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SINZHEIMER, H. *Jüdische Klassiker der Deutschen Rechtswissenschaft.* Frankfurter Wissenschaftliche Beiträge, Rechts- und Wirtschaftswissenschaftliