und Gewinnverteilung im neuen Aktienrecht, Frankfurt 1960.

18 H. COING/H. KRONSTEIN, Die nennwertlose Aktie als Rechtsproblem, Frankfurt 1959.

Deutschland und den Vereinigten Staaten. Weit über 100 junge Juristen aus Deutschland und den Vereinigten Staaten, später auch aus der Schweiz, haben am Austausch zwischen Frankfurt und Washington teilgenommen, davon etwa ein Viertel spätere Professoren. Die Bedeutung des hierdurch ermöglichten engen Kontakts junger deutscher Rechtswissenschaftler mit dem amerikanischen Rechtsdenken läßt sich nicht hoch genug einschätzen; die wissenschaftlichen Arbeiten und der berufliche Werdegang der Beteiligten bezeugen dies. Aus Frankfurt waren z.B. die späteren Professoren KURT BIEDENKOPF, VOLKMAR GÖTZ, CHRISTIAN JOERGES, ULRICH LOEWENHEIM, NORBERT HORN, ERNST-JOACHIM MESTMÄCKER, FRITZ NICKLISCH, NORBERT REICH, HELMUT RÜSSMANN und der Verfasser - überwiegend als Schultezur-Hausen-Stipendiaten oder aufgrund eines Habilitationsstipendiums - am Washingtoner Institut. Wenngleich die Zahl der Amerikaner, die einen Forschungsaufenthalt in Frankfurt verbrachten, deutlich geringer blieb - die deutsche Sprache erwies sich hier als eine Barriere -, so war doch in den meisten Jahren jeweils ein Amerikaner am Frankfurter Institut. Nach KRONSTEINS Tod haben sich die beiden Institute auseinanderentwickelt. Das Austauschprogramm ist aber - in kleinerem Umfang - fortgesetzt worden. In ihm lebt KRONSTEINS Idee vom akademischen Brückenschlag weiter.



## Walter Hallstein (1901-1982)\*

von *Friedrich Kübler*

### I.

Was in diesem Band über WALTER HALLSTEIN geschrieben wird, hat sich der Frage zu stellen, inwieweit es berechtigt ist, ihn für die Frankfurter Juristenfakultät zu reklamieren. Gewiß: er hat dieser Fakultät der - von ihm sehr ernst genommenen - Form nach von 1942 bis zu seinem Tod, also über vierzig Jahre angehört. Aber er hatte wenig Gelegenheit, den Beruf des Rechtslehrers in Frankfurt auszuüben. Was HALLSTEIN historischen Rang verleiht, hat sich außerhalb der Universität zugetragen. Auch insoweit bestehen jedoch wichtige Bezüge zur Rechtswissenschaft: bei der Würdigung des gelehrten Juristen dürfen die Ämter des Bonner Staatssekretärs und des Brüsseler Kommissionspräsidenten nicht außer Betracht bleiben. Der weitreichende Erfolg dieses Wirkens, vor allem die Rolle bei Gründung und Aufbau der Europäischen Gemeinschaft, können indessen im Kontext einer Studie nicht angemessen erörtert werden, die die institutionellen und intellektuellen Aspekte der Fakultätszugehörigkeit zum Anlaß hat. Dieser Bezug legt vielmehr die Frage nahe, wo und wie sich generelle Themen aus Frankfurter Perspektive im Wirken und im Werk WALTER HALLSTEIN aufzeigen und verfolgen lassen. Das soll in drei Schritten versucht werden: einer Skizze der persönlichen, wissenschaftlichen und politischen Biographie (II.), der Rekonstruktion der Entwicklung privatrechtstheoretischer Vorstellungen (III.) und dem Nachvollzug theoretischer wie praktizierter Auffassungen, die das Verhältnis von Rechtswissenschaft und Politik betreffen (IV.); ein kurzes Resümee (V.) schließt sich an.

### II.

WALTER HALLSTEIN wurde am 17. November 1901 in Mainz als Sohn eines Regierungsbaurates geboren; sein Vater stammte aus Höchst, seine Mutter aus Schwabenheim in Hessen. Er ging auf das humanistische Gymnasium in Mainz, das er 1920 mit dem Abitur verließ. Das juristische Stu-

\*) Prof. Dr. Dres. h. c. HELMUT COING und Prof. Dr. ERNST STEINDORFF habe ich für wichtige Hinweise und hilfreiche Auskünfte zu danken.



Lt. Ihrem Anruf bei Fr. Schröder (Prof. Biedenkopf)

Liste der Mitglieder entspricht leider nicht dem  
neusten Stand.

7.2.1983

TN - Sekretariat Wassner -

Kronstein-Kreis



Mitglieder des Kronstein-Kreises (Deutscher Kreis),  
zu denen teilweise seit 1974 keine Verbindung mehr besteht.

(Stand 8.5.1978/4.6.1981)

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Schlabrendorff

## Fabian v. Schlabrendorff über H. Kronstein: „Briefe an einen jungen Deutschen“

# ZEUGNIS VON EINEM LEBEN

Der prominente Rechtsanwalt und ehemalige 20.-Juli-Widerstandskämpfer Dr. Fabian von Schlabrendorff, 60, ist am 1. September dieses Jahres zum Richter am Bundesverfassungsgericht in Karlsruhe ernannt worden.

Es gibt Verlage, die Bücher verlegen, und solche, die Autoren verlegen. Der Verlag C. H. Beck hat in diesem Jahr einen Autor verlegt: Heinrich Kronstein. Was vermittelt sein Buch? Vieles, aber nichts stärker als ein Bild seines Autors.

Kronstein, der einer angesehenen jüdischen Familie aus Karlsruhe entstammt, lehrt heute gleichzeitig an der Universität in Frankfurt am Main und an der Georgetown University in Washington Wirtschaftsrecht. Dank seiner umfassenden wirtschaftlichen und politischen Kenntnisse ist er in Europa und Amerika nicht ohne Einfluß auf unsere Geschichte.

In seinem Buch unternimmt er den Versuch, ein packendes und allgemeinverständliches Bild unserer Vergangenheit und Zukunft aus Briefen und Tagebuchnotizen sichtbar zu machen. Der Versuch gelingt. Seine Briefe — echte Briefe, die er in den letzten Jahren an einen jungen deutschen Juristen schrieb — geben, nüchtern und engagiert zugleich, Zeugnis von einem Leben, das fern von Konventionen in außergewöhnlichen Bahnen verläuft.

Das ist, bei aller Sachlichkeit, kein einfach zu lesender Bericht. Nichts, auch nicht die Zeit seiner Kindheit, läßt der Autor unreflektiert. Erstaunlich sind die Ähnlichkeiten mit der Autobiographie Carl Zuckermayers: Kronstein schlägt den gleichen Grundton für Jugend, Ersten Weltkrieg und Studienzeit in Heidelberg an — geborgen, kritisch, suchend.

Dabei geben schon diese Seiten Anregungen für jeden Studenten die Fülle. Nicht nur in Deutschland, in der ganzen Welt ist ja die studierende Jugend heute von innerer und äußerer Unruhe erfaßt. Wer nicht dieser Unruhe in Permanenz verfallen, sondern sie, mit einem festen Ziel im Auge, überwinden will, der sollte lesen, was Kronstein über seine Studienzeit nach dem Ersten Weltkrieg schreibt.

Was haben wir in Deutschland über unsere Vergangenheit nicht alles hören müssen — von der Kollektivschuld-These bis zur völligen Selbstrechtfertigung! Kronstein sieht in

der „Freisetzung“ des inneren und äußeren Menschen einen ersten Schritt zu jenem Nihilismus, der schließlich im Nationalsozialismus endete. Er widerspricht Hannah Arendt nicht nur im Hinblick auf das Werden und Wesen des Nationalsozialismus, sondern auch im Hinblick auf die Möglichkeit der deut-



Heinrich Kronstein:  
„Briefe an einen  
jungen Deutschen“  
Verlag  
C. H. Beck  
München  
324 Seiten  
16,80 Mark

schen Juden, sich gegen Hitlers Unmenschlichkeit zur Wehr zu setzen.

Das Buch bleibt interessant, wenn der Autor sich Amerika zuwendet. Wir erfahren von den Schwierigkeiten des Emigranten und von der Arbeit Kronsteins als Berater im Department of Justice. Der fatale Gemeinplatz vom großen Schmelztiegel USA wird treffend widerlegt. Die



Kronstein

Kälte, die Leere Amerikas, die weitverbreitete Unkenntnis über Europa, über Erscheinungen wie Marxismus, Kommunismus und Nationalsozialismus — nichts davon entgeht Kronsteins Kritik, und mit Vergnügen stellt man fest: seine Kritik schießt nie über das Ziel hinaus.

Immer wieder findet Kronstein — selbst dem Denken in Gruppen und

Kollektiven feind — seine Freunde und Mitarbeiter unter den Outsidern, den Spontanen, den Individualisten außerhalb der großen, aber trägen Organisationen. Dennoch wird hier kein schrankenloser Individualismus verkündet, im Gegenteil: Der Autor widmet von nun an sein Leben ganz dem Brückenschlag zwischen Europa und den USA.

In diesem Zusammenhang darf nicht unerwähnt bleiben, daß der Autor häufig auf seine Konversion zum Katholizismus zu sprechen kommt. Seine Ausführungen bleiben aber in diesem Punkt für den dezidierten Nicht-Katholiken etwas dunkel.

Glück und Können führen den Kenner des deutschen Rechts auf die Schulbank der amerikanischen Universität, deren Vor- und Nachteile nun von ihm abgewogen werden. Der Gegensatz zwischen deutschem und angelsächsischem Rechtsdenken wird dem Leser anschaulich gemacht. Dem deutschen Begriffshimmel wird die amerikanische Fallmethode entgegengestellt. Für besonders bedeutsam halte ich, was Kronstein zur Methode des Lernens und der Mitarbeit der Studierenden äußert. Er ist keineswegs dafür, das amerikanische Vorbild auf Europa zu übertragen.

Die „Briefe an einen jungen Deutschen“ sind ein eminent politisches Buch. Wir erfahren deshalb von der wissenschaftlichen Leistung und Bedeutung des Autors nur wenig. Wer mehr darüber erfahren will, sollte die ebenfalls in diesem Jahr erschienene Monographie Kronsteins über internationales Kartellrecht zur Hand nehmen (J. Schweitzer Verlag, Berlin; 520 Seiten; 146 Mark). Dort kann man lernen, daß heute nicht mehr der Staat das Recht allein setzt, sondern daß immer mehr internationale Gremien unsere Rechtsordnung bestimmen — eine äußerst wichtige Erkenntnis.

Dagegen sind die „Briefe an einen jungen Deutschen“ der Ausdruck einer allgemeinen Lebensauffassung. Sie besagt: Wir haben trotz aller Enttäuschungen und Zerstörungen nicht das Recht, bitter zu werden und zu resignieren; wir haben mit gesundem Augenmaß für das Mögliche an Neu- und Wiederaufbau zu denken.

Wer wollte sich diesem Appell entziehen!



# Die atlantische Gemeinschaft mit neuem Sinn erfüllen

Heinrich Kronstein, unverzagter Mentor der europäisch-amerikanischen Zusammenarbeit / Von Professor Kurt Biedenkopf

„Unter denen, die an der europäisch-amerikanischen Brücke arbeiten, wird sich wohl kaum jemand finden, der dieses Bauwerk jemals als vollendet oder auch nur als voll tragfähig angesehen hätte.“ Diese eher skeptische Beurteilung zwanzigjähriger Bemühungen um die große Aufgabe unserer Zeit: die atlantische Gemeinschaft, steht am Beginn einer erneuten Überprüfung des Erreichten und noch nicht Bewältigten, mit der Heinrich Kronstein 1966 seine Lebenserinnerungen abschließt. Studentische Unruhen und die sich abzeichnende Katastrophe des Vietnam-Kriegs in Amerika, die Spannungen zwischen Washington und Bonn in der Frage der Stationierungskosten und der Zahlungsbilanz, Probleme innerhalb der EWG und die innenpolitischen Entwicklungen, die wenig später zum Sturz der Erhard-Regierung führen, veranlaßten ihn seinerzeit zu der Feststellung, vieles, auf dem er zwei oder drei Jahre zuvor habe fest aufbauen können, habe sich als weit weniger stabil erwiesen als angenommen.

Heinrich Kronstein wird heute 75 Jahre alt. Als akademischer Lehrer, als Wissenschaftler, als Freund und Berater ist er mit dem Werk einer atlantischen Gemeinschaft eng verbunden. Wie seine Freunde ging er davon aus, daß Amerika durch das Band gemeinsamer Geschichte und Kultur mit Europa verbunden ist. Von den sittlichen und geistigen Katastrophen, die Europa heimsuchten, war er verschont geblieben.

Inzwischen hat sich die „atlantische Krise“ weiterentfaltet, in den Vereinigten Staaten wie in unserem Lande. Die Herausforderung einer den Atlantik überspannenden Gemeinschaft ist verblaßt. Es war zu keiner Zeit einfach, die Bedeutung der gemeinsamen Grundwerte in der atlantischen Gemeinschaft gegenüber der rein pragmatischen Begründung des Bündnisses zu behaupten.

Nach der Phase der Existenzerhaltung, die unmittelbar auf den Zweiten Weltkrieg folgte, waren die Beziehungen zwischen Europa und Amerika bis zur Entstehung der Europäischen Wirtschaftsgemeinschaft bestimmt durch die Polarität des kalten Krieges. Die atlantische Gemeinschaft war eine Verteidigungsgemeinschaft: die Freiheitlichkeit der eigenen Ordnung definierte sich zunehmend durch ihren Widerspruch zur Unfreiheitlichkeit.

## Neubestimmung der Werte

Damit war die Voraussetzung für eine Entwicklung geschaffen, in der Freiheit und ökonomischer Wohlstand eine neuartige Synthese eingehen konnten, sie wurde in der wirtschaftlichen Entwicklung der frühen 60er Jahre und durch die Europäische Wirtschaftsgemeinschaft vollzogen. An die Stelle des militärischen Primats der Atlantischen Gemeinschaft trat der ökonomische. Heinrich Kronstein hat bereits Mitte der 60er Jahre vor den Konsequenzen gewarnt, die eine solche Entwicklung für die Vitalität des Gedankens der Atlantischen Gemeinschaft haben mußte. Sein Wissen um die Notwendigkeit wertgebundener Ordnung, ebenso wie seine Nähe zur studentischen Jugend auf beiden Seiten des Atlantiks ließen ihn früher als andere die Gefahren erkennen, die vom ökonomischen Positivismus für die Tragfähigkeit der Atlantischen Gemeinschaft ausgehen. Der wieder beginnende Prozeß der Zersetzung gemeinsamer Märkte durch Protektionismus, kurzfristige Optimierung partikularer Interessen und die Neubelebung national-definierter wirtschaftlicher Zielvorstellungen, von ihm bereits Anfang der 60er Jahre vorausgesehen, gehören inzwischen zu den realen Problemen der westlichen Einheit.

Die politische Beherrschung dieser Probleme ist nur möglich auf einer

Grundlage, die über das kleinste gemeinsame Vielfache nationaler Interessen hinausweist. Sie neu zu bestimmen, ist Aufgabe einer modernen Atlantischen Gemeinschaft, in der militärische und ökonomische Bündnisse ihren Platz haben, ohne sie zu erschöpfen. Die Anstrengungen dieser Gemeinschaft müssen auf die Neubestimmung der Werte gerichtet sein, an denen wir unser Handeln ausrichten, der politischen und gesellschaftlichen Institutionen, durch die wir handeln, und der Aufgabe, deren wir verpflichtet sein wollen.

Eine solche Aufgabenstellung leistet dreierlei: Der Bundesrepublik gewährt sie die Sicherheit und Unterstützung, derer sie für die erfolgreiche geistige und politische Auseinandersetzung mit den Systemen des Ostens bedarf. Die Ostpolitik der Bundesregierung hat die formalen und historischen Schranken niedergelegt, die einer solchen Auseinandersetzung bisher entgegenstanden. Auf die geistige Konfrontation, die ihr folgen muß, hat sie uns bisher nicht ausreichend vorbereitet. Diese Konfrontation wird ungeachtet der Abgrenzungsbemühungen des Ostens stattfinden und bestanden werden müssen. Wir können sie trotz unseres eigenen demokratischen Fundus nicht ohne die Hilfe einer Wertgemeinschaft bestehen, deren Wurzeln bis in die Neue Welt reichen.

Den europäischen Partnern wird die atlantische Gemeinschaft der Zukunft die Möglichkeit eröffnen, an der Lösung der Probleme mitzuwirken, vor denen die Vereinigten Staaten stehen. Die soziale Frage, die Sanierung der Städte, die Verwirklichung sozialer Verantwortung im industriellen Bereich sind Fragen, zu deren Beantwortung Europa entscheidende Beiträge geleistet hat. Sie sollten für die Vereinigten Staaten nutzbar gemacht werden. Europa kann damit zugleich jene politische und geistige Tradition wiederaufnehmen, die die Vereinigten Staaten nach dem

Zweiten Weltkrieg trotz mancher Fehlschläge und Mißverständnisse erfolgreich begonnen haben: das Gedankengut weiterzureichen, das hier wie drüben aus gleichen Wurzeln gewachsen ist.

## Prüfung im Wettbewerb

Schließlich wird die Zusammenarbeit bei der Lösung politischer und gesellschaftlicher Probleme dazu beitragen, daß die Entwicklung der Institutionen und Ordnungen in den Ländern der atlantischen Gemeinschaft auch in Zukunft parallel zueinander erfolgt. Damit bleibt die Chance gegenseitiger Befruchtung und Kontrolle erhalten. Sie ist für eine erfolgreiche Verteidigung unserer freien Gesellschaftsordnung entscheidend. Nur im Wettbewerb miteinander lassen sich verschiedene institutionelle Antworten auf die Grundfragen einer freien Gesellschaft prüfen, kontrollieren und fortentwickeln. Eine fruchtbare Konkurrenz der Institutionen ist jedoch nur denkbar, wenn die Ziele und damit die Aufgabenstellungen die gleichen sind. Der Vergleich von Institutionen, die unvereinbaren Zielen dienen, ist wissenschaftlich und politisch gefährlich. Er verschleiert die Unvereinbarkeit der Ziele und bedroht damit die Substanz der Werte, denen die Institutionen dienen.

Heinrich Kronstein hat diese Aufgaben der gemeinsamen Zielsetzung in einer atlantischen Gemeinschaft stets gesehen. Nur eine Zielsetzung, die über die politischen Bedürfnisse des Tages hinausweist, kann der Gemeinschaft in seinen Augen einen Sinn geben. Zwar ist die Aufgabe stets wie immer gewaltig. Doch einem jungen Deutschen schrieb er 1966: „Ich habe trotz aller Rückschläge und Enttäuschungen die zusehender Hoffung, daß sie gemeistert werden kann und eines Tages gemeistert sein wird.“



# Der treuhänderische Professor zur Rechenschaft verpflichtet

F.A.Z. 27/3-68

Beispiele lautloser Hochschulreform // Von Günther von Lojewski

Heinrich Kronstein liest Wirtschaftsrecht zugleich in Frankfurt und an der amerikanischen Georgetown University. Bis zu seiner Emeritierung hatte er an beiden Universitäten einen Lehrstuhl. Aber noch heute weicht der Siebzigjährige der doppelten Belastung nicht aus. Die Erfahrung kommt seinen Schülern zugute. Allen jenem zum Trotz, die der Universität totale Erstarrung vorwerfen, hat er in seinem Umkreis ganze Abschnitte der Hochschul- und Studienreform vorweggenommen.

Kronsteins Verhältnis zu seinen Assistenten ist nur ein Beispiel dafür. Ob Rektor Biedenkopf in Bochum, Mestmäcker in Münster und als Vorsitzender des Gründungsausschusses zugleich in Bielefeld, Fikentscher in Tübingen, Steindorf in München, Kornblum in Marburg — keiner von ihnen ist in Frankfurt länger als vier, fünf Jahre Assistent gewesen. Der „Chef“ selbst hat auf ihre Habilitation gedrängt. Sie waren einerseits stets an seiner Arbeit beteiligt, andererseits von Verwaltungs- und wissenschaftlichen Hilfsdiensten freigestellt. Vieles von dem, was die Rektorenkonferenz in ihrer Assistenten-Erklärung für die Zukunft gerade erst empfohlen hat, ist hier also seit Jahren praktiziert.

Ähnlich verhält es sich mit den Studenten. Ebenfalls von amerikanischen Beobachtungen angeregt, hat Kronstein die „Verschulung“, die das amerikanische College-System kennzeichnet, auch in Frankfurt für die ersten Jura-Semester durchgesetzt. Die Fakultät stimmte ihm vor zwei Jahren zu, weil sie sich davon für die Folgezeit ein freieres Stu-

dium versprach. Die Professoren Wietölter und nach ihm Kronstein hielten als erste vor zwei Jahren eine sechsstündige Einführungsvorlesung in das Bürgerliche Recht, in der sie, beginnend bei Robinson Crusoe, schlicht von den einfachen Regelungen zwischenmenschlicher Beziehungen ausgingen. In jedem Kolleg gaben sie auch Gelegenheit zu Fragen. Parallel dazu finden seitdem obligatorisch zweistündige Arbeitsgemeinschaften statt, je eine für etwa 25 Studenten. Hier sollen junge, mit „gut“ examinierte Rechtsreferendare — die auf diese Weise selbst Gelegenheit erhalten, sich für die wissenschaftliche Laufbahn zu qualifizieren — die ersten Semester an einzelne „Fälle“ heranzuführen, für später auch auf das Schreiben von Klausurarbeiten vorbereiten.

Kronsteins ordnungspolitischer Ansatz für die Reformen, die fast lautlos in Bewegung gesetzt wurden, ist, daß die Universität wie die Gesellschaft offen sein, daß Verkrustungen aller Art entgegengewirkt werden müsse. Das Ziel heißt nicht Egalisierung jeglichen Besitzstandes, sondern Chancengleichheit.

Seine Schüler haben Kronstein zwar wiederholt gesagt, daß sie diese Ordnung, die er auch seiner Lehre zugrunde legt, in dieser Zeit nicht anzuerkennen vermöchten. Aber ihre Unruhe hat er selbst besser vorausgesehen als sie. Aus Amerika schrieb er im März 1966: „Wir wußten, daß wir am Vorabend des großen Protestes der Studenten gegen Ihre Universität standen. Die Strömung begann sich gegen die zu wenden, die alle Ideale verneinten, die die Wertfreiheit

zum Dogma erhoben und für die die Gleichmacherei eine Lebensaufgabe war.“ In einem Prozeß, wie er sich in dieser Zeit auch in anderen Lebensbereichen vollzieht — etwa im Verhältnis zwischen Arbeitgebern und Arbeitnehmern —, verlangt Kronstein deshalb von der Universität, daß sie zunächst sich selbst und dann zugleich die Studenten in Pflicht für das Ganze nimmt.

Wie das geschehen kann, zeigt Biedenkopf in Bochum, einer Hochschule freilich, die vor anderen den Vorteil hat, jung, von Traditionen weitgehend unbelastet zu sein. Indem er den Verzicht auf Beobachtung der Studenten beim Klausurenschreiben anregt, gibt er einerseits Teile des alten Disziplinarrechtes auf, macht er die Studenten andererseits mitverantwortlich für das Funktionieren „des ganzen Betriebes“; daraus folgt später ihre Beteiligung an der Gestaltung von Prüfungs- und Lehrplänen. Indem er vier Theologie-Professoren von der Notwendigkeit einer gemeinsamen Einführungsvorlesung in das Neue Testament überzeugte, folgte er nicht nur studentischem Wunsch, führte er vielmehr auch auseinanderstrebende Fächer wieder zusammen.

Daß daraus schließlich erhebliche Konsequenzen für die Universitätsstruktur wie für den Lehrbetrieb erwachsen ist, Biedenkopf bewußt. Der Dualismus zwischen dem Rektor und dem den Staat repräsentierenden Kanzler würde fallen, mit den Studienordnungen die Studienziele und Lehrpläne sich wandeln. Die Hochschule müßte vor allem durch und durch transparent wer-

den. Schon jetzt sucht man in Bochum „die Information ins Haus zu bringen, weil der treuhänderische Professor zur Rechenschaft über seine Entscheidungen verpflichtet ist und zugleich radikalen Kräften durch nichts der Vorsprung gegenüber der Masse der Studenten besser aus der Hand genommen werden kann“. Der Vorlesungskritik zuvorkommend, verteilen Bochumer Professoren seit langem von sich aus an die Studenten Fragebogen zur Qualität des Unterrichts, gehen sie hinein in die täglichen Diskussionen auf dem Hochschulgelände. Wenn dann noch akademische Besitzstände und Privilegien sich ständiger Anfragestellung nicht länger zu entziehen vermöchten, träten mit einmal die Professoren, die Hochschulen selbst in Wettbewerb zueinander. „Mit Leistung aber“, so Biedenkopf, „sind auch die Studenten wieder für die Universität wie für den Staat zu gewinnen.“

Die Vorstellung, daß sich die Hochschulen gleichsam in moderne Wirtschaftsunternehmen (mit der Konsequenz eines möglichen Konkurses) verwandeln ließen, daß geisteswissenschaftliche Forschung statt in Muße künftig unter dem Druck der Konkurrenz betrieben werden und erfolgreich sein könnte, mutet heute zwar noch utopisch an. Biedenkopf aber ist entschlossen, was Kronstein in Frankfurt für sein Fach begann, in Bochum im großen zu beweisen. Die Münchener Beschlüsse der Reformkommission der juristischen Fakultäten haben inzwischen die lautlosen Reformen geweiht und regen die Neuordnung des Jurastudiums in der ganzen Bundesrepublik an.



such decisions, several brilliant commentators<sup>15</sup> have suggested that the courts forthrightly adopt a general doctrine which calls for refusal to enforce directly—i. e., without recourse to such indirect devices—highly unfair provisions of all so-called “contracts of adhesion” where there was no possibility of real bargaining. These writers urge that some decisions, in cases where this point of view was not presented to, or considered by, the courts should not now be deemed controlling. Their position is that of Holmes<sup>16</sup> and Corbin,<sup>17</sup> i. e., that the courts will do justice better by forthrightly, not obliquely, articulating important doctrines of public policy. The commentators on “adhesion” contracts do not at all suggest that all standardized contracts be stricken down, for they recognize that such contracts often serve a highly useful purpose where the parties are not markedly unequal in bargaining power (as in many “commercial” contracts).<sup>18</sup>

So far as I can discover, there is but one instance in which an American

court has explicitly referred to this “adhesion” doctrine. See *Bekken v. Equitable Life Assurance Society*, 70 N.D. 122, 293 N.W. 200, 212: “It has been said that ‘life-insurance contracts are contracts of “adhesion.”’ The contract is drawn up by the insurer and the insured, who merely “adheres” to it, has little choice as to its terms.’ 33 Harvard L. R. p. 222. Both the applicant and the insurance company are bound by the applicable laws and valid regulations promulgated pursuant thereto; but, except as so limited, the contract is prepared by the insurance company. The applicant may choose whether he will apply for insurance, \* \* \* and which one of the several types of policies he prefers; but, his choice virtually ends with the right to apply for one or more of the contracts the insurance company has to offer.” That aptly describes the position of the passenger here.

An ordinary contract has been called a sort of private statute, mutually made by the parties and governing their relations.<sup>19</sup> But in a take-it-or-leave-it con-

whole contract is conditioned on some presupposition which is held to have failed.”

See Also Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Col.L.Rev. 629, 635 (1943) as to “back-door” judicial devices; cf. 58 Yale L.J. (1949) 1161, 1163–1164.

15. See, e. g., Kessler, *Contracts of Adhesion, etc.*, supra; Llewellyn, *Book Review*, 52 Harv.L.Rev. 700 (1939); Patterson, *The Delivery of a Life-Insurance Policy*, 33 Harv.L.Rev. 198 (1919); Fuller, *Basic Contract Law*, 263 (1946); Carnahan, *Conflict of Laws and Insurance Contracts* (1942).

For the history of “adhesion” contracts, see Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (1937).

16. See Holmes’ view expressed in the following: *Common Carriers and The Common Law*, 13 Am.L.Rev. (1879) 609, 630, 631; *The Common Law* (1881) 1, 5, 35, 36, 68, 116, 204, 205; *The Path of the Law*, 10 Harv.L.Rev. (1897) 457, 466, 467; Frankfurter, *The Early Writings of*

O. W. Holmes, Jr., 44 Harv.L.Rev. (1931) 717, 719, 774, 779, 781 note, 791; *Vegetahn v. Guntner*, 167 Mass. 92, 104, 106, 44 N.E. 1077, 35 L.R.A. 722; *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828.

17. See 3 Corbin, *Contracts* (1951) 164, to the effect that “a better brand of justice may be delivered by a court that is clearly conscious of its own processes, than by one that states hard-bitten traditional rules and doctrines and then attains an instinctively felt justice by an avoidance of them that is only half-conscious, accompanied by an extended exegesis worthy of a medieval theologian.”

18. Cf. *Cerro De Pasco Copper Corp. v. Knut Knutsen*, 2 Cir., 187 F.2d 990. There the shipper (as the record shows) was a financially powerful copper company. We held it bound by a provision in a bill of lading which provided that suit should be brought in Norwegian courts only.

19. See the French Civil Code No. 1134; Lawson, *The Rational Strength of English Law* (1951) 56–57.



tract, absent actual freedom to contract, the parties do not "legislate" by mutual agreement; the dominant party "legislates" for both. Salleilles, who in France in 1901, coined the phrase "contract of adhesion," used it to describe contracts "in which one predominant unilateral will dictate its law to an undetermined multiple rather than to an individual \* \* \*, as in all contracts which, as the Romans said, resemble a law more than the meeting of the minds." <sup>20</sup>

All this has special pertinence here: A party, like the passenger here, having no real choice about the matter, cannot in fairness be said to have joined in a "choice of law" merely because the carrier has inserted a provision that some particular foreign "law" shall govern; therefore it would seem that that party should not be bound by such a provision. I shall not elaborate this point, since it is amply discussed in a recent excellent article, Ehrenzweig, "Adhesion Contracts in The Conflict of Laws," 53 Col.L.Rev. (1953) 1072, where most of the authorities are cited and considered.<sup>21</sup>

7. I grant that, in this context, I am stressing the need to do justice in par-

20. Cf. *Lachs v. Fidelity & Casualty Co.*, 306 N.Y. 357, 118 N.E. 555. In *Campbell Soup Co. v. Wentz*, 3 Cir., 172 F.2d 80, the court refused to grant specific performance of an unfair contract of "adhesion" but indicated that it would rule differently in a suit at "law." It is difficult to see why such a ruling should be thus restricted. Our legal history discloses numerous instances in which "equitable" doctrines as to unfairness or the like have been adapted at "law." See, e. g., "law" cases concerning "unconscionable" contracts; *Hume v. United States*, 132 U.S. 406, 10 S.Ct. 134, 33 L.Ed. 393; *Scott v. United States*, 12 Wall. 443, 445, 20 L.Ed. 438; *Kelley v. Caplice*, 23 Kan. 474; 3 *Corbin, Contracts* (1951) 156. The doctrine of "frustration" in this country apparently began in "equity"—*Willard v. Tayloe*, 8 Wall. 557, 19 L.Ed. 501—but is now a "law" doctrine as well. And consider the development of "equitable defenses" in suits at "law"; 3 *Corbin, Contracts* (1951) 614-616.

ticular instances. I do so unashamedly. For it is generally agreed that the decisions of conflict-of-laws cases by mechanized rules, without regard to particularized justice, cannot be defended on the ground that they have promoted certainty and uniformity, since such results have not been thus achieved.<sup>22</sup> Several wise commentators have urged that the element of justice should have a dominating influence.<sup>23</sup>

8. Finally, I am by no means sure that, even if English intramural "law" applied to the waiver, the result would be that which my colleagues report:

(a) I think that *Yorkshire Insurance Company, Ltd. v. Craine* [1922] 2 A.C. 541 does not bear out the interpretation my colleagues give it. There the plaintiff was the insured under two identical fire insurance policies issued by the two defendant companies. Each policy provided that the insured must deliver to the company a written claim containing as particular an account as is reasonably practicable of all property damaged or destroyed, and that the claim be delivered within fifteen days after the loss or damage or within such further time as the Company may in writing allow. Each

21. See also Carnahan, *Conflict of Laws and Life Insurance Contracts* (1942) 245-250; Yntema, "Autonomy" in *Choice of Law*, 1 *Am.J. of Comp.Law*, 341, 353.

22. See, e. g., Cavers, *A Critique of The Choice of Law Theory*, 47 *Harv.L.Rev.* (1933) 173, 177; Rheinstein, *Book Review*, 28 *Ind.L.Rev.* (1953) 443; Rheinstein, *Conflict of Laws in the Uniform Commercial Code*, 16 *L. & Contemp. Problems* (1951) 114; cf. Goodrich, *Directive or Dialectic*, 6 *Vand.L.Rev.* (1953) 442; Goodrich, *Yielding Place to New: Rest and Motion in The Conflict of Laws*, 50 *Col.L.Rev.* (1950) 881.

23. See, e. g., Cavers, *A Critique of The Choice of Law Theory*, 47 *Harv.L.Rev.* (1933) 173, 178, 186 et seq.; Kronstein, *Crisis of Conflict of Laws*, 3 ~~George~~ *George* *town L.Rev.* (1949) 483, 484; Morris, *The Proper Law of A Tort*, 64 *Harv.L.Rev.* (1951) 881; Shaw, Savill, *Albion & Co. v. The Fredericksburg*, 2 Cir., 189 F.2d 952, 953; cf. Green, *Judge and Jury* (1930), 76-77, 97, 151.



eis),  
mehr besteht.

Lt. Ihrem Anruf bei Fr. Schröder (Prof. Biedenkopf)

Liste der Mitglieder entspricht leider nicht dem  
neusten Stand.

7.2.1983

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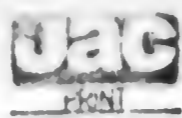
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*Milton V. Freeman*

**Journal**

**VON**

**Schlabrendorff**

**Begegnungen**

**in fünf**

**Jahrzehnten**

**Wunderlich**



**Fabian  
von  
Schlabrendorff**

**Begegnungen  
in fünf  
Jahrzehnten**

**Wunderlich**



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## XX. KAPITEL

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### *Heinrich Kronstein*

Als ich nach dem Kriege wieder den Beruf des Rechtsanwaltes ergriff, lernte ich einen Mann kennen, der auf die zweite Hälfte meines Lebens einen kaum zu überschätzenden Einfluß haben sollte. Eine Dame der Frankfurter Gesellschaft, die Schwiegertochter des in allen medizinischen Kreisen auf der Welt bekannten Internisten Franz Volhard, machte es sich zur Aufgabe Menschen zusammenzubringen, die sich sonst im normalen Leben wahrscheinlich nie begegnet wären, von denen sie aber glaubte, daß gerade die Begegnung der beiden von ihr ausgewählten Menschen gute Frucht tragen würde. Eines Tages fragte sie mich, ob ich nicht einen Deutschamerikaner mit dem Namen Heinrich Kronstein bei ihr kennenlernen wolle. Ich lehnte zunächst ab, da ich zwar sehr neugierig war, Vertreter der Neuen Welt in Europa kennenzulernen, aber Deutschamerikanern einigermaßen gleichgültig gegenüberstand, weil ich fand, daß sie nicht immer die besten Eigenschaften der beiden Völker in sich vereinten, aus denen sie stammten. Aber ich ließ mich schließlich mehr überreden als überzeugen. Ort, Tag und Stunde wurden vereinbart. Ich kam, pünktlich wie immer, und mußte feststellen, daß mein Gesprächspartner noch nicht da war. Aus Höflichkeit gegenüber der Dame des Hauses verlegte ich mich auf das Warten. Ich kann nicht behaupten, daß meine Laune durch dieses Warten besser wurde. Vielmehr steigerte sich ein Gefühl der Abneigung. Nach einer mir endlos erscheinenden Zeit tat



sich die Tür auf. Heinrich Kronstein, von dessen Existenz ich bisher nichts ahnte, betrat das Zimmer. Er war in Zivil, was damals für einen Deutschamerikaner noch die Ausnahme bildete. Mir gegenüber stand eine unscheinbare Gestalt und murmelte in deutscher Sprache eine nur schwer verständliche Entschuldigung wegen seiner Verspätung. Mühsam wahrte ich die Form. Aber mit einem Mal sah ich die Augen dieses Mannes. Dadurch veränderte sich das ganze Bild. Schlagartig wurde mir klar, daß es sich hier um einen Menschen handelte, in dem ungewöhnliche Kräfte verborgen lagen, Fähigkeiten, die von großer Güte und tiefer Religiosität getragen waren. Nach wenigen Minuten war ich in seinem Bann. Er erzählte mir, daß er aus einer alten jüdischen Familie aus Karlsruhe stamme, daß er schon frühzeitig von seinem Vater darauf hingewiesen worden sei, ein Sohn dieser Familie müsse mehr arbeiten als andere, müsse zuverlässiger sein und müsse das Wohl seiner Umwelt im Auge haben. Er kam auch auf seine Studentenzeit zu sprechen und wies darauf hin, daß er alle juristischen Examina, ohne jemals einen Repetitor besucht zu haben, bestanden habe.

Dann erzählte Kronstein, wie ihn der Erste Weltkrieg überrascht habe. Als ganz junger Mann sei er zum Soldaten auserkoren worden. So wenig die durch das Kriegsschicksal gestellte Aufgabe ihm gelegen habe, so sehr habe er diese Aufgabe bewältigt und schließlich als Artillerieoffizier vor Verdun gelegen und monatelang das ganze Verhängnis einer Materialschlacht am eigenen Leibe erlebt, zumal er schon damals verwundet worden sei – eine Verletzung, die ihn noch Jahre später verfolgen und schließlich seinen Tod herbeiführen sollte.

Nach Beendigung des Krieges hatte er sich dann der Jurisprudenz zugewandt. Kronstein wurde Mitarbeiter in einer berühmten Mannheimer Anwaltssozietät, die seiner Mitarbeit viel verdankt, obwohl gerade Kronsteins Mitarbeit sich nicht im Licht der Öffentlichkeit abspielte, sondern bescheiden im Hintergrunde blieb.

Dann überraschte diesen Mann das Jahr 1933, das die Mehr-



zahl der in Deutschland lebenden Juden zur Passivität nötigte. Ganz anders Kronstein. Er ergriff die Initiative und verhandelte mit staatlichen Stellen, um den Versuch zu machen, für die Juden einen Status zu schaffen, der es ihnen ermöglichte, im Dritten Reich, wenn auch in einer minderen Rechtsstellung, zu arbeiten und zu existieren. Der Versuch schlug fehl. Jeder andere wäre in Verzweiflung geraten. Kronstein aber zog schon 1935 aus dem Mißlingen seines Versuches die einzig mögliche Folgerung: er wanderte mit seiner Frau in die Vereinigten Staaten von Amerika aus. Dort lernte er Englisch und hielt sich mit Übersetzungsarbeiten über Wasser. Von neuem wandte er sich der Jurisprudenz zu. Er erlernte das amerikanische Recht, bestand seine Examina und wurde schließlich Professor für Wirtschaftsrecht an der Georgetown University in Washington. Dort gründete er ein Institut, das bis auf den heutigen Tag erkennen läßt, wer sein Gründer war und welchen Einfluß ein solches Institut auch auf die Praxis auszuüben imstande ist. Kronsteins Fall und Wiederaufstieg ist nur zu verstehen, wenn man weiß, daß er damals einen religiösen Wandel durchmachte. Er konvertierte, wurde also katholisch. Jeder Kenner des Menschentums weiß, daß Heinrich Kronstein damit eine Plattform gefunden hatte, auf der er ein neues Leben aufbauen konnte. Alles trug ein neues Gesicht für ihn. Seine Sorge wandelte sich in Hoffnung. Aus dem Rechtsgelehrten wurde über Nacht ein anderer Mensch. Kronstein erkannte, daß im angelsächsischen Rechtsdenken ein großer Vorzug verborgen war, indem es vom Sachverhalt ausging und diesen in seiner ganzen Individualität zum Ausdruck brachte, während das vom römischen Recht geprägte europäische Recht dazu neigt, über den Sachverhalt Rechtsvorstellungen zu stülpen, die dem individualistischen Charakter des Tatbestandes nicht immer gerecht werden. Arbeitete Kronstein ein Gutachten aus, so zeichneten sich diese Gutachten gerade dadurch aus, daß der Einzelfall stärker berücksichtigt wurde als die allgemeine Rechtsidee. Trotzdem war Kronstein ein Anhänger des katholischen Naturrechts, weshalb ihm die Überwindung des gesetzten Rechtes keine Schwierigkeiten machte.



Kronstein war nicht einfach zu verstehen. Sein Gedankenreichtum war zu stark, als daß er sich in eine einfache Sprachform kleiden ließ. Der Zuhörer hatte Schwierigkeiten, ihn zu verstehen. Wer aber diese Schwierigkeiten einmal überwunden hatte, für den war die Welt aufgeschlossen und erschien in einem neuen Licht. Aber Kronstein erschöpfte sich nicht in juristischer Tätigkeit, obwohl er, sobald es die Verhältnisse erlaubten, sich auch an der Universität in Frankfurt habilitierte und dort ein Institut schuf, ohne das die Frankfurter Universität heute nicht mehr zu denken ist. So weilte er denn ein halbes Jahr in Washington und das weitere halbe Jahr in Frankfurt, ohne darüber zu klagen, daß der ständige Wechsel des Wohnsitzes viele Beschwerden und Mißhelligkeiten mit sich brachte. Rückschläge, die auch ihm nicht erspart blieben, überwand er mit einem verzeihenden Lächeln. Für die Schwächen des Menschen hatte er viel Verständnis und nur selten Verachtung. Jeder Rückschlag war ihm eine Aufmunterung, mit Geduld und mit Überzeugung der Schwierigkeiten Herr zu werden, so daß ihm mit der Zeit vieles gelang, was anderen Menschen, die einen tatkräftigeren Eindruck machen, versagt blieb, weil sie nach einer Niederlage die Achseln zu zucken pflegten, um entweder in Passivität zu verfallen oder sich einer anderen Aufgabe zuzuwenden. Wenn man die Fülle der von Kronstein geschaffenen Arbeiten ansieht, so fragt man sich unwillkürlich: Woher hat dieser Mann so viel Zeit genommen? Die Lösung des Geheimnisses lag darin, daß Kronstein zu einer sehr frühen Zeit am Tage mit der Arbeit begann und während der Dauer des Tages auf vieles verzichtete, was anderen Menschen zur selbstverständlichen Gewohnheit wurde. Im Grunde ist er seinem Wesen nach nie Amerikaner geworden. Obwohl er Parties haßte, sah man ihn auch dort, weil Kronstein wußte, welche Möglichkeiten der kurzen Unterredung sich gerade auf Parties ergeben. Aber wer ihn genauer beobachtete, mußte feststellen, daß er das Glas mit dem üblichen amerikanischen Drink bald unausgetrunken in eine Ecke stellte, um sich den Menschen zuzuwenden. Mit dem Mittel einer nicht auf die Spitze getriebenen Askese vermied er manche Gefahr, die einen



anderen zu Fall gebracht hätte. Nicht nur in Amerika, sondern auch in Deutschland sprach es sich herum, daß eine ernsthafte Bitte, an Kronstein herangetragen, nicht ohne Echo blieb. Ich kenne keinen Fall, in dem er nicht einen Ausweg gefunden hätte, obwohl die Lösung des Falles vorher jedermann aussichtslos schien.

Kronsteins eigentliche Leidenschaft aber galt nicht der Jurisprudenz, sondern der Politik. Natürlich haben zunächst die Amerikaner auf ihn zurückgegriffen, als sie Deutschland besiegt hatten, und haben Kronstein so manchen einflußreichen Posten innerhalb der amerikanischen Besatzungsmacht für Deutschland angeboten. Aber Kronstein verweigerte die Übernahme solcher Positionen – sieht man von seiner Mitarbeit in der Decartelizations-Abteilung ab. Er vergaß nie, daß er aus Deutschland stammte und daß Deutschland sein Vaterland war. Und im Auftrage einer anderen Macht tätig zu werden, war ihm ebenso zuwider wie die Verfolgung ehemaliger Nazis, denen er eher mit Bedauern als mit dem Wahn, andere anklagen zu müssen, gegenüberstand.

Er konnte Dinge verstehen, die sich der Wiedergabe durch die *ratio* entziehen. Er konnte eine eigene Stellung beziehen und konnte junge Menschen überzeugen und mit seinem Geist erfüllen, nicht nur in Deutschland, sondern auch in Amerika. Wenige wissen heute, wer damals alles bei Kronstein verkehrte und wen er in seinen Gedankenkreis zog. Sein Einfluß in Washington war so groß, daß man ihn kaum überschätzen kann. Das gleiche gilt für die damals in der Bildung begriffene Bundesrepublik Deutschland. Eine Persönlichkeit wie Hallstein ist ohne Kronsteins Einfluß nicht zu denken. Das gilt ebenso für Dean Acheson in Washington. Kronstein sah den Brückenschlag zwischen Amerika und Deutschland als die einzige Lösungsmöglichkeit an, um die *pénétration pacifique* durch den russischen Imperialismus zu vermeiden. Kronstein war aber nicht nur ein Mann der Güte und des Ausgleichs, sondern konnte bei Gelegenheit andere Menschen in einem Ton zur Ordnung rufen, der keinen Wider-



spruch duldete. Zufällig bin ich Zeuge eines solchen Ereignisses geworden, als ich an einem Abend in Washington in seiner Wohnung neben vielen anderen Gästen den Botschafter eines europäischen Landes traf. Dieser sprach mich an und glaubte, mich als Deutschen über den Verlust Ostdeutschlands an den bolschewistischen Osten durch den Hinweis trösten zu können, daß ja mit Westdeutschland der bessere Teil Deutschlands gerettet worden sei. Kronsteins Dazwischentreten ersparte mir eine Antwort. Er sagte ziemlich kühl zu dem Botschafter: »Das dürfen Sie nicht zu einem Menschen sagen, der aus dem Osten Deutschlands kommt. Schließlich ist die Industriekraft des Ruhrgebietes nicht alles. Sie würden ja auch eine solche Zweiteilung Ihres Vaterlandes nicht gutheißen können.« Der Botschafter verstummte und verharrte den ganzen Abend bis zu seinem Weggang in tiefem Schweigen.

Kronstein hat Schule gemacht. In Amerika, in Deutschland hat er nicht nur Schüler, sondern auch Jünger. Sie lernten von ihm, daß Überheblichkeit eine Untugend ist. Das war auch der Grund, weshalb Kronstein zu dem langjährigen Vertreter einer großen europäischen Zeitung in Washington deutliche Distanz bewahrte. Die gleiche Haltung bewahrte Kronstein gegenüber Walter Lippmann, während er mit amerikanischen Persönlichkeiten einen Umgang pflegte, der es ihm erlaubte, jede sonst verschlossene Tür zu öffnen. Er hatte eine erstaunliche Gabe, seine Gedanken zu Papier zu bringen. Schon in der Frühe des Morgens saß er in Washington in der Fessenden Street auf der dem Garten zugewandten Veranda seines Hauses und verfaßte auf gelbem Manuskriptpapier ein Memorandum. Mit solchen Arbeiten hat er auch auf den sonst so schwierigen John Foster Dulles während dessen Zeit als Secretary of State einen Einfluß ausgeübt, den nur der wirklich einzuschätzen vermag, der weiß, mit welcher Gründlichkeit John Foster Dulles die von Kronstein verfaßten Memoranden zu lesen pflegte. Was die Amerikaner bei Kronstein bewunderten, war dessen Fähigkeit, auf Fragen zu verzichten. Kronstein besaß ein Sensorium, das es für ihn unnötig mach-



te, sein Gegenüber mit indiskreten Fragen zu belästigen. Sein sicheres Fingerspitzengefühl sagte ihm, was auf dieser Welt vorging und was sein Partner meinte, ohne es vielleicht zum Ausdruck zu bringen. In der Kunst des Zuhörens war Kronstein Meister. Aber auch in der Zusammenarbeit. So gab es damals in Washington einen amerikanischen Junggesellen, der nach außen hin den Beruf eines Anwaltes ausübte, der aber in Wirklichkeit, nur gegen Erstattung der Auslagen, in Fragen der amerikanischen Politik in vielen auswärtigen Verhandlungen auftrat und dort die Interessen seines Landes verfocht. Die innere Belastung wurde eines Tages zu groß. Ein Herzinfarkt setzte dem Leben des amerikanischen Mitarbeiters ein Ende. Kronstein war nie müde, diesem seinem amerikanischen Freunde – es handelt sich um Frank Nash – zuzuarbeiten. Frank Nash gehörte zu jenen Amerikanern, die sich aus Leidenschaft um die Politik dieser Welt kümmern, ohne Bearater zu sein. Die amerikanische Regierung ist klug genug, um solche Persönlichkeiten zu verwenden und ihnen ihre Unkosten zu ersetzen. Frank Nash wollte kein Amt. Er hatte Zeit und Geld genug, um sich in das politische Getriebe dieser Welt hineinzusetzen. Auf vielen außenpolitischen Konferenzen erschien er und hatte den Vorzug, sagen zu können, was er wollte. Die Regierung seines Landes genoß dafür den Vorzug, durch ihn Dinge sagen zu lassen, die ein Regierungsbeamter aus Gründen der Staatsräson nicht aussprechen konnte. Ein Gespräch mit Frank Nash war immer ein Hochgenuß, weil er von einer äußeren und inneren Freiheit war, die man in Europa nicht kennt.

Kronstein und Frank Nash haben durch ihre Kunst zu verhandeln dem Streit zwischen den Vereinigten Staaten und der Schweiz ein Ende gesetzt. Dieser Streit war entstanden, als Amerika ohne Lizenz schweizerische Waffen nachgebaut hatte. Die Diskrepanz hatte sich dadurch verstärkt, daß Amerika eines Tages ein schweizerisches Unternehmen bombardierte, weil es im Verdacht stand, für deutsche U-Boote Zusatzteile herzustellen. Die Vereinigten Staaten haben den Prozeß vermieden, weil Amerika sich zu deutlich durch Mißachtung der schweizerischen



Neutralität ins Unrecht gesetzt hatte. Ein Vergleich schuf den Streit aus der Welt. Das war Kronsteins Verdienst.

Wer Kronstein gekannt hat, der weiß, wieviel Einfluß Menschen haben können, denen jede äußere Position fehlt, die aber sich durch persönliches Auftreten und durch persönliche Beziehungen eine Vertrauensbasis geschaffen haben, auf die auch kein Staatsmann verzichten kann. Dabei war Kronstein gar nicht ohne Kritik an der amerikanischen Außenpolitik. So war er z. B. alles andere als ein Pazifist. Er wußte eben, daß, wer mit allen Mitteln den Krieg vermeiden will, den Krieg erntet. Deshalb war ihm die Untätigkeit Amerikas bei den Konflikten in den Ländern, die das östliche Mittelmeer umgrenzen, unverständlich. Er war dafür, mit militärischen Mitteln einzugreifen, Truppen zu landen und eine militärische Machtposition zu begründen, die es Amerika erlaubt hätte, mit eigenen Streitkräften in die Kämpfe um den Nahen Osten einzugreifen. Von dem Krieg in Vietnam hielt er gar nichts. Er wußte eben, daß es sehr leicht ist, die Flagge der Nation auf einem weitentfernten Außenposten zu hissen, aber ebenso schwer, diese Flagge wieder in Ehren herunterzuholen. Die tatsächlichen Verhältnisse haben Kronstein recht gegeben. Erstaunlicherweise hatte er nicht nur Freunde, sondern auch Gegner. Mit diesen fertigzuwerden, hatte er Schwierigkeiten. Angriffe in der Presse verletzten ihn tief. Er konnte zwar das Summen einer Fliege hören, aber er hatte alles andere als eine Rhinzeroshaut. Zu einem Vollblutpolitiker gehört beides. Kronstein blieb letzten Endes in sich gekehrt. Wahrheiten waren ihm wichtiger als Tatsachen. Er war nicht zu denken ohne seine Frau, die aus Danzig stammt, und ohne seine beiden tüchtigen Söhne, die vieles von ihrem Vater geerbt haben: große Klugheit, Uneigennützigkeit, unermüdlichen Fleiß und das innere Wissen, daß die Geschehnisse auf dieser Welt nicht das Letzte sind, sondern nur ein Vorläufiges.

Zu den großen Freunden Heinrich Kronsteins zählte der Frankfurter Arbeitsrechtler Franz Böhm und der Ölindustrielle Schulte zur Hausen.



Aus der Fülle von Kronsteins Büchern ragen vier Veröffentlichungen hervor. Sein erstes Opus ist seine schon erwähnte Habilitationsarbeit, die von der juristischen Fakultät der Universität Heidelberg abgelehnt wurde. In diesem Buch befaßt sich Kronstein mit dem Recht der juristischen Person und legt den Akzent auf die abhängige juristische Person. Nach Kronstein ist die juristische Person eine Schöpfung der Rechtsordnung. Sie macht es möglich, Personengemeinschaften über den Wechsel der Person hinaus als Gemeinschaft bestehen zu lassen. Sie ähnelt der physischen Person als Träger von Rechten und Pflichten. Nach Kronstein steht hinter der juristischen Person ein fortdauernder Wille, ähnlich wie bei der Stiftung, nur daß diese staatlich genehmigt und staatlich beaufsichtigt wird. Kronstein weist in diesem Zusammenhang darauf hin, daß die Rechtsordnungen der Völker aus der juristischen Person ein willenloses juristisches Werkzeug gemacht haben, ein Spielzeug, dessen man sich bedienen kann, wenn man es nötig hat. Im Gegensatz hierzu beschäftigt sich Kronstein mit der Problematik, in welchen Grenzen die juristische Person als Realität anzuerkennen ist, wann ihr effektiver Charakter überwiegt und insbesondere wann der Durchgriff zu den hinter der juristischen Person stehenden Persönlichkeiten gegeben oder sogar geboten ist.

Später – 1967 – hat Kronstein diesen Gedanken wieder aufgegriffen in seinem Werk über *Das Recht der internationalen Kartelle*. Hier befaßt er sich mit dem Recht, das internationale Kartelle auf ihre Umwelt ausüben. Er befaßt sich vor allem mit der Gefahr, daß es internationalen Kartellen immer wieder gelingt, die geltende staatliche Rechtsordnung zu überspielen oder zu umgehen. Kronstein sieht in der Institution der Kartelle die Gefahr der Wettbewerbsbeschränkung und der Alleinmacht. Es ist ihm möglich, eine ungeheure Zahl von Fällen aufzuzeichnen, die sich auf publizierte Aktenstücke stützen. Dann wendet sich Kronstein den Kartelltypen zu und der Wirkung, die diese Kartelltypen auf die Rohstoffpreise haben. Im weiteren Teil seines Buches zeigt Kronstein die Gefahr auf, die die internationalen



Kartelle dadurch herbeiführen, daß sie alle Rechtsinstitute der einzelnen Staaten aushöhlen und sie jedem billigen Zweck gefügig machen.

Kronstein wagt in seinem Buch auch eine Klinge gegen die private Schiedsgerichtsbarkeit und spricht sich für die staatliche Justiz aus. Natürlich weiß er, daß auch die staatliche Gerichtsbarkeit nur ein Notbehelf ist. Aber er vertritt mit überzeugenden Gründen die These, daß sie immer noch besser sei als die Schiedsgerichtsbarkeit. Letzten Endes führt diese Abhandlung zur Ablehnung einer Wertneutralität und fordert das wertbezogene Recht. Mit diesem Werk hat Kronstein Grundfragen angeührt, die noch auf lange Zeit hinaus heftig umstritten sein werden.

Die Tatsache, daß Kronstein das deutsche und das amerikanische Recht souverän beherrschte, führte ihn immer wieder dazu, die Frage der Ausbildung des Juristen zu untersuchen. Mit verhaltener Leidenschaft hat Kronstein immer wieder zu diesem Thema Stellung bezogen. Hierbei hat er vor allem die Vorstellung abgelehnt, als ob die Jurisprudenz in der Lage sei, wie die Naturwissenschaft zu Lösungen zu kommen, die den Charakter der Wertfreiheit haben. Um diese Scheinwissenschaft zu bekämpfen, fordert Kronstein, daß der junge Jurist sich erst mit den Zusammenhängen beschäftigen muß, die zwischen dem Recht einerseits und der Geschichte der Philosophie, der Sozialwissenschaften und der Politik andererseits bestehen. Deshalb hat er gefordert, daß schon nach zwei Jahren der Student eine Prüfung ablegen müsse, um zu zeigen, daß er das Handwerkszeug im Griff hat. Für die nächsten Semester fordert Kronstein die Vertiefungsstufe durch Konzentration. Er meint, daß hierzu auch Praktiker hinzugezogen werden sollten, die an Hand von Beispielen dem jungen Juristen die Problematik der Wertfindung nicht ersparen. Auf das Referendarexamen möchte Kronstein verzichten, weil er fordert, daß im zweiten Teil des Studiums der Jurist Prüfungen abzulegen habe, in denen er mehrfach seine



Qualifikation nachweisen müsse. Ist der junge Jurist aber zum Referendar ernannt, so fordert Kronstein einen Einführungskurs von sechs Monaten, damit der Jurist lerne, Akten zu studieren, das Grundbuch und das Registerwesen kennenzulernen sowie sich die Kenntnisse anzueignen, die zum Urteilsaufbau erforderlich sind. Erst danach sollte nach Kronstein der Referendar einem Richter überwiesen werden, um dann an der praktischen Jurisprudenz teilzunehmen. Hat der junge Jurist dieses Gerichtspraktikum absolviert, so fordert Kronstein, daß er sich nunmehr spezialisieren. Hier redet Kronstein gewissen Wahlmöglichkeiten das Wort, wobei er meint, daß der junge Jurist sich entweder für die Staatsverwaltung oder für die Unternehmensverwaltung zu entscheiden habe. Kronstein meint, daß auch eine Ausbildung bei der Post, bei Finanzämtern, bei Großbanken, Versicherungen und Gewerkschaften eine gute Berufsvorbereitung sei. Nach seiner Ansicht sollte dann die Referendarzeit mit einer Schlußprüfung enden, wobei es sich herausstellen werde, ob der Kandidat sich auf einige Gebiete des Rechtslebens konzentriert habe.

Das entscheidende Werk von Kronstein aber ist nicht juristischer Natur. Es sind seine *Briefe an einen jungen Deutschen*. Das Buch ist 1967 bei dem bekannten Münchner Verlag C.H. Beck erschienen. In diesen Briefen hat Kronstein das ganze Schicksal seiner Generation offengelegt. Wir erfahren, daß er in der Schule von Martin Wolff groß geworden ist und bei ihm über die Frage des Heimstättenrechts doktriniert hat. Wir erfahren aber gleichzeitig, daß er im Gegensatz zu seinem Lehrer Wege gegangen ist, auf denen er sich der Freirechtsschule genähert hat. Schon frühzeitig hat Kronstein erkannt, daß nicht nur der Gesetzgeber, sondern auch der Richter berechtigt und verpflichtet ist, das Recht weiterzubilden.

Nach Kronstein ist niemals der Wortlaut einer gesetzlichen Bestimmung entscheidend. Letzten Endes kommt es immer wieder auf die Frage an, ob die geltenden Rechtsnormen geeignet sind, einem Ziel zu dienen, das sich aus der gesamten Ordnung der Gesellschaft ergibt. Hierbei bleibt nach Kronstein die Wah-



rung gewisser Grundwerte entscheidend, um den Rechtsuchenden nicht der Willkür der Gerichte auszuliefern.

In seinem Buche schildert Kronstein zum ersten Mal seinen Versuch, die Judenfrage im Dritten Reich einer Lösungsmöglichkeit zuzuführen. Er weist den Vorwurf von Hannah Arendt, das Judentum habe sich in Deutschland durch die Nazis widerstandslos hinschlachten lassen, als Irrtum zurück. Kronstein erzählt von seinem Brief an Carl Schmitt, den anfänglichen Rechtstheoretiker des nationalsozialistischen Regimes. Sein Brief bleibt unbeantwortet. Damit scheiterte der Versuch Kronsteins, den damals in Deutschland lebenden Juden eine Rechtsstellung zu verschaffen. Mit Schauern erfährt man, daß die in einem farblosen Liberalismus wurzelnden Menschen erst sich selbst und dann ihre Mitmenschen freisetzen und damit wider Willen ein Chaos heraufführen, das nicht nur das eigene Land, sondern schließlich einen Großteil der Welt beherrscht.

An seiner Annahme der katholischen Lehre macht Kronstein es deutlich, daß es dem Menschen, allen Widrigkeiten zum Trotz, gegeben ist, in immerwährenden Bemühungen Maßstäbe zu finden, die ihn in den Stand versetzen, die tiefe Kulturkrise seiner Zeit zu überwinden.

Im Alter meldete sich plötzlich die Verwundung aus dem Ersten Weltkrieg. Kronstein ging auf Urlaub und besuchte 1972 die von ihm heißgeliebte Schweiz. Seine Krankheit machte einen Hospitalaufenthalt notwendig. Schon glaubte er, das Hauptübel überstanden zu haben, da näherte sich ihm der Tod.

Nicht nur seine Werke, sondern auch sein Leben haben gezeigt, daß die Menschheit mit Kronstein mehr als einen großen Gelehrten, mehr als einen großen Rechtskenner – einen Heiligen unserer Zeit verloren hat.



erkennung gefunden hat, ja durch sie wurde IHERINGS Lebenswerk, wenigstens in einem wichtigen Bestandteil, für die Gegenwart und die nähere Zukunft erhalten und weitergeführt.

Wie das Schicksal der Freirechtsschule zeigt, hätte nicht viel gefehlt und IHERING wäre eine Episode, eine, wenn auch eindrucksvolle, rechtstheoretische Reminiszenz geworden. Denn die Freirechtsschule, der es doch vor allem auch um die Erhaltung des Entwicklungsdenkens im Recht zu tun war, scheiterte mit diesem Anliegen, weil sie auch mit ihrem anderen unterlag, ihrer Begriffskritik aufgrund eines – gegenüber IHERING verengten – Rechtsgefühls. Ohne die Interessenjurisprudenz, die IHERINGS Zweckdenken im Recht wenigstens auf dem wichtigen Teilgebiet der Interessenvermittlung weiterführte, wäre von IHERINGS Leistung heute wahrscheinlich nur noch die Rechtssoziologie übriggeblieben. So aber reicht von IHERING über die Interessenjurisprudenz und ihre heutige Tochter, die Wertjurisprudenz, eine ununterbrochene methodologische Kette von der Romanistik und Pandektistik bis in die Praxis der letzten Jahrzehnte dieses Jahrtausends.

Im dritten Bande des „Geistes“ und in dem Artikel über die Reflexwirkungen subjektiver Rechte hatte IHERING die These verfochten, daß nicht der Wille das entscheidende Merkmal bei den juristischen Gestaltungsmöglichkeiten des Privatrechts war, sondern, in einer objektivisch-empirischen Wendung, das Interesse, das entweder vom Recht zum rechtlich geschützten Interesse erhoben werde, oder aber als nicht schützenswertes der Zurückweisung oder Hintanstellung unterliege<sup>56</sup>. Von dieser Position aus hatte IHERING seine konstruktionsmethodische Phase hinter sich gelassen und sein Denken „philosophisch“ zu einer allgemeinen Theorie der Zwecke im Recht ausgeweitet, in der Absicht, der Zwecktheorie eine Theorie des „Rechtsgefühls“ folgen zu lassen. Weder den Interessenansatz bei der Deutung des subjektiven Rechts noch den allgemeinen Zweckbegriff im Recht hat IHERING jedoch methodisch so weitgehend vertieft und verfeinert, daß er für die Anwendung eines Kodex nach Art des BGB brauchbar gewesen wäre. Es war dies auch nicht IHERINGS Thema, da er den Vorbereitungsarbeiten am BGB fernstand, ja von ihnen ferngehalten wurde<sup>57</sup>.

Bei Inkrafttreten des BGB stellte sich daher notwendig die Frage, ob es möglich sei, das IHERINGSche Zweckdenken zu einer Auslegungstheorie des Kodex zu entwickeln. Allein diese Frage mit Bewußtsein zu stellen, war

<sup>56</sup> Geist III, 1, § 60; IHERINGS Jahrbücher, Bd. X, Abh. V, in den Gesammelten Aufsätzen, Bd. II, Jena 1882, 79 ff.

<sup>57</sup> Siehe zu alledem oben Kap. 23 IV 3.

eine große methodische Leistung. Denn man hätte auch niemand einen Vorwurf daraus machen können, das IHERINGSche Zweckdenken mit seiner rechtstheoretischen Wurzel, der Suche nach einem sich in der Zeit fortentwickelnden Recht, bei Inkrafttreten des großen Kodex ad acta zu legen.

Es wird oft gesagt und entspricht sicherlich der ganz herrschenden Meinung, daß um die Jahrhundertwende der Gesetzespositivismus allumfassend geherrscht habe. Demgegenüber wurde im IHERING-Kapitel (oben Kap. 23) und bei der Deutung der Freirechtsschule der Standpunkt verfochten, nicht wenige Praktiker um die Jahrhundertwende hätten offensichtlich unter dem Einfluß IHERINGS gestanden, weil man sich seinem Zweckdenken und der Einsichtigkeit der dadurch bewirkten Relativierung gedruckter Gesetzesvorschriften schlechthin nicht entziehen konnte.

Daß die Freirechtsschule ein Versuch war, IHERING gegen das BGB zu retten, war die oben vertretene Ansicht. Der Versuch mißlang. Daß die Interessenjurisprudenz aus dem gleichen Geiste kam und daß sie beabsichtigte und es ihr auch gelang, IHERING für das BGB methodologisch zu nutzen, wird niemand bestreiten können. Nur so kam es, was oben bei IHERINGS und WINDSCHEIDS Würdigung gesagt wurde, daß der Stoff, mit dem die deutsche Zivilistik heute arbeitet, durch die Hand WINDSCHEIDS gegangen ist, und der Geist, in dem dieser Stoff heute angewendet wird, durch Vermittlung der Interessenjurisprudenz von IHERING stammt.

Als nach 1965 neomarxistische Kritiker dem deutschen Recht vorwarfen, wertfrei, zweckfrei, ohne Rücksicht auf soziologische Gegebenheiten in abstrakten und liberalen Norm-Allgemeinheiten zu verharren, beruhte dieser Vorwurf auf einer unbewußten oder – häufig auch – bewußten Verkennung IHERINGSchen Zweckdenkens, interesse-juristischer Theorie und Praxis und hierauf ausgerichteter jahrzehntelanger Universitäts- und Referendar-Ausbildung<sup>58</sup>. Die Klügeren unter den „kritischen“ Kritikern wandten sich denn auch alsbald dem „wiederentdeckten“ Zweck- und Interessedenken im deutschen Recht oder auch den amerikanischen Rechtsrealisten zu<sup>59</sup>. Den Voreingenommenen blieb damit allerdings nichts anderes übrig, als der Zweck- und Interessenjurisprudenz den bequemen Stempel der Bürgerlichkeit, des Kapitalismus und damit des Faschismus aufzudrücken.

Als Begründer der Interessenjurisprudenz gilt der Tübinger Professor PHILIPP HECK, der in kritischer Auseinandersetzung mit der Freirechts-

<sup>58</sup> Vorwürfe dieser Art finden sich z. B. bei THOMAS BLANKE und GERD BRÜGGEMEIER, Nachruf auf eine Ausbildungsreform, KJ 1971, 235, 238.

<sup>59</sup> Z. B. ROTTLEUTHNER, Zur Soziologie richterlichen Handelns (II), KJ 1971, 60 ff.



wie bei diesen Fortschritten in rechtsphilosophischer Beziehung, die politische Erschütterung durch HITLER-Diktatur und Zweiten Weltkrieg. So kam es, daß vor allem nach 1945 die Selbstkritik des späten HECK aufgegriffen und die Wertjurisprudenz entwickelt wurde.

#### b) Vergebliche Lösungsversuche

Mit dieser politisch verständlichen, rechtsphilosophisch vorbereiteten und methodisch als notwendig erkannten Wendung zur Wertfrage wurden drei tastende Versuche, die Metaphysik der Werte aus dem Recht fernzuhalten, nicht weiter verfolgt, die gedanklich zwischen der Interessenjurisprudenz und der Wertjurisprudenz stehen und versucht hatten, der empirischen Tradition so treu wie möglich zu bleiben.

aa) Die Empirie bei IHERING ist erträglich, weil er aus der *autonomen Ethik* des römischen Rechts schöpft, die, für ihn unbewußt, auf die tragisch-demokratische Ethik der Polis und der von ihr zehrenden römischen Republik zurückging. Bewußt gemacht hat IHERING das Problem sich und anderen durch seine späten, undifferenzierten Reflexionen über das „Rechtsgefühl“. Der Liberalismus und der Voluntarismus der deutschen Pandektistik zehrten von der gleichen Substanz. Das römische Recht hatte so viel an Werterfahrung mitgebracht und überliefert, daß sich ohne politische Erschütterung subjektiv gar nicht mehr feststellen ließ, woher diese Werte eigentlich stammten. Diese allgemeine Menschlichkeit, dieser unreflektierte Humanismus klassisch-antiker und christlicher Prägung reichten fürs erste aus und bestimmten noch die unreflektierte Ethik der „älteren Interessenjurisprudenz“.

Erst die dann eintretenden politischen Umwälzungen brachten wieder zu Bewußtsein, daß die autonome Ethik die Ethik des Adam ist, der in vermeintlicher Erkenntnis von Gut und Böse das Recht und damit sich selbst zerstört. Wenngleich die autonome Ethik auch heute noch von manchen vertreten wird, wenn nicht alles trügt, vor allem naturgemäß in Kreisen, die der Rechtsgeschichte nahe stehen, hat die Kritik am Selbstverständnis der autonomen Ethik und der von ihr für fraglos gehaltenen Existenz führender Werte im Recht so überhandgenommen, daß die Wertfrage wieder stellbar wurde<sup>81</sup>.

bb) Ein anderer Vorschlag, die Wertungsfrage gleichsam pauschal durch eine Wortsubstituierung zu lösen, ist HANS KELSENS späte Antwort auf die Frage „Was ist Gerechtigkeit?“. KELSEN gab zur Antwort, sie sei

<sup>81</sup> Vgl. dazu die einleitenden Worte der Abhandlung von LARENZ, Grundformen wertorientierten Denkens in der Jurisprudenz, Festschrift WILBURG, Graz 1975, 217 f.

„Toleranz“<sup>82</sup>. MAYER-MALY meint, vielen sei KELSENS Antwort als Ausflucht in den Bereich des Unverbindlichen erschienen. In Wahrheit erschließe aber gerade diese Auskunft fundamentale Kategorien des Rechts<sup>83</sup>. Die Bereitschaft, mit der Möglichkeit zu rechnen, daß nicht der Opponent, sondern man selbst im Irrtum ist, bildet nach MAYER-MALY die unerlässliche Voraussetzung für die Funktionsfähigkeit einer Rechtsordnung, die nicht mehr von einem geschlossenen Wertsystem getragen wird, sondern im Zeichen des Pluralismus steht<sup>84</sup>.

In Wahrheit liegt hier nur eine *petitio principii* vor, denn jene von KELSEN und MAYER-MALY für wünschenswert und möglich gehaltene Stellung des Opponenten, der schließlich ja auch im Recht sein könne, setzt eine ganz bestimmte politische Ordnung voraus, eine Ordnung, die ein „richtiges Bewußtsein“ theologischer, völkischer, marxistischer oder anderer Prägung ablehnt und statt dessen den Zweifel heiligt. Diese politische Ordnung aber entsteht nicht von allein, sondern durch die bewußte Bejahung von Werten, insbesondere von unentziehbaren Rechten des „Opponenten“. KELSENS und MAYER-MALYS Antwort ist daher unverbindlich, solange mit ihr keine spezifische politische Entscheidung verbunden wird, die ihrerseits die Wertfrage impliziert. „Toleranz“ schafft nicht Werte und erledigt nicht das Wertproblem, sondern ist ihrerseits die Folge von Bejahung von Werten. Es handelt sich um eine liberalistische Scheinlösung in der Tradition von „SPINOZAS Irrtum“ (unten Kap. 34 VIII).

cc) Neben autonomer Ethik und abstrakt-allgemeinem Begriff von Toleranz-Gerechtigkeit bildet eine dritte versuchte Pauschallösung der Wertfrage die Theorie des *volitiven Akts*. Bei seinem Versuch, CARDOZOS Methodik in weiterführender Weise für die Lösung des Problems des alternden Kodex einzusetzen, stand ESSER vor der Frage, wie seiner Rechtsquellenlehre ein materiales Prinzip der „Grundsätze“, der „principles“, zu unterlegen sei<sup>85</sup>. ESSER geht die Lösung der Frage dadurch an, daß er seine „Grundsätze“ und „Institutionen“ „Medien der Gerechtigkeit“ nennt. Hiermit könnte die autonome Ethik abendländischer Rechts-tradition gemeint sein, vielleicht auch ein allgemeiner Gerechtigkeitsbegriff

<sup>82</sup> HANS KELSEN, Was ist Gerechtigkeit?, 1953; ihm zustimmend, MAYER-MALY, Der liberale Gedanke und das Recht, Festschrift für ADOLF J. MERKL, München-Salzburg 1970, 247 ff., 252.

<sup>83</sup> MAYER-MALY, aaO, 252; DERS., Gedächtnisschrift R. SCHMIDT, 1966, 30 ff.

<sup>84</sup> MAYER-MALY, Festschrift MERKL, aaO, 252.

<sup>85</sup> HANS JULIUS WOLFF hat in seiner Besprechung von ESSER, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts, rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre, Tübingen 1956, Zeitschrift für die gesamte Staatswissenschaft 120 (1964), 758 ff., 759, auf diesen Gedankengang bei ESSER besonders hingewiesen.



nach Art des KELSENSchen Vorschlags. ESSER geht jedoch beide Wege nicht. Vielmehr nennt er das Gerechtigkeitsurteil einen volitiven Akt und spricht ihm kognitiven Charakter ab<sup>86</sup>.

WOLFF bemerkt dazu: „Abgesehen davon, daß diese Redensart sich selbst widerspricht, weil jedes Urteil kognitiv ist, bedeutet sie die Option für einen der Reflexion und Diskussion entzogenen Dezisionismus, dessen nur durch den Beifall anderer (Anerkennung) geminderter Subjektivismus sowohl die Objektivität der ‚Institutionen‘ als auch den Rechtscharakter der ‚Grundsätze‘ und aller ihrer Ableitungen zunichte macht. Daraus folgt dann konsequent, daß der Richter die Positivität des Rechts nicht vorfindet, sondern schafft.“<sup>87</sup>

Mit seiner Theorie vom volitiven Akt als Ersatz für die Wertungsfrage kommt ESSER an sich der für ihn zur Anregung gewordenen amerikanischen Verfassungswirklichkeit am nächsten. Er unterstellt dabei nur wiederum, wie der autonome Ethiker in der Polis und in der Republik und der Gerechtigkeits-Axiomatiker nach Art des KELSENSchen Vorschlags, ein ganz bestimmtes politisches System, das keineswegs selbstverständlich ist und das allein in der Lage ist, dem volitiven Akt einen Beitrag zur Gerechtigkeit abzugewinnen.

Es ist das Verschweigen oder Nichtbegreifen der politischen Prämissen, das bei den drei vorgeschlagenen Pauschallösungen der Wertfrage stört. ESSER ist selbst später andere Wege gegangen<sup>88</sup>.

#### c) Die Rolle der Generalklauseln in der Wertungsproblematik

Die Öffnung zur Wertungsfrage in der deutschen Methodik bedeutete auch ein verändertes Verhältnis zur Norm. Für die „ältere Interessenjurisprudenz“ brauchte es keine Rolle zu spielen, wie weit die Norm gefaßt war, ob sie die Regelung eines speziellen Falles oder eine Generalklausel war. Im Gegenteil, die Analyse der Interessen verbürgte auch bei weitgefaßten Tatbeständen, etwa der Treu- und Glaubensvorschrift des § 242 oder bei der Verhinderung sittenwidrigen Wettbewerbs in § 1 UWG, einen leichteren methodischen Zugang zur Konkretisierung. Erst als die Wertfrage neben die Interessenfrage trat, meldete sich die Kritik an den Generalklauseln an, deren Gefahr darin erkannt wurde, die Wertungsfragen zu verschleiern. Auch in den Generalklauseln wurde fortan kein überzeugender Lösungsansatz der Wertungsproblematik im Recht mehr gesehen.

Der erste, dem das Verdienst zukommt, hierauf hingewiesen zu haben, ist JUSTUS WILHELM HEDEMANN in seiner Schrift „Die Flucht in die Ge-

<sup>86</sup> Dazu ESSER, Grundsatz und Norm, 256 ff., 261 f.; HANS JULIUS WOLFF, aaO, 759.

<sup>87</sup> HANS JULIUS WOLFF, aaO, 759 f.

<sup>88</sup> Siehe dazu unten Kap. 27 III 2.

neralklauseln“<sup>89</sup>. An diese Schrift schloß sich eine Reihe von Veröffentlichungen an, die, der HEDEMANNschen Warnung Recht gebend, versuchten, die Generalklauseln zu konkreten Normen oder Normenbündeln zu zerteilen, um die Gefahr von Fehlwertungen zu verhindern<sup>90</sup>.

#### d) Der gegenwärtige Stand des Problems

Nach Ausscheidung dieser Versuche, die Wertfrage gleichsam pauschal einer Lösung zuzuführen, muß auf die Fortführung der Interessenjurisprudenz in der modernen Wertjurisprudenz näher eingegangen werden (Kap. 27). Die „abstrakte Wertjurisprudenz“ wurde zum Einsatzpunkt bei jener Weiterführung. Durch die Präzisierung der Wertungsfrage wurde jedoch die Interessenjurisprudenz, anfänglich vielleicht etwas zu ihrem Leidwesen, allzusehr ins Faktische abgedrängt. Man würde ihr hierdurch sicherlich nicht gerecht werden, da es gerade die Aufgabe der Interessenjurisprudenz ist, die auf dem Spiele stehenden Interessen und Zwecke der an der in einer Norm vorgesehenen Regelung Beteiligten für die spätere Wertung zu ermitteln und aufzubereiten. Die Interessenjurisprudenz wurde dadurch zu einer bewußten Vermittlerin rechtserheblicher Tatsachen für rechtsbeurteilende Wertung. Und wie auf der einen Seite die Interessenjurisprudenz sich zur (zunächst abstrakten, später konkreten) Wertungsjurisprudenz weiterentwickelte, sonderte sie auf der anderen Seite, auf der Seite der Tatsachen, die Rechtssoziologie aus sich aus.

## II. Die Rechtssoziologie

### 1. Die empirische Tradition, fortgesetzt in der Rechtssoziologie

Wiederum muß bei IHERING angesetzt werden. Zu Recht gilt er heute als der Begründer der Rechtssoziologie, ja es gibt Stimmen, die auch die Entwicklung der allgemeinen Soziologie maßgeblich auf IHERING zurückführen<sup>91</sup>. Es lag daher nahe, die IHERINGSche Tradition schlicht als Rechtssoziologie fortzuführen. Sicherlich würde dabei die IHERINGSche Thematik ebenso eingengt worden sein, wie die Freirechtsschule mit ihrer Kodex-

<sup>89</sup> J. W. HEDEMANN, Die Flucht in die Generalklauseln, eine Gefahr für Recht und Staat, Tübingen 1933.

<sup>90</sup> Z. B. NERRETER, Allgemeine Grundlagen eines deutschen Wettbewerbsrechts, Berlin 1936; FRANZ WIEACKER, Zur rechtstheoretischen Präzisierung des § 242 BGB, Tübingen 1956; vgl. auch die oben in Kap. 25, Anm. 124 genannten Arbeiten von FRITZ VON HIPPEL.

<sup>91</sup> Siehe dazu die Bemerkungen zu DURKHEIM und HAURIOU oben Kap. 7, ferner HELMUT SCHELSKY zu IHERING, unten Anm. 97.



ist den Bemühungen von WESTERMANN bis ZIPPELIUS und KRONSTEIN die Suche nach brauchbaren Anleitungen für die im Recht erforderlichen Bewertungen. Hierbei geht es den genannten Wertungsjuristen um die Wertung als solche, nicht um die Betonung konkreter, benannter Werte (etwa „Menschenwürde“, „Elternrecht“, „habeas corpus“ und ähnliche bekannte wichtige Werte). Nicht, daß die Wertungsjuristen die Bedeutung dieser und anderer Werte leugnen würden. Sie stellen aber nicht bestimmte konkrete Werte als zu verwirklichende Postulate auf, wie es das Naturrecht tat, das mit festgelegten und vorschreibbaren Werten arbeitete<sup>46</sup>, sondern es geht ihnen um die Methodik der Wertermittlung.

In diesem Sinne, und in einem durchaus positiv gemeinten, kann man die vorherrschende Richtung der Wertungsjurisprudenz eine „abstrakte“ nennen. Die Beschränkung auf das Wertungsverfahren als Methode erfolgt mit Absicht. Man hält es für unvereinbar mit der pluralistischen Gesellschaftsordnung, für die alle genannten Wertungsjuristen eintreten, wenn bestimmte Werte fraglos gestellt und vorrangig behandelt werden. Es scheint vorläufig, so wird man angesichts der derzeitigen Verfassungsverhältnisse in Westdeutschland sagen, kaum möglich zu sein, über diesen Punkt methodisch hinauszuarbeiten. Und dennoch ist, ein wenig unmerkelt, schon seit längerem der Versuch gemacht worden, innerhalb des pluralistischen Systems zu gewissen konkreten Wertungsaussagen vorzudringen. Diese Bemühungen sind im folgenden darzustellen.

## *II. Das Denken in Wertbedingtheiten. Ansätze zu einer konkreten Wertjurisprudenz*

### *1. Das „konkrete Naturrecht“ bei Arthur Kaufmann*

Um die Fragestellung hat sich namentlich ARTHUR KAUFMANN bemüht. Er hat in einer Übersicht über den derzeitigen Stand der philosophischen und methodologischen Bemühungen im gegenwärtigen westdeutschen Recht festgestellt, daß die wichtigste Frage derzeit die nach einem „konkreten Naturrecht“ ist<sup>47</sup>. In diesem Sinne meint auch LARENZ, die anfängliche Neigung der Jahre nach 1945 zu einer Rückkehr zu einem „Naturrecht“ im Sinne zeitlos gültiger Rechtssätze sei „inzwischen freilich subtileren

<sup>46</sup> Siehe dazu oben Kap. 24 und 25.

<sup>47</sup> ARTHUR KAUFMANN, *Recht und Sittlichkeit*, Tübingen 1964; DERS., *Naturrecht und Geschichtlichkeit*, Tübingen 1957; DERS., *Wozu Rechtsphilosophie heute?*, Frankfurt/M. 1971; ARTHUR KAUFMANN und WINFRIED HASSEMER, *Grundprobleme der zeitgenössischen Rechtsphilosophie und Rechtstheorie*, Frankfurt/M. 1971.

Überlegungen gewichen“<sup>48</sup>. Es geht, allgemein ausgedrückt, um den Versuch, über den abstrakten rein auf die Methodik der Wertermittlung beschränkten Ansatz der Wertjurisprudenz hinauszugelangen und trotz der in einer pluralistischen Gesellschaft und einem freiheitlich demokratischen System grundlegenden Wertoffenheit zu besser begründbaren Aussagen über das Wertungsverfahren im Recht zu gelangen. Keinesfalls geht es darum, problemgeschlossenen, nicht hinterfragbaren Naturrechtspositionen zu unbestreitbarer Geltung zu verhelfen<sup>49</sup>.

### *2. Die Erforschung von Bedingungsbeziehungen zwischen Wertungen und Methodik des Rechts*

Die von ARTHUR KAUFMANN umschriebene Fragestellung nach einem „konkreten Naturrecht“ ist von einer in methodologischer Hinsicht noch wenig ausgewerteten Strömung in der deutschen Jurisprudenz schon vor mehr als einer Generation angeklungen und hat dort und seitdem innerhalb dieser Richtung zu einem Denken geführt, das man als „rechtsmethodisches Denken in Wertbedingtheiten“ bezeichnen könnte. Es handelt sich um die ins Bewußtsein gehobene Vorstellung, daß sich scheinbar unverbunden nebeneinanderstehende Teile der Rechtsordnung in wertungsmäßiger Hinsicht ergänzen, daß die Begriffe auf einem Gebiet von Wertungen auf einem anderen abhängen und daß umgekehrt die Verwendung von Begriffen zu bestimmten Wertungen führen muß. Ein methodologisch passender Name ist für dieses „Denken in Wertungsbedingungen“ noch nicht gefunden worden. Meist bezeichnet man diese Richtung, die von HEINRICH KRONSTEINS Habilitationsschrift ihren Ausgang nahm und heute vor allem unter der jüngeren Generation eine Reihe von Anhängern verzeichnet, als „neoliberal“ oder „ordoliberal“.

<sup>48</sup> LARENZ, *Methodenlehre*, 2. Aufl., 127, mit folgenden Angaben dazu in Anm. 2, aaO: FECHNER, *Rechtsphilosophie*, 184 ff.; WELZEL, *Naturrecht und materiale Gerechtigkeit*, 4. Aufl. 1962, 219 ff.; DERS., *Festschrift NIEDERMEYER*, 1953, 279 ff.; WIEACKER, *Privatrechtsgeschichte der Neuzeit*, 2. Aufl., 603 ff.; ERIK WOLF, *Das Problem der Naturrechtslehre*, 3. Aufl. 1964; WÜRTEMBERGER, *Die geistige Situation der deutschen Strafrechtswissenschaft*, 1957, 19 ff.; ARTHUR KAUFMANN, *Naturrecht und Geschichtlichkeit*, 1957; DERS., *Festschrift ERIK WOLF*, 1962, 357 ff.; DERS., *Die ontologische Struktur des Rechts*, in: ARTHUR KAUFMANN, Hrsg., *Die ontologische Begründung des Rechts*, 1965, 470 ff.

<sup>49</sup> So ist das Bekenntnis zum „positivierten Naturrecht“, das bei vielen Verfassungstheoretikern zu finden ist, auch nicht zu verstehen, vgl. z. B. NIPPERDEY in BETTERMANN-NIPPERDEY-SCHEUNER, *Die Grundrechte*, Bd. II, 2 ff.; NIPPERDEY, *Allg. Teil des bürgerlichen Rechts*, § 33 V; HEINRICH LEHMANN, *Die Wirkungsstärke des Naturrechts*, *Festschrift RAAPE*, Hamburg 1948, 371 ff.



HEINRICH KRONSTEIN war der erste, der in seinem Buch über „Die abhängige juristische Person“ darauf aufmerksam machte, daß die Begrifflichkeit des Sachenrechts von bestimmten wirtschaftspolitischen Prämissen abhängt. Die Eigentumsordnung des BGB ist, so KRONSTEIN, für eine bestimmte Art von Wettbewerbswirtschaft geschaffen und nur für diese. Hieraus folgt, daß sachenrechtliche Begriffe, wie z. B. das Eigentum, mißbraucht werden, wenn sie unabhängig und außerhalb jener wirtschaftspolitischen Prämissen verwendet werden. Dies am Beispiel des Eigentums historisch durchgeführte gedankliche Experiment wendete KRONSTEIN sodann auf die juristische Person an und gelangte auf diese Weise schon 1930 zu theoretisch fundierten Beurteilungen von Konzentrationsbewegungen in der Wirtschaft. Die große Konzentrationswelle in der zweiten Hälfte der zwanziger Jahre hatte dazu den wirtschaftspolitischen Anlaß gegeben.

KRONSTEIN versuchte nachzuweisen, daß mit dem Vorgang der Konzentrierung und der Fusionierung von Großgesellschaften die Begriffe Eigentum und juristische Person überdehnt werden, weil sie für Zwecke eingesetzt werden, für die sie nach ihren ursprünglich gewerteten Zwecken nicht gedacht waren.

KRONSTEINS Buch über die „abhängige juristische Person“ war als Habilitationsschrift gedacht. Sie wurde jedoch nicht akzeptiert, weil zumindest ein führender Konzernjurist Verbindung mit der Heidelberger Fakultät aufnahm, um die Habilitation zu verhindern. Die Heidelberger Fakultät, sei es aus Unkenntnis der Zusammenhänge, sei es aus Furcht einiger ihrer Mitglieder, es mit der Großindustrie zu verderben, folgte der Anregung, KRONSTEIN mit dieser Schrift nicht zu habilitieren<sup>50</sup>. Die Ablehnung der Schrift durch die Heidelberger Fakultät konnte ihr Erscheinen nicht verhindern, vor allem auch nicht, daß sie der Ausgangspunkt der „neoliberalen“ Betrachtungsweise im Recht und damit der Ansatz zu einem „konkreten Naturrecht“ wurde<sup>51</sup>.

<sup>50</sup> Siehe dazu HEINRICH KRONSTEIN, Briefe an einen jungen Deutschen, 2. Aufl., München 1968, 124 f., wo die unerfreuliche, aber für den Beginn der konkreten Wertungsjurisprudenz bezeichnende Geschichte aus Rücksicht auf noch lebende Personen nur sehr zurückhaltend dargestellt ist.

<sup>51</sup> In späteren Schriften ist KRONSTEIN seiner Ausgangsposition immer treu geblieben. Siehe vor allem HEINRICH KRONSTEIN, Recht und wirtschaftliche Macht, Ausgewählte Schriften, eingeleitet von FRANZ BÖHM und Rev. BRIAN A. McGRATH, S. J., hrsg. von K. H. BIEDENKOPF, Karlsruhe 1962; noch in seinem letzten Vortrag, wenige Monate vor seinem Tod, weist KRONSTEIN auf die Zusammenhänge von Verfassungsrecht und gesellschaftlichen Wertungen in der Rechtsprechung des Supreme Court hin, KRONSTEIN, Die Entwicklung des amerikanischen Verfassungsrechts durch den Supreme Court, Schriftenreihe der juristischen Studiengesellschaft Karlsruhe, Heft 110, insbes. 21 f.

Ob KRONSTEIN seine Idee, Grundbegriffe des Privatrechts im Sinne eines Bedingungs Zusammenhangs mit wirtschaftspolitischen Prämissen zu verstehen, durch eine Anregung erhalten hat, ist zweifelhaft. KRONSTEIN war Schüler von MARTIN WOLFF und hatte mit ihm Gespräche über die Bedeutung des Eigentumsbegriffs geführt<sup>52</sup>. Außerdem stand KRONSTEIN damals offensichtlich unter dem Eindruck der rechtssoziologischen Schule und ihrer freirechtlichen Variante<sup>53</sup>. Die gedankliche Herstellung eines Bedingungs Zusammenhangs und damit die Eröffnung der Möglichkeit, über so aktuelle Fragen wie die Wirtschaftskonzentration und die Erstreckung des Eigentumsbegriffs konkrete wertende Aussagen zu machen, scheinen KRONSTEINS eigene Leistung gewesen zu sein.

Die beiden anderen Namen, die zu Beginn dieser konkreten Wertungsversuche im Sinne eines Bedingungs Zusammenhangs im Schrifttum hervortraten, sind FRANZ BÖHM und WALTER EUCKEN. FRANZ BÖHM und HEINRICH KRONSTEIN waren seit ihrer Jugend befreundet. Sie standen auch später in ständigem Kontakt und tauschten Gedanken über das Recht der Wirtschaftskonzentration aus<sup>54</sup>. FRANZ BÖHM hat in seiner Schrift über Wettbewerb und Monopolkampf die theoretischen Grundlagen des deutschen Kartellrechts gelegt<sup>55</sup>.

Der „Neoliberalismus“ oder „Ordoliberalismus“<sup>56</sup> entstand erst im Anschluß an die vorgenannten juristischen Veröffentlichungen. Weder KRONSTEIN noch BÖHM sind, als Juristen, im engeren Sinne der nationalökonomischen Richtung des Neo- oder Ordoliberalismus zuzurechnen, die

<sup>52</sup> KRONSTEIN, Briefe an einen jungen Deutschen, 2. Aufl., München 1968, 76 ff., 86 ff.

<sup>53</sup> Siehe dazu oben Kap. 27 I 2.

<sup>54</sup> Zu FRANZ BÖHM siehe insbes. sein Buch „Wettbewerb und Monopolkampf“, 1933.

<sup>55</sup> Siehe ferner auch die bei FIKENTSCHER, Wettbewerb und gewerblicher Rechtsschutz, München-Berlin 1958, 13 ff. zusammengetragene Literatur.

<sup>56</sup> Die Ausdrücke werden gelegentlich synonym verwendet, doch haftet ihnen ein gewisser Betonungsunterschied an. Bei „Neoliberalismus“ liegt der Ton eher auf der Antithese zum klassischen Liberalismus des Laissez-faire Laissez-aller, daß der Staat oder jedenfalls die organisierte Gesellschaft für die Offenhaltung von Wettbewerbsbedingungen zu sorgen hat, weil anders die Freiheit sich selbst aufhebt; mit dem Ausdruck „Ordoliberalismus“ verbindet sich im Anschluß an die „Ordo“-Vorstellungen der Freiburger Schule von Nationalökonomern die Vorstellung, daß der Staat bei der Aufrechterhaltung der Freiheit innerhalb der Gesellschaft, vor allem der wirtschaftlichen Freiheit in bestimmter Weise reglementierend eingreifen muß; diese reglementierenden Züge des Ordoliberalismus hat UWE RUNGE, Antinomien des Freiheitsbegriffs im Rechtsbild des Ordoliberalismus, Tübingen 1971, zum Gegenstand einer übertriebenen Kritik gemacht, die vor allem übersieht, daß die genannten Reglementierungen nicht Selbstzweck, sondern der Tendenz nach auf die Erhaltung der Freiheit gerichtet sind. Zustimmung findet RUNGE bei WIETHÖLTER, Festschrift RAISER, 645, 690. Erweiternd behandelt das Thema LUDWIG RAISER, Antinomien im Recht der Wettbewerbsbeschränkungen, Festschrift ERICH FECHNER, 1973, 57 ff.



später als „Freiburger Schule“ zunächst theoretische, dann aber nach 1945 eminent praktische Bedeutung erlangte<sup>57</sup>. Vor allem KRONSTEIN steht, wie sich auch aus der Äußerung im Brief FRANZ BÖHMS ergibt, den engeren ordoliberalen Vorstellungen ferner. Von BÖHM jedoch gingen wichtige Impulse auf die Nationalökonomie aus. Seine Gedanken trafen sich mit denen von WALTER EUCKEN<sup>58</sup>.

Von WALTER EUCKEN ging sodann die Anregung auf andere Nationalökonomien über, die, beginnend etwa 1935, die Freiburger Schule zu einem der wirtschaftspolitisch wirksamsten wissenschaftlichen Gedankengebäude ausbauten, das es jemals gegeben hat<sup>59</sup>. Man muß bedenken, daß in der damaligen Zeit, zu Beginn der HITLERDiktatur, die Arbeiten der Freiburger Schule in wirtschaftspolitischer Hinsicht reinste Theorie waren. Die Ansätze wurden theoretisch entwickelt und als *l'art pour l'art* veröffentlicht, ohne je die Chance zu haben, praktisch beachtet zu werden. Erst der verlorene Krieg 1945 und das politische Engagement vieler „Freiburger“, nicht zuletzt FRANZ BÖHMS selbst, aber auch LUDWIG ERHARDS, MÜLLER-ARMACKS und anderer führten dazu, daß zunächst das sogenannte deutsche „Wirtschaftswunder“ und später eine im internationalen Vergleich ungewöhnlich krisenbeständige Wirtschaftsordnung nach den Modellen der Freiburger Schule entstanden. Nachdem die Lehren der Freiburger Schule, die wachstumspolitisch neutral konzipiert waren, in den Jahren nach 1955 wachstumsideologisch eine Zeitlang optisch überlagert waren<sup>60</sup>, scheint mit der 1973 endgültig eingetretenen Wachstumskrise eine offene Rückkehr zu den Thesen der Freiburger Schule einzutreten<sup>61</sup>.

<sup>57</sup> Die „soziale Marktwirtschaft“ der Jahre nach 1948 war nichts anderes als die unter LUDWIG ERHARD und MÜLLER-ARMACK in die politische Praxis umgesetzte Lehre der Freiburger Schule.

<sup>58</sup> W. EUCKEN, *Die Grundlagen der Nationalökonomie*, 7. Aufl., Berlin 1959; DERS., *Grundsätze der Wirtschaftspolitik*, 4. Aufl., Tübingen 1968.

<sup>59</sup> Aus der großen Zahl der Veröffentlichungen jener Jahre sei vor allem die Schrift von LEONHARD MIKSCH erwähnt, die durch ihren Titel der ganzen Bewegung eine Überschrift gab: „Wettbewerb als Aufgabe“, Stuttgart-Berlin 1937, 2. Aufl., Bad Godesberg 1947.

<sup>60</sup> Siehe dazu § 1 Stabilitätsgesetz vom 8. 6. 1967, BGBl. I 582.

<sup>61</sup> Insbesondere die Reaktion der sozialliberalen Regierung unter WILLY BRANDT auf die Verknappung des Mineralöls durch die Ölkrise vom Herbst 1973 war eindeutig marktwirtschaftlich. WILLY BRANDT sprach selbst in der Regierungserklärung nach Verhängung des Ölboykotts von einer „vollständigen Ausschöpfung der Möglichkeiten des Weltmarkts“. Es ist auffällig, daß sich die sozialistische Wirtschaftspolitik, wiewohl grundsätzlich auf Verteilung von Vorhandenem gestimmt, in Krisenzeiten auf die wertschöpfenden Möglichkeiten des Marktes besinnt, während die kapitalistische Wirtschaftspolitik normalerweise den Markt als Stimulans der Wertschöpfung bejaht, aber in der Krise zur reglementierten Verteilung des Vorhandenen neigt.

Zusammengefaßt kann man sagen, daß das Interesse der der Freiburger Schule vorausgehenden Juristen KRONSTEIN und BÖHM vorwiegend dem Bedingungsverständnis von Rechtsbegriffen und Wirtschaftsordnung galt, während die Nationalökonomien der Freiburger Schule, offensichtlich angeregt durch die juristischen Arbeiten, das Bedingungsverständnis von Freiheit und Wirtschaftsordnung durchdachten. Gemeinsam ist beiden Varianten der Wille, gesellschaftssteuernde Werte in ihrem wirtschaftspolitischen und allgemein gesellschaftlichen Bedingungsverständnis zu sehen, d. h. einerseits wirtschaftliche und rechtliche Begriffe als Funktionen einer gegebenen Wirtschaftsordnung zu betrachten, andererseits die Wirtschaftsordnung durch funktional verwendete juristische und wirtschaftliche Begriffe zu lenken. Das zentrale Thema war dabei die Erhaltung der menschlichen Freiheit durch einen rechtlichen Schutz gegen den Mißbrauch der Freiheit im Namen der Freiheit.

### 3. *Das Privatrecht als Funktion wirtschaftlicher und politischer Entscheidungen (Biedenkopf, Steindorff)*

Man kann eine ältere und eine jüngere Generation der „Neoliberalen“ unterscheiden. Dies gilt für die rechtswissenschaftliche Seite mehr als für die nationalökonomische. Während auf wirtschaftswissenschaftlichem Gebiet in den Forschungen der Freiburger Schule nach dem Tode WALTER EUCKENS 1951 eine merkbare Stagnation eintrat, insbesondere ein Brückenschlag zur im Vordringen begriffenen Wachstumsideologie und Wachstumswissenschaft nicht versucht wurde, und auch die Integration von Neoliberalismus und Keynesianismus theoretisch niemals befriedigend erfolgte<sup>62</sup>, haben Juristen, vor allem Schüler KRONSTEINS und BÖHMS, die methodische Seite des Wertbedingungsdenkens verfeinert und sowohl die juristischen wie auch die politischen Aspekte schärfer ins Auge gefaßt. Dazu zählen die Schriften und die politische Tätigkeit KURT BIEDENKOPFS<sup>63</sup>. Im Bereich des internationalen Wirtschaftsrechts hat ERNST STEINDORFF das Bedingungsverständnis methodisch angewandt<sup>64</sup>.

<sup>62</sup> Dies führte zu der unorganischen Erweiterung des KEYNESSchen magischen Dreiecks (Preisstabilität, Vollbeschäftigung und ausgeglichene Zahlungsbilanz) durch die neoliberale Marktwirtschaft und die Wachstumsideologie in § 1 des Stabilitätsgesetzes zu einem „Fünfeck“, wobei namentlich das „Wirtschaftswachstum“ als Ballast erscheint.

<sup>63</sup> Siehe zu ihm Anm. 80 unten.

<sup>64</sup> STEINDORFF, *Zweckmäßigkeit im Wettbewerbsrecht*, Frankfurt/M. 1959; im internationalen Privatrecht: STEINDORFF, *Sachnormen im internationalen Privatrecht*, Frankfurt/M. 1958.



zung eines bestimmten Strafverfahrens. In einem Strafverfahren kann daher nur ein Haftbefehl gegen einen Beschuldigten bestehen, auch wenn dieser mehrerer Taten dringend verdächtig ist. Dieser Haftbefehl muß alle Taten enthalten, die in demselben Verfahren untersucht werden, soweit der dringende Tatverdacht besteht (§ 112 I StPO). Es wäre ein Verstoß gegen die prozeßrechtliche Fairness<sup>1</sup>, wenn der Haftbefehl nur auf eine von den mehreren Taten gestützt würde, deren der Beschuldigte dringend verdächtig ist, vielleicht sogar zu dem Zweck, später die andere Tat zur Begründung des Haftbefehls nachschieben oder gar die eine Tat durch die andere ersetzen zu können. Nur wenn alle Taten, die den Haftbefehl zu rechtfertigen geeignet sind, in diesen miteinbezogen werden, wird eine Irreführung des Beschuldigten vermieden. Wenn dagegen der Haftbefehl nur auf eine Tat unter grundloser Weglassung anderer gestützt wird, kann der Beschuldigte zu unnützen Anträgen und Beschwerden und damit zu unnötiger Verzögerung und vielleicht sogar zu nichtgewollter Verlängerung der Untersuchungshaft bewogen werden. Aus eben diesen Erwägungen hat der Deutsche Bundestag bei den Beratungen über das Strafprozeßänderungsgesetz vom 19. 12. 1964 bei der Formulierung des § 114 II Nr. 4 StPO beschlossen, daß im Haftbefehl grundsätzlich alle Tatsachen anzugeben sind, aus denen sich der dringende Tatverdacht und der Haftgrund ergibt.

Daraus folgt, daß der Ausdruck „wegen derselben Tat“ in § 121 I StPO in der Regel — entgegen der Auffassung des OLG Oldenburg — das gleiche bedeutet, wie wenn es hieße „in demselben Verfahren“<sup>2</sup>. Wird eine neue Tat bekannt oder durch Verbindung zweier Verfahren Gegenstand der Untersuchung, so ist sie bei nächster Gelegenheit in den Haftbefehl miteinzubeziehen, wenn sie diesen zu begründen geeignet ist. War der Vollzug des Haftbefehls vorher ausgesetzt worden (§ 116 StPO), so kann die neue Tat Anlaß sein, diese Anordnung rückgängig zu machen (§ 116 IV Nr. 3 StPO)<sup>3</sup>. Nur wenn in einem Verfahren ein Haftbefehl aufgehoben worden ist und dann erst eine weitere Tat des Beschuldigten bekannt oder aus einem sonstigen Grund in das Verfahren einbezogen wird, kann wegen dieser neuen Tat ein neuer Haftbefehl erlassen werden. Für ihn läuft die 6-Monate-Frist für die besondere Haftprüfung nach den §§ 121, 122 StPO selbständig. Der frü-

here Haftbefehl und seine Vollzugsdauer haben hierauf keinen Einfluß mehr.

Nun zu dem Fall, mit dem sich das OLG Oldenburg zu befassen hatte. Die Verfahren vor dem Jugendschöffengericht und dem Landgericht waren z. Z. der Entscheidung des Oberlandesgerichts noch nicht miteinander verbunden. Im ersteren Verfahren bestand der Haftbefehl, über den zu entscheiden war; im letzteren war ebenfalls ein Haftbefehl erlassen, sein Vollzug war jedoch ausgesetzt worden. Da die beiden Verfahren noch nicht zu einem verbunden waren, konnten die beiden Haftbefehle nebeneinander bestehen. Wären sie schon verbunden gewesen, so hätten beide Haftbefehle zu einem zusammengefaßt werden müssen. In diesem Falle hätten auch die Vollzugszeiten aus beiden Haftbefehlen bei der Anwendung des § 121 StPO zusammengerechnet werden müssen. Z. Z. des Beschlusses des OLG Oldenburg bestand hierzu noch kein Anlaß. Darin ist dem Beschluß im Ergebnis — wenn auch aus anderen Erwägungen — zuzustimmen.

Das Bedenklichste an der Beschlußbegründung ist die Auffassung, die im letzten Absatz zum Ausdruck kommt: Wenn die 6-Monate-Frist zur Vorlegung der Akten am Tage der Beschlußfassung des vorlegenden Richters (§ 122 I StPO) schon abgelaufen gewesen wäre, hätte sich das Oberlandesgericht dazu genötigt gesehen, den weiteren Vollzug von Untersuchungshaft sofort zu beenden. Erfreulicherweise lehnt die große Mehrheit der Oberlandesgerichte eine derartige Schematisierung ab<sup>4</sup>. Nach der Entstehungsgeschichte der §§ 121, 122 StPO sollen in dem besonderen Haftprüfungsverfahren außer den normalen zusätzliche materielle Haftvoraussetzungen geprüft werden. Das soll an der 6-Monate-Grenze geschehen. Hätte der Gesetzgeber die Haftbeendigung nach 6 Monaten oder etwa auch nach einer anschließenden 3-Monate-Frist (§ 122 IV S. 2 StPO) allein wegen Versäumnis des Vorlegungstermins gewollt, hätte er eine automatische Haftbeendigung vorgesehen und vorsehen müssen. Dann hätte er auch nicht in das Ermessen des Oberlandesgerichts stellen dürfen, wie lange es sich für seine Entscheidung Zeit lassen darf (§ 121 III S. 1 StPO). Im übrigen darf dem Gesetzgeber doch nicht eine Regelung als gewollt unterstellt werden, bei der es vom reinen Zufall abhängen kann, ob die Untersuchungshaft weiterbestehen soll oder nicht. Diese Wirkung hatte früher und hat heute keine Haftprüfungsfrist.

Generalstaatsanwalt Dr. Theodor KLEINKNECHT, Nürnberg  
senberg, Ergänzungsband, 1966, Anm. 9 zu § 116 StPO.

<sup>4</sup> Wie Oldenburg OLG Schleswig NJW 65, 2119; OLG Frankfurt, 1. Strafsenat, NJW 65, 1731; 66, 2076, anders jedoch der 3. Strafsenat im Beschluß vom 26. 7. 1967, OLGSt S. 38 zu § 121 StPO.

<sup>1</sup> Schwarz-Kleinknecht, StPO, 27. Auflage, Einl. 7 A; Anhang A 4 Anm. 4 zu Art. 6 MRK.

<sup>2</sup> Schwarz-Kleinknecht, Anm. 1 C zu § 121 StPO.

<sup>3</sup> Dünnebier, Das neue Recht der Untersuchungshaft und in Löwe-Ro-

## LITERATUR

Kronstein, Heinrich: Briefe an einen jungen Deutschen. München: Beck. 1967. 323 S. Lw. 16.80.

Dies Buch, äußerlich die Selbstbiographie eines Professors der Rechte in Briefform, gibt sich nüchtern und schlicht im Stil, durchsichtig und prägnant im Inhalt und in der Gedankenführung. Aber schon nach wenigen Seiten spürt der Leser: Es handelt sich um eines der tiefsten und aufrührendsten „Sachbücher“ der Nachkriegszeit. Zu Recht sagt Tiefenbacher im Betriebsberater 1967, S. 1495, Kronsteins „Briefe“ gehörten zu den aufschlußreichsten Autobiographien der letzten Jahrzehnte, die der Rezensent gelesen habe. Das Buch ist, um mit Tiefenbacher zu sprechen, eben nicht nur die historisch getreue Schilderung des Schicksals und der Odyssee eines jüdischen Mitbürgers. Das „Briefbuch“ hat viele Dimensionen, eine zeitgeschichtliche, eine personengeschichtliche, eine juristische, eine bildungspolitische, eine hochpolitische. Das einfache Gewand der Briefe an einen jungen deutschen Jurastudenten, der, aus der Ostzone kommend, mit unvoreingenommenen Fragen an den Autor herantrat und ihn dadurch zu einer Autobiographie veranlaßte, die glanzlose Sprache und die lockere, gelegentlich impressionistische Gedankenfolge erweisen sich als Untertreibungen. Sie sind möglicherweise gezielt; denn sie fangen den Leser ein in eine Dialektik von einfacher Aussageform und schwerem Aussageinhalt, wodurch die

zupackende, angreifende Wirkung des Buches nur noch verstärkt wird. Sicherlich spiegelt die Verhaltenheit der Darstellung eine typische Aussageweise Kronsteins wider. Kronstein pflegte sich oft auf diese Weise zu äußern, schon in seiner Habilitationsschrift über die abhängige juristische Person, oder in seinem Artikel „Arbitration is Power“, New York University Law Review, 1963. Auch in Kronsteins anschließend zu besprechendem, gleichzeitig mit dem „Briefbuch“ erschienenen Werk über die internationalen Kartelle gelingt dem Verfasser diese Darstellungsweise. Es wäre ein Mißverständnis, dies als Provokation oder als „Anklageschrift“ zu verstehen, wie Fritz Schönherr in seiner Besprechung des Kartellbuchs in der Österreichischen Juristenzeitung 1967, S. 588, andeutet. Kronsteins Aussagen sind nicht als Anklagen gemeint, weder im „Briefbuch“ noch im „Kartellbuch“, es geht ihm vielmehr nur um nüchterne Feststellungen, um gleichsam selbstverständliche Beobachtungen, deren Wirkung auf den Leser Kronstein offen läßt. Die dahinterstehende Meinung kann freilich dem Leser nicht entgehen, aber ein sachlich urteilender Gegner wird Kronstein zugestehen müssen, daß er seine Thesen ohne Schärfe und Sendungsbewußtsein vertritt. Die Themen des Briefbuchs und des Kartellbuchs sind im Grunde gleich: Das Verhältnis des Menschen zu den ihn steuernden Werten und die Überprüfung der Echtheit dieser Werte. Die im Briefbuch abgehan-



delten Themen sind Mittel zum Zweck der Darstellung der Grundfrage.

Das Buch schildert nur kurz, wie *Kronstein* im traditionsgebundenen, aber weltoffenen jüdischen Elternhaus aufwächst, wie 1914 sich die „allgemeine Auflösung unseres gewohnten Lebens vollzog“, und wie er dann an der Westfront als Melder „Verbindungen herzustellen“ hatte. Das ganze Buch ist ein Zeugnis dafür, wie man unter Beschuß von allen möglichen Seiten Verbindungen vorbereiten und herstellen kann, allerdings nicht mehr für kriegerische, sondern für friedliche Zwecke.

Auf die Schilderung der von politischen Störungen beeinflussten Studentenzeit in Heidelberg und Bonn, wo er Schüler von *Martin Wolff*, *Erich Kaufmann* und *Josef Partsch* wurde, folgt, biographisch eingekleidet, eine Einführung in den Kern *Kronsteinscher* Gedankengänge: Das Problem des Mißbrauchs juristischer Formen für Zwecke, für die sie nicht geschaffen sind. *Kronstein* benutzt die nicht undramatische Geschichte der Veröffentlichung seiner Schrift über die abhängige juristische Person zur Entwicklung seines Problems. Das 1931 erschienene Werk ist bis heute eines der wenigen und daher wichtigen Werke über die Grenzen, die der Verwendung des Eigentumsbegriffs und des Begriffs der juristischen Person vom wirtschaftlichen Zweck gesteckt sind. Wer sich mit der für das Konzernrecht entscheidenden Durchgriffsproblematik beschäftigt hat, muß erkennen, daß viele der von *Kronstein* damals aufgestellten rechtspolitischen Forderungen bis heute noch nicht erfüllt werden konnten.

Ein Brief schildert *Kronsteins* Anwaltstätigkeit (S. 106 ff.). Er enthält in kurzen Worten Grundsätze freiheitlicher Advokatur. („...Ich möchte sagen, daß es ein entscheidendes Kriterium für den Unterschied zwischen einem freien und einem totalitären Land ist, ob es ein Anwaltsbüro und ein Beratungszimmer dieser Art geben kann oder nicht.“) Wie *Kronstein* dann durch randalierende SA und auf andere Weise aus seiner Mannheimer Anwaltspraxis vertrieben wurde, wie die Bemühungen um einen organisierten Schutz jüdischer Mitbürger fehlschlügen, wie die Jahre der Emigration in USA begannen, zieht am Leser, bei aller Zurückhaltung in der Darstellung, eindrucklich und bedrückend vorüber. Nachhaltig wendet sich *Kronstein* gegen die These von *Hannah Arendt*, die deutschen Juden hätten sich nicht verteidigt, sondern seien wie preußische Soldaten, denen man zu sterben befohlen hätte, gestorben, auch sie hätten die „preußische Philosophie“ akzeptiert und so letztlich selbst ihren Tod veranlaßt.

Einem zweiten Studium der Jurisprudenz in den USA folgt die praktische Tätigkeit als Rechtsgutachter, Übersetzer und Sachbearbeiter im amerikanischen Justizministerium, und seit 1939 in der Antitrust Division unter *Thurman Arnold*. Seit 1942 bekleidet *Kronstein* eine Professur an der Georgetown University in Washington D. C. Was *Kronstein* über seine auch nach 1942 andauernden Arbeiten in der Washingtoner Justizverwaltung schreibt, gehört zu dem Interessantesten, was bisher über die Roosevelt-Verwaltung der Kriegsjahre aus deutscher Feder zu erfahren war. Höhepunkte der Darstellung sind dabei die Sitzung „kurz vor Beginn des deutsch-russischen Krieges“, in der schon damals die deutsche Teilung in der Art, wie sie heute besteht, als unvermeidlich vorhergesehen wurde (!) (S. 211), und die Schilderung des Sieges der „Negativisten“, als die Amerikaner im Zuge der Besetzung Deutschlands von den Massenvernichtungen der Juden erfuhren (S. 226/227). *Kronsteins* Beobachtung, daß die höhere amerikanische Verwaltung von der Eigenschaft deutscher KZs als Vernichtungslager erst im Zuge der Besetzung Deutschlands, also etwa ab Herbst 1944 erfuhr, dürfte einen Beitrag darstellen zu der bis heute ungelösten Frage, von wann ab in Deutschland und außerhalb Deutschlands die Durchführung der Vernichtungsprogramme bekannt sein mußte.

Das letzte Drittel des Buches wendet sich dem Wiederaufbau Deutschlands zu, an dem *Kronstein* als Wirtschaftsoffizier zeitweise mitgewirkt hat. Als Bestandteile einer nationalen und übernationalen Friedensordnung werden Fragen der Bildungsreform, der Einigung Europas und der internationalen Organisation erörtert. Eine differenzierende Betrachtungsweise wird vor allem auf die Fragen transatlantischer Universitätsreform angewandt. *Kronstein* warnt wie kaum ein anderer vor vereinfachender Übernahme fremder Muster.

Das Buch ist mehr als das Zeugnis eines Menschen, der, von seinem Volk verstoßen, sein Volk im Ausland juristisch und politisch vertritt, um nach der militärischen Niederlage seines Volkes wirtschaftlich, juristisch und geistig am Wiederaufbau teilzunehmen. *Kronstein* hätte dies nicht zum Gegenstand einer Selbstdarstellung gemacht. Es ließ sich für ihn nicht vermeiden, auch dies darzustellen.

Es geht *Kronstein* in diesem Buch um den Nachweis, daß man als Gelehrter, als Europäer und als Christ (*Kronstein* begründet im

Briefbuch seine 1935 erfolgte Konversion vom Judentum zum Katholizismus) auch in ausweglos erscheinender menschlicher und politischer Situation helfen und Brücken schlagen kann. Doch wäre das Buch nicht ausgeschöpft durch seine Charakterisierung als moralischer Appell an die junge Generation. Auch soll kein „Beispiel“ aufgezeigt werden. Man könnte dem Briefbuch auch die Überschrift „Transatlantische Reflexionen“ geben. Das Eigenartige dieses Buches ist, daß sich die Reflexionen zwar auf die verschiedensten Lebensbereiche, wie Recht, Politik, Wirtschaft, Geistesgeschichte, Bildungsreform, Religion beziehen, und daß doch alle Reflexionen ausgehen von einer im Glauben verwurzelten personalen Mitte und eben darum nicht Reflexionen bleiben, sondern zu gelebten und beschriebenen Taten werden. So leicht zugänglich die gedankliche Erfassung des „Briefbuches“ als bloßer „moralischer Appell“ wäre, so schwer zugänglich ist die Erfassung dieser Vielschichtigkeit des Buches. Und doch scheint *Kronstein* unmittelbar verstanden zu werden. Die erste Auflage war binnen weniger Wochen vergriffen. Eine zweite ist im Erscheinen.

Prof. Dr. Wolfgang FIKENTSCHER, Tübingen

*Kronstein, Heinrich*: Das Recht der internationalen Kartelle, zugleich eine rechtsvergleichende Untersuchung von Entwicklung und Funktion der Rechtsinstitute im modernen internationalen Handel. Berlin: J. Schweitzer. 1967. XXXVIII, 518 S. (Recht der internationalen Verwaltung und Wirtschaft, Bd. 5. Hrsg. von *Günther Jaenicke*, *Heinrich Kronstein*, *Hans Jürgen Schlochauer* in Verbindung mit dem Institut für ausländisches und internationales Wirtschaftsrecht, Frankfurt a. M.) Lw. 146.—

Es handelt sich um den fünften, aber zeitlich zuerst erschienenen Band eines neunbändigen Sammelwerkes, das unter der Betreuung des Instituts für ausländisches und internationales Wirtschaftsrecht an der Universität Frankfurt am Main das Werk von *Karl Neumeyer*, Internationales Verwaltungsrecht, vier Bände, 1910—1936, fortsetzen will. In dem hier zu besprechenden Band 5, „Das Recht der internationalen Kartelle“, legt *Kronstein* das Ergebnis jahrzehntelanger Studien im internationalen Kartellrecht vor. Das Werk geht zutreffend von der Tatsache aus, daß es eine internationale rechtliche Regelung der Kartelle nicht gibt. Das Buch wendet sich aber nun nicht einem vielleicht fruchtlosen Bemühen zu, die Eignung nationaler Kartellrechte zur Erfassung internationaler Kartelle zu prüfen, sondern es nimmt eine Arbeitsweise wieder auf, die seit *Arthur Nußbaums* „Rechtstatsachenforschung“ im Wirtschaftsrecht zu sehr vernachlässigt wurde: Die Erforschung tatsächlicher Zusammenhänge und rechtlicher Wirkungsabläufe. Die Arbeitsweise internationaler Kartelle in rechtlicher und wirtschaftlicher Hinsicht wird von *Kronstein* mit umfassendem Material belegt. Über die Rechtstatsachenforschung hinaus weist *Kronstein* Wege zu einer Regelung internationaler Kartelle in rechtspolitischer Hinsicht.

Nach kurzer Darstellung der zugrundeliegenden Probleme wendet sich der Verfasser unmittelbar dem Verhältnis zwischen staatlicher und privater Ordnung im internationalen Handel zu, wodurch das Buch erfreuliche Wirklichkeitsnähe gewinnt. Dem folgt eine Schilderung der modernen Kartelltypen, wobei man die Beschreibung des „technologischen Kartells“ als eine geglückte Entdeckung bezeichnen darf. Nicht mehr das Rohstoff- oder das Produktkartell steht heute im Vordergrund der wirtschaftsrechtlichen Bedeutung, sondern die Zusammenarbeit der Entwicklungsindustrien im technologischen Kartell. Auch dem Abwehrkartell werden eingehende Ausführungen gewidmet. Es folgt eine juristische Analyse des Vertragssystems der internationalen Kartelle unter Hervorhebung der Rolle der Vertragsparteien sowie anderer Marktbeteiligter, der Bedeutung der gewerblichen Schutzrechte und der Schiedsgerichtsbarkeit und Schlichtung.

In einem zweiten Teil des Buches prüft *Kronstein* die Verwendung und Umgestaltung der nationalen Rechtsinstitute durch internationale Kartelle. Dem „Besonderen Teil“ des internationalen Kartellrechts folgt gleichsam ein „Allgemeiner“. Der zweite Teil beginnt mit Ausführungen zum internationalen Privatrecht der Kartelle, das zunehmend eine Unterstellung internationaler Kartelle unter „neutrales Recht“ und „neutrale Gerichte“ zum Ziel hat. Dem folgt eine Darstellung der wichtigsten internationalprivatrechtlichen und -zivilprozessrechtlichen Probleme in den wesentlich beteiligten Rechtsordnungen, unter Hervorhebung des deutschen und amerikanischen Rechts. Zutreffend wird der privaten Schiedsgerichtsbarkeit ein breiterer Raum eingeräumt als den üblichen internationalzivilprozessualistischen Fragen. Eine grundlegende theoretische Betrachtung beschließt den zweiten Teil, nämlich die „Verwendung und Umgestaltung der gewerblichen Schutzrechte und der juristischen Person“ für die Zwecke der internationalen Wettbewerbsbeschränkungen.



Vier Merkmale sind es also, die dieses Buch von anderen abheben: In methodischer Hinsicht das Wiederaufgreifen der Rechtsstatistikforschung; in rechtspolitischer Hinsicht der Ruf an die Rechtswissenschaft, sich des seit Jahrzehnten vernachlässigten internationalen Kartellrechts anzunehmen; in rechtsdogmatischer Hinsicht die Entdeckung und sehr genaue Beschreibung des „technologischen Kartells“; sowie, für das deutsche Schrifttum erstmalig, der umfangreiche Nachweis eines engen Zusammenhangs zwischen internationalem Kartellrecht und Schiedsgerichtsbarkeit.

Es mag verstatet sein, die rechtspolitische Thematik noch einmal aufzugreifen. *Schönherr* hat hierzu bemerkt, das Buch *Kronsteins* könne weithin als Anklage empfunden werden (Österreichische Juristenzeitung 1967, S. 587/588). Man muß sich fragen, gegen wen sich eine Anklage, wenn überhaupt, richtet. *Kronstein* beschreibt allerdings die handels- und wettbewerbsbeschränkenden Praktiken bestehender internationaler Kartelle und mit ihnen zusammenarbeitender Nationalstaaten und internationaler Organisationen so detailliert und gut belegt, daß der Leser, juristisch vorgebildet oder nicht, das Buch recht ernüchert aus der Hand legt. Und doch kann man mit Sicherheit sagen, daß *Kronstein* keine „Anklage“ gegen Bestehen oder Praktiken internationaler Kartelle richten wollte. *Kronstein* wollte die Dinge schildern wie sie sind. Ein in Jahrzehnten mühsam zusammengetragenes Material wird vorurteilslos vor dem erstaunten Leser ausgebreitet und durch einen kritischen Apparat unterbaut, der schlechthin Bewunderung abnötigt. Die rechtspolitische Haltung *Kronsteins* ist dabei aber nicht, daß man, was hier nachgewiesen wird, verbieten sollte. Aber *Kronstein* hält es nicht mit denen, die über die Wirtschaftswirklichkeit der internationalen Kartelle nicht sprechen wollen, die, um mit den Worten der alten Reichstagsdenkschrift aus den Jahren 1904/1906 zu sprechen, sagen würden: „Die Zusammenhänge hält man diskret“. *Kronstein* hat es sich zur Aufgabe gesetzt, das, was er auf Grund seiner wirtschaftsrechtlichen Erfahrungen in Theorie und Praxis persönlich für wichtig hält, auszusprechen und zu beschreiben.

Wenn das Buch also keine Anklage gegen die internationalen handelsbeschränkenden Praktiken enthält, so läßt es doch in anderer Richtung eine Kritik, wenn auch keine Anklage laut werden, und zwar durch seine bloße Existenz: Von ganz wenigen Ausnahmen abgesehen, hat es sich die Rechtswissenschaft, zumal in Deutschland, schon seit der Jahrhundertwende zu leicht gemacht, wenn es um das Verhältnis von Staat und Wirtschaft vor dem Forum der Gerechtigkeit geht. *Kronsteins* Buch will offenbar machen, daß es eine ganze Gruppe von wichtigen Zusammenhängen wirtschaftsrechtlicher Art gibt, die bisher zu wenig beachtet wurden. Zu lang hat man sich über bloße Rechtsformen (z. B. den Kartellbegriff), über gesellschaftsrechtliche Gestaltungsmöglichkeiten (z. B. die Doppelgesellschaft) und über rein kollisionsrechtliche Fragen (wie die Parteiautonomie, das gesellschaftsrechtliche Personalstatut und die Anknüpfung in der internationalen Schiedsgerichtsbarkeit) Gedanken gemacht, ohne sich über die wirtschaftlichen Hintergründe Rechenschaft abzulegen, die durch die Setzung von Machtpositionen den Rechtsfragen bestimmte Zielrichtungen zu geben vermögen. *Kronsteins* Buch will, trotz seines Umfangs, hier nur ein Anfang sein. Das Werk stellt nicht nur den Juristen des Wirtschaftsrechts, sondern auch denen des gesamten Privatrechts eine Aufgabe. Entsprechend *Kronsteins* Methode wird, auf umfangreiches Tatsachenmaterial gestützt, das rechtspolitische Anliegen und die Sorge um seine Verwirklichung deutlich. Es geht um eine Jurisprudenz, welche die von ihr eingesetzten Mittel unter Kontrolle behält, eine Jurisprudenz, die sich ihre Werkzeuge nicht von außerrechtlichen Kräften aus der Hand winden läßt.

Prof. Dr. Wolfgang FIKENTSCHER, Tübingen

*Brockhaus Enzyklopädie* in 20 Bänden. 17., völlig neu bearb. Aufl. des Großen Brockhaus. Bd. 4: CHOD — DOL. Wiesbaden: Brockhaus. 1968. 824 S. Subskr.-Preis für Bd. 4: Halbleder 79.—

Im Mittelpunkt dieses Bandes stehen die Artikel über Deutschland und die anderen mit „Deutsch...“ beginnenden Stichwörter. Sie

sind im Vergleich mit der Vorauflage erheblich erweitert (rd. 230 Seiten!) und bieten eine Fülle von Informationen. Im Artikel „Deutschland“ wird u. a. ausführlich über Verfassung, Verwaltung, Finanzen, Wirtschaft, Bildungswesen usw. der Bundesrepublik (S. 618—644) und der DDR (S. 644—665) berichtet. Hervorgehoben seien ferner die Artikel „Demokratie“ (informativ, soweit in dem zu engen Umfangsrahmen möglich) und „Dialektischer Materialismus“ (mit gutem Literaturnachweis) sowie „Daten“ und „Dokumentation“ (beide stark ausgebaut). Den Stichwörtern „Diplom“ und „Doktor“ sind nützliche Verzeichnisse der Diplome und Doktorgrade der deutschsprachigen Hochschulen beigelegt. Im Artikel „Dissertation“ wird behauptet, „die Qualität der Dissertationen“ sei „in den meisten Fächern so gestiegen, daß heutige Dissertationen mit früheren Habilitationsschriften vergleichbar sind (!).“ Deshalb (?) werden seit 1967 sehr gute Dissertationen von einigen Fakultäten als Teile von Habilitationsleistungen anerkannt.“ — Ergänzungswunsch: Dem studentischen Disziplinarrecht, das in dem Artikel „Dienststrafrecht, Disziplinarrecht“ seltsamerweise unerwähnt bleibt, sollte ein eigener Artikel (mit Literaturnachweis) gewidmet werden. Die kurze, zudem mißverständliche Bemerkung im 2. Abs. der Ausführungen zum Stichwort „akademische Freiheit“ (Bd. 1 S. 248) reicht zur Information über die rechtlich und politisch problematische Materie nicht aus.

M.

*Scheyhing, Robert*: Höfeordnung. Köln: Carl Heymanns Verlag. 1967. 256 S. kart. 33.—

Das Buch enthält außer den in seinem Mittelpunkt stehenden Erläuterungen der Höfeordnung vom 24. April 1947, die auf den Stand des Schrifttums vom September 1966 abgestellt sind, die wichtigsten Gesetzestexte sowie Anmerkungen zu den §§ 37, 38, 58, 59 der Verfahrensordnung für Landwirtschaftssachen. Den Erläuterungen (183 Seiten) liegt der Leitgedanke zugrunde, das in den Ländern Hamburg, Niedersachsen, Nordrhein-Westfalen und Schleswig-Holstein geltende Anerbenrecht als eine mit dem Erbrecht des Bürgerlichen Gesetzbuchs verbundene Sonderregelung verständlich zu machen. Dementsprechend schließt sich der Gang der Ausführungen möglichst an die Begriffe des bürgerlichen Rechts an, wobei vereinzelt Seitenblicke auf Regelungen anderer deutscher Anerbengesetze gerichtet werden. Durch die Deutlichkeit, mit der diese Konzeption in den Erläuterungen hervortritt, hebt sich das Werk *Scheyhings* von den beiden umfangreicheren Kommentierungen ab, die in der 6. Auflage der Höfeordnung von *Lange/Wulff* nach dem Stande vom Sommer 1965 sowie in der völlig neu bearbeiteten 2. Auflage von *Wöhrmann*, Landwirtschaftsrecht, vom Mai 1966 — sie konnte noch nicht verwertet werden — geboten werden; diese gehen mehr auf die Entstehungsgeschichte und die Vorläufer der in der Höfeordnung enthaltenen Regelungen ein.

Die Erläuterungen zeichnen sich durch selbständige Gedankenführung aus und geben infolgedessen auch dort, wo sie im Ergebnis den Meinungen anderer entsprechen, nicht selten eigene Begründungen. Im ganzen überwiegt das Bestreben, die vertretenen Standpunkte eingehend zu fundieren, gegenüber einer Tendenz, überall Rechtsprechung und abweichende Meinungen und deren Gründe zu behandeln oder zu erwähnen (vgl. z. B. Anm. 9 zu § 8 — a. A. *Wöhrmann* —, Anm. 30 zu § 8 — abweichende Rechtsprechung —, Anm. 13 zu § 13 — *BGHZ* 28, 92 —, Anm. 21 zu § 14, Anm. 15 zu § 17 — *BGH* RdL 1962, 18 u. a. —, Anm. 54 zu § 17 — abweichende Rechtsprechung —).

*Scheyhings* flüssig geschriebene Erläuterungen haben entsprechend dem beschränkten Umfang ihren Schwerpunkt in den Hauptproblemen des Höferechts, z. B. ist der Übergabevertrag besonders eingehend behandelt (22 Seiten). Bei Erwähnung und Erörterung von weiteren Einzelfragen, die sich für die Anwendung der Vorschriften der Höfeordnung ergeben, zeigt der Verfasser verständliche Zurückhaltung. Die dabei getroffene Auswahl des Stoffes erscheint fast durchweg als gelungen; sie macht das Werk übersichtlich und regt den Leser zum Denken an.

Ministerialdirigent Dr. Heinrich von SPRECKELSEN, Bonn

Verantwortlich für den redaktionellen Teil: Dr. Ulrich Weber, Tübingen. — Verantwortlich für den Anzeigenteil: Konrad Bader, Heidelberg. Die Juristenzeitung erscheint zweimal monatlich. Abonnementspreis vierteljährlich DM 14.70 (einschließlich DM —.70 Mehrwertsteuer) zuzügl. Postgebühr DM —.80, für Studenten und Referendare DM 9.90, Preis des Einzelhefts DM 3.—. Bestellungen werden durch den Buchhandel, die Postanstalten und den Verlag entgegengenommen. Bestellungen zum ermäßigten Preis (DM 9.90) nur durch Buchhandel und Verlag. Abbestellungen müssen spätestens 3 Wochen vor Quartalschluß erfolgen. — Zuschriften, die sich auf den Inhalt der Zeitschrift beziehen, werden an die Redaktion der Juristenzeitung, 74 Tübingen, Wilhelmstr. 18, erbeten, geschäftliche Mitteilungen an den Verlag J. C. B. Mohr (Paul Siebeck), 74 Tübingen, Postfach 2040, Zuschriften, die sich auf Anzeigen beziehen, an die Juristenzeitung, Anzeigenabteilung, 6900 Heidelberg 1, In der Aue 4 a. — Unverlangten Manuskripten ist Rückporto beizufügen; es wird für sie keine Haftung übernommen. — Alle Rechte vorbehalten. Fotomechanische Vervielfältigungen zum innerbetrieblichen oder beruflichen Gebrauch sind nur nach Maßgabe des zwischen dem Börsenverein des Deutschen Buchhandels und dem Bundesverband der Deutschen Industrie abgeschlossenen Rahmenabkommens 1959 und des Zusatzabkommens 1960 erlaubt. Werden die Gebühren durch Wertmarken der Inkassostelle für Fotokopiegebühren beim Börsenverein des Deutschen Buchhandels o. V. entrichtet, so ist für jedes Fotokopieblatt eine Marke von —.10 DM zu entrichten. Druck: Tübinger Chronik, Tübingen.



sche internationale Soziologie und (Tiefen-)Psychologie bzw. Psychiatrie heranziehen sollen, mit der er in der Sache übereinstimmt, die aber dazu besonders viel zu sagen hat. Insgesamt ist das Buch aber sehr lesenswert und nützlich.

Professor DR. ANNE-EVA BRAUNECK, Gießen

**FISCHER-HERGET-MOLLOWITZ: Das ärztliche Gutachten im Versicherungswesen, Bd. I. 3.,** neubearb. Aufl. - München, Verlag J. A. Barth 1968. 885 S. Ganzl. DM 135,-.

Das zu rezensierende Werk erinnert in seiner neuesten Auflage nach Aufmachung und Inhalt an das von LOB herausgegebene „Handbuch der Unfallbegutachtung“, dessen erster Band 1961 erschienen ist. Unter den vielen Mitarbeitern des vorliegenden Werks finden sich denn auch vertraute Namen wieder (z. B. PERRET, REICHENBACH), zu denen sich Koryphäen gesellen, die als Gutachter ein Begriff sind (u. a. BÜRKLE DE LA CAMP, A. W. FISCHER, HERGET, MOLLOWITZ). Das Werk gliedert sich in zwei Hauptteile, von denen der eine „Juristische Fragen“, der andere die „Begutachtung der Unfallfolgen und Berufskrankheiten“ umfaßt. Die Ausführungen im ersten Teil (Einzelthemen: „Allgemeine Fragen rechtlicher Natur“, „Das medizinische Gutachten bei Haftpflichtschäden“, „Das medizinische Gutachten bei Arzthaftpflichtschäden“, „Die private Unfallversicherung“) sollen dem ärztlichen Sachverständigen das nun einmal erforderliche haftpflicht- und versicherungsrechtliche Rüstzeug vermitteln, während der zweite Teil ausschließlich dem materiellen Gegenstand der medizinischen Begutachtung gewidmet ist. Hier zeigen Leuchten ihres Faches auf, was der Gutachter auf den Gebieten der Chirurgie, der Orthopädie, der Hautkrankheiten, der Urologie, der HNO-Heilkunde, der Augenheilkunde und der Stomatologie zu berücksichtigen hat, um ein überzeugendes Votum abgeben zu können. Interessanter für den Richter, den Anwalt, den Verwaltungsfunktionär und den Versicherungssachbearbeiter sind naturgemäß die juristischen Betrachtungen, um so mehr, als dabei auch Mediziner zu Wort kommen. Der Durchschnittsmediziner und der 08/15-Jurist reden leider häufig aneinander vorbei, weil der eine den anderen und umgekehrt nicht so recht versteht. Es ist daher zu begrüßen, daß juristisch ausreichend beschlagene Mediziner wie PERRET und REICHENBACH zu Kollegen sprechen, um sie behutsam in das juristisch Denkschema einzuführen. Richter und Anwalt wissen es zu schätzen, wenn der medizinische Sachverständige zwischen Verursachung und Verschulden und zwischen abstrakter und konkreter Erwerbsminderung zu unterscheiden vermag. Das Studium des Werks macht den Mediziner nicht zum Juristen, ebensowenig wie der Jurist zum Mediziner wird; es trägt aber dazu bei, daß beide sich gegenseitig besser verstehen. Das allein schon sollte genügen, dem Werk einen angemessenen Bestsellerrang zu sichern.

Rechtsanwalt DR. MAX SCHMALZL, Stuttgart

**Medizinische Psychologie.** Ein Kompendium. Von Prof. DR. J. DELAY und Prof. DR. P. PICHOT. Übersetzt u. bearb. von DR. DR. W. BÖCHER. - Stuttgart, Verlag Georg Thieme 1966. 399 S., 41 Abbildungen, flexibel geb. DM 10,80.

Das Werk ist ursprünglich aus einer Vorlesungsreihe, die 1961-1962 in Paris zur psychologischen Ausbildung der Medizinstudenten gehalten wurde, hervorgegangen. Bestehend daran ist die typisch französische Klarheit der Definitionen und der Gliederung.

Nur verfallt man nicht in den Irrtum zu glauben, es handle sich bei der bescheidenen Aufmachung und dem relativ geringen Umfang um eine leicht faßliche Einführung in die Materie. Im Gegenteil, es werden doch recht solide Grundkenntnisse vorausgesetzt (zum Beispiel ist die Neurophysiologie der Empfindungen und Wahrnehmungen in dieser schlagwortartigen Kürze sonst nicht zu verstehen).

Dann allerdings ist dieses Kompendium eine sehr wertvolle Zusammenstellung der verschiedenen Erkenntnisse und Theorien auf dem Gebiet der normalen und pathologischen Psychologie.

Ein gründliches Literaturverzeichnis zu jedem Kapitel, das der deutsche Bearbeiter noch durch deutschsprachige Veröffentlichungen ergänzt hat, sowie ein Register erhöhen den Wert dieses Taschenbuches.

DR. MED. ERIKA SAURE, Frankfurt/M.

**Wassergesetz für Baden-Württemberg mit DVOen und WHG.** Kommentar von RegDir. DR. MANFRED BULLING und RRat OTTO FINKENBEINER. Loseblattausg. - Stuttgart, W. Kohlhammer-Verlag 1968. 454 S. einschl. Ordner DM 36,-.

Das WHG machte eine Neuschaffung des früheren Badischen-Hohenzollernschen (Preußischen) und Württembergischen Wasserrechtes für das Land Baden-Württemberg notwendig. Das Gesetz ist seit dem 1. 3. 1960 in Kraft. Schon die früheren

Wasserrechte gingen davon aus, daß am Gewässerbett ein Privateigentum im allgemeinen nicht möglich sei.

Das neue WasserG hat das öffentlich-rechtliche Eigentum am Gewässerbett für Staat und Gemeinden festgelegt. Das WasserG und mit ihm die Verf. als Referenten für Wasserrecht nehmen an, daß das Fischereirecht als früheres Regal des Staates der Gewässerhoheit des Staates untergeordnet sei und deshalb bei staatlichen Eingriffen infolge Ausbau und Unterhaltung von Gewässern keinen Schutz verdiene. Diese Auffassung wird von anderen Kommentaren wie ZIEGLER, Kommentar zum WG für Baden-Württ., sowie SEITTER, Fischereirecht und Enteignung, Bad.-Württ. VerwBl. 65, 4, und GERHARD WIEDMANN, Das Fischereirecht bei Gewässeränderungen (Dissertation Tübingen, 1967) nicht mehr geteilt.

Auch die noch nicht rechtskräftige Entscheidung des VG Stuttgart v. 11. 12. 1967 - VRS I 61/63 - lehnt den Ausschluß von Entschädigungsrechten des Fischereiberechtigten ab.

Der Kommentar ist sehr sorgfältig bearbeitet. Er enthält neben den zum WG ergangenen Rechtsverordnungen auch sonst nicht bekannte Ministerialentscheidungen und Gerichtsurteile. Wer sich über eine Frage gründlich und zuverlässig unterrichten will, wird in dem Kommentar die Antwort finden.

Rechtsanwalt DR. ROLF LAIBLIN, Stuttgart

**Briefe an einen jungen Deutschen.** Von Prof. DR. HEINRICH KRONSTEIN. 2. Aufl. - München, C. H. Beck'sche Verlagsbuchhandlung 1968. 323 S. Ganzl. DM 16,80.

Wer sich jemals in seinem Leben mit Wirtschaftsrecht befaßt hat, kennt den Namen HEINRICH KRONSTEIN. Man weiß um seine juristischen Verdienste in den Vereinigten Staaten und in der Bundesrepublik Deutschland. Man weiß, welchen großen Beitrag zur Frage des Kartellrechts und zum Problem des Aktienrechtes er geleistet hat. Mit anderen Worten: Er ist ein originärer juristischer Geist.

Aber wer würde vermuten, daß KRONSTEIN an einen jungen Deutschen, der aus Thüringen stammt, Briefe schreibt, in denen er das ganze Schicksal seiner Generation vor der heutigen Jugend offenlegt? Keine mit den Fragen der praktischen Jurisprudenz vertraute Persönlichkeit kann an diesem Buch vorbeigehen, in dem KRONSTEIN, von dem wir alle wissen, daß er gleichzeitig Lehrer an der Johann-Wolfgang-Goethe-Universität in Frankfurt/Main und an der Georgetown University in Washington ist, sein juristisches Bekenntnis ablegt.

Im einzelnen:

1. Wir erfahren von ihm, daß er in der Schule eines MARTIN WOLFF groß geworden ist und bei ihm über die Frage des Heimstättenrechtes doktoriert hat. Wir erfahren aber auch gleichzeitig, daß er schon damals im Gegensatz zu seinem Lehrer Wege gegangen ist, in denen er sich dem Gründer der Freirechtsschule - ERNST FUCHS - genähert hat, weil er frühzeitig erkannte, daß nicht nur der Gesetzgeber, sondern auch der Richter berechtigt und verpflichtet ist, das Recht weiterzubilden. KRONSTEIN legt deshalb überzeugend dar, daß der Wortlaut einer gesetzlichen Bestimmung niemals entscheidend sein kann. Letzten Endes kommt es nach KRONSTEIN auf die Frage an, ob die Rechtsinstitute, die Rechtsnormen und die Gesetzesbestimmungen vorhanden sind, um einem Ziele zu dienen, das sich aus der Gesamtordnung der Gesellschaft ergibt. Die Wahrung gewisser Grundwerte bleibt nach KRONSTEIN das Entscheidende, wenn der Rechtssuchende nicht der Willkür der Gerichte und ihrer Auslegung ausgesetzt sein will.

2. Rechtshistorisch wird hier zum ersten Mal von einem Juden der Versuch der Lösung der Judenfrage im Dritten Reich geschildert. Der Vorwurf HANNAH ARENDTS, das Judentum in Deutschland habe sich widerstandslos hinschlachten lassen, wird als illusorisch zurückgewiesen. Gleichzeitig wird die Verweigerung einer Antwort des brillanten Rechtstechnikers CARL SCHMITT als Schuld der Professorenschaft charakterisiert, die weitgehend vor, während und nach 1933 versagt hat.

3. Mit Schaudern erfährt man, daß die nicht in einer wirklichen Überzeugung, sondern in einem farblosen Liberalismus wurzelnden Menschen erst sich selbst und dann ihre Mitmenschen freigesetzt und damit wider Willen das Chaos herausgeführt haben, das nicht nur Deutschland, sondern auch viele andere Länder jahrelang beherrscht hat und vielleicht noch heute beherrscht.

4. Trotzdem spricht aus diesem Buche ein überzeugender Optimismus, daß es allen Widrigkeiten zum Trotz den für das Gute lebenden Menschen gelungen ist und gelingen wird, die Maßstäbe zu finden, die uns in den Stand versetzen, die tiefe Kulturkrise unserer Zeit zu überwinden.

DR. FABIAN VON SCHLABRENDORFF,  
Richter am Bundesverfassungsgericht, Karlsruhe



## BOOK REVIEWS

### **Schmitthoff's Export Trade: The Law and Practice of International Trade, 9th Edition**

By Clive M. Schmitthoff.\* London Stevens & Sons, 1990, pp. cii, 798, \$86.75.

With the appearance of the ninth edition of Professor Schmitthoff's *Export Trade* it is hard to realize that the first edition appeared in 1948 when the nations of the world were still recovering from the devastating effects of World War II and international trade was just beginning to revive. There had been no Treaty of Rome to give birth to the European Economic Community and no Convention of Stockholm setting up the European Free Trade Association. The developments over the intervening years in all the fields covered by this book have been phenomenal, and yet the author (who has written by far the major part of each edition) has managed to keep abreast of them all. Professor Schmitthoff has, however, done much more than simply keep abreast of the developments in the international trade, he has also analyzed and explained them in a concise and well-organized fashion for both lawyer and businessperson alike. As he states in his preface, he writes "to give guidance to the newcomer and the expert" (p. vii), and this he certainly achieves.

The extent of the task undertaken by the author is appreciated when one considers the wide diversity of the topics covered by the book. These range from, of course, sale of goods, through marketing, financing, insurance, transportation and conclude with customs law. The needs of the businessperson are kept in mind as the author is careful not only to mention the forms required for particular transactions, but also the addresses of agencies from whom such forms or further information are available. At the same time the author bears in the mind the needs of the legal practitioner and academic by always providing the sources and the appropriate readings when discussing any points of law. His system of cross-references is good, and the examples he uses when explaining a difficult point are always helpful and to the point. Professor Schmitthoff is particularly to be commended for the way he endeavors to anticipate legal issues that might arise out of legislative developments when as yet there has been little or no litigation.

The author is careful to pay attention to the new trends in international trade law. He draws attention to the global integration in this field and the increasing importance of European Community law. These developments have led to two new chapters in this edition, one on Product Liability and the other on Com-

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\**Editor's Note:* Professor Emeritus Clive M. Schmitthoff passed away on September 28, 1990.



plaints Procedures under the General Agreement on Tariffs and Trade. The former is, of course, a large area, but on account of the nature of this book and the many topics it has to cover the subject unfortunately is dealt with in just fourteen pages. While the coverage is as always lucid, much has either been dealt with cursorily or omitted altogether. The lawyer will soon be aware of this, but it is to be hoped that the businessperson will not be misled by the oversimplification of a difficult subject.

Each edition of any work in the rapidly expanding subject of international trade law is bound to be overtaken fairly quickly by both political and legal developments. The enormous changes that have taken place in Eastern Europe (including the reunification of Germany) have mostly occurred since the writing of this book toward the end of 1989. These developments have already affected and will continue to affect international trade, particularly in Europe. For example at page 762 there is reference to the Coordinating Committee on Multinational Export Controls (CoCom), which vets the transfer of sensitive Western technology to the Eastern bloc. Fortunately, Eastern and Western bloc concepts in the international trade world are becoming things of the past. We are also standing on the brink of the establishment of a single market in the European Community by December 31, 1992. The single market is referred to in this edition, but of course its implications and ramifications will have to await future editions.

While the book focuses on United Kingdom cases and legislation, the author is careful throughout to refer to appropriate U.S. legislation and leading cases. The book includes an index to American legal materials referred to in the volume, and many chapters contain a succinct summary of relevant American law. The author pays tribute for these references to Professor Stephen Leacock of De Paul University, Chicago. Use of the book certainly will cross national boundaries, as is evidenced by the fact that its various editions already have been translated into Russian, Japanese, France, and Chinese.

All in all this new edition maintains the high standard set by the previous editions for a lucid and highly competent summary in one volume of so many different areas of international trade law. The fact that it has now reached its ninth edition surely indicates its value to anyone who is at all interested or involved in the field of export trade.

C.H.C. Edwards  
Professor of Law and Dean Emeritus  
Faculty of Law, University of Manitoba  
Winnipeg, Canada



## Current Topics in U.S.-German Tax and Commercial Law—Anniversary Issue in Honor of Otto L. Walter

Edited by Henry S. Conston, Osnabrück, Germany: Verlag A. Fromm, 1988, pp. 367, approx. \$40.00.

This is a useful, thorough book on selected U.S.-German topics<sup>1</sup> and an appropriate tribute to a man who truly has been American *and* German, a practitioner and a scholar. The emphasis on combining seemingly contrary aspects has characterized most of the life and work of Dr. Otto L. Walter. Dr. Walter appears to have been always on top of things: he was born in Hof, a small industrial town in the very north of Bavaria that now refers to itself as being "at the top of Bavaria"; Dr. Walter was at the top of his class and about to become, like his father, a Bavarian notary, a career reserved in Bavaria to the top law school graduates, when he was forced to leave Germany. After emigration, he reemerged in New York at the top of the U.S.-German tax and legal community and, finally, became the top of his own respected law firm. In his dedication to the present book, Walter Seuffert correctly states that Dr. Walter, a Munich emigrant in New York and a New Yorker travelling extensively in Germany and Europe, has provided an "encouraging experience," which was necessary to rebuild his home country.<sup>2</sup>

The bulk of the contributions to the present book deal with taxation; the two contributions dealing with commercial law concern the U.N. Convention on the International Sale of Goods and are written by associates of Dr. Walter's law firms in New York and Munich. The contributors include the most distinguished experts in their fields. Most of the contributions on taxation deal with matters under the U.S.-German Income Tax Treaty. While the U.S.-German Income Tax Treaty has been revised in the meantime, the essays continue to be important practical tools and scholarly sources.

### I. Structure and Content

Goerdeler and Jahn<sup>3</sup> reject the position of the German tax administration, which denies the German income tax exemption for remuneration of loans and services by a German partner to a U.S. partnership. Their argument is based on the basic rules of partnership taxation in the United States and Germany and on the general rule that, in international taxation, one needs to resort to domestic law in applying a treaty term that is not defined in, or otherwise controlled by, the

1. Hereinafter cited as CURRENT TOPICS.

2. Seuffert, *Dedication*, in CURRENT TOPICS, at 17, 18.

3. Goerdeler & Jahn, *Zur Problematik von Sondervergütungen unter dem deutsch-amerikanischen Doppelbesteuerungsabkommen aus deutscher Sicht*, in CURRENT TOPICS, at 25-42.



treaty. This rule, which is contained in most, if not all, international tax treaties, has been retained in the U.S.-German Income Tax Treaty as well. Goerdeler and Jahn present a considered, useful rationale: treaty terms should be applied identically in both treaty countries. Therefore, an express definition in the treaty or a definition to be derived from the context of the treaty has priority over any other interpretation. However, in the absence of such a definition in or by the treaty itself, each country is not free to interpret the treaty as it wishes. Rather, the treaty requires that each country apply the treaty in accordance with its own domestic law. The objective of this rule is not merely the elimination or reduction of arbitrary or unpredictable treaty application. Each country is required to follow the standards that the country itself has set in defining its own domestic law. This requirement combines principles of nondiscrimination, the prohibition of *venire contra factum proprium*, practicality, and predictability.

Lempenau<sup>4</sup> discusses the importance of the place of performance in taxing income derived from services. He focuses on the tax and legal ramifications of the issue, as illustrated by the unique German rule that services of a company's managing director are deemed performed at the statutory seat of the company. Lempenau retraces the development of the pertinent case law: initially, the courts sought to tax nonresident managing directors of German companies irrespective of the place where the services were actually performed. This approach backfired because it exempted from German tax the income of German managing directors of foreign companies. As a result, the German tax courts, prodded by the German tax authorities, began to "refine" the rule in a manner that made its application both uncertain and unconvincing. Lempenau advocates the U.S. rules, under which service income would be taxed solely on the basis of the place of (effective) performance. While Lempenau stresses the 1986 U.S. tax reform, this U.S. rule dates back much further.

Killius<sup>5</sup> discusses German taxation of Anglo-American trusts under both domestic and treaty law. He distinguishes between Germany as the country of the source, Germany as the country of residence of the trustee, and Germany as the country of a lifetime beneficiary. The emphasis is on Germany as the country of the source. Killius puts the German rules of trust taxation into the broader context of the provisions and general rules of German income tax treaties. Trusts may be a very flexible and efficient tool for both international and German legal and tax planning. Apart from several uncertainties concerning basics and details of German trust taxation, the German tax authorities have been opposed to the use of trusts strictly for German tax planning. Nonetheless, Killius points out the many opportunities for using a trust for German property of nonresidents, for

4. Lempenau, *Der Tätigkeitsort als Abgrenzungskriterium bei der Besteuerung von Einkünften aus Dienstleistungen*, in CURRENT TOPICS, at 43-62.

5. Killius, *Der anglo-amerikanische Trust und die deutschen Doppelbesteuerungsabkommen*, in CURRENT TOPICS, at 63-79.



nonresidents moving to, or moving back to, Germany, and for foreign assets of German residents. He provides new explanations for several German income tax decisions in this area. The most interesting tax benefits (as well as the most serious risks) derived from using a trust lie in the area of inheritance and gift tax.

The development of German tax law in the area of income taxation may be summarized by noting the increasing preference for the fully or partially transparent treatment of trusts for German tax purposes. This is also evident from Killius's discussion on, and practical German tax treatment of, other quasi-transparent structures (like conduit companies applying for treaty benefits or being designated as recipients of payments from Germany).

Horst Vogel<sup>6</sup> contributes a critical view of German constitutional and tax law aspects of the retroactive application of tax treaties. He is skeptical of the distinction between retroactivity, in a narrow and a broad sense, and retrospectivity. He emphasizes that a permitted retrospective application of a new treaty or law to factual situations created many years ago may impose much more unreasonable burdens on a taxpayer than would a forbidden retroactive application over a short period. Vogel denies that the interpretation of the concept of retroactivity allows for fine distinctions; rather, he suggests that the concept is axiomatic and binds both those who make and those who apply the law.

Klaus Vogel<sup>7</sup> analyzes the German "source" rules contained in two separate sets of provisions of the Income Tax Act, distinguishing between the foreign tax credit rules for residents earning foreign income and the rules on taxing nonresidents earning German income. The U.S. rules, as reflected in the International Revenue Code (IRC), distinguish between source rules and jurisdictional rules: the different sets of jurisdictional rules imposing tax (like those beginning with section 871 of the IRC) are separate from the source rules (beginning with section 861 of the IRC). The approach of the German Income Tax Act (ITA) has been the opposite: originally, source rules were only contained in the rules imposing tax on nonresidents (section 49 of the ITA). The source rules for the foreign tax credit for residents were added only recently. Between the two sets of source rules is a third area of sources of income that are neither German nor foreign (now covered by the rules on expatriate taxation in section 2 of the Foreign Tax Act). Vogel advocates a single set of source rules in order to distinguish German and foreign sources for all purposes.

Weber,<sup>8</sup> a retired official of the German Federal Finance Ministry and a veteran of German treaty negotiations and applications (including the old U.S.-German

6. Vogel, *Zur Rückwirkung von Regelungen in Abkommen zur Vermeidung der Doppelbesteuerung*, in CURRENT TOPICS, at 81-100.

7. Vogel, "Source" und "Jurisdiction" im Steuerrecht der Vereinigten Staaten und im deutschen Recht, in CURRENT TOPICS, at 101-14.

8. Weber, *Überblick über die deutsche Rechtsprechung zum Doppelbesteuerungsabkommen zwischen den Vereinigten Staaten und der Bundesrepublik Deutschland*, in CURRENT TOPICS, at 115-68.



Income Tax Treaty), provides a fairly complete summary of German case law on the U.S.-German Income Tax Treaty. He starts his paper by highlighting the fact that the U.S.-German Income Tax Treaty of 1954 was the first German postwar treaty and was fraught with difficulties on the German side in understanding and dealing with the problems arising in the U.S.-German context. The difficulties have been reflected in the practical application of the treaty to this day. Take for instance the exemption of U.S. dividends paid to German corporate parents, an exemption that originally was not restricted to intercompany dividends, and until today, appears inappropriately limited to dividends subject to U.S. withholding tax, irrespective of the underlying U.S. corporate taxation. Or consider the prohibition against extraterritorial taxation in article XIV(2) on the German side, where the treaty provision was written very broadly even though an early paper coauthored by Dr. Walter (who advised the German side in the treaty negotiations at the time) indicates that the German side realized the uncertainty and possible broadness of the provision. (It was only after Weber wrote his paper that the German Supreme Tax Court applied article XIV(2) to exempt the German branch of a U.S. bank from German tax on interest income earned in the branch, a result even more surprising than recent U.K. case law applying the similar rule in the U.K.-U.S. treaty to a U.K. branch of a German and a Brazilian bank).

Debatin<sup>9</sup> analyses the rationales and the application of the U.S.-German Estate Tax Treaty. The difficulties in negotiating the treaty are reflected in several extraordinary provisions with loose ends, for example, the taxation of partnerships or estates and trusts. These are the estate tax aspects of the general complexity of partnership and trust structures, which are also reflected in the income tax papers mentioned above. In addition, the Estate Tax Treaty contains other interesting provisions regarding, for example, dual residents, allocation of liabilities, and inclusion of state taxes for German foreign tax credit purposes.

Ebke<sup>10</sup> proposes a functional rather than deductive or inductive approach to the application of the German Value-Added Tax (VAT) rules to a German holding company with an interest in a U.S. or other subsidiary corporation or partnership. Starting with the basic distinction between consumption and excise taxes, Ebke confirms German and European Community case law, which denies the VAT credit to these holding companies.

Van Hoorn<sup>11</sup> advocates the deduction of losses of a foreign subsidiary by its domestic parent. He contrasts the need for such a deduction with the legislative and administrative practice of seeking to tax foreign profits under anti-abuse and anti-avoidance tax legislation, such as U.S. Subpart F or the German *Aussensteuergesetz*.

9. Debatin, *Das amerikanisch-deutsche Erbschaftsteuer-Doppelbesteuerungsabkommen als Instrument des Steuersystemausgleichs*, in CURRENT TOPICS, at 169-204.

10. Ebke, *Transnational Investments and Germany's Value Added Tax: A Statute in Search of a Purpose*, in CURRENT TOPICS, at 207-40.

11. Van Hoorn, *The Tax Treatment of Foreign Losses*, in CURRENT TOPICS, at 241-46.



Levin<sup>12</sup> reviews the fundamental issues of U.S. constitutional and tax law involved in the "override" of tax treaties by U.S. domestic law. At the time of his writing, the residual treaty override of the 1987 Technical Corrections Bill had only been proposed. Levin expresses his hope that this proposal would be recognized as misguided and withdrawn before it could injure U.S. international relations. This hope unfortunately has not been realized. Rather, treaty overriding has become almost a fixture in international tax treaty discussions.

Von Borch<sup>13</sup> summarizes the history of the U.N. Convention on the International Sale of Goods since the 1930s and throws some light on its future. Para<sup>14</sup> focuses on the U.N. Convention from a U.S. point of view.

## II. Conclusion

The book concludes with an incomplete summary of Dr. Walter's bibliography, listing more than one hundred books, articles, and lectures on matters of substantive and procedural tax law, on U.S.-German investment in general, on matters of business, trade, and currency, on the Bible, on ethical considerations, and on the international practice of law.

The book is memorable and useful, and — notwithstanding some typographical errors — a reliable and illuminating treatise on U.S.-German tax and commercial law.

Reinhard Pöllath  
Rädler Raupach & Bezenberger  
Frankfurt

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12. Levin, *United States Legislative Override of Tax Treaties*, in CURRENT TOPICS, at 247-62.

13. Von Borch, *Einheitliches UN-Kaufrecht. Entwicklung A Inhalt A Zukunft*, in CURRENT TOPICS, at 265-317.

14. Para, *The UN Convention on International Sales*, in CURRENT TOPICS, at 321-55.



nerlei Schwierigkeiten haben.

Da ich nicht zu meinem guten Jungen gelangen kann, so gehe ich zu meinen guten Eltern, in das einzige Land, bei dem man keine Devisen, keinen Permit, keinen Paß und kein Visum nötig hat.

Von Wiederbelebungsversuchen bitte ich dich abzusehen. Sie wären eine unnütze Grausamkeit.

Mein letzter Hauch wird Dank, Liebe und Segen für dich sein.

Der Deine bis in den Tod

Ludwig.

- 1 Karli: Ludwig und Helene Fuldas einziges Kind Karl Hermann Fulda (22.8.1909 - 5.1.1975). Den jungen Referendar trafen Hitlers Arierungsmaßnahmen schon Anfang 1933. Als "Mischling ersten Grades" fand er im Nazi-Deutschland keine Arbeit mehr. Nach einem gescheiterten Versuch, in Frankreich beruflich Fuß zu fassen, gelang es ihm und seiner Frau Gaby im März 1936, die Einwanderungsgenehmigung in die USA zu bekommen. Dort mußte Karl Fulda nochmals das Examen in amerikanischem Recht absolvieren und erhielt im Oktober 1938 eine feste Anstellung an der Cornell Universität in Ithaca N.Y. Ludwig Fulda, der seinen Sohn Weihnachten 1937 in New Haven besuchte, bemühte sich danach ebenfalls um eine unbefristete Aufenthaltserlaubnis für die Staaten.
- 2 Gustel: L. Fuldas in Frankfurt verheiratete Schwester Auguste Bruck (27.5.1872 - ?).
- 3 Peierls: Heinz und Else Peierls. Verwandte Fuldas, die zu seinem engsten Freundeskreis gehörten. Auch sie müssen Deutschland verlassen und flüchten am 4.3.1939 nach London.
- 4 Freund Hermann: Hermann Goldschmidt. Vgl. Brief Nr. 69, Anm. 12.
- 5 Günzburg und Wurzmann: Frankfurter Jugendfreunde Fuldas.
- 6 Luisa Saracini: Fulda lernte die bei Bozen lebende Gräfin Luisa Lorber-Saracini bei einem seiner ersten Karersee-Aufenthalte 1904 kennen und blieb ihr lebenslang freundschaftlich verbunden.
- 7 Elsa Bernstein: Fulda war mit dem Ehepaar Bernstein

seit seiner Münchner Zeit eng befreundet. Mit der Schriftstellerin Else Bernstein (Ps.: Ernst Rosner) führte er bis zu seinem Tod einen regen Briefwechsel, der leider nicht mehr erhalten ist. Vgl. Brief Nr. 69, Anm. 11.

- 8 Judenbuße: Als "Sühneleistung" bezeichnete Kontribution von 1 Milliarde Reichsmark, die Hitler den deutschen Juden nach dem Attentat von Herschel Grynszpan auf Ernst vom Rath, einen Beamten der deutschen Botschaft in Paris, auferlegte.
- 9 Reichsfluchtsteuer: Eine schon seit 1931 existierende Bestimmung, die den chronischen Kapitalschwund des deutschen Reiches verhindern sollte und zwar hauptsächlich mit Hilfe des Vermögens auswandernder deutscher Juden. Diese Steuer wurde unter der NS-Regierung auf 25 Prozent für ausgeführte Kapitalien über 50 000 Reichsmark erhöht. Die restlichen 75 Prozent des Vermögens konnten aber auch nicht in bar ausgeführt werden, sondern wurden auf sogenannte "Sperrmark-Konten" deponiert. Den ausgewanderten deutschen Juden war es zwar möglich, diese Konten gegen Devisen einzulösen, jedoch nur zu einem Kurswert von 50 Prozent (1938 waren es nur noch 10 Prozent). Der Barbetrag, den ein Auswanderer mitnehmen durfte, wurde im Juni 1934 von 10 000 auf 2000 Reichsmark und im Herbst 1935 auf 10 Reichsmark herabgesetzt. Durch diese ausbeutenden Gesetze flossen dem Reich hunderte von Millionen Reichsmark zu. (Vgl. dazu Drobisch/Goguel/Müller: Juden unterm Hakenkreuz, Berlin 1973)
- 10 Dr. Du Roy Raymond: Behandelnder Arzt Fuldas. (Vgl. Tgb. 13.3.1939).

Aus: B. Gayek v. W. v. Ungern-Sternberg, Ludwig Fulda Briefwechsel 1882-1939, Zeugnisse eines literarischen Deutschland (Verl. Peter Lang, Frankfurt 1988), Teil 2, S. 1042-1045



**Abschiedsbrief Fuldas an seine Frau Helene vor seinem Freitod am 30.3.1939.**

Hs.: FDH 23721, Frankfurt a.M.

B.D. 29.3.39

Mein guter Engel! Mein innigst geliebtes Herz!

Nun muß es sein. Ich kann es nicht länger ertragen, dir durch meine bloße Existenz eine Kette von Leiden aufzuerlegen, die weiter andauern und aller Wahrscheinlichkeit nach sich noch verschärfen würden. Ich habe keine Hoffnungen mehr, weder hinauszukommen, noch eine Änderung zu erleben. Was also soll ich noch? Da ohnehin meine Tage durch das Naturgesetz gezählt sind. Zusammen wären wir verloren; du allein aber wirst es nicht sein. Du bist 16 ½ Jahre jünger als ich und hast Anrecht auf das Leben. Du bist Arierin, und es wird dir, wenn ich nicht mehr bin, nichts mehr geschehen können. Darum kannst, sollst und mußt du gerettet werden.

Du pflegtest zu sagen, ich hinge am Leben, da irrtest du dich. Ich hing schon lange nur noch an dir - in grenzenloser, unsäglicher Liebe. Und aus Liebe zu dir verlasse ich dich. So unendlich leicht mir der Abschied von dieser Welt, wie sie geworden ist, fällt, so unendlich schwer fällt mir der Abschied von dir. -

Du wirst mich betrauern, mich vermissen, obwohl ich dir in den letzten Zeiten so oft und schwer auf die Nerven fiel. Aber du wirst mir nach mehr als sechs Jahren der Seelenfolter und nach den letzten Monaten der Höllenqualden Frieden gönnen.

Habe Dank, kniefälligen Dank für alles, alles!

Über 30 Jahre bist du mir ein so idealer Lebenskamerad gewesen, wie die kühnste Phantasie ihn sich irgend träumen kann. Du hast mich glücklich gemacht. Deine Liebe, deine Güte, deine Fürsorglichkeit, Hingebung und Aufopferung waren nicht zu überbieten. Du hast mir den geliebten Sohn geschenkt, dessen Kindheit und Jugend uns so viel gemeinsames

Glück spendete, und den wir hergeben mußten samt allem anderen, der aber gottlob geborgen ist. Du hast mir eine vorbildliche Häuslichkeit bereitet, die mir gestattete, ungestört meiner Arbeit zu leben. Und als das entsetzliche Schicksal über uns hereinbrach, da hast du dich als der großartige Charakter bewährt, der du bist - durch deine unwandelbare Treue, deine heroische Tapferkeit ohnegleichen.

Ich beschwöre dich kniefällig als mein letztes, heiligstes Vermächtnis: Lebe!! Lebe für dich, für Karl<sup>1</sup>; für mein Andenken. Behüte meinen Nachlaß und meine Urheberrechte (Reiß, Cotta, vielleicht auch Bloch). Behüte mein Lebenswerk, damit es in einer besseren Zukunft Zeugnis davon ablege, daß ich bis in den innersten Kern meines Herzens ein guter Deutscher gewesen bin.

Ich kann keine weiteren Abschiedsbriefe schreiben. Darum bitte ich dich, mein herzliches Lebewohl unsern Angehörigen (namentlich Gustel<sup>2</sup> und Peierls<sup>3</sup>), meinem alten Freund Hermann<sup>4</sup> (der mir wohl bald nachfolgen wird) Günzburg und Wurzmann<sup>5</sup> (Adressen in meinem Adreßbuch), meinen alten Freundinnen Luisa Saracini<sup>6</sup> und Elsa Bernstein<sup>7</sup>, sowie unsern hiesigen Bekannten zu übermitteln. (Auch dem Mädchen).

Für die wirtschaftliche Basis deiner Zukunft ist gesorgt, auch wenn du die Judenbuße<sup>8</sup> noch zweimal voll bezahlen mußt. Du hast unsere Effekten, die Leibrente, die für dich allein über 1100 Mark jährlich beträgt, die Lebensversicherung der Friedrich-Wilhelm im Werte von 860 Mark, unser Haus, das du voraussichtlich vorteilhaft verkaufen kannst, und den Ertrag des Hauses Laurin. Die Sperre der Reichsfluchtsteuer<sup>9</sup> wird vermutlich für dich aufgehoben werden. Alles in Allem ein Vermögen von erheblich über 200.000 Mark. Auch daß du aus meinen Urheberrechten noch etwas einnimmst, ist wenigstens nicht ausgeschlossen.

Von Dr. Du Bois Reymond<sup>10</sup> und Dr. Walter Wolff sind noch die Liquidationen einzufordern. Infolge der Gutergemeinschaft wirst du als meine Universalerbin mit der Erbübernahme kei-



zung eines bestimmten Strafverfahrens. In *einem* Strafverfahren kann daher nur *ein* Haftbefehl gegen einen Beschuldigten bestehen, auch wenn dieser mehrerer Taten dringend verdächtig ist. Dieser Haftbefehl muß alle Taten enthalten, die in demselben Verfahren untersucht werden, soweit der dringende Tatverdacht besteht (§ 112 I StPO). Es wäre ein Verstoß gegen die prozeßrechtliche Fairness<sup>1</sup>, wenn der Haftbefehl nur auf eine von den mehreren Taten gestützt würde, deren der Beschuldigte dringend verdächtig ist, vielleicht sogar zu dem Zweck, später die andere Tat zur Begründung des Haftbefehls nachschieben oder gar die eine Tat durch die andere ersetzen zu können. Nur wenn alle Taten, die den Haftbefehl zu rechtfertigen geeignet sind, in diesen miteinbezogen werden, wird eine Irreführung des Beschuldigten vermieden. Wenn dagegen der Haftbefehl nur auf eine Tat unter grundloser Weglassung anderer gestützt wird, kann der Beschuldigte zu unnützen Anträgen und Beschwerden und damit zu unnötiger Verzögerung und vielleicht sogar zu nichtgewollter Verlängerung der Untersuchungshaft bewegen werden. Aus eben diesen Erwägungen hat der Deutsche Bundestag bei den Beratungen über das Strafprozeßänderungsgesetz vom 19. 12. 1964 bei der Formulierung des § 114 II Nr. 4 StPO beschlossen, daß im Haftbefehl grundsätzlich alle Tatsachen anzugeben sind, aus denen sich der dringende Tatverdacht und der Haftgrund ergibt.

Daraus folgt, daß der Ausdruck „wegen derselben Tat“ in § 121 I StPO in der Regel — entgegen der Auffassung des *OLG Oldenburg* — das gleiche bedeutet, wie wenn es hieße „in demselben Verfahren“<sup>2</sup>. Wird eine neue Tat bekannt oder durch Verbindung zweier Verfahren Gegenstand der Untersuchung, so ist sie bei nächster Gelegenheit in den Haftbefehl miteinzubeziehen, wenn sie diesen zu begründen geeignet ist. War der Vollzug des Haftbefehls vorher ausgesetzt worden (§ 116 StPO), so kann die neue Tat Anlaß sein, diese Anordnung rückgängig zu machen (§ 116 IV Nr. 3 StPO)<sup>3</sup>. Nur wenn in einem Verfahren ein Haftbefehl aufgehoben worden ist und dann erst eine weitere Tat des Beschuldigten bekannt oder aus einem sonstigen Grund in das Verfahren einbezogen wird, kann wegen dieser neuen Tat ein neuer Haftbefehl erlassen werden. Für ihn läuft die 6-Monate-Frist für die besondere Haftprüfung nach den §§ 121, 122 StPO selbständig. Der frü-

here Haftbefehl und seine Vollzugsdauer haben hierauf keinen Einfluß mehr.

Nun zu dem Fall, mit dem sich das *OLG Oldenburg* zu befassen hatte. Die Verfahren vor dem Jugendschöffengericht und dem Landgericht waren z. Z. der Entscheidung des Oberlandesgerichts noch nicht miteinander verbunden. Im ersteren Verfahren bestand der Haftbefehl, über den zu entscheiden war; im letzteren war ebenfalls ein Haftbefehl erlassen, sein Vollzug war jedoch ausgesetzt worden. Da die beiden Verfahren noch nicht zu einem verbunden waren, konnten die beiden Haftbefehle nebeneinander bestehen. Wären sie schon verbunden gewesen, so hätten beide Haftbefehle zu einem zusammengefaßt werden müssen. In diesem Falle hätten auch die Vollzugszeiten aus beiden Haftbefehlen bei der Anwendung des § 121 StPO zusammengerechnet werden müssen. Z. Z. des Beschlusses des *OLG Oldenburg* bestand hierzu noch kein Anlaß. Darin ist dem Beschluß im Ergebnis — wenn auch aus anderen Erwägungen — zuzustimmen.

Das Bedenklichste an der Beschlußbegründung ist die Auffassung, die im letzten Absatz zum Ausdruck kommt: Wenn die 6-Monate-Frist zur Vorlegung der Akten am Tage der Beschlußfassung des vorlegenden Richters (§ 122 I StPO) schon abgelaufen gewesen wäre, hätte sich das Oberlandesgericht dazu genötigt gesehen, den weiteren Vollzug von Untersuchungshaft sofort zu beenden. Erfreulicherweise lehnt die große Mehrheit der Oberlandesgerichte eine derartige Schematisierung ab<sup>4</sup>. Nach der Entstehungsgeschichte der §§ 121, 122 StPO sollen in dem besonderen Haftprüfungsverfahren außer den normalen zusätzliche materielle Haftvoraussetzungen geprüft werden. Das soll an der 6-Monate-Grenze geschehen. Hätte der Gesetzgeber die Haftbeendigung nach 6 Monaten oder etwa auch nach einer anschließenden 3-Monate-Frist (§ 122 IV S. 2 StPO) allein wegen Versäumnis des Vorlegungstermins gewollt, hätte er eine automatische Haftbeendigung vorgesehen und vorsehen müssen. Dann hätte er auch nicht in das Ermessen des Oberlandesgerichts stellen dürfen, wie lange es sich für seine Entscheidung Zeit lassen darf (§ 121 III S. 1 StPO). Im übrigen darf dem Gesetzgeber doch nicht eine Regelung als gewollt unterstellt werden, bei der es vom reinen Zufall abhängen kann, ob die Untersuchungshaft weiterbestehen soll oder nicht. Diese Wirkung hatte früher und hat heute keine Haftprüfungsfrist.

Generalstaatsanwalt Dr. Theodor KLEINKNECHT, Nürnberg

<sup>1</sup> Schwarz-Kleinknecht, StPO, 27. Auflage, Einl. 7 A; Anhang A 4 Anm. 4 zu Art. 6 MRK.

<sup>2</sup> Schwarz-Kleinknecht, Anm. 1 C zu § 121 StPO.

<sup>3</sup> Dünnebier, Das neue Recht der Untersuchungshaft und in Löwe-Ro-

senberg, Ergänzungsband, 1966, Anm. 9 zu § 116 StPO.

<sup>4</sup> Wie Oldenburg *OLG Schleswig* NJW 65, 2119; *OLG Frankfurt*, 1. Strafsenat, NJW 65, 1731; 66, 2076, anders jedoch der 3. Strafsenat im Beschluß vom 26. 7. 1967, OLGSt S. 38 zu § 121 StPO.

## LITERATUR

*Kronstein, Heinrich*: Briefe an einen jungen Deutschen. München: Beck. 1967. 323 S. Lw. 16.80.

Dies Buch, äußerlich die Selbstbiographie eines Professors der Rechte in Briefform, gibt sich nüchtern und schlicht im Stil, durchsichtig und prägnant im Inhalt und in der Gedankenführung. Aber schon nach wenigen Seiten spürt der Leser: Es handelt sich um eines der tiefsten und aufrührendsten „Sachbücher“ der Nachkriegszeit. Zu Recht sagt Tiefenbacher im Betriebsberater 1967, S. 1495, Kronsteins „Briefe“ gehörten zu den aufschlußreichsten Autobiographien der letzten Jahrzehnte, die der Rezensent gelesen habe. Das Buch ist, um mit Tiefenbacher zu sprechen, eben nicht nur die historisch getreue Schilderung des Schicksals und der Odyssee eines jüdischen Mitbürgers. Das „Briefbuch“ hat viele Dimensionen, eine zeitgeschichtliche, eine personengeschichtliche, eine juristische, eine bildungspolitische, eine hochpolitische. Das einfache Gewand der Briefe an einen jungen deutschen Jurastudenten, der, aus der Ostzone kommend, mit unvoreingenommenen Fragen an den Autor herantrat und ihn dadurch zu einer Autobiographie veranlaßte, die glanzlose Sprache und die lockere, gelegentlich impressionistische Gedankenfolge erweisen sich als Untertreibungen. Sie sind möglicherweise gezielt; denn sie fangen den Leser ein in eine Dialektik von einfacher Aussageform und schwerem Aussageinhalt, wodurch die

zupackende, angreifende Wirkung des Buches nur noch verstärkt wird. Sicherlich spiegelt die Verhaltenheit der Darstellung eine typische Aussageweise Kronsteins wider. Kronstein pflegte sich oft auf diese Weise zu äußern, schon in seiner Habilitationsschrift über die abhängige juristische Person, oder in seinem Artikel „Arbitration is Power“, New York University Law Review, 1963. Auch in Kronsteins anschließend zu besprechendem, gleichzeitig mit dem „Briefbuch“ erschienenen Werk über die internationalen Kartelle gelingt dem Verfasser diese Darstellungsweise. Es wäre ein Mißverständnis, dies als Provokation oder als „Anklageschrift“ zu erstehen, wie Fritz Schönherr in seiner Besprechung des Kartellbuchs in der Österreichischen Juristenzeitung 1967, S. 588, andeutet. Kronsteins Aussagen sind nicht als Anklagen gemeint, weder im „Briefbuch“ noch im „Kartellbuch“, es geht ihm vielmehr nur um nüchterne Feststellungen, um gleichsam selbstverständliche Beobachtungen, deren Wirkung auf den Leser Kronstein offen läßt. Die dahinterstehende Meinung kann freilich dem Leser nicht entgehen, aber ein sachlich urteilender Gegner wird Kronstein zugestehen müssen, daß er seine Thesen ohne Schärfe und Sendungsbewußtsein vertritt. Die Themen des Briefbuchs und des Kartellbuchs sind im Grunde gleich: Das Verhältnis des Menschen zu den ihn steuernden Werten und die Überprüfung der Echtheit dieser Werte. Die im Briefbuch abgehan-



delten Themen sind Mittel zum Zweck der Darstellung der Grundfrage.

Das Buch schildert nur kurz, wie *Kronstein* im traditionsgebundenen, aber weltoffenen jüdischen Elternhaus aufwächst, wie 1914 sich die „allgemeine Auflösung unseres gewohnten Lebens vollzog“, und wie er dann an der Westfront als Melder „Verbindungen herzustellen“ hatte. Das ganze Buch ist ein Zeugnis dafür, wie man unter Beschuß von allen möglichen Seiten Verbindungen vorbereiten und herstellen kann, allerdings nicht mehr für kriegerische, sondern für friedliche Zwecke.

Auf die Schilderung der von politischen Störungen beeinflussten Studentenzeit in Heidelberg und Bonn, wo er Schüler von *Martin Wolff*, *Erich Kaufmann* und *Josef Partsch* wurde, folgt, biographisch eingekleidet, eine Einführung in den Kern *Kronsteinscher* Gedankengänge: Das Problem des Mißbrauchs juristischer Formen für Zwecke, für die sie nicht geschaffen sind. *Kronstein* benutzt die nicht undramatische Geschichte der Veröffentlichung seiner Schrift über die abhängige juristische Person zur Entwicklung seines Problems. Das 1931 erschienene Werk ist bis heute eines der wenigen und daher wichtigen Werke über die Grenzen, die der Verwendung des Eigentumsbegriffs und des Begriffs der juristischen Person vom wirtschaftlichen Zweck gesteckt sind. Wer sich mit der für das Konzernrecht entscheidenden Durchgriffsproblematik beschäftigt hat, muß erkennen, daß viele der von *Kronstein* damals aufgestellten rechtspolitischen Forderungen bis heute noch nicht erfüllt werden konnten.

Ein Brief schildert *Kronsteins* Anwaltstätigkeit (S. 106 ff.). Er enthält in kurzen Worten Grundsätze freiheitlicher Advokatur. („...Ich möchte sagen, daß es ein entscheidendes Kriterium für den Unterschied zwischen einem freien und einem totalitären Land ist, ob es ein Anwaltsbüro und ein Beratungszimmer dieser Art geben kann oder nicht.“) Wie *Kronstein* dann durch randalierende SA und auf andere Weise aus seiner Mannheimer Anwaltspraxis vertrieben wurde, wie die Bemühungen um einen organisierten Schutz jüdischer Mitbürger fehlschlagen, wie die Jahre der Emigration in USA begannen, zieht am Leser, bei aller Zurückhaltung in der Darstellung, eindrücklich und bedrückend vorüber. Nachhaltig wendet sich *Kronstein* gegen die These von *Hannah Arendt*, die deutschen Juden hätten sich nicht verteidigt, sondern seien wie preußische Soldaten, denen man zu sterben befohlen hätte, gestorben, auch sie hätten die „preußische Philosophie“ akzeptiert und so letztlich selbst ihren Tod veranlaßt.

Einem zweiten Studium der Jurisprudenz in den USA folgt die praktische Tätigkeit als Rechtsgutachter, Übersetzer und Sachbearbeiter im amerikanischen Justizministerium, und seit 1939 in der Antitrust Division unter *Thurman Arnold*. Seit 1942 bekleidet *Kronstein* eine Professur an der Georgetown University in Washington D. C. Was *Kronstein* über seine auch nach 1942 andauernden Arbeiten in der Washingtoner Justizverwaltung schreibt, gehört zu dem Interessantesten, was bisher über die Roosevelt-Verwaltung der Kriegsjahre aus deutscher Feder zu erfahren war. Höhepunkte der Darstellung sind dabei die Sitzung „kurz vor Beginn des deutsch-russischen Krieges“, in der schon damals die deutsche Teilung in der Art, wie sie heute besteht, als unvermeidlich vorhergesehen wurde (!) (S. 211), und die Schilderung des Sieges der „Negativisten“, als die Amerikaner im Zuge der Besetzung Deutschlands von den Massenvernichtungen der Juden erfuhren (S. 226/227). *Kronsteins* Beobachtung, daß die höhere amerikanische Verwaltung von der Eigenschaft deutscher KZs als Vernichtungslager erst im Zuge der Besetzung Deutschlands, also etwa ab Herbst 1944 erfuhren, dürfte einen Beitrag darstellen zu der bis heute ungelösten Frage, von wann ab in Deutschland und außerhalb Deutschlands die Durchführung der Vernichtungsprogramme bekannt sein mußte.

Das letzte Drittel des Buches wendet sich dem Wiederaufbau Deutschlands zu, an dem *Kronstein* als Wirtschaftssoffizier zeitweise mitgewirkt hat. Als Bestandteile einer nationalen und übernationalen Friedensordnung werden Fragen der Bildungsreform, der Einigung Europas und der internationalen Organisation erörtert. Eine differenzierende Betrachtungsweise wird vor allem auf die Fragen transatlantischer Universitätsreform angewandt. *Kronstein* warnt wie kaum ein anderer vor vereinfachender Übernahme fremder Muster.

Das Buch ist mehr als das Zeugnis eines Menschen, der, von seinem Volk verstoßen, sein Volk im Ausland juristisch und politisch vertritt, um nach der militärischen Niederlage seines Volkes wirtschaftlich, juristisch und geistig am Wiederaufbau teilzunehmen. *Kronstein* hätte dies nicht zum Gegenstand einer Selbstdarstellung gemacht. Es ließ sich für ihn nicht vermeiden, auch dies darzustellen.

Es geht *Kronstein* in diesem Buch um den Nachweis, daß man als Gelehrter, als Europäer und als Christ (*Kronstein* begründet im

Briefbuch seine 1935 erfolgte Konversion vom Judentum zum Katholizismus) auch in ausweglos erscheinender menschlicher und politischer Situation helfen und Brücken schlagen kann. Doch wäre das Buch nicht ausgeschöpft durch seine Charakterisierung als moralischer Appell an die junge Generation. Auch soll kein „Beispiel“ aufgezeigt werden. Man könnte dem Briefbuch auch die Überschrift „Transatlantische Reflexionen“ geben. Das Eigenartige dieses Buches ist, daß sich die Reflexionen zwar auf die verschiedensten Lebensbereiche, wie Recht, Politik, Wirtschaft, Geistesgeschichte, Bildungsreform, Religion beziehen, und daß doch alle Reflexionen ausgehen von einer im Glauben verwurzelten personalen Mitte und eben darum nicht Reflexionen bleiben, sondern zu gelebten und beschriebenen Taten werden. So leicht zugänglich die gedankliche Erfassung des „Briefbuches“ als bloßer „moralischer Appell“ wäre, so schwer zugänglich ist die Erfassung dieser Vielschichtigkeit des Buches. Und doch scheint *Kronstein* unmittelbar verstanden zu werden. Die erste Auflage war binnen weniger Wochen vergriffen. Eine zweite ist im Erscheinen.

Prof. Dr. Wolfgang FIKENTSCHER, Tübingen

*Kronstein, Heinrich*: Das Recht der internationalen Kartelle, zugleich eine rechtsvergleichende Untersuchung von Entwicklung und Funktion der Rechtsinstitute im modernen internationalen Handel. Berlin: J. Schweitzer. 1967. XXXVIII, 518 S. (Recht der internationalen Verwaltung und Wirtschaft, Bd. 5. Hrsg. von *Günther Jaenicke*, *Heinrich Kronstein*, *Hans Jürgen Schlochauer* in Verbindung mit dem Institut für ausländisches und internationales Wirtschaftsrecht, Frankfurt a. M.) Lw. 146.—

Es handelt sich um den fünften, aber zeitlich zuerst erschienenen Band eines neunbändigen Sammelwerkes, das unter der Betreuung des Instituts für ausländisches und internationales Wirtschaftsrecht an der Universität Frankfurt am Main das Werk von *Karl Neumeier*, Internationales Verwaltungsrecht, vier Bände, 1910—1936, fortsetzen will. In dem hier zu besprechenden Band 5, „Das Recht der internationalen Kartelle“, legt *Kronstein* das Ergebnis jahrzehntelanger Studien im internationalen Kartellrecht vor. Das Werk geht zutreffend von der Tatsache aus, daß es eine internationale rechtliche Regelung der Kartelle nicht gibt. Das Buch wendet sich aber nun nicht einem vielleicht fruchtlosen Bemühen zu, die Eignung nationaler Kartellrechte zur Erfassung internationaler Kartelle zu prüfen, sondern es nimmt eine Arbeitsweise wieder auf, die seit *Arthur Nußbaums* „Rechtstatsachenforschung“ im Wirtschaftsrecht zu sehr vernachlässigt wurde: Die Erforschung tatsächlicher Zusammenhänge und rechtlicher Wirkungsabläufe. Die Arbeitsweise internationaler Kartelle in rechtlicher und wirtschaftlicher Hinsicht wird von *Kronstein* mit umfassendem Material belegt. Über die Rechtstatsachenforschung hinaus weist *Kronstein* Wege zu einer Regelung internationaler Kartelle in rechtspolitischer Hinsicht.

Nach kurzer Darstellung der zugrundeliegenden Probleme wendet sich der Verfasser unmittelbar dem Verhältnis zwischen staatlicher und privater Ordnung im internationalen Handel zu, wodurch das Buch erfreuliche Wirklichkeitsnähe gewinnt. Dem folgt eine Schilderung der modernen Kartelltypen, wobei man die Beschreibung des „technologischen Kartells“ als eine geglückte Entdeckung bezeichnen darf. Nicht mehr das Rohstoff- oder das Produktkartell steht heute im Vordergrund der wirtschaftsrechtlichen Bedeutung, sondern die Zusammenarbeit der Entwicklungsindustrien im technologischen Kartell. Auch dem Abwehrkartell werden eingehende Ausführungen gewidmet. Es folgt eine juristische Analyse des Vertragssystems der internationalen Kartelle unter Hervorhebung der Rolle der Vertragsparteien sowie anderer Marktbeteiligter, der Bedeutung der gewerblichen Schutzrechte und der Schiedsgerichtsbarkeit und Schlichtung.

In einem zweiten Teil des Buches prüft *Kronstein* die Verwendung und Umgestaltung der nationalen Rechtsinstitute durch internationale Kartelle. Dem „Besonderen Teil“ des internationalen Kartellrechts folgt gleichsam ein „Allgemeiner“. Der zweite Teil beginnt mit Ausführungen zum internationalen Privatrecht der Kartelle, das zunehmend eine Unterstellung internationaler Kartelle unter „neutrales Recht“ und „neutrale Gerichte“ zum Ziel hat. Dem folgt eine Darstellung der wichtigsten internationalprivatrechtlichen und -zivilprozeßrechtlichen Probleme in den wesentlich beteiligten Rechtsordnungen, unter Hervorhebung des deutschen und amerikanischen Rechts. Zutreffend wird der privaten Schiedsgerichtsbarkeit ein breiterer Raum eingeräumt als den üblichen internationalzivilprozessualistischen Fragen. Eine grundlegende theoretische Betrachtung beschließt den zweiten Teil, nämlich die „Verwendung und Umgestaltung der gewerblichen Schutzrechte und der juristischen Person“ für die Zwecke der internationalen Wettbewerbsbeschränkungen.



Vier Merkmale sind es also, die dieses Buch von anderen abheben: In methodischer Hinsicht das Wiederaufgreifen der Rechtsstatistikforschung; in rechtspolitischer Hinsicht der Ruf an die Rechtswissenschaft, sich des seit Jahrzehnten vernachlässigten internationalen Kartellrechts anzunehmen; in rechtsdogmatischer Hinsicht die Entdeckung und sehr genaue Beschreibung des „technologischen Kartells“; sowie, für das deutsche Schrifttum erstmalig, der umfangreiche Nachweis eines engen Zusammenhangs zwischen internationalem Kartellrecht und Schiedsgerichtsbarkeit.

Es mag verstattet sein, die rechtspolitische Thematik noch einmal aufzugreifen. *Schönherr* hat hierzu bemerkt, das Buch *Kronsteins* könne weithin als Anklage empfunden werden (Österreichische Juristenzeitung 1967, S. 587/588). Man muß sich fragen, gegen wen sich eine Anklage, wenn überhaupt, richtet. *Kronstein* beschreibt allerdings die handels- und wettbewerbsbeschränkenden Praktiken bestehender internationaler Kartelle und mit ihnen zusammenarbeitender Nationalstaaten und internationaler Organisationen so detailliert und gut belegt, daß der Leser, juristisch vorgebildet oder nicht, das Buch redit ermuntert aus der Hand legt. Und doch kann man mit Sicherheit sagen, daß *Kronstein* keine „Anklage“ gegen Bestehen oder Praktiken internationaler Kartelle richten wollte. *Kronstein* wollte die Dinge schildern wie sie sind. Ein in Jahrzehnten mühsam zusammengetragenes Material wird vorurteilslos vor dem erstaunten Leser ausgebreitet und durch einen kritischen Apparat unterbaut, der schlechthin Bewunderung abnötigt. Die rechtspolitische Haltung *Kronsteins* ist dabei aber nicht, daß man, was hier nachgewiesen wird, verbieten sollte. Aber *Kronstein* hält es nicht mit denen, die über die Wirtschaftswirklichkeit der internationalen Kartelle nicht sprechen wollen, die, um mit den Worten der alten Reichstagsdenkschrift aus den Jahren 1904/1906 zu sprechen, sagen würden: „Die Zusammenhänge hält man diskret“. *Kronstein* hat es sich zur Aufgabe gesetzt, das, was er auf Grund seiner wirtschaftsrechtlichen Erfahrungen in Theorie und Praxis persönlich für wichtig hält, auszusprechen und zu beschreiben.

Wenn das Buch also keine Anklage gegen die internationalen handelsbeschränkenden Praktiken enthält, so läßt es doch in anderer Richtung eine Kritik, wenn auch keine Anklage laut werden, und zwar durch seine bloße Existenz: Von ganz wenigen Ausnahmen abgesehen, hat es sich die Rechtswissenschaft, zumal in Deutschland, schon seit der Jahrhundertwende zu leicht gemacht, wenn es um das Verhältnis von Staat und Wirtschaft vor dem Forum der Gerichtigkeit geht. *Kronsteins* Buch will offenbar machen, daß es eine ganze Gruppe von wichtigen Zusammenhängen wirtschaftsrechtlicher Art gibt, die bisher zu wenig beachtet wurden. Zu lang hat man sich über bloße Rechtsformen (z. B. den Kartellbegriff), über gesellschaftsrechtliche Gestaltungsmöglichkeiten (z. B. die Doppelgesellschaft) und über rein kollisionsrechtliche Fragen (wie die Parteiautonomie, das gesellschaftsrechtliche Personalstatut und die Anknüpfung in der internationalen Schiedsgerichtsbarkeit) Gedanken gemacht, ohne sich über die wirtschaftlichen Hintergründe Rechenschaft abzulegen, die durch die Setzung von Machtpositionen den Rechtsfragen bestimmte Zielrichtungen zu geben vermögen. *Kronsteins* Buch will, trotz seines Umfangs, hier nur ein Anfang sein. Das Werk stellt nicht nur den Juristen des Wirtschaftsrechts, sondern auch denen des gesamten Privatrechts eine Aufgabe. Entsprechend *Kronsteins* Methode wird, auf umfangreiches Tatsachenmaterial gestützt, das rechtspolitische Anliegen und die Sorge um seine Verwirklichung deutlich. Es geht um eine Jurisprudenz, welche die von ihr eingesetzten Mittel unter Kontrolle behält, eine Jurisprudenz, die sich ihre Werkzeuge nicht von außerrechtlichen Kräften aus der Hand winden läßt.

Prof. Dr. Wolfgang FIKENTSCHER, Tübingen

*Brockhaus Enzyklopädie* in 20 Bänden. 17., völlig neu bearb. Aufl. des Großen Brockhaus. Bd. 4: CHOD — DOL. Wiesbaden: Brockhaus. 1968. 824 S. Subskr.-Preis für Bd. 4: Halbleder 79.--

Im Mittelpunkt dieses Bandes stehen die Artikel über Deutschland und die anderen mit „Deutsch...“ beginnenden Stichwörter. Sie

sind im Vergleich mit der Voraufgabe erheblich erweitert (rd. 230 Seiten!) und bieten eine Fülle von Informationen. Im Artikel „Deutschland“ wird u. a. ausführlich über Verfassung, Verwaltung, Finanzen, Wirtschaft, Bildungswesen usw. der Bundesrepublik (S. 618—644) und der DDR (S. 644—665) berichtet. Hervorgehoben seien ferner die Artikel „Demokratie“ (informativ, soweit in dem zu engen Umfangsrahmen möglich) und „Dialektischer Materialismus“ (mit gutem Literaturnachweis) sowie „Daten“ und „Dokumentation“ (beide stark ausgebaut). Den Stichwörtern „Diplom“ und „Doktor“ sind nützliche Verzeichnisse der Diplome und Doktorgrade der deutschsprachigen Hochschulen beigelegt. Im Artikel „Dissertation“ wird behauptet, „die Qualität der Dissertationen“ sei „in den meisten Fächern so gestiegen, daß heutige Dissertationen mit früheren Habilitationsschriften vergleichbar sind (!?). Deshalb (!?) werden seit 1967 sehr gute Dissertationen von einigen Fakultäten als Teile von Habilitationsleistungen anerkannt.“ — Ergänzungswunsch: Dem studentischen Disziplinarrecht, das in dem Artikel „Dienststrafrecht, Disziplinarrecht“ seltsamerweise unerwähnt bleibt, sollte ein eigener Artikel (mit Literaturnachweis) gewidmet werden. Die kurze, zudem mißverständliche Bemerkung im 2. Abs. der Ausführungen zum Stichwort „akademische Freiheit“ (Bd. 1 S. 248) reicht zur Information über die rechtlich und politisch problematische Materie nicht aus.

M.

*Scheyhing, Robert*: Höfeordnung. Köln: Carl Heymanns Verlag. 1967. 256 S. kart. 33.—

Das Buch enthält außer den in seinem Mittelpunkt stehenden Erläuterungen der Höfeordnung vom 24. April 1947, die auf den Stand des Schrifttums vom September 1966 abgestellt sind, die wichtigsten Gesetzestexte sowie Anmerkungen zu den §§ 37, 38, 58, 59 der Verfahrensordnung für Landwirtschaftssachen. Den Erläuterungen (183 Seiten) liegt der Leitgedanke zugrunde, das in den Ländern Hamburg, Niedersachsen, Nordrhein-Westfalen und Schleswig-Holstein geltende Anerbenrecht als eine mit dem Erbrecht des Bürgerlichen Gesetzbuchs verbundene Sonderregelung verständlich zu machen. Dementsprechend schließt sich der Gang der Ausführungen möglichst an die Begriffe des bürgerlichen Rechts an, wobei vereinzelt Seitenblicke auf Regelungen anderer deutscher Anerbengesetze gerichtet werden. Durch die Deutlichkeit, mit der diese Konzeption in den Erläuterungen hervortritt, hebt sich das Werk *Scheyhings* von den beiden umfangreicheren Kommentierungen ab, die in der 6. Auflage der Höfeordnung von *Lange/Wulff* nach dem Stande vom Sommer 1965 sowie in der völlig neu bearbeiteten 2. Auflage von *Wöhrmann*, Landwirtschaftsrecht, vom Mai 1966 — sie konnte noch nicht verwertet werden — geboten werden; diese gehen mehr auf die Entstehungsgeschichte und die Vorläufer der in der Höfeordnung enthaltenen Regelungen ein.

Die Erläuterungen zeichnen sich durch selbständige Gedankenführung aus und geben infolgedessen auch dort, wo sie im Ergebnis den Meinungen anderer entsprechen, nicht selten eigene Begründungen. Im ganzen überwiegt das Bestreben, die vertretenen Standpunkte eingehend zu fundieren, gegenüber einer Tendenz, überall Rechtsprechung und abweichende Meinungen und deren Gründe zu behandeln oder zu erwähnen (vgl. z. B. Anm. 9 zu § 8 — a. A. *Wöhrmann* —, Anm. 30 zu § 8 — abweichende Rechtsprechung —, Anm. 13 zu § 13 — *BGHZ* 28, 92 —, Anm. 21 zu § 14, Anm. 15 zu § 17 — *BGH RdL* 1962, 18 u. a. —, Anm. 54 zu § 17 — abweichende Rechtsprechung —).

*Scheyhings* flüssig geschriebene Erläuterungen haben entsprechend dem beschränkten Umfang ihren Schwerpunkt in den Hauptproblemen des Höferechts, z. B. ist der Übergabevertrag besonders eingehend behandelt (22 Seiten). Bei Erwähnung und Erörterung von weiteren Einzelfragen, die sich für die Anwendung der Vorschriften der Höfeordnung ergeben, zeigt der Verfasser verständliche Zurückhaltung. Die dabei getroffene Auswahl des Stoffes erscheint fast durchweg als gelungen; sie macht das Werk übersichtlich und regt den Leser zum Denken an.

Ministerialdirigent Dr. Heinrich von SPRECKEISEN, Bonn

Verantwortlich für den redaktionellen Teil: Dr. Ulrich Weber, Tübingen. — Verantwortlich für den Anzeigenteil: Konrad Bader, Heidelberg. Die Juristenzeitung erscheint zweimal monatlich. Abonnementspreis vierteljährlich DM 14.70 (einschließlich DM —.70 Mehrwertsteuer) zuzügl. Postgebühr DM —.80, für Studenten und Referendare DM 9.90, Preis des Einzelhefts DM 3.—. Bestellungen werden durch den Buchhandel, die Postanstalten und den Verlag entgegengenommen. Bestellungen zum ermäßigten Preis (DM 9.90) nur durch Buchhandel und Verlag. Abbestellungen müssen spätestens 3 Wochen vor Quartalsschluß erfolgen. — Zuschriften, die sich auf den Inhalt der Zeitschrift beziehen, werden an die Redaktion der Juristenzeitung, 74 Tübingen, Wilhelmstr. 18, erbeten, geschäftliche Mitteilungen an den Verlag J. C. B. Mohr (Paul Siebeck), 74 Tübingen, Postfach 2040, Zuschriften, die sich auf Anzeigen beziehen, an die Juristenzeitung, Anzeigenabteilung, 6900 Heidelberg 1, In der Aue 4 a. — Unverlangten Manuskripten ist Rückporto beizufügen; es wird für sie keine Haftung übernommen. — Alle Rechte vorbehalten. Fotomechanische Vervielfältigungen zum innerbetrieblichen oder beruflichen Gebrauch sind nur nach Maßgabe des zwischen dem Börsenverein des Deutschen Buchhandels und dem Bundesverband der Deutschen Industrie abgeschlossenen Rahmenabkommens 1959 und des Zusatzabkommens 1960 erlaubt. Werden die Gebühren durch Wertmarken der Inkassostelle für Fotokopiegebühren beim Börsenverein des Deutschen Buchhandels e. V. entrichtet, so ist für jedes Fotokopieblatt eine Marke von —.10 DM zu entrichten. Druck: Tübinger Chronik, Tübingen.



# Memoiren eines Rechtsanwalts

Was ein alter Professor heute jungen Deutschen zu sagen hat / Von F. A. Mann

Heinrich Kronstein: „Briefe an einen jungen Deutschen“; C. H. Beck'sche Verlagsbuchhandlung, München; 323 Seiten, 16,80 DM.

Die Mannheimer Anwaltschaft hat im deutschen Rechtsleben seit langem eine besondere Stellung eingenommen. Ihre hohe Qualität nahm ihr jeden provinziellen Charakter und ließ sie zu einem Zentrum wirtschaftsrechtlicher Beratungspraxis werden. Nunmehr aber zeigt sich ein weiterer Grund, indem sie wohl die beiden einzigen deutschen Anwälte hervorgebracht hat, die ihre Lebenserinnerungen veröffentlicht haben. Der erste war Max Hachenburg, einer der größten Söhne Mannheims, dessen „Lebenserinnerungen eines Rechtsanwalts“ 1927 erschienen sind. Der zweite ist Heinrich Kronstein, der unter dem weniger eindeutigen Titel „Briefe an einen jungen Deutschen“ sein Leben teils in Tagebuchnotizen aus dem Jahre 1945, teils in Briefen, der bekanntlich leichtesten Literaturform, überschaubar.

Allerdings war er nur kurz Anwalt in Mannheim. Er wurde 1897 in Karlsruhe als Sohn jüdischer Eltern geboren. Von etwa 1915 bis 1918 diente er im Ersten Weltkrieg. Von 1919 bis 1921 studierte er Rechtswissenschaften in Heidelberg, ging dann nach Bonn, wo er Martin Wolff nahekam („Irgendwie kamen wir gleich bei meinem ersten Besuch in ein sehr ernstes und sehr langes Gespräch“). Nachdem er schon 1921 in Baden das Referendarexamen bestanden hatte, ging er nach Berlin, um bei Martin Wolff zu doktorieren, aber hier ergab sich die erste Episode, die Kenner der Beteiligten aufschlußreich finden werden: die Doktorarbeit bestand aus zwei theoretischen und einem dritten, mehr praktischen Teil, aber Martin Wolff schickte ihm „die ganze Arbeit zurück und ließ mir mitteilen, daß er nur den dritten Teil als Doktorarbeit annehmen wolle. Diesen sollte ich fertigmachen; wenn ich aber doch das Ganze vorlegen wolle, so sollte ich mich an einen anderen Professor der Berliner Universität wenden“.

Es folgte etwa 1924 das Assessorexamen und der Eintritt in den Justizdienst, für den „wirklich nur die Allerbesten“ genommen werden. In Mannheim tat der stellvertretende Amtsrichter Dinge, die in ungeklärter Beziehung „nicht das Übliche“ waren, ihn mit der Dienstaufsicht in Berührung brachten und ihn schließlich, wohl etwa 1925, mit dem Justizdienst abbrechen und Anwalt in Mannheim werden ließen.

Wohl im Jahre 1930 versuchte er, sich bei Karl Geiler in Heidelberg zu habilitieren, wurde aber im Verlauf eines dritten, unaufgeklärten Zwischenfalls von der Fakultät abgelehnt, weil er „belastet“ gewesen und folgendes passiert sei: Geiler soll von einem Freund, dem er Kronsteins Arbeit zu lesen gegeben hatte, bedeutet worden sein, „daß das Erscheinen eines derartigen Buches als Habilitationsschrift unter der Ägide Geilers für diesen unangenehm sein müsse, da es eine Bedrohung der Interessen darstelle, die von ihm vertreten wurden“.

Also Karl Geiler, einer der charaktervollsten Männer der neueren deutschen Rechtsgeschichte, soll seinen eigenen Habilitanten aus eigensüchtigen Interessen verraten und fallengelassen haben! Karl Geiler, dessen „engster Mitarbeiter ... sowohl in anwaltschaftlichen, gutachtlichen als auch wissenschaftlichen Dingen“ Kronstein, wie er an anderer Stelle sagt, gewesen sein will und von dem niemand anders sprechen sollte als im Ton der größten Verehrung und Zuneigung, wird fünfzehn Jahre nach seinem Tod eine Handlung unverzeihlicher Gemeinheit nachgesagt.

Aber zurück zu dem Verfasser: 1935 verließ er Mannheim und wanderte nach den Vereinigten Staaten aus. Wie viele andere, fing er von vorn an zu studieren, erwarb 1939 in New York seine amerikanische Qualifikation. Während dieses Zeitraums trat er zur katholischen Kirche über, wozu er bemerkt: „Christus hatte mich

schon früher gerufen, aber jedesmal hatte ich rationale Gründe gefunden, um nicht zu antworten. Der Satz, der Jude dürfe Christus nicht in dieser Welt treffen, und die Tatsache, daß in Deutschland der getaufte Jude wirtschaftliche Vorteile genoß, hatten mich zurückgehalten. Doch alle diese Erwägungen entfielen nun. Vom wirtschaftlichen Standpunkt war jetzt eine Konversion eher nachteilig, waren doch alle Adressen, die ich hatte, alle Verbindungen, die mir offenstanden, jüdisch. Ich kannte in New York kaum einen einzigen Katholiken.“

Noch vor Kriegsausbruch siedelte er nach Washington über, wo er teils als Übersetzer, teils als Jurist in verschiedenen Ministerien tätig war, bis er schließlich 1946 ordentlicher Professor an der Georgetown in Washington wurde, einer katholischen Universität, an der er schon seit 1942 gelehrt hatte. Im Jahre 1945 war er im Auftrag der amerikanischen Verwaltung ein paar Monate lang in Deutschland; damals entstanden die Tagebuchnotizen. Als er nach Amerika zurückkam, war es ihm klar, daß er „mit allen Kräften dabei mithelfen mußte, den Steg, der zwischen Amerika und Europa errichtet worden war, zur festgefügtten Brücke auszubauen“. Diesem Ziel strebte er insbesondere dadurch nach, daß er im Lauf „der zügigen Verwirklichung der schon seit langem geplanten Doppelprofessur“ 1955 zum ordentlichen Professor in Frankfurt berufen wurde.

## Ein Brief an Carl Schmitt

Kronsteins Buch enthält gewiß einiges von Interesse für einen größeren Leserkreis, so vielleicht zur Problematik der Anwaltschaft oder zum amerikanischen Hochschulwesen (wobei der Kenner sein Urteil allerdings mit vielen Vorbehalten aufnehmen wird). Im ganzen gesehen kann der Leser jedoch ein Gefühl des Unbehagens nicht los werden.

Kann man etwa im Urteil eines Verfassers trauen, der während einer Tätigkeit in der Kartellabteilung des Department of Justice eine seiner grundlegenden Aufgaben darin sah, durch völkerrechtliche Bestimmungen sicherzustellen, „daß eine Wiederbelebung der öffentlichrechtlichen und privatrechtlichen Handelsbeschränkungen, die unserer Auffassung nach wesentlich zu den Katastrophen von 1929, 1933 und 1939 beigetragen hatten, unmöglich wurde“? Handelsbeschränkungen also sollen Hitler 1933 zur Macht gebracht und ihn 1939 nach Polen getrieben haben!

Oder, um ein anderes Beispiel herauszugreifen, vor dem man mit fassungslosem Erstaunen steht, sei der Brief erwähnt, den Kronstein wohl etwa 1932 an Carl Schmitt richtete, „den berühmten Staatsrechtler, der nach Zeitungsmeinungen beauftragt war, das künftige Verhältnis zwischen Juden und Nichtjuden zu ordnen. Ich schrieb ihm: Im Liberalismus hat die Gesellschaft nicht von Problemen Kenntnis genommen, die sich etwa durch eine zu starke Konzentration einer Minderheit in bestimmten Berufen, wie der Anwaltschaft und der Ärzteschaft, zeigten. Im Liberalismus hat man nicht den Versuch gemacht, bei einer Integration einer Minderheit für die richtige Verteilung dieser Minderheit in der Gesamtgesellschaft zu sorgen. In einer wirklich geplanten und durchdachten Gesellschaft kann das aber keine Schwierigkeit machen. Es müßte deshalb möglich sein, innerhalb von eins, zwei oder höchstens drei Generationen eine richtige Verteilung des ja doch zahlenmäßig kleinen deutschen Judentums in der ganzen deutschen Gesellschaft zu erreichen. Die unvermeidlichen Opfer, die die einzelnen Juden dabei möglicherweise bringen müßten, würden sie gerne bringen, wenn nur die Möglichkeit bestünde, daß sie dadurch Teil des deutschen Volkes blieben...“

Man ist im Grunde überrascht, daß ein so

prominenter Nazi wie Carl Schmitt auf diesen Brief „nie geantwortet“ hat und daß auch späterhin „von möglichst hoher nationalsozialistischer Stelle eine klare Antwort nicht zu bekommen war“. Wenn in einer antiliberalistischen Ordnung die Verteilung einer Minderheit „keine Schwierigkeit“ macht und die Juden die unvermeidlichen Opfer „gerne bringen“, so hätte man erwarten können, daß Carl Schmitt Herrn Kronstein etwa als Schweinehirt nach Ostpreußen verpflanzt und so die Integration einer opferfreudigen Minderheit gefördert hätte.

Oder man stelle sich einen Verfasser vor, der im August 1945 durch Frankreich fährt und folgendes nicht nur schwarz auf weiß in sein Tagebuch schreibt, sondern auch mehr als zwanzig Jahre später drucken läßt: Frankreich „weint und klagt. Nur durch eine übermenschliche Anstrengung schafft es dieses Volk, sich um seine Ernte, sein Vieh und seine Wohnstätten zu kümmern. Nur ein Staatsmann, der 5 bis 10 Millionen Italiener und Juden zum Siedeln nach Frankreich holt, kann wirklich dazu beitragen, daß neues Leben unter dem Vorzeichen französischer Kultur entsteht. Hitler hat dem Frankreich von gestern den Todesstoß gegeben. Nur ein Schuß neuen Blutes kann hier helfen.“

Wer noch eines vierten Beispiels bedarf, der lese nach, was der Verfasser darüber zu sagen hat, daß seine juristische Arbeit „ihrem ganzen Wesen nach politisch“ war und ist: Politik: „ist die zielbewußte Verwirklichung der als richtig erkannten Werte, und damit ist sie integraler Bestandteil der Philosophie, des Rechts, der Wirtschaft, ja jeder Betätigung, durch die die Gesellschaft unmittelbar oder mittelbar zu einem bestimmten Ziel geführt werden soll. Eine ‚Entpolitisierung‘ besonders der Geisteswissenschaften führt stets zu einer Verödung dieser Disziplinen und zum Verlust der ihnen Sinn verleihenden Zielsetzung.“

Es wird nicht viele Professoren des Rechts geben, die ein solches Bekenntnis zur Politik nicht nur an einen jungen Deutschen, sondern an Deutschland richten zu dürfen glauben.

Welches sind nun die Werte, die Kronstein selbst als richtig erkannt hat und dem jungen Deutschen ans Herz legt? Gewiß der Katholizismus. Gewiß die Ablehnung des „Rechtspositivismus“, wobei der Verfasser es offenläßt, was er darunter versteht und was er an seine Stelle setzen will. Gewiß auch der Kampf gegen die „Rechtsphilosophie der Zweckmäßigkeit im Recht“, an der Kronstein selbst so sehr mitgearbeitet haben will, „daß auch ich mitschuldig bin“. Ferner wird die sog. „Stabilisierungsidee“ verworfen, nämlich der Gedanke, daß „es eine völlig geordnete und geplante Wirtschaft geben könne, in der die Stabilisierung der Gesamtwirtschaft und innerhalb dieser die Position jedes einzelnen industriellen und kaufmännischen Unternehmens gesichert würde“. Wenn diese Worte konkrete Erscheinungen im Auge haben sollten, so können sie wohl nur einen gewissen Zusammenhang mit dem faschistischen Staat oder mit Konzernen und Kartellen andeuten, die als Erscheinungen des Rechts und der Wirtschaft immer das besondere Interesse Kronsteins gefunden haben.

## Kein Echo auf Karl Jaspers

Aber die wichtigste Wörterkenntnis des Verfassers ergibt sich wohl aus seiner Einstellung zu Deutschland, „dem Land meiner ersten Liebe“, und zu Amerika, „dem Lande, das wir als das unsere akzeptiert und adaptiert hatten“ und das, so darf man ja wohl hinzufügen, die Familie Kronstein akzeptiert und ihr das Leben gerettet hat.

Hier zeigt sich Ungewöhnliches. Zwar wird Kronstein vielleicht bei manchen auf Verständnis stoßen, wenn er in eingehenden Darlegungen auseinandersetzt, daß er die „haßgefüllte Politik des organisierten Chaos“ immer und so energisch verworfen hat, daß er sich während des Krieges in Washington als Außenseiter, als boykottiert und „verfemt“ vorkam. Und andere mögen es ihm hoch anrechnen, daß er während seiner Tätigkeit im amerikanischen Justizministerium es „für ausgesprochen taktlos (hielt), an der Beschlagnahme deutschen Eigentums mitzuwirken“, und daß er nach dem Krieg sich einer Anordnung entzog, nach der Regierungsbeamte in den Kriegsverbrecherkommissionen Dienst zu tun hatten: „Ich hielt es nicht für meine Aufgabe, mich an diesen Untersuchungen zu beteiligen. Dazu habe ich selbst zu viel gelitten.“

Der schlechthin einzigartige Tatbestand ist jedoch der, daß der Verfasser, für den Politik die Verwirklichung der als richtig erkannten Werte ist, in dem ganzen Buch so gut wie nichts von dem Kampf sagt, der unser Jahrhundert geprägt und der Erhaltung unserer Grundwerte gegolten hat. War die Ausrottung des Bösesten, das die Welt je gesehen hat, nicht die fundamentale Voraussetzung unserer physischen und moralischen Existenz, die große Sehnsucht aller Rechtenden, das oberste Ziel des Krieges? Hat Herr Kronstein Herz im Jahre 1940 nicht um die Zukunft gebangt? Gab es kein Ereignis, keine Kriegsmaßnahme, keine Schlacht, die ihn der Verzweiflung nahebrachte oder ihm Hoffnung erweckte? Hat er keine Rede gehört, die der Erwähnung wert ist? Hat nichts ihm eine Träne der Sorge oder der Freude, des Schmerzes oder der Rührung abgelockt? Es muß wohl so gewesen sein; denn von der Mission und dem wechselvollen Verlauf des Krieges wird in diesem Buch nicht gesprochen. Wahrlich, das große und furchtbare Wort von Karl Jaspers: „Daß wir noch leben, ist unsere Schuld“, findet bei Kronstein kein Echo.

Auf etwa acht Seiten entwickelt er eine absonderliche Theorie der „Freisetzung“. Es ist nicht leicht, festzustellen, was damit gemeint sein soll. Vielleicht soll die Freiheit von Bindungen, Indifferenz, Neutralität getroffen werden. War Kronstein etwa in Amerikas entscheidenden Stunden „freigesetzt“? Sie waren auch die entscheidenden Stunden des wahren Deutschlands, und gerade für diejenigen, die sich zu ihm zählten, gab es in jenen Jahren des Schreckens keine „Freisetzung“. Darf diese Erfahrung dem jungen Deutschen vorenthalten werden?

# Salut für Hardenberg

Einem verkannten Staatsmann widerfährt späte Gerechtigkeit

Peter G. Thielen: „Karl August von Hardenberg, 1750—1822. Eine Biographie“; Grote'sche Verlagsbuchhandlung, Köln. 535 Seiten, 39,— DM.

Der preußische Staatskanzler Karl August von Hardenberg hat in deutschen Geschichtsbüchern keine gute Presse. Der Sohn eines Obristen und späteren hannoverschen Feldmarschalls, am 31. Mai 1750 in Essenrode halbwegs zwischen Braunschweig und Gifhorn geboren, gestorben zu Genua am 26. November 1822, stand in der deutschen Geschichtsschreibung lange im Schatten der anderen preußischen Reformer, zu denen er dennoch gezählt wurde. Erst diese Biographie des Bonner Historikers der jüngeren Schule setzt neue Akzente.

Seit der ersten, noch ohne Aktenkenntnis geschriebenen Schilderung durch Klose 1851, der höchst unzuverlässigen Darstellung von Arndt 1864 und der Einleitung Rankes zur Edition der „Denkwürdigkeiten“ 1877 ist keine vollständige Hardenberg-Biographie mehr erschienen; Hans Hausherr, der vor Jahren mit Vorarbeiten zu einer umfassenden „politischen Biographie“ begann, konnte sein Werk nicht vollenden. Und im Sammelwerk „Die großen Deutschen“ fehlt in der Neuausgabe ein entsprechender Beitrag, der in der ersten Ausgabe von 1936 noch aufgenommen worden war.

Der kurfürstlich hannoversche Kammerrat Hardenberg, herzoglicher Minister in Braunschweig, Leiter der staatlichen Geschäfte in Ansbach-Bayreuth, Kabinettsminister und Staatskanzler in Preußen in napoleonischer Zeit und während der ersten Jahre der Restauration, war kein „Patriot“, weder im damaligen noch im späteren Sinne des Wortes. Er war ein Kind des ab-

solutistischen, aufgeklärten 18. Jahrhunderts, seiner Lebensführung, seinem Denken nach ein Grandseigneur des Ancien régime, auch bereit, alte Provinzen gegen neue auszutauschen, um das Staatsgebiet zu arrondieren.

Und doch hat er bei aller Rationalität seines politischen Denkens nicht geringen Anteil daran gehabt, Preußen in eine neue Ära zu führen. Er, der in den besten Mannesjahren stand, als die Bastille gestürzt, der nach den Maßstäben seiner Generation das Greisenalter erreicht hatte, als er sechzigjährig Staatskanzler wurde, hat immer wieder an den Zeitgeist appelliert und gefordert, von der Revolution und ihrem Erben Napoleon zu lernen: Weniger Reformer von der impulsiven, drängenden Art der Stein, Scharnhorst, Boyen, mehr Diplomat der alten Schule, kein eigentlicher Theoretiker des neuen Staates, aber ein beharrlicher und zäher Neuerer in der praktischen Staatsverwaltung, hat er zwar nicht alles erreicht, was er plante, aber doch den Weg bereitet, der von der friderizianischen aufgeklärten Despotie zum modernen, liberaleren Verfassungsstaat führte.

So schildert ihn uns jetzt Peter G. Thielen in einer durchaus kritischen, wissenschaftlich fundierten Darstellung, die auf zum Teil neu aufgefundenem, der Forschung kaum bekannten Material und eminenten Stoffbeherrschung beruht. Er zeichnet in glänzendem Stil ein farbenkräftiges Bild des Lebens und politisch-staatsmännischen Wirkens Hardenbergs, das diesem verkannten Manne vor der Geschichte Gerechtigkeit widerfahren läßt. Die mit schönen Bildern, reichhaltigen dokumentarischen Anhang, Bibliographie, Zeit- und Stammtafel vorzüglich ausgestattete Biographie ist eine bedeutende historiographische Leistung, sie zu lesen, ein einziger Genuß.

Friedrich Andrae



# Memoiren eines Rechtsanwalts

Was ein alter Professor heute jungen Deutschen zu sagen hat / Von F. A. Mann

Heinrich Kronstein: „Briefe an einen jungen Deutschen“; C.H. Beck'sche Verlagsbuchhandlung, München; 323 Seiten, 16,80 DM.

Die Mannheimer Anwaltschaft hat im deutschen Rechtsleben seit langem eine besondere Stellung eingenommen. Ihre hohe Qualität nahm ihr jeden provinziellen Charakter und ließ sie zu einem Zentrum wirtschaftsrechtlicher Beratungspraxis werden. Nimmehar zeigt sich ein weiterer Grund, indem sie wohl die beiden einzigen deutschen Anwälte hervorgebracht hat, die ihre Lebenserinnerungen veröffentlicht haben. Der erste war Max Hachenburg, einer der größten Söhne Mannheims, dessen „Lebenserinnerungen eines Rechtsanwalts“ 1927 erschienen sind. Der zweite ist Heinrich Kronstein, der unter dem weniger eindeutigen Titel „Briefe an einen jungen Deutschen“ sein Leben teils in Tagebuchnotizen aus dem Jahre 1945, teils in Briefen, der bekanntlich leichtesten Literaturform, überschaubar.

Allerdings war er nur kurz Anwalt in Mannheim. Er wurde 1897 in Karlsruhe als Sohn jüdischer Eltern geboren. Von etwa 1915 bis 1918 diente er im Ersten Weltkrieg. Von 1919 bis 1921 studierte er Rechtswissenschaften in Heidelberg, ging dann nach Bonn, wo er Martin Wolff nahekam („Argentinien kamen wir gleich bei meinem ersten Besuch in ein sehr ernstes und sehr langes Gespräch“). Nachdem er schon 1921 in Baden das Referendarexamen bestanden hatte, ging er nach Berlin, um bei Martin Wolff zu doktorieren, aber hier ergab sich die erste Episode, die Kenner der Beteiligten aufschlußreich finden werden: die Doktorarbeit bestand aus zwei theoretischen und einem dritten, mehr praktischen Teil, aber Martin Wolff schickte ihm „die ganze Arbeit zurück und ließ mir mitteilen, daß er nur den dritten Teil als Doktorarbeit annehmen wolle. Diesen sollte ich fertig machen; wenn ich aber doch das Ganze vorlegen wolle, so sollte ich mich an einen anderen Professor der Berliner Universität wenden“.

Es folgte etwa 1924 das Assessorexamen und der Eintritt in den Justizdienst, für den „zähltlich nur die Allerbesten“ genommen werden. In Mannheim tat der stellvertretende Amtsrichter Dinge, die in ungeklärter Beziehung „nicht das Übliche“ waren, ihm mit der Dienstaufsicht in Berührung brachten und ihn schließlich, wohl etwa 1925, mit dem Justizdienst abbrechen und Anwalt in Mannheim werden ließen.

Wohl im Jahre 1930 versuchte er, sich bei Karl Geiler in Heidelberg zu habilitieren, wurde aber im Verlauf eines dritten, unaufgeklärten Zwischenfalls von der Fakultät abgelehnt, weil er „belastet“ gewesen und folgendes passiert sei: Geiler soll von einem Freund, dem er Kronsteins Arbeit zu lesen gegeben hatte, bedeutet worden sein, „daß das Erscheinen eines derartigen Buches als Habilitationschrift unter der Ägide Geilers im diesen unangenehm sein müsse, da es eine Bedrohung der Interessen darstelle, die von ihm vertreten werden“.

Also Karl Geiler, einer der charaktvollsten Männer der neueren deutschen Rechtsgeschichte, soll seinen eigenen Habilitanten aus eigensüchtigen Interessen verraten und fallengelassen haben! Karl Geiler, dessen „engster Mitarbeiter ... sowohl in anwaltschaftlichen, gutachtlichen als auch wissenschaftlichen Dingen“ Kronstein wie er an anderer Stelle sagt, gewesen sein will und von dem niemand anders sprechen sollte als im Ton der größten Verehrung und Zuneigung, wird fünfzehn Jahre nach seinem Tod eine Handlung unverzeihlicher Gemeinheit nachgesagt.

Aber zurück zu dem Verfasser: 1935 verließ er Mannheim und wanderte nach den Vereinigten Staaten aus. Wie viele andere, fing er von vorn an zu studieren, erwarb 1939 in New York seine amerikanische Qualifikation. Während dieses Zeitraums trat er zur katholischen Kirche über, wozu er bemerkt: „Christus hatte mich

schon früher gerufen, aber jedesmal hatte ich rationale Gründe gefunden, um nicht zu antworten. Der Satz, der Jude dürfe Christus nicht in dieser Welt treffen, und die Tatsache, daß in Deutschland der getaufte Jude wirtschaftliche Vorteile genoss, hatten mich zurückgehalten. Doch alle diese Erwägungen entfielen nun. Vom wirtschaftlichen Standpunkt war jetzt eine Konversion eher nachteilig, waren doch alle Adressen, die ich hatte, alle Verbindungen, die mir offenstanden, jüdisch. Ich kamte in New York kaum einen einzigen Katholiken“.

Noch vor Kriegsausbruch siedelte er nach Washington über, wo er teils als Übersetzer, teils als Jurist in verschiedenen Ministerien tätig war, bis er schließlich 1946 ordentlicher Professor an der Georgetown in Washington wurde, einer katholischen Universität, an der er schon seit 1942 gelebt hat. Im Jahre 1945 war er im Auftrag der amerikanischen Verwaltung ein paar Monate lang in Deutschland; damals entstanden die Tagebuchnotizen. Als er nach Amerika zurückkam, war es ihm klar, daß er „mit allen Kräften dabei mithelfen mußte, den Steg, der zwischen Amerika und Europa errichtet worden war, zur festgefühten Brücke auszubauen“. Diesem Ziel strebte er insbesondere dadurch nach, daß er im Lauf „der zügigen Verwirklichung der schon seit langem geplanten Doppelprofessur“ 1955 zum ordentlichen Professor in Frankfurt berufen wurde.

## Ein Brief an Carl Schmitt

Kronsteins Buch enthält gewiß einiges von Interesse für einen größeren Leserkreis, so vielleicht zur Problematik der Anwaltschaft oder zum amerikanischen Hochschulwesen (wobei der Kenner sein Urteil allerdings mit vielen Vorbehalten aufnehmen wird). Im ganzen gesehen kann der Leser jedoch ein Gefühl tiefen Unbehagens nicht los werden.

Kann man etwa dem Urteil eines Verfassers trauen, der während seiner Tätigkeit in der Kartellabteilung des Department of Justice eine seiner grundlegenden Aufgaben darin sah, durch völkerrechtliche Bestimmungen sicherzustellen, „daß eine Wiederbelebung der öffentlichrechtlichen und privatwirtschaftlichen Handelsbeschränkungen, die unserer Auffassung nach wesentlich zu den Katastrophen von 1929, 1933 und 1939 beigetragen hatten, unmöglich werde“? Handelsbeschränkungen also sollen Hitler 1933 zur Macht gebracht und ihn 1939 nach Polen getrieben haben!

Oder, um ein anderes Beispiel herauszugreifen, vor dem man ein fassungsloses Erstaunen steht, sei der Brief erwähnt, den Kronstein wohl etwa 1932 an Carl Schmitt richtete, „den berühmten Staatsrechtler, der nach Zeitungsmeldungen beauftragt war, das künftige Verhältnis zwischen Juden und Nichtjuden zu ordnen. Ich schrieb ihm: Im Liberalismus hat die Gesellschaft nicht von Problemen Kenntnis genommen, die sich etwa durch eine zu starke Konzentration einer Minderheit in bestimmten Bereichen, wie der Anwaltschaft und der Ärzteschaft, zeigten. Im Liberalismus hat man nicht den Versuch gemacht, bei einer Integration einer Minderheit für die richtige Verteilung dieser Minderheit in der Gesamtgesellschaft zu sorgen. In einer wirklich geplanten und durchdachten Gesellschaft kann das aber keine Schwierigkeit machen. Es müßte deshalb möglich sein, innerhalb von eins, zwei oder höchstens drei Generationen eine richtige Verteilung des ja doch zahlenmäßig kleinen deutschen Judentums in der ganzen deutschen Gesellschaft zu erreichen. Die unermesslichen Opfer, die die einzelnen Juden dabei möglicherweise bringen müßten, würden sie gerne bringen, wenn nur die Möglichkeit bestünde, daß sie dadurch Teil des deutschen Volkes blieben...“

Man ist im Grunde überrascht, daß ein so

prominenter Nazi wie Carl Schmitt auf diesen Brief „nie geantwortet“ hat und daß auch späterhin „von möglichst hoher nationalsozialistischer Stelle eine klare Antwort nicht zu bekommen war“. Wenn in einer antiliberalistischen Ordnung die Verteilung einer Minderheit „keine Schwierigkeit“ macht und die Juden die unvermeidlichen Opfer „gerne bringen“, so hätte man erwarten können, daß Carl Schmitt Herrn Kronstein etwa als Schweinehirt nach Ostpreußen verpflanzt und so die Integration einer opferfreundigen Minderheit gefördert hätte.

Oder man stelle sich einen Verfasser vor, der im August 1945 durch Frankreich fährt und folgendes nicht nur schwarz auf weiß in sein Tagebuch schreibt, sondern auch mehr als zwanzig Jahre später drucken läßt: Frankreich „weint und klagt. Nur durch eine übermenschliche Anstrengung schafft es dieses Volk, sich um seine Ernte, sein Vieh und seine Wohnstätten zu kümmern. Nur ein Staatsmann, der 5 bis 10 Millionen Italiener und Juden zum Siedeln nach Frankreich holt, kann wirklich dazu beitragen, daß neues Leben unter dem Vorzeichen französischer Kultur entsteht. Hitler hat dem Frankreich von gestern den Todesstoß gegeben. Nur ein Schuß neuen Blutes kann hier helfen“.

Wer noch eines vierten Beispiels bedarf, der lese nach, was der Verfasser darüber zu sagen hat, daß seine juristische Arbeit „ihrem ganzen Wesen nach politisch“ war und ist: Politik: „ist die zielbewußte Verwirklichung der als richtig erkannten Werte, und damit ist sie integraler Bestandteil der Philosophie, des Rechts, der Wirtschaft, ja jeder Betätigung, durch die die Gesellschaft unmittelbar oder mittelbar zu einem bestimmten Ziel geführt werden soll. Eine „Entpolitisierung“ besonders der Geisteswissenschaften führt stets zu einer Verödung dieser Disziplinen und zum Verlust der ihnen Sinn verleihenden Zielsetzung“.

Es wird nicht viele Professorensöhne geben, die ein solches Bekenntnis zur Politik nicht nur zu ihren jungen Deutschen, sondern auch Deutschland und richten zu dürfen glauben.

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Friedrich Andrae



Max Gruenewald  
18 Haran Circle  
Millburn, New Jersey 07041

October 19, 1987

Dear Ernst:

I received your letter and the complete separate print and I thank you for sending them.

I was particularly interested in what you had to say about Kronstein, and, since you intend to enlarge your article about the immigrants to U.S.A. who belong to your faculty, I am writing these lines.

That Kronstein was or became a Catholic by conviction was also confirmed by Fred Friedrich Brodnitz, Mrs. Kronstein's cousin, with whom I discussed Kronstein. I believe that Kronstein was attracted by mystical love and by intellectual discipline, and that his attachment to the Church and to Roman law have the same roots.

In his Catholic tendencies he was influenced by his mother - his parents lived in Karlsruhe - his mother was a Russian Jewess and not the only one who tended toward the Catholic religion. Not the only Russian Jewess who was pro-Catholic.

As long as Kronstein was a lawyer in Mannheim, he was an ardent C.V. man. In USA he favored contacts with Catholics. It was through him that I became acquainted with the Great Duke of Wuerttemberg, who became a monk.

Kronstein had great difficulties with the English language and I believe it was his conversion that helped him into the Department of Justice.

He was helpful to me, when I contacted the cabinet of Roosevelt with a plan (not very original) to get the deportees from Baden to the Virgin Islands. He was also helpful to a member of my family.

When he converted, he took his wife and children with him. They all became Catholics.

Warmest regards,

Max Gruenewald



## SECOND INTENTIONAL EXPOSURE

Max Gruenewald  
18 Haran Circle  
Millburn, New Jersey 07041

October 19, 1987

Dear Ernst:

I received your letter and the complete separate print and I thank you for sending them.

I was particularly interested in what you had to say about Kronstein, and, since you intend to enlarge your article about the immigrants to U.S.A. who belong to your faculty, I am writing these lines.

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Max Gruenewald  
18 Haran Circle  
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October 19, 1987

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and, since you intend, to enlarge your article about the immigrants to  
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Roman Law had the same roots.

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In U.S.A. he favored contact with Catholics. It was through  
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Virgin Islands. He was also helpful to a member of my faculty.

When he converted, he took his wife and children with him. They all became  
Catholics. Warmest regards Mrs. Paven



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October 13, 1987

Rabbi Dr. Max Gruenewald  
18 Haran Circle  
Millburn, N.J. 07041

Dear Max:

I hasten to send you a complete copy of the "Deutsche juristische Emigration in den U.S.A."

At the request of Professor Mommsen and myself, the Deutsche Forschungsgemeinschaft has asked a professional historian to develop this article into a book which is now under way. Professor Herbert Strauss is informed; I will be pleased to show you some parts which have been drafted.

I have also a more or less complete collection of what has been written by and on Heinrich Kronstein which I will bring along for our next meeting. Because of his unusual personality and contributions to law and government, I have asked his niece Marianne Kronstein, now married Luetke (who is also a friend of my brother Rudy), living in Peekskill, to make available some family and law-related memorabilia, including the Kronstein papers which are now with the Catholic George Washington University in Washington, D.C.

It was a great event to hear and see you officiate at the rebirth of the Mannheim Synagogue. We will have a lot to talk about - please let me know when.

Best regards,



ECS:irn  
Enclosure

cc: Luise Metzger  
Rudy Stiefel  
Marianne Luetke



Max Gruenewald  
18 Haran Circle  
Millburn, New Jersey 07041

October 6, 1987

Professor

Ernst Stiefel  
Attorney at Law  
Suite 1300  
200 Park Avenue  
New York, N.Y. 10166

Dear Ernst,

When I see you again I shall thank you for directing birthday congratulations to the Leo Baeck Institute. Dr. Finkel sent me a copy of his thanks.

With great interest I read your contribution to the Festschrift for Walter Oppenhoff. And after reading "mit Pension" - what you have to say about the "Kasche justische Emigration in the U.S.A." I feel that you should write your biography. This quest comes from somebody to whom the independence is a foreign matter.

Please, send me the missing pages 442, 444, 446, 448.

I am particularly interested in the vivid Krenstein, whom I knew intimately, until the time when her conversion to Catholicism became known to me.

Your article makes interesting reading.

With warm regards and good wishes

Yours

M. Gruenewald



1969 andererseits) — zusätzlicher Koordinationspunkt ist hier die antike Rechtsgeschichte.

Gut zwei Jahrzehnte sind zu wenig für ein solches Spektrum wissenschaftlicher Ziele. Aber *Preiser* hat sich erst nach dem Kriege habilitieren können (mit einer — leider nicht publizierten — Arbeit über „Herkunft und Grundlagen der strafrechtlichen Irrtumslehre des Reichsgerichts“). Vorher war er Richter. Er hat nie viel Aufhebens davon gemacht, wie schwer es ihm gefallen ist, dieses Amt während der NS-Zeit auszuüben. Der Rückzug auf andere Interessen (*Preiser* studierte Kunstgeschichte und promovierte auch in diesem Fach) konnte nicht für alles aufkommen. Welcher Art die Fähigkeiten waren, die man als Richter auf sich nehmen mußte, um Schlimmstes zu verhüten, hat *Preiser* — sehr viel später — mit

großer persönlicher Zurückhaltung in seinem Beitrag zur Festschrift für Fritz von Hippel („Über die Verwirklichung des Naturrechts in der Zeit der Gewaltherrschaft“, 1967), beschrieben. Er spricht dort von der geheimen „sich von selbst herstellenden Ordnung“, welche die Beteiligten „auch ohne ausdrückliche Absprache“ zusammengeschlossen habe. Ob solche Ordnungen der Empirie zugänglich seien, ist die ebenso nüchterne wie moderne Frage, die *Preiser* dabei stellt. Das ist ein Programm — für das Völkerrecht und seine Geschichte wie für ein durch Zurücknahme unerfüllbarer Ansprüche an Überzeugungskraft gewinnendes Strafrecht.

Prof. Dr. Klaus LÜDERSEN, Frankfurt a. M.,  
und Prof. Dr. Karl-Heinz ZIEGLER, Hamburg

## Nachrufe

### Heinrich Kronstein †

*Heinrich Kronstein*, Emeritus der Universität Frankfurt und der Georgetown University School of Law, ist am 27. September 1972 im Alter von 75 Jahren verstorben. Mit ihm ging ein Forscherleben zu Ende, das für den deutschen Gelehrtenstand zwischen 1925 und 1972 in vielem kennzeichnend war. In *Kronsteins* Leben fängt sich wie in einem Hohlspiegel das Schicksal der wissenschaftlichen Avantgarde der zwanziger Jahre, der Verfolgten und Vertriebenen der dreißiger Jahre, der Emigranten, die ihre Hoffnung auf ein freies Deutschland nie aufgaben und nach dem Zusammenbruch der Diktatur den Wiederanfang in Deutschland wagten, und die doch in den Jahren nach 1965 manches in Zweifel gezogen sahen, wofür sie sich zeitweilig eingesetzt hatten. *Kronstein* hat diesen Kreis politischer und wissenschaftlicher Hoffnungen und Enttäuschungen mit einer Wachheit und intellektuellen Anteilnahme verfolgt und durchgemessen, wie es nur wenigen gelungen ist.

Am 12. 9. 1897 in Karlsruhe geboren, studierte er Rechtswissenschaft in Heidelberg und Berlin, wo er Schüler von *Martin Wolff* wurde. Dem Einfluß von *Martin Wolff* ist es — vielleicht — zuzuschreiben, daß sich *Kronstein* in seiner Habilitationsschrift der Frage zuwandte, unter welchen Voraussetzungen Institute wie das Eigentum und die juristische Person von ihren ursprünglichen gesetzlichen Zwecken entfremdet und unter veränderten wirtschaftlichen Bedingungen gesellschaftsfeindlich eingesetzt werden können. Man hat bisher zu wenig beachtet, daß diese Gedanken, die später von den sogenannten Neoliberalen (*Franz Böhm*, *Walter Eucken*, *Leonhard Miksch* u. a.) in den Mittelpunkt ihrer Wettbewerbstheorie gestellt wurden, so vorher von einem Juristen in einer Art allgemeiner gesellschaftlicher Institutionenkritik vorgetragen wurden. *Kronsteins* Thesen, die, in die Wirklichkeit umgesetzt, zu einer Konzentrationskontrolle geführt hätten, waren führenden Wirtschaftsrechtlern damals suspekt. Es gelang ihnen, die Habilitation in Heidelberg zu verhindern.<sup>1</sup>

*Kronstein* wandte sich dem Anwaltsberuf zu, aus dem er durch nationalsozialistischen Terror vertrieben wurde. 1935 emigrierte er in die Vereinigten Staaten, studierte von neuem Jura und wurde nach Ablegung der amerikanischen Examina und einer Zeit der Praxis 1940 Professor an der Georgetown University in Washington, D. C. Nach dem Krieg war er an den Überlegungen zur Gründung der Montanunion und der Europäischen Wirtschaftsgemeinschaft beteiligt und lehrte seit 1952 an der Frankfurter Universität Wirtschaftsrecht und Bürgerliches Recht. Von jener Zeit an versah *Kronstein* in Washington und Frankfurt den Dienst als Professor und Direktor eines Instituts für Internationales und ausländisches Wirtschaftsrecht. In dieser Eigenschaft hat er vielen europäischen und amerikanischen Gelehrten rechtsvergleichende Studien ermöglicht und auf manchen Gesetzentwurf, wie auch das deutsche Gesetz gegen Wettbewerbsbeschränkungen, durch Vermittlung rechtsvergleichender Kontakte Einfluß genommen.

*Kronstein* trat als Autor zahlreicher wirtschaftsrechtlicher Schriften hervor, u. a. als Verfasser eines amerikanischen casebooks über Antitrust-Recht. In deutscher Sprache erschienen in den letzten Jahren sein großangelegtes Internationales Kartellrecht (1967) und seine Beiträge zum Kölner Aktienrechtskommentar<sup>2</sup>.

<sup>1</sup> Die Begebenheit ist, unter Weglassung wesentlicher Details, berichtet in *Heinrich Kronstein*, Briefe an einen jungen Deutschen, München 1967, S. 124.

<sup>2</sup> Vgl. u. a. *Heinrich Kronstein*, Ausgewählte Schriften, Selected Essays, hrsg. mit einer Einleitung von *Franz Böhm* und *Brian A. McGrath* S. J., von *Kurt H. Biedenkopf*, Karlsruhe 1962; ein Verzeichnis der Ver-

In den Jahren der Krise nach 1965 wirkte *Kronstein* in Frankfurt und in den Vereinigten Staaten als Verfechter einer wirksamen Hochschulreform und veröffentlichte seine Vorschläge in mehreren Aufsätzen und Schriften. In Frankfurt bemühte er sich um Diskussionen mit der Frankfurter Soziologenschule, bis ihm, zu einer Zeit, als jene Schule auf dem Höhepunkt ihres politischen Einflusses stand, einer ihrer führenden Vertreter die Diskussion verweigerte.

In weiteren Kreisen wurde *Kronstein* bekannt durch sein Buch „Briefe an einen jungen Deutschen“<sup>3</sup>, in dem authentische Briefe *Kronsteins* an einen Jurastudenten, der aus der Ostzone geflüchtet war, der Öffentlichkeit übergeben wurden. Das Buch vermittelt nicht nur einen anschaulichen Einblick in geistesgeschichtliche und politische Fragen von der Kaiserzeit bis zum deutschen Zusammenbruch und Wiederaufbau, sondern zeigt auch *Kronstein* in seiner Anteilnehmenden, optimistischen und wissenschaftlich-kritischen Art mit jener Lebendigkeit, die nur ein Briefwechsel vermitteln kann<sup>4</sup>. *Kronstein*, aus jüdischer Familie, gläubiger Katholik, hervorragender Jurist in zwei so unterschiedlichen Rechtskreisen wie dem mittel-europäischen und dem common law, ausgezeichnet durch weitgreifende historische, philosophische und soziologische Interessen, politisch von großem Einfluß und doch unabhängig als Wissenschaftler, Helfer, Vermittler und Förderer ganzer Generationen junger Rechtsvergleicher, wird der deutschen und der amerikanischen Rechtswissenschaft unersetzbar bleiben. Wer ihn persönlich kannte, seinen wissenschaftlichen und politischen Weitblick<sup>5</sup>, seine Bescheidenheit, seine Bereitschaft, „jeden Morgen die eigene Position von Grund auf in Frage zu stellen und neu zu durchdenken“, wird ihn auch als Vorbild und Freund vermissen.

Wolfgang FIKENTSCHER, München

### Erich Kaufmann †

Am 5. November 1972 ist einer der wenigen Großen der deutschen Rechtswissenschaft fast unbemerkt aus dem Leben gegangen.

Es ist hier nicht der Ort, seinen Lebensweg nachzuzeichnen und sein Werk zu würdigen, das in der dreibändigen Ausgabe seiner „Gesammelten Schriften“ (1960) vor uns steht. Nur von einem soll die Rede sein, was *Erich Kaufmann* vor vielen anderen auszeichnet: Zu allen Epochen, die in seine Lebenszeit fielen, suchte er nicht nur ein lebensvolles Verhältnis, sondern fand es auch.

Keiner hat so tief wie er das Staatswesen *Bismarcks* gedeutet und Wesenszüge herausgehoben, die über das Pragmatische und Praktische hinausgingen. Nicht zufällig galt seine Erstlingschrift über die Staatslehre des monarchischen Prinzips auch dem Rechtsphilosophen *Friedrich Julius Stahl*, aus dessen Werken „die Sprache unserer Verfassungsurkunden, unseres politischen Lebens... philosophisch begriffen werden“ kann.

Als die Republik kam, stand *Erich Kaufmann* nicht im Lager der Rückgewandten. Im März 1919 schrieb er im „Tag“:

Öffentlichungen von *Heinrich Kronstein* bis 1967 findet sich in: Das Unternehmen in der Rechtsordnung, Festgabe für *Heinrich Kronstein* aus Anlaß seines 70. Geburtstages, hrsg. von *Kurt H. Biedenkopf*, *Helmut Coing* und *Ernst Joachim Mestmäcker*, Karlsruhe 1967, S. 387 ff.

<sup>3</sup> München 1967.

<sup>4</sup> Vgl. dazu die Besprechung des Briefbuchs in dieser Zeitschrift 1968, 342.

<sup>5</sup> *Kronstein* sagte um die Jahreswende 1937/38 voraus, der Zweite Weltkrieg werde erst ausbrechen, wenn sich Hitler und Stalin verbündeten. Mit dieser Prophezeiung erntete er damals in den USA Heiterkeit. — Die im Text folgende Bemerkung äußerte *Kronstein* im Jahr 1962 zum Verfasser.



„Für den Wegfall des Kaisertums und der preußischen Hegemonie kann es nur einen Ersatz geben: Die Souveränität der deutschen Volksgesamtheit selbst, rückhaltlos und unbedingt“.

Mit *Heinrich Triepel* entwarf er einen Verfassungstext für die Republik, geschlossener, dichter und wirklichkeitsnäher als das Werk von Weimar. Entschieden trat er auf den Boden der politischen Entwicklung und in den Dienst des Reiches: nach außen als Kämpfer für die deutsche Sache gegenüber den früheren Gegnern, nach innen als Ratgeber, Mahner, Deuter und Lehrer.

Als er 1934 aus Amt und Hörsaal verdrängt wurde, zog er sich in sein Haus am Nikolassee zurück — zusammen mit seinem Seminar, das er neun Semester lang — von 1934 bis 1938 — dort versammelte — „unbekümmert um das, was draußen geschah, und unbekümmert darum, was man ihm selbst angetan hatte“ (wie *Theanotte Baehnisch* 1960 schrieb). Von drängenden Tagespflichten

befreit, legte er seine Gedanken über „Staat und Recht“ 1935 in dem bedeutendsten Werk aus der Zeit der Reife („*Règles Générales du droit de la Paix*“) nieder. Erst 1938 verließ er die Heimat.

Was er nach der Rückkehr aus dem niederländischen Exil geleistet hat, wird vielen Zeitgenossen in Erinnerung sein: Wiederaufbau der Juristischen Fakultät in München und dann ab 1950 als Rechtsberater des Auswärtigen Amtes. Der 70jährige lieferte das geistige Rüstzeug, als sich die Bundesrepublik anschickte, freier mit anderen Völkern umzugehen. Dabei nutzte er die Erfahrungen aus der Zeit des Völkerbundes. Es wird erst allmählich sichtbar werden, wie vieles dabei ihm zu verdanken ist. Erinnerung sei nur daran, daß er anfangs der 50er Jahre davor warnte, die Europäischen Gemeinschaften so zu gestalten, daß Großbritannien ihnen nicht beitreten könne. Mit schärfem Blick sah er über die erste Periode deutscher Außenpolitik hinaus.

Karl Josef PARTSCH, Bonn

## Berichte

### Rechtsphilosophentagung in Mainz

Am 6. und 7. Oktober 1972 fand in Mainz eine Arbeitstagung der deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie (IVR) statt. Die Tagung wurde von Prof. Dr. *Theodor Viehweg*, Mainz, dem derzeitigen Vorsitzenden, als Problemdiskussion und nicht als Abfolge von Vorträgen organisiert. Den Wünschen der Mitglieder entsprechend, die aufgefordert waren, Themenvorschläge einzureichen, wurden drei Arbeitsgruppen gebildet.

1. Das erste Kolloquium, das den für 1974 geplanten Kongreß „Recht und Sprache“ vorbereiten half, hatte das Thema „Recht, Sprache und Informatik“.

Der Praxisbezug der juristischen Sprachdiskussion liegt derzeit vor allem im Einsatz von EDV im Recht. Dabei bestimmt jedoch nicht der Abnehmer das Produkt; er hat sich vielmehr dem schon vorhandenen Produkt, dem Rechner, anzupassen. Diese These von Dr. *Hans Brinkmann*, Darmstadt, kennzeichnete in etwa das gemeinsame Problembewußtsein der Teilnehmer. Strittig war, ob man die geforderte Anpassung technisch erträglich machen sollte oder sie aufgrund ihrer rechtspolitischen Konsequenzen verweigern sollte. Die von Dr. *Dieter Horn*, Berlin, Dr. *Hubert Rodingen*, Mainz, und *Thomas M. Seibert*, Mainz, vorgebrachte Sprachkritik richtete sich gegen das methodische Fundament jeder Automatisierung: die Festsetzung einer unabhängig von der Situation geglaubten Wortbedeutung. Wie sich in den Beiträgen von Prof. Dr. *Arthur Kaufmann*, München, *Helmut Freise*, Hannover, und Dr. *Waldemar Schreckenberg*, Mainz, zeigte, ist die begrifflich-syntaktische Einseitigkeit bisher dadurch vermieden worden, daß die Rechtswissenschaft (idealiter) den Gegensatz von Rechtssicherheit und Billigkeit oder von Dogmatik und Einzelfall in der Subsumtion aushandelte. Nach Auffassung der Sprachkritiker zielt die automatische Normanwendung wie die alte Begriffsjurisprudenz allein auf „Rechtssicherheit“ durch Automatisierung der Subsumtion ab. An die Stelle einer Perfektionierung der Legitimität (so charakterisiert von Dr. *Karl Haag*, Berlin) sollte Interaktion in „dialogischer Begründung“ gesetzt werden.

Zu der rechtspolitischen Gegenthese, die Prof. Dr. *Ottmar Ballweg*, Mainz, anschnitt, bekannte sich niemand: daß nämlich eine funktionsfähige Verwaltung nicht Enttäuschung aufarbeiten könne, sondern Interaktion durch Bürokratisierung (u. a. Automatisierung) verhindern müsse. Dagegen betonte Dr. *Adalbert Podlech*, Heidelberg, daß, um erst einmal Interaktion in Gang zu bringen und Zweckverschleierung zu vermeiden, die juristischen Führungsgrößen wie Gerechtigkeit und Gemeinwohl eindeutig definiert werden müßten. Wie solche Eindeutigkeit herzustellen sei, darüber äußerten sich Prof. Dr. *Wilhelm Steinmüller* und Dr. *Hansjürgen Carstka*, beide Regensburg, mehr zurückhaltend. Konkrete Beispiele wurden nicht gegeben. *Steinmüller* bezeichnete lediglich die allgemeine Systemtheorie und die Semiotik als geeignete Methoden, Recht als soziales Teilsystem abzubilden; auf jeden Fall müsse die Automatisierung den Benutzerbezug mitbedenken, die Pragmatik. Insofern berücksichtige *Steinmüller* vorsichtig *Dieter Horns* These, daß die Informationswissenschaft bisher die Maschine als Menschmaschine verkannt habe und nicht einmal die Unfähigkeit des Bearbeiters vorausgesehen habe, etwa bei der Informationswiedergewinnung Texte so zu beschreiben, daß sie „eindeutig auffindbar“ wären.

\* 2. Das zweite Kolloquium informierte über die Institutionalisierung der Grundlagenfächer Rechtsphilosophie, Rechtstheorie und Rechtssoziologie (*Viehweg*, *Rolf Naujoks*, Mainz) und gab Anregungen für die Verbesserung des Unterrichts. Eigens für Grundlagenfächer sind in der BRD 9 Lehrstühle und eine II-3-Stelle eingerichtet; außerdem gibt es 4 Lehrstühle neuer Art, welche die Grundlagenfächer an die erste Stelle rücken und mit einem dogmatischen Fach verbinden.

In den Grundlagenfächern sollte mehr empirische Sozialforschung betrieben werden (Dr. *Frank Rotter*, Düsseldorf, *Wolfgang Bayer*, Mainz). Der Unterricht kam nicht nur die Lehrinhalte kritisch in Frage stellen, sondern muß auch auf Verbesserung der Rechtspraxis abzielen (*Wolfgang Kilian*, Frankfurt/M.). Betont wurden die Tendenzen zur Schwerpunktbildung (Prof. Dr. *Hans-Martin Pawlowski*, Mannheim) und zur Interdisziplinarität (*Freise*, *Viehweg*). Gegen den Vorwurf, es bilde sich hier eine Grundlagenlobby heraus (*Haag*), wurde darauf verwiesen, daß in vielen Ländern des Westens und des Ostens die Grundlagenfächer stärker vertreten sind als in der BRD und zum Teil gegenüber dogmatischen Fächern Vorrang haben (Dr. *Jung-Pyung Lim*, Mainz/Seoul).

3. Das Thema des dritten Kolloquiums war „Recht und Politik“. Begrifflich unterscheidet sich das Recht von der Politik durch seine relative Invarianz sowie durch Beschränkung auf eine bestimmte Redeweise (Dr. *Rupert Schreiber*, Köln), wobei gegenwärtig sowohl die Verrechtlichung des Politischen als auch die Politisierung des Rechts zunehmen (Dr. *Heino Garrn*, Bielefeld). Zur Durchsichtigkeit des politischen Geschehens würde die Wahl der Verwaltungsspitzen durch das Volk beitragen (Dr. *Dietrich Gunst*, Wiesbaden). Das Problem der Geltung, das alle sozialwissenschaftlichen Disziplinen gleichermaßen berührt, sehen *Marx* im gerechten Tausch, *Habermas* im Diskurs und *Luhmann* in der Ausschaltung von Kontingenz (*Horst Folkers*, Heidelberg).

Unter sozialpsychologischem Aspekt kanalisiert das Strafrecht archaische Impulse wie Ausstoßung und Rachsucht. Die strafrechtliche Dogmatik verdeckt und verklärt vielfach legale Aggression; unangebracht ist die repressive Strafe jedenfalls bei persönlichkeitsgestörten Tätern (*Helmut Ostermeyer*, Bielefeld). Wenn die Unterschicht unter den Straftätern überrepräsentiert ist, dann liegt dies weniger an ihr selber als an der Kriminalisierung durch die Gesellschaft. Radikale Abhilfe kann hier nur die Aufhebung der Schichtverhältnisse bringen (Dr. *Johannes Feest*, Freiburg). Zwar wird gegenwärtig in erfreulicher Eindeutigkeit der Wert einer größtmöglichen menschlichen Entfaltung betont, dennoch dauert die soziale Repression insofern fort, als Verfahren im persönlichen Interesse, so z. B. psychoanalytische Verfahren, gegenüber Verfahren im sozialen Interesse wie Gerichtsverfahren hoffnungslos in der Minderheit sind (*Rotter*).

Empirische Sozialwissenschaft zeigt sich durch die Art ihrer Begriffsbildung als andere Weise, über juristische Sachverhalte zu reden. Diese Redeweise stellt über eine andere Selektionsleistung (so *Rodingen* gegen *Rotter*) eine andere Wirklichkeit her als die dem Juristen vertraute, indem etwa an die Stelle von Schuld und Strafe defizitäre Sozialisation und Triebverdrängung treten.

Hubert RODINGEN/Thomas M. SEIBERT, Mainz



## ZUM GELEIT

Wir entdecken in letzter Zeit neben den Festschriften, die Verleger für ihre Autoren veröffentlichen, solche, die Autoren ihren Verlegern widmen. Ist dies ein weiterer Hinweis auf den gegenwärtig nicht selten stattfindenden Rollentausch zwischen Autor und Verleger?

Der Verleger sorgt sich um Abfassung und Gestaltung des Manuskripts, während der Autor der äusseren Aufmachung und dem wirtschaftlichen Schicksal seines Buches besondere Beachtung schenkt.

Es wäre naheliegend, wenn auch wenig reizvoll gewesen, den Verleger bedeutender Festschriften selbst mit einer solchen Publikation zu würdigen. Indes wies eine im Verlag entstandene Idee einen anderen Weg. Eine kleine Sammlung von Briefen wurde angeregt. Diese sollten dem Verleger und Freund aus Anlass seines Geburtstages zugeeignet werden.

Das abwechslungsreich-amüsante Ergebnis dieser 'Verlagsidee' eigener Art kann zum 11. Februar 1968 rechtzeitig (!) vorgelegt werden.

Das Wirken und der Beruf des Verlegers, seine Beziehungen zu Autoren und Lektoren spiegeln sich in den 19 Briefen lebendig wider.

Eine glückliche Fügung tritt hinzu: im Laufe von Jahren wurden aus Freunden Autoren und aus Autoren Freunde. Dazu kommen Kollegen und Mitarbeiter.

Kann es eine schönere Bestätigung eigenen Tuns geben?

Allen denen, die dazu beigetragen haben, sei Dank.

Karlsruhe, Februar 1968

*Christof Müller-Wirth*



## Glückwunsch eines der 'Verlegten' an den Verleger

Wer wie ich so viele seiner Arbeiten und die seiner Freunde und Schüler beim selben Verleger hat erscheinen sehen, schuldet ihm gar viel. Das mindeste, das er zum Dank tun kann, ist etwas zu einer Schrift über den Jubilar selbst, seiner Persönlichkeit als Verleger, seinen Leistungen und seinem Leiden beizutragen.

Robert Müller-Wirth hat alles, was ein juristischer Verleger braucht: unwiderstehliche Fröhlichkeit, Geduld, Nachsicht und juristische Phantasie.

Die Gelehrten der Soziologie und Psychologie streiten sich, ob alle Charaktereigenschaften schon in der frühesten Jugend ausgebildet sind. Wie dem auch sei, Bob Müller-Wirth strahlt heute noch die innere Fröhlichkeit aus, die ihn schon als Kind auszeichnete. Als ich zum ersten Male, nachdem ich in der Quarta sitzengeblieben war, meine neue Klasse betrat, nahm mich seine Heiterkeit gleich so gefangen, dass ich alle Schwierigkeiten vergass und mich in der ungewohnten Umgebung gleich unbeschwert bewegte.

Und doch fühlt man sich von ihm irgendwie durchschaut, aber auch eingeladen, ihm trotz erkannter Schwächen zu folgen. Diese Kraft wirkte auch auf gestrenge Lehrer. In der Untersekunda sollten er und ich in den Karzer kommen, weil wir die Noten, die der Herr Professor für Hausarbeiten gegeben hatte, in der Klasse verbreiteten, statt sie nur in der Wohnung des Professors abzuholen. Die Tat war nicht zu bestreiten. Das Urteil lag rechtskräftig fest. Aber es kam anders. Am Nachmittag suchten wir den gekränkten Professor auf und Bob unterzog ihn seiner unwiderstehlichen Behandlung. Als wir den Professor wieder verliessen, war alles ohne die geringsten Nachwirkungen erledigt.

Wer von den bei unserem Jubilar Verlegten kann sich nicht erinnern, wie er irgendwann einmal seinen Vorschlag, ein Buch oder einen Aufsatz zu schreiben, annahm, obwohl er sich ganz fest vorgenommen hatte, das nicht zu tun. Ich glaube, Dr. Müller-Wirth hätte es nicht fertiggebracht, einen ganz neuen juristischen Verlag aufzubauen, wenn er nicht die Kraft hätte, den Widerstand der sich sträubenden Gelehrten zu überwinden.

Es gibt wohl kaum einen Menschen, der wirklich innerlich fröhlich und dabei auch gleichzeitig geduldig und tolerant ist. Jeder Schriftsteller weiss für den Rest seines Lebens, wenn der Verleger ihn einmal hat warten lassen, ohne auch nur je daran zu denken, dass es kaum einen Autoren gibt, der nicht seinerseits einen vereinbarten Termin um Monate oder Jahre überschritten hätte. Unser Jubilar scheint uns allen gegenüber eine unendliche Geduld zu haben.

Geduld und Toleranz musste er in der Tat schon zeigen, als wir in Berlin im Jahre 1923 in der Hauptstrasse in Schöneberg in zwei nebeneinander liegenden Zimmern als Studenten hausten. Die Räume waren gewöhnlich ungeheizt und auch sonst sehr unfreundlich. Zerschmetternd aber war die politische Atmosphäre, in der der Rathenau-Mord geschah und täglich Unruhen aus allen Teilen des Reiches gemeldet wurden. Die grosse Politik war damals genau wie heute nicht von den juristischen Problemen



zu trennen, an denen wir in der damals so ausgezeichneten Berliner Fakultät arbeiteten. Wir hörten bei Partsch eine Vorlesung über den Versailler Vertrag, der er seine damals täglich neuen Erfahrungen mit den Prozessen über den Friedensvertrag zugrunde legte, und bei Smend Staatslehre. Die damals von Tag zu Tag schlimmer werdende Inflation gab uns praktischen Unterricht über den Zusammenhang des Vertragsrechts und der Geldpolitik des Staates, der Teil des unvergesslichen Gesprächs Partschs über die römische Grundlage des BGBs war.

Wenn wir auch beide unser juristisches und politisches Verständnis in der Auseinandersetzung mit diesen Dingen entwickelten, so war sicherlich Bob Müller-Wirth derjenige, der unter ihnen litt. Meine Vorliebe für die Diskussion juristischer Methoden und Theorien und für politische Vorhersagen führte in jenen turbulenten Jahren dazu, dass sich meine Gedanken überstürzten und ich mich nicht selten einfach von Ihnen davontragen liess. Bei unseren vielen Gesprächen war Bob stets liebenswürdig, doch ein kleiner sarkastischer Zug in seinem Gesicht legte es nahe, die Geduld des Zwangszuhörers nicht zu überspannen. Trotz alledem war er bei diesen Gelegenheiten nicht nur unendlich geduldig, sondern er war festen und begründeten Meinungen gegenüber auch stets tolerant. Diese Art der Toleranz, die gar nichts mit Wertfreiheit zu tun hat, ermöglichte es dem Verleger Müller-Wirth, ein breites Spektrum der Auffassungen und Ideen seiner Schriftsteller zu akzeptieren. Der Verlag unseres Jubilars ist der lebendige Ausdruck der ganzen Fülle juristischer und sozialwissenschaftlicher Möglichkeiten.

Nicht nur in Berlin, sondern auch später wieder in Karlsruhe betrieben wir im privaten Kreise zusammen mit anderen Freunden, insbesondere Hellmut Isele und Herbert Schneider, eine Art positive 'kritische juristische Universität'. Wir haben uns über die Zusammenhänge des bürgerlichen Rechts, des römischen und deutschen Privatrechts mit der Gesellschaft und über alles mögliche zerstritten und zusammengerauft. Es gibt keine positivere Erarbeitung juristischer Ideen und Kenntnisse, als eine solche Auseinandersetzung unter Freunden. Bob Müller-Wirths juristische Phantasie hat uns damals viel gegeben, wie er auch wahrscheinlich von uns anderen empfangen hat.

Als er mich nach dem Ende des Zweiten Weltkrieges zum ersten Mal wiedertraf, entwarf er mir seinen Plan einer neuen juristischen Lehrbuchreihe, in der er eine Verbindung der deduktiven deutschen Methode mit der anglo-amerikanischen induktiven auf Fällen aufgebauten Methode verwirklichen wollte. Schon damals hatte er die Gedankenwelt der Bücher, die sich dann etwa in dem Sachenrecht von Westermann und dem Schuldrecht von Esser in vieler Beziehung verwirklichten, in allen Einzelheiten vorgedacht. Wie gerne hätte ich mich damals irgendwie an dieser Reihe beteiligt. Aber das war mir nun einmal durch mein Leben sowohl in Frankfurt als auch in Washington, im amerikanischen und im deutschen Rechtskreis, nicht möglich. Und doch wusste unser Jubilar mich voll einzusetzen. Meine erste bei ihm verlegte Schrift über neue deutsche wirtschaftsrechtliche Entscheidungen im Lichte des amerikanischen Antitrustrechtes 1953 beruhte in hohem Maße auf seiner Initiative. Zuvor hatte er mich mit Herren des Bundesgerichts zusammengebracht und dabei den Gedanken aufgeworfen, einmal zu untersuchen, inwieweit Bemerkungen des Bundesgerichts über amerikanisches Recht wirklich einem kritischen Kenner des amerikanischen Rechts standhielten.

Genauso bedeutungsvoll war es, dass uns der Jubilar die Möglichkeit gab, unsere Arbeiten und Vorträge im Institut für ausländisches und internationales Wirtschaftsrecht jeweils in der Sprache, in der die Vorträge oder Aufsätze verfasst



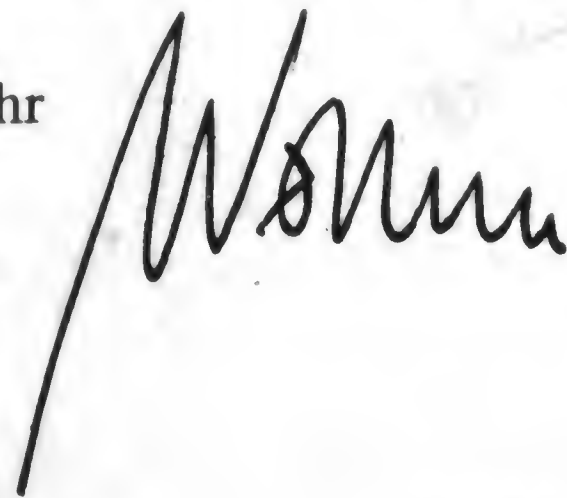
persönlichen Anlässen und in dem Inhalt der Korrespondenz aus.

Es ist nicht bei dem schriftlichen Gedankenaustausch geblieben. Oft habe ich auf Reisen nach Süddeutschland in Karlsruhe halt gemacht und einige Male haben Sie uns in unserem Feriendomizil in Königsfeld oder hier in Münster besucht. Auf langen Spaziergängen kam alles zur Sprache, was Verleger und Autor zu fragen und zu sagen hatten.

Das war ein Rückblick auf zwanzig Jahre Korrespondenz mit Ihnen und Ihrem Verlag. Ich glaube, hier ist es leicht, Bilanz zu ziehen: Eine Freundschaft, die aus sachlichen Gemeinsamkeiten in so langen Jahren wuchs, wird Bestand haben, solange die Persönlichkeiten leben, die diese Freundschaft verbindet. In diesem Sinne grüße ich Sie heute und wünsche Ihnen - und damit mir - noch viele Jahre!

Stets

Ihr





zur Aufhebung und Zurückverweisung führt, nur dann kostenrechtlich als erfolgreich behandelt wird, wenn und soweit das Prozeßergebnis von diesem Rechtsmittel beeinflusst wird.<sup>14)</sup> Diese Handhabung – ihre Richtigkeit einmal unterstellt – besagt nicht darüber, daß die ihr entsprechende Auslegung des § 473 Abs. 1 StPO richtig ist. Denn im Zivilprozeß verfolgt der Kläger ein von ihm selbst gewähltes Prozeßziel. Die Kostenregelung stellt hier darauf ab, ob er dieses Prozeßziel bzw. der Beklagte dessen Scheitern im Ergebnis erreicht. Die Prozeßpartei wird hier als Handelnder, als Subjekt betrachtet. Dagegen ist der Beschuldigte/Angeklagte im Strafverfahren Objekt. Sinn der Verfahrensvorschriften ist es, ihn als Objekt der Strafverfolgung vor der Willkür der Strafverfolgungsorgane zu schützen. Sie sind deshalb im eigentlichen Sinne Schutzgesetze zu seinen Gunsten. Der Angeklagte kann nicht das kostenrechtliche Risiko dafür tragen, daß er sich – durch Einlegung der Revision – gegen die Verletzung der Verfahrensvorschriften durch den Tatrichter schützt.

Rechtsanwalt DR. JUSTUS R. G. WARBURG, Hamburg

## Umwelt und Recht

### Völkerverbindende Rechtsforschung und Rechtslehre

#### Zum Tode von Heinrich Kronstein

Eine Zeit, die geprägt ist von dem Bemühen um Annäherung und Zusammenarbeit zwischen den Völkern sowohl auf politischem wie auch auf wirtschaftlichem Gebiet, die ferner grenzüberschreitende Integrationsbestrebungen ausgelöst hat, welche seit dem Zweiten Weltkrieg zu einer bemerkenswerten Anzahl internationaler und supranationaler Einrichtungen geführt haben, zwingt zu einer entsprechenden Orientierung der Lehr- und Forschungsprogramme verschiedener wissenschaftlicher Disziplinen. Die Juristen müssen in wesentlich stärkerem Maße aus dem Gesichtskreis der eigenen staatlichen Rechtsordnung heraustreten und sich mit Theorie und Praxis fremder Rechte befassen, um sich das geistige Rüstzeug für den von ihnen erwarteten Beitrag zu den im Gange befindlichen Entwicklungen zu verschaffen.

Echtes Rechtsverständnis setzt erlebte Kenntnis der Mentalität der Rechtsunterworfenen voraus. Das gilt für fremde Rechte in gleicher Weise wie für das inländische Recht. Die Begegnung und den geistigen Austausch mit Angehörigen anderer Rechtssysteme als Erkenntnisquelle für das Studium ausländischen Rechts wie auch als völkerverbindendes Element besonders gefördert zu haben, ist eines der großen Verdienste von HEINRICH KRONSTEIN, der wenige Tage nach Vollendung seines 75. Lebensjahres am 27. 9. 1972 starb. Mit ihm verliert die Rechtswissenschaft eine der wenigen Persönlichkeiten, die auf der Basis einer profunden Ausbildung im deutschen wie im angelsächsischen Recht gleichzeitig in beiden Rechtskreisen forschend und lehrend wirken. Sichtbarer Ausdruck seines Schaffens in zwei Kontinenten war seine Simultanzugehörigkeit zu den Lehrkörpern der Universität Frankfurt am Main und der Georgetown University in Washington, eine Aufgabe, deren gewissenhafte Wahrnehmung einen außergewöhnlichen Einsatz verlangte und zu der er sich über viele Jahre mit tiefem inneren Engagement bekannt hat.

KRONSTEIN'S wissenschaftliche Heimat war das Wirtschaftsrecht. Sein besonderes Interesse galt dabei dem Phänomen der wirtschaftlichen Macht, ihrer Entstehung und Wirkungsweise sowie ihres Verhältnisses zur staatlichen Rechtsordnung. Viele, ja der größte Teil seiner wissenschaftlichen Arbeiten gehen auf diesen Problemkreis zurück, den er vornehmlich im Lichte des Kartellrechts, aber auch des Gesellschafts- und des Patentrechts, des internationalen Privatrechts sowie der Schiedsgerichtsbarkeit behandelte, häufig in rechtsvergleichender Darstellung. KRONSTEIN hatte ein spezifisch enges Verhältnis zur Rechts-

wirklichkeit. Sorgfältige Rechtstatsachenforschung war stets ein wesentliches Element seiner wissenschaftlichen Arbeit. Als Beleg hierfür mag sein Hauptwerk „Das Recht der Internationalen Kartelle“ (1967) dienen, in welches der Extrakt eines großen Teils seiner vielfältigen rechtsdogmatischen Untersuchungen ebenso eingebunden ist wie das Ergebnis einer langjährigen Rechtstatsachensammlung, dessen Darstellung allein die Hälfte des Raums dieses Buches einnimmt.

KRONSTEIN'S Praxisnähe reflektiert die Stationen seines beruflichen Werdegangs. Nach seiner Promotion bei MARTIN WOLFF und dem Assessorexamen war er zunächst Richter und dann Anwalt in Mannheim. Hier kam es zu einer engen anwaltlichen wie auch wissenschaftlichen Zusammenarbeit mit KARL GEILER, welche ihm diejenigen Horizonte des Wirtschaftsrechts und der Wirtschaftspraxis öffnete, die für seine künftige berufliche Tätigkeit bestimmend wurden. In seinem in dieser Zeit geschriebenen Werk „Die abhängige Juristische Person“ (1931) wendet er sich, eingedenk seiner praktischen Erfahrungen, gegen den rein instrumentalen Einsatz der Rechtsinstitute des Zivilrechts und zeigt Wege auf, wie die Juristische Person vor zweckwidrigem Gebrauch zu schützen ist. 1935 mußte KRONSTEIN als russisch Verfolgter Deutschland verlassen, ein Schicksal, an dem er zwar innerlich schwer trug, das aber in ihm außerordentliche moralische und geistige Kräfte freisetzte. Aus eigener Kraft baute er sich in den USA nicht nur eine neue Existenz für sich selbst auf, sondern er half auch vielen Leidensgenossen in dem unendlich schwierigen Prozeß, als Flüchtling in einem fremden Land Fuß zu fassen. Nach einem Studium des amerikanischen Rechts an der Columbia Law School in New York ging KRONSTEIN nach Washington, wo er im Department of Justice eine Tätigkeit begann, die ihn in die Mitte seines Interessengebietes führte: die Mitarbeit bei Klagesachen und Untersuchungen der Antitrust Division hinsichtlich internationaler Verflechtungen und Kartellangelegenheiten. Das Ziel seiner beruflichen Intentionen, die hauptamtliche Hochschulprofessur, erreichte KRONSTEIN, bedingt durch sein schweres persönliches Schicksal, erst 1946 mit der Übernahme einer ordentlichen Professur an der Georgetown University, dafür aber ausgestattet mit einem reichen Schatz praktischer Erfahrungen, welche besonders in einer Rechtsdisziplin wie der des Wirtschaftsrechts bei manchen Fachvertretern schmerzlich vermißt werden.

In den Schriften KRONSTEIN'S klingt immer wieder der Gesichtspunkt der Wertgebundenheit der Rechtsordnung an. Unablässig kämpfte er gegen Erscheinungen des heute in Deutschland überwundenen Rechtspositivismus, welcher die Existenz einer dem Gesetzesrecht übergeordneten Wertordnung leugnet und dem staatlichen Gesetzgeber eine unbeschränkte Rechtssetzungsbefugnis einräumt. Seine im Jahre 1957 nach Übernahme einer ordentlichen Professur an der Universität Frankfurt am Main zu dem Thema „Rechtsauslegung im wertgebundenen Recht“ gehaltene Antrittsvorlesung<sup>1)</sup> fordert auf, daß im Rahmen teleologischer Gesetzesauslegung stets die Hierarchie der Werte Beachtung finde, deren Verwirklichung das Recht diene. Vor diesem geistigen Hintergrund, der seine Wurzeln in der katholischen Naturrechtslehre hat, setzt er sich für eine Disziplinierung der Macht der organisierten Gruppen, insbesondere der Wirtschaftsunternehmen, ein, deren Handeln stärker an die Leitlinien der Rechts- und Wirtschaftsordnung herangeführt werden müsse. Soweit sich die Parteien bei der Gestaltung ihrer Beziehungen der Institutionen des Rechts bedienen, hätte an die Stelle des begrifflichen Denkens die wertorientierte Besinnung auf die ihnen im Rechtssystem zugewiesenen Funktionen zu treten.

Als Rechtspolitiker ist KRONSTEIN vornehmlich bei den Reformarbeiten zum deutschen Aktiengesetz wirksam geworden. Sein Eintreten für stärkere Publizität auch

<sup>14)</sup> Vgl. BAUMBACH-LAUTERBACH, 30. Aufl. 1970, § 97 ZPO Anm. 1 B m. N.

1) Abgedruckt in KRONSTEIN, Ausgewählte Schriften, 1962.



außerhalb der Organisationsform der Aktiengesellschaft war weitgehend von Erfolg gekrönt. Als wichtiger Beitrag auf diesem Gebiet sei seine Gemeinschaftsarbeit mit CLAUSEN „*Publizität und Gewinnverteilung im neuen Aktienrecht*“ (1960) erwähnt.

Ein Nekrolog auf KRONSTEIN würde eine entscheidende Lücke aufweisen, käme nicht seine menschliche Dimension zur vollen Geltung. Mit der Kraft der Versöhnung begabt, arbeitete der aus Deutschland Vertriebene seit Kriegsende am transatlantischen Brückenbau, dem Bemühen um eine menschliche Annäherung des deutschen und des amerikanischen Volkes. Was er auf diesem Gebiet geleistet hat, ist beispielhaft. Zahlreiche deutsche Hochschullehrer und Studenten verdanken ihm Studienaufenthalte in den USA. In gleicher Weise ermöglichte er amerikanischen Juristen unmittelbare Einblicke in das deutsche Rechtsleben. Als Stützpunkte dienten das Institute for International and Foreign Trade Law in Washington und das Institut für ausländisches und internationales Wirtschaftsrecht an der

Universität Frankfurt am Main, die beide unter seiner Leitung bzw. Mitleitung standen. Mit Leidenschaft nahm KRONSTEIN sein Lehramt bis zur letzten Stunde seines physischen Leistungsvermögens wahr. Der permanente Kontakt zur studentischen Jugend, die er über die Bezirke der Universität hinweg förderte, war ihm ein Herzensanliegen. Seine Aufgeschlossenheit für ihre Probleme spiegelt sich wider in seinen Beiträgen zur Reform der Juristenausbildung.

Zu seinem siebzigsten Geburtstag wurde KRONSTEIN mit einer Festgabe über das Generalthema „*Das Unternehmen in der Rechtsordnung*“ (1967) geehrt. Im gleichen Jahr erschien seine Autobiographie „*Briefe an einen jungen Deutschen*“, (2. Auflage 1968), welche die Qualität eines bedeutenden zeitgeschichtlichen Dokuments hat. KRONSTEIN hinterläßt einen großen Kreis von Schülern und Freunden. In ihnen werden seine Ideen, wird sein Werk fortleben.

Rechtsanwalt DR. HEINRICH GÖTZ, Frankfurt am Main

## Mitteilungen

### 32. Tagung des Studienkreises für Presserecht und Pressefreiheit über das Thema: Personelles Mitbestimmungsrecht in der Redaktion

Bei seiner 32. Tagung, die am 13./14. 10. 1972 in Celle stattfand, beschäftigte sich der „Studienkreis“ mit der obengenannten besonders wichtigen Spezialfrage aus dem aktuellen Bereich der Mitbestimmung im Presse- und Rundfunkwesen. Das im Januar 1972 in Kraft getretene neue Betriebsverfassungsgesetz v. 15. 1. 1972 (BGBl. I 13) gab Anlaß genug, die vom Studienkreis wiederholt diskutierte Problematik erneut zu überprüfen.<sup>1)</sup>

Zum Erfolg der Tagung trug wesentlich bei, daß das Grundsatzerferat einem so hervorragenden Kenner der Materie wie Prof. DR. MAYER-MALY (Salzburg) anvertraut war. Aus den bisher bekannt gewordenen „*Redaktionsstatuten*“, in denen die Sozialpartner die Frage der Mitbestimmung und der Kompetenzabgrenzung durch freiwillige Übereinkunft zu regeln versuchten, entnahm MAYER-MALY, daß es auf dem Gebiet der personellen Mitbestimmung in der Redaktion vor allem um die folgenden neuralgischen Punkte geht: Anstellung und Entlassung von Redakteuren, Berufung bzw. Abberufung von Ressortchefs und Chefredakteuren sowie Änderung der Arbeitsbedingungen in der Redaktion. Nach dem neuen BetrVerfG gehören alle diese Themen zum Kreis der in §§ 92 ff. geregelten „*personellen Angelegenheiten*“. Presse und Rundfunk genießen als sog. Tendenzbetriebe (früher § 81, jetzt 118 BetrVerfG) auch künftig im Interesse der Sicherung der Pressefreiheit den Schutz ihrer geistig-ideellen, insbesondere ihrer politischen „*Tendenz*“. Demzufolge entfällt bei Tendenzbetrieben die Mitwirkung des Betriebsrats in sog. „*wirtschaftlichen Angelegenheiten*“ (§§ 106 ff.) überhaupt, sofern nicht der Sonderfall der „*Betriebsänderung*“ gegeben ist (§§ 111 ff.). In personellen Angelegenheiten scheidet die Mitwirkung des Betriebsrats überall dort aus, wo „*die Eigenart des Unternehmens oder des Betriebs dem entgegensteht*“ (§ 118 Abs. 1). Die „*Eigenart des Betriebs*“ spielt naturgemäß gerade bei Anstellung und Entlassung leitender Angestellter (Redakteure) als sog. „*Tendenzträger*“ eine wesentliche Rolle. Zum Kreis der „*personellen Angelegenheiten*“ gehören nach MAYER-MALY auch die in §§ 81 ff. geregelten Mitwirkungs- und Beschwerechte des einzelnen Arbeitnehmers einschließlich der Einsicht in die Personalakten. Dagegen gehört das wichtige Recht der Bestimmung der *grundsätzlichen Haltung der Zeitung*, das dem Verleger zusteht, wie auch das strittige Thema der Richtlinienkompetenz und der sog. Einzelanweisung nicht zum Bereich der personellen Mitbestimmung. Dasselbe gilt für den Anspruch der Redaktion auf Informierung bzw. Anhörung vor oder bei etwaigen das Unternehmen betreffenden Verkaufsverhandlungen. Hier liegt nach MAYER-MALY ein klarer Fall der wirtschaftlichen Mitbestimmung vor. Da das BetrVerfG von 1972 gegenüber der alten Fassung von 1952 hinsichtlich der Mitbestimmung des *Betriebsrats* in Tendenzbetrieben keine wesentliche Änderung bringt, hat man nunmehr versucht, den Anspruch auf eine stärkere Mitbestimmung der Redakteure unmittelbar aus dem Grundrecht der Pressefreiheit des Art. 5 GG als sog. „*innere Pressefreiheit*“ herzuleiten. Diese These wurde vor allem in dem Gutachten verfochten, das Prof. DR. FRIEDRICH

KÜBLER (Konstanz) für den 49. Deutschen Juristentag erstattete.<sup>2)</sup> Nach KÜBLER handelt es sich bei der angestrebten „*Redaktionsvertretung*“ nicht in erster Linie um die Wahrung von Arbeitnehmerinteressen im Sinne des Betriebsverfassungsrechtes, sondern um eine optimale Gestaltung des von den Redaktionen zu erarbeitenden geistigen Produkts, also um Presserecht, nicht um Arbeitsrecht.

Nach MAYER-MALY führt die hier versuchte Konfrontation: „*Hie Presserecht – hie Arbeitsrecht*“ in die Irre, denn die Frage nach der Stellung der Redakteure in Presse- und Rundfunkbetrieben hat sowohl presserechtlichen wie arbeitsrechtlichen Bezug. Es läßt sich nicht wegdiskutieren, daß die Redakteure auch Arbeitnehmer sind. Diese Eigenschaft wird durch den publizistischen Charakter ihrer Tätigkeit nicht aufgehoben. Aus dieser Feststellung zieht MAYER-MALY den praktisch recht bedeutsamen Schluß, daß für eine *gesetzliche Regelung* der Materie „*Mitbestimmung*“ sowohl die arbeitsrechtliche Gesetzgebungskompetenz (Art. 74 Nr. 12 GG) wie auch die presserechtliche Rahmenkompetenz (Art. 75 Nr. 2 GG) gegeben sein müßten und sonach zumindest zwei Gesetze erforderlich seien. Den von Prof. DR. PETER LERCHE (München)<sup>3)</sup> vorgeschlagenen Weg, durch „*Schwerpunktermittlung*“ die letztlich maßgebliche Kompetenz zu ermitteln (die LERCHE bei der Mitbestimmung dem Presserecht zuerkennen will), lehnte MAYER-MALY als nicht gangbar ab. MAYER-MALY widersprach der Ausgangsthese KÜBLERS, daß die „*Redaktionsautonomie*“ zum Wesen der Pressefreiheit gehöre. Denn es ließe sich durchaus der Fall denken, daß Redaktionsautonomie in konsequenter Auswirkung zu einer Beeinträchtigung wahrer Pressefreiheit führen könne. Doch lehnte MAYER-MALY in Übereinstimmung mit KÜBLER die altliberale Ansicht ab, wonach sich der Schutz der Pressefreiheit nur gegen staatliche Eingriffe wende; das Grundrecht des Art. 5 GG wende sich auch gegen Eingriffe durch nichtstaatliche Normsetzung. Nachdrücklich wandte sich MAYER-MALY gegen die von Prof. SPIROS SIMITIS auf dem 49. Deutschen Juristentag vertretene These,<sup>4)</sup> wonach die Tendenz-Schutzbestimmung des § 118 BetrVerfG einer Verwirklichung der „*inneren Pressefreiheit*“ im Wege stehe und eliminiert werden müsse. Diese Ansicht übersehe, daß § 118 zwar nicht Verfassungsrang, wohl aber unmittelbaren Verfassungsbezug habe, weil er in Ausprägung des Art. 5 GG den Freiheitsraum von Wissenschaft, Kunst, Religion und Publizistik im sozialrechtlichen Bereich sichere.

Zu der rechtlich schwierigen Grundsatzfrage, ob und in welchem Umfang in Presse- und Rundfunkbetrieben neben dem Betriebsrat eine *besondere Redaktionsvertretung* eingerichtet werden könne, vertrat MAYER-MALY die Auffassung, daß gegen eine solche Sonderregelung im Presse- und Rundfunkbereich keine verfassungsrechtlichen Bedenken bestünden. Der § 3 des neuen BetrVerfG sehe Sondervertretungen der Arbeitnehmer bestimmter Arbeitsbereiche ausdrücklich vor. Dem Gesetzgeber stehe es frei, einer solchen Redaktionsvertretung selbst dort

1) Vgl. NJW 67, 1015; 71, 1303.

2) Siehe auch NJW 72, 2077.

3) JZ 72, 468 ff.

4) Siehe auch NJW 72, 2077.



ren kann daher nur ein Haftbefehl gegen einen Beschuldigten bestehen, auch wenn dieser mehrerer Taten dringend verdächtig ist. Dieser Haftbefehl muß alle Taten enthalten, die in demselben Verfahren untersucht werden, soweit der dringende Tatverdacht besteht (§ 112 I StPO). Es wäre ein Verstoß gegen die prozeßrechtliche Fairness<sup>1</sup>, wenn der Haftbefehl nur auf eine von den mehreren Taten gestützt würde, deren der Beschuldigte dringend verdächtig ist, vielleicht sogar zu dem Zweck, später die andere Tat zur Begründung des Haftbefehls nachschieben oder gar die eine Tat durch die andere ersetzen zu können. Nur wenn alle Taten, die den Haftbefehl zu rechtfertigen geeignet sind, in diesen miteinbezogen werden, wird eine Irreführung des Beschuldigten vermieden. Wenn dagegen der Haftbefehl nur auf eine Tat unter grundloser Weglassung anderer gestützt wird, kann der Beschuldigte zu unnützen Anträgen und Beschwerden und damit zu unnötiger Verzögerung und vielleicht sogar zu nichtgewollter Verlängerung der Untersuchungshaft bewogen werden. Aus eben diesen Erwägungen hat der Deutsche Bundestag bei den Beratungen über das Strafprozeßänderungsgesetz vom 19. 12. 1964 bei der Formulierung des § 114 II Nr. 4 StPO beschlossen, daß im Haftbefehl grundsätzlich alle Tatsachen anzugeben sind, aus denen sich der dringende Tatverdacht und der Haftgrund ergibt.

Daraus folgt, daß der Ausdruck „wegen derselben Tat“ in § 121 I StPO in der Regel — entgegen der Auffassung des OLG Oldenburg — das gleiche bedeutet, wie wenn es hieße „in demselben Verfahren“<sup>2</sup>. Wird eine neue Tat bekannt oder durch Verbindung zweier Verfahren Gegenstand der Untersuchung, so ist sie bei nächster Gelegenheit in den Haftbefehl miteinzubeziehen, wenn sie diesen zu begründen geeignet ist. War der Vollzug des Haftbefehls vorher ausgesetzt worden (§ 116 StPO), so kann die neue Tat Anlaß sein, diese Anordnung rückgängig zu machen (§ 116 IV Nr. 3 StPO)<sup>3</sup>. Nur wenn in einem Verfahren ein Haftbefehl aufgehoben worden ist und dann erst eine weitere Tat des Beschuldigten bekannt oder aus einem sonstigen Grund in das Verfahren einbezogen wird, kann wegen dieser neuen Tat ein neuer Haftbefehl erlassen werden. Für ihn läuft die 6-Monate-Frist für die besondere Haftprüfung nach den §§ 121, 122 StPO selbständig. Der frü-

Einfluß mehr.

Nun zu dem Fall, mit dem sich das OLG Oldenburg zu befassen hatte. Die Verfahren vor dem Jugendschöffengericht und dem Landgericht waren z. Z. der Entscheidung des Oberlandesgerichts noch nicht miteinander verbunden. Im ersteren Verfahren bestand der Haftbefehl, über den zu entscheiden war; im letzteren war ebenfalls ein Haftbefehl erlassen, sein Vollzug war jedoch ausgesetzt worden. Da die beiden Verfahren noch nicht zu einem verbunden waren, konnten die beiden Haftbefehle nebeneinander bestehen. Wären sie schon verbunden gewesen, so hätten beide Haftbefehle zu einem zusammengefaßt werden müssen. In diesem Falle hätten auch die Vollzugszeiten aus beiden Haftbefehlen bei der Anwendung des § 121 StPO zusammengerechnet werden müssen. Z. Z. des Beschlusses des OLG Oldenburg bestand hierzu noch kein Anlaß. Darin ist dem Beschluß im Ergebnis — wenn auch aus anderen Erwägungen — zuzustimmen.

Das Bedenklichste an der Beschlußbegründung ist die Auffassung, die im letzten Absatz zum Ausdruck kommt: Wenn die 6-Monate-Frist zur Vorlegung der Akten am Tage der Beschlußfassung des vorlegenden Richters (§ 122 I StPO) schon abgelaufen gewesen wäre, hätte sich das Oberlandesgericht dazu genötigt gesehen, den weiteren Vollzug von Untersuchungshaft sofort zu beenden. Erfreulicherweise lehnt die große Mehrheit der Oberlandesgerichte eine derartige Schematisierung ab<sup>4</sup>. Nach der Entstehungsgeschichte der §§ 121, 122 StPO sollen in dem besonderen Haftprüfungsverfahren außer den normalen zusätzliche materielle Haftvoraussetzungen geprüft werden. Das soll an der 6-Monate-Grenze geschehen. Hätte der Gesetzgeber die Haftbeendigung nach 6 Monaten oder etwa auch nach einer anschließenden 3-Monate-Frist (§ 122 IV S. 2 StPO) allein wegen Versäumnis des Vorlegungstermins gewollt, hätte er eine automatische Haftbeendigung vorgesehen und vorsehen müssen. Dann hätte er auch nicht in das Ermessen des Oberlandesgerichts stellen dürfen, wie lange es sich für seine Entscheidung Zeit lassen darf (§ 121 III S. 1 StPO). Im übrigen darf dem Gesetzgeber doch nicht eine Regelung als gewollt unterstellt werden, bei der es vom reinen Zufall abhängen kann, ob die Untersuchungshaft weiterbestehen soll oder nicht. Diese Wirkung hatte früher und hat heute keine Haftprüfungsfrist.

Generalstaatsanwalt Dr. Theodor KLEINKNECHT, Nürnberg

<sup>1</sup> Schwarz-Kleinknecht, StPO, 27. Auflage, Einl. 7 A; Anhang A 4 Anm. 4 zu Art. 6 MRK.

<sup>2</sup> Schwarz-Kleinknecht, Anm. 1 C zu § 121 StPO.

<sup>3</sup> Dünnebier, Das neue Recht der Untersuchungshaft und in Löwe-Ro-

senberg, Ergänzungsband, 1966, Anm. 9 zu § 116 StPO.

<sup>4</sup> Wie Oldenburg OLG Schleswig NJW 65, 2119; OLG Frankfurt, 1. Strafsenat, NJW 65, 1731; 66, 2076, anders jedoch der 3. Strafsenat im Beschluß vom 26. 7. 1967, OLGSt S. 38 zu § 121 StPO.

## LITERATUR

Kronstein, Heinrich: Briefe an einen jungen Deutschen. München: Beck. 1967. 323 S. Lw. 16.80.

Dies Buch, äußerlich die Selbstbiographie eines Professors der Rechte in Briefform, gibt sich nüchtern und schlicht im Stil, durchsichtig und prägnant im Inhalt und in der Gedankenführung. Aber schon nach wenigen Seiten spürt der Leser: Es handelt sich um eines der tiefsten und aufrührendsten „Sachbücher“ der Nachkriegszeit. Zu Recht sagt Tiefenbacher im Betriebsberater 1967, S. 1495, Kronsteins „Briefe“ gehörten zu den aufschlußreichsten Autobiographien der letzten Jahrzehnte, die der Rezensent gelesen habe. Das Buch ist, um mit Tiefenbacher zu sprechen, eben nicht nur die historisch getreue Schilderung des Schicksals und der Odyssee eines jüdischen Mitbürgers. Das „Briefbuch“ hat viele Dimensionen, eine zeitgeschichtliche, eine personengeschichtliche, eine juristische, eine bildungspolitische, eine hochpolitische. Das einfache Gewand der Briefe an einen jungen deutschen Jurastudenten, der, aus der Ostzone kommend, mit unvoreingenommenen Fragen an den Autor herantrat und ihn dadurch zu einer Autobiographie veranlaßte, die glanzlose Sprache und die lockere, gelegentlich impressionistische Gedankenfolge erweisen sich als Untertreibungen. Sie sind möglicherweise gezielt; denn sie fangen den Leser ein in eine Dialektik von einfacher Aussageform und schwerem Aussageinhalt, wodurch die

zupackende, angreifende Wirkung des Buches nur noch verstärkt wird. Sicherlich spiegelt die Verhaltenheit der Darstellung eine typische Aussageweise Kronsteins wider. Kronstein pflegte sich oft auf diese Weise zu äußern, schon in seiner Habilitationsschrift über die abhängige juristische Person, oder in seinem Artikel „Arbitration is Power“, New York University Law Review, 1963. Auch in Kronsteins anschließend zu besprechendem, gleichzeitig mit dem „Briefbuch“ erschienenen Werk über die internationalen Kartelle gelingt dem Verfasser diese Darstellungsweise. Es wäre ein Mißverständnis, dies als Provokation oder als „Anklageschrift“ zu verstehen, wie Fritz Schönherr in seiner Besprechung des Kartellbuchs in der Österreichischen Juristenzeitung 1967, S. 588, andeutet. Kronsteins Aussagen sind nicht als Anklagen gemeint, weder im „Briefbuch“ noch im „Kartellbuch“, es geht ihm vielmehr nur um nüchterne Feststellungen, um gleichsam selbstverständliche Beobachtungen, deren Wirkung auf den Leser Kronstein offen läßt. Die dahinterstehende Meinung kann freilich dem Leser nicht entgehen, aber ein sachlich urteilender Gegner wird Kronstein zugestehen müssen, daß er seine Thesen ohne Schärfe und Sendungsbewußtsein vertritt. Die Themen des Briefbuchs und des Kartellbuchs sind im Grunde gleich: Das Verhältnis des Menschen zu den ihn steuernden Werten und die Überprüfung der Echtheit dieser Werte. Die im Briefbuch abgehan-



delten Themen sind Mittel zum Zweck der Darstellung der Grundfrage.

Das Buch schildert nur kurz, wie *Kronstein* im traditionsgebundenen, aber weltoffenen jüdischen Elternhaus aufwächst, wie 1914 sich die „allgemeine Auflösung unseres gewohnten Lebens vollzog“, und wie er dann an der Westfront als Melder „Verbindungen herzustellen“ hatte. Das ganze Buch ist ein Zeugnis dafür, wie man unter Beschuß von allen möglichen Seiten Verbindungen vorbereiten und herstellen kann, allerdings nicht mehr für kriegerische, sondern für friedliche Zwecke.

Auf die Schilderung der von politischen Störungen beeinflussten Studentenzeit in Heidelberg und Bonn, wo er Schüler von *Martin Wolff*, *Erich Kaufmann* und *Josef Partsch* wurde, folgt, biographisch eingeleitet, eine Einführung in den Kern *Kronsteinscher* Gedankengänge: Das Problem des Mißbrauchs juristischer Formen für Zwecke, für die sie nicht geschaffen sind. *Kronstein* benutzt die nicht undramatische Geschichte der Veröffentlichung seiner Schrift über die abhängige juristische Person zur Entwicklung seines Problems. Das 1931-erschienene Werk ist bis heute eines der wenigen und daher wichtigen Werke über die Grenzen, die der Verwendung des Eigentumsbegriffs und des Begriffs der juristischen Person vom wirtschaftlichen Zweck gesteckt sind. Wer sich mit der für das Konzernrecht entscheidenden Durchgriffsproblematik beschäftigt hat, muß erkennen, daß viele der von *Kronstein* damals aufgestellten rechtspolitischen Forderungen bis heute noch nicht erfüllt werden konnten.

Ein Brief schildert *Kronsteins* Anwaltstätigkeit (S. 106 ff.). Er enthält in kurzen Worten Grundsätze freiheitlicher Advokatur. („...Ich möchte sagen, daß es ein entscheidendes Kriterium für den Unterschied zwischen einem freien und einem totalitären Land ist, ob es ein Anwaltsbüro und ein Beratungszimmer dieser Art geben kann oder nicht.“) Wie *Kronstein* dann durch randalierende SA und auf andere Weise aus seiner Mannheimer Anwaltspraxis vertrieben wurde, wie die Bemühungen um einen organisierten Schutz jüdischer Mitbürger fehlschlagen, wie die Jahre der Emigration in USA begannen, zieht am Leser, bei aller Zurückhaltung in der Darstellung, eindrücklich und bedrückend vorüber. Nachhaltig wendet sich *Kronstein* gegen die These von *Hannah Arendt*, die deutschen Juden hätten sich nicht verteidigt, sondern seien wie preußische Soldaten, denen man zu sterben befohlen hätte, gestorben, auch sie hätten die „preußische Philosophie“ akzeptiert und so letztlich selbst ihren Tod veranlaßt.

Einem zweiten Studium der Jurisprudenz in den USA folgt die praktische Tätigkeit als Rechtsgutachter, Übersetzer und Sachbearbeiter im amerikanischen Justizministerium, und seit 1939 in der Antitrust Division unter *Thurman Arnold*. Seit 1942 bekleidet *Kronstein* eine Professur an der *Georgetown University* in Washington D. C. Was *Kronstein* über seine auch nach 1942 andauernden Arbeiten in der Washingtoner Justizverwaltung schreibt, gehört zu dem Interessantesten, was bisher über die Roosevelt-Verwaltung der Kriegsjahre aus deutscher Feder zu erfahren war. Höhepunkte der Darstellung sind dabei die Sitzung „kurz vor Beginn des deutsch-russischen Krieges“, in der schon damals die deutsche Teilung in der Art, wie sie heute besteht, als unvermeidlich vorhergesehen wurde (!) (S. 211), und die Schilderung des Sieges der „Negativisten“, als die Amerikaner im Zuge der Besetzung Deutschlands von den Massenvernichtungen der Juden erfuhren (S. 226/227). *Kronsteins* Beobachtung, daß die höhere amerikanische Verwaltung von der Eigenschaft deutscher KZs als Vernichtungslager erst im Zuge der Besetzung Deutschlands, also etwa ab Herbst 1944 erfuhr, dürfte einen Beitrag darstellen zu der bis heute ungelösten Frage, von wann ab in Deutschland und außerhalb Deutschlands die Durchführung der Vernichtungsprogramme bekannt sein mußte.

Das letzte Drittel des Buches wendet sich dem Wiederaufbau Deutschlands zu, an dem *Kronstein* als Wirtschaftsoffizier zeitweise mitgewirkt hat. Als Bestandteile einer nationalen und übernationalen Friedensordnung werden Fragen der Bildungsreform, der Einigung Europas und der internationalen Organisation erörtert. Eine differenzierende Betrachtungsweise wird vor allem auf die Fragen transatlantischer Universitätsreform angewandt. *Kronstein* warnt wie kaum ein anderer vor vereinfachender Übernahme fremder Muster.

Das Buch ist mehr als das Zeugnis eines Menschen, der, von seinem Volk verstoßen, sein Volk im Ausland juristisch und politisch vertritt, um nach der militärischen Niederlage seines Volkes wirtschaftlich, juristisch und geistig am Wiederaufbau teilzunehmen. *Kronstein* hätte dies nicht zum Gegenstand einer Selbstdarstellung gemacht. Es ließ sich für ihn nicht vermeiden, auch dies darzustellen.

Es geht *Kronstein* in diesem Buch um den Nachweis, daß man als Gelehrter, als Europäer und als Christ (*Kronstein* begründet im

Briefbuch seine 1935 erfolgte Konversion vom Judentum zum Katholizismus) auch in ausweglos erscheinender menschlicher und politischer Situation helfen und Brücken schlagen kann. Doch wäre das Buch nicht ausgeschöpft durch seine Charakterisierung als moralischer Appell an die junge Generation. Auch soll kein „Beispiel“ aufgezeigt werden. Man könnte dem Briefbuch auch die Überschrift „Transatlantische Reflexionen“ geben. Das Eigenartige dieses Buches ist, daß sich die Reflexionen zwar auf die verschiedensten Lebensbereiche, wie Recht, Politik, Wirtschaft, Geistesgeschichte, Bildungsreform, Religion beziehen, und daß doch alle Reflexionen ausgehen von einer im Glauben verwurzelten personalen Mitte und eben darum nicht Reflexionen bleiben, sondern zu gelebten und beschriebenen Taten werden. So leicht zugänglich die gedankliche Erfassung des „Briefbuches“ als bloßer „moralischer Appell“ wäre, so schwer zugänglich ist die Erfassung dieser Vielschichtigkeit des Buches. Und doch scheint *Kronstein* unmittelbar verstanden zu werden. Die erste Auflage war binnen weniger Wochen vergriffen. Eine zweite ist im Erscheinen.

Prof. Dr. Wolfgang FIKENTSCHER, Tübingen

*Kronstein, Heinrich*: Das Recht der internationalen Kartelle, zugleich eine rechtsvergleichende Untersuchung von Entwicklung und Funktion der Rechtsinstitute im modernen internationalen Handel. Berlin: J. Schweitzer. 1967. XXXVIII, 518 S. (Recht der internationalen Verwaltung und Wirtschaft, Bd. 5. Hrsg. von *Günther Jaenicke*, *Heinrich Kronstein*, *Hans Jürgen Schlochauer* in Verbindung mit dem Institut für ausländisches und internationales Wirtschaftsrecht, Frankfurt a. M.) Lw. 146.—

Es handelt sich um den fünften, aber zeitlich zuerst erschienenen Band eines neunbändigen Sammelwerkes, das unter der Betreuung des Instituts für ausländisches und internationales Wirtschaftsrecht an der Universität Frankfurt am Main das Werk von *Karl Neumeyer*, Internationales Verwaltungsrecht, vier Bände, 1910—1936, fortsetzen will. In dem hier zu besprechenden Band 5, „Das Recht der internationalen Kartelle“, legt *Kronstein* das Ergebnis jahrzehntelanger Studien im internationalen Kartellrecht vor. Das Werk geht zutreffend von der Tatsache aus, daß es eine internationale rechtliche Regelung der Kartelle nicht gibt. Das Buch wendet sich aber nun nicht einem vielleicht fruchtlosen Bemühen zu, die Eignung nationaler Kartellrechte zur Erfassung internationaler Kartelle zu prüfen, sondern es nimmt eine Arbeitsweise wieder auf, die seit *Arthur Nußbaums* „Rechtstatsachenforschung“ im Wirtschaftsrecht zu sehr vernachlässigt wurde: Die Erforschung tatsächlicher Zusammenhänge und rechtlicher Wirkungsabläufe. Die Arbeitsweise internationaler Kartelle in rechtlicher und wirtschaftlicher Hinsicht wird von *Kronstein* mit umfassendem Material belegt. Über die Rechtstatsachenforschung hinaus weist *Kronstein* Wege zu einer Regelung internationaler Kartelle in rechtspolitischer Hinsicht.

Nach kurzer Darstellung der zugrundeliegenden Probleme wendet sich der Verfasser unmittelbar dem Verhältnis zwischen staatlicher und privater Ordnung im internationalen Handel zu, wodurch das Buch erfreuliche Wirklichkeitsnähe gewinnt. Dem folgt eine Schilderung der modernen Kartelltypen, wobei man die Beschreibung des „technologischen Kartells“ als eine geglückte Entdeckung bezeichnen darf. Nicht mehr das Rohstoff- oder das Produktkartell steht heute im Vordergrund der wirtschaftsrechtlichen Bedeutung, sondern die Zusammenarbeit der Entwicklungsindustrien im technologischen Kartell. Auch dem Abwehrkartell werden eingehende Ausführungen gewidmet. Es folgt eine juristische Analyse des Vertragssystems der internationalen Kartelle unter Hervorhebung der Rolle der Vertragsparteien sowie anderer Marktbeteiligter, der Bedeutung der gewerblichen Schutzrechte und der Schiedsgerichtsbarkeit und Schlichtung.

In einem zweiten Teil des Buches prüft *Kronstein* die Verwendung und Umgestaltung der nationalen Rechtsinstitute durch internationale Kartelle. Dem „Besonderen Teil“ des internationalen Kartellrechts folgt gleichsam ein „Allgemeiner“. Der zweite Teil beginnt mit Ausführungen zum internationalen Privatrecht der Kartelle, das zunehmend eine Unterstellung internationaler Kartelle unter „neutrales Recht“ und „neutrale Gerichte“ zum Ziel hat. Dem folgt eine Darstellung der wichtigsten internationalprivatrechtlichen und -zivilprozessrechtlichen Probleme in den wesentlich beteiligten Rechtsordnungen, unter Hervorhebung des deutschen und amerikanischen Rechts. Zutreffend wird der privaten Schiedsgerichtsbarkeit ein breiter Raum eingeräumt als den üblichen internationalzivilprozessualistischen Fragen. Eine grundlegende theoretische Betrachtung beschließt den zweiten Teil, nämlich die „Verwendung und Umgestaltung der gewerblichen Schutzrechte und der juristischen Person“ für die Zwecke der internationalen Wettbewerbsbeschränkungen.



Vier Merkmale sind es also, die dieses Buch von anderen abheben: In methodischer Hinsicht das Wiederaufgreifen der Rechtsstatistikforschung; in rechtspolitischer Hinsicht der Ruf an die Rechtswissenschaft, sich des seit Jahrzehnten vernachlässigten internationalen Kartellrechts anzunehmen; in rechtsdogmatischer Hinsicht die Entdeckung und sehr genaue Beschreibung des „technologischen Kartells“; sowie, für das deutsche Schrifttum erstmalig, der umfangreiche Nachweis eines engen Zusammenhangs zwischen internationalem Kartellrecht und Schiedsgerichtsbarkeit.

Es mag verstatet sein, die rechtspolitische Thematik noch einmal aufzugreifen. *Schönherr* hat hierzu bemerkt, das Buch *Kronsteins* könne weithin als Anklage empfunden werden (Österreichische Juristenzeitung 1967, S. 587/588). Man muß sich fragen, gegen wen sich eine Anklage, wenn überhaupt, richtet. *Kronstein* beschreibt allerdings die handels- und wettbewerbsbeschränkenden Praktiken bestehender internationaler Kartelle und mit ihnen zusammenarbeitender Nationalstaaten und internationaler Organisationen so detailliert und gut belegt, daß der Leser, juristisch vorgebildet oder nicht, das Buch recht ernüchert aus der Hand legt. Und doch kann man mit Sicherheit sagen, daß *Kronstein* keine „Anklage“ gegen Bestehen oder Praktiken internationaler Kartelle richten wollte. *Kronstein* wollte die Dinge schildern wie sie sind. Ein in Jahrzehnten mühsam zusammengetragenes Material wird vorurteilslos vor dem erstaunten Leser ausgebreitet und durch einen kritischen Apparat unterbaut, der schlechthin Bewunderung abnötigt. Die rechtspolitische Haltung *Kronsteins* ist dabei aber nicht, daß man, was hier nachgewiesen wird, verbieten sollte. Aber *Kronstein* hält es nicht mit denen, die über die Wirtschaftswirklichkeit der internationalen Kartelle nicht sprechen wollen, die, um mit den Worten der alten Reichstagsdenkschrift aus den Jahren 1904/1906 zu sprechen, sagen würden: „Die Zusammenhänge hält man diskret“. *Kronstein* hat es sich zur Aufgabe gesetzt, das, was er auf Grund seiner wirtschaftsrechtlichen Erfahrungen in Theorie und Praxis persönlich für wichtig hält, auszusprechen und zu beschreiben.

Wenn das Buch also keine Anklage gegen die internationalen handelsbeschränkenden Praktiken enthält, so läßt es doch in anderer Richtung eine Kritik, wenn auch keine Anklage laut werden, und zwar durch seine bloße Existenz: Von ganz wenigen Ausnahmen abgesehen, hat es sich die Rechtswissenschaft, zumal in Deutschland, schon seit der Jahrhundertwende zu leicht gemacht, wenn es um das Verhältnis von Staat und Wirtschaft vor dem Forum der Gerechtigkeit geht. *Kronsteins* Buch will offenbar machen, daß es eine ganze Gruppe von wichtigen Zusammenhängen wirtschaftsrechtlicher Art gibt, die bisher zu wenig beachtet wurden. Zu lang hat man sich über bloße Rechtsformen (z. B. den Kartellbegriff), über gesellschaftsrechtliche Gestaltungsmöglichkeiten (z. B. die Doppelgesellschaft) und über rein kollisionsrechtliche Fragen (wie die Parteienautonomie, das gesellschaftsrechtliche Personalstatut und die Anknüpfung in der internationalen Schiedsgerichtsbarkeit) Gedanken gemacht, ohne sich über die wirtschaftlichen Hintergründe Rechenschaft abzulegen, die durch die Setzung von Machtpositionen den Rechtsfragen bestimmte Zielrichtungen zu geben vermögen. *Kronsteins* Buch will, trotz seines Umfangs, hier nur ein Anfang sein. Das Werk stellt nicht nur den Juristen des Wirtschaftsrechts, sondern auch denen des gesamten Privatrechts eine Aufgabe. Entsprechend *Kronsteins* Methode wird, auf umfangreiches Tatsachenmaterial gestützt, das rechtspolitische Anliegen und die Sorge um seine Verwirklichung deutlich. Es geht um eine Jurisprudenz, welche die von ihr eingesetzten Mittel unter Kontrolle behält, eine Jurisprudenz, die sich ihre Werkzeuge nicht von außerrechtlichen Kräften aus der Hand winden läßt.

Prof. Dr. Wolfgang FIKENTSCHER, Tübingen

*Brockhaus Enzyklopädie* in 20 Bänden. 17., völlig neu bearb. Aufl. des Großen Brockhaus. Bd. 4: CHOD — DOL. Wiesbaden: Brockhaus. 1968. 824 S. Subskr.-Preis für Bd. 4: Halbleder 79.--

Im Mittelpunkt dieses Bandes stehen die Artikel über Deutschland und die anderen mit „Deutsch...“ beginnenden Stichwörter. Sie

sind im Vergleich mit der Voraufgabe erheblich erweitert (rd. 230 Seiten!) und bieten eine Fülle von Informationen. Im Artikel „Deutschland“ wird u. a. ausführlich über Verfassung, Verwaltung, Finanzen, Wirtschaft, Bildungswesen usw. der Bundesrepublik (S. 618—644) und der DDR (S. 644—665) berichtet. Hervorgehoben seien ferner die Artikel „Demokratie“ (informativ, soweit in dem zu engen Umfangsrahmen möglich) und „Dialektischer Materialismus“ (mit gutem Literaturnachweis) sowie „Daten“ und „Dokumentation“ (beide stark ausgebaut). Den Stichwörtern „Diplom“ und „Doktor“ sind nützliche Verzeichnisse der Diplome und Doktorgrade der deutschsprachigen Hochschulen beigelegt. Im Artikel „Dissertation“ wird behauptet, „die Qualität der Dissertationen“ sei „in den meisten Fächern so gestiegen, daß heutige Dissertationen mit früheren Habilitationsschriften vergleichbar sind (!?). Deshalb (?) werden seit 1967 sehr gute Dissertationen von einigen Fakultäten als Teile von Habilitationsleistungen anerkannt.“ — Ergänzungswunsch: Dem studentischen Disziplinarrecht, das in dem Artikel „Dienststrafrecht, Disziplinarrecht“ seltsamerweise unerwähnt bleibt, sollte ein eigener Artikel (mit Literaturnachweis) gewidmet werden. Die kurze, zudem mißverständliche Bemerkung im 2. Abs. der Ausführungen zum Stichwort „akademische Freiheit“ (Bd. 1 S. 248) reicht zur Information über die rechtlich und politisch problematische Materie nicht aus. M.

*Scheyhing, Robert*: Höfeordnung. Köln: Carl Heymanns Verlag. 1967. 256 S. kart. 33.--

Das Buch enthält außer den in seinem Mittelpunkt stehenden Erläuterungen der Höfeordnung vom 24. April 1947, die auf den Stand des Schrifttums vom September 1966 abgestellt sind, die wichtigsten Gesetzestexte sowie Anmerkungen zu den §§ 37, 38, 58, 59 der Verfahrensordnung für Landwirtschaftssachen. Den Erläuterungen (183 Seiten) liegt der Leitgedanke zugrunde, das in den Ländern Hamburg, Niedersachsen, Nordrhein-Westfalen und Schleswig-Holstein geltende Anerbenrecht als eine mit dem Erbrecht des Bürgerlichen Gesetzbuchs verbundene Sonderregelung verständlich zu machen. Dementsprechend schließt sich der Gang der Ausführungen möglichst an die Begriffe des bürgerlichen Rechts an, wobei vereinzelt Seitenblicke auf Regelungen anderer deutscher Anerbengesetze gerichtet werden. Durch die Deutlichkeit, mit der diese Konzeption in den Erläuterungen hervortritt, hebt sich das Werk *Scheyhings* von den beiden umfangreicheren Kommentierungen ab, die in der 6. Auflage der Höfeordnung von *Lange/Wulff* nach dem Stande vom Sommer 1965 sowie in der völlig neu bearbeiteten 2. Auflage von *Wöhrmann*, Landwirtschaftsrecht, vom Mai 1966 — sie konnte noch nicht verwertet werden — geboten werden; diese gehen mehr auf die Entstehungsgeschichte und die Vorläufer der in der Höfeordnung enthaltenen Regelungen ein.

Die Erläuterungen zeichnen sich durch selbständige Gedankenführung aus und geben infolgedessen auch dort, wo sie im Ergebnis den Meinungen anderer entsprechen, nicht selten eigene Begründungen. Im ganzen überwiegt das Bestreben, die vertretenen Standpunkte eingehend zu fundieren, gegenüber einer Tendenz, überall Rechtsprechung und abweichende Meinungen und deren Gründe zu behandeln oder zu erwähnen (vgl. z. B. Anm. 9 zu § 8 — a. A. *Wöhrmann* —, Anm. 30 zu § 8 — abweichende Rechtsprechung —, Anm. 13 zu § 13 — *BGHZ* 28, 92 —, Anm. 21 zu § 14, Anm. 15 zu § 17 — *BGH RdL* 1962, 18 u. a. —, Anm. 54 zu § 17 — abweichende Rechtsprechung —).

*Scheyhings* flüssig geschriebene Erläuterungen haben entsprechend dem beschränkten Umfang ihren Schwerpunkt in den Hauptproblemen des Höferrechts, z. B. ist der Übergabevertrag besonders eingehend behandelt (22 Seiten). Bei Erwähnung und Erörterung von weiteren Einzelfragen, die sich für die Anwendung der Vorschriften der Höfeordnung ergeben, zeigt der Verfasser verständliche Zurückhaltung. Die dabei getroffene Auswahl des Stoffes erscheint fast durchweg als gelungen; sie macht das Werk übersichtlich und regt den Leser zum Denken an.

Ministerialdirigent Dr. Heinrich von SPRECKELSEN, Bonn

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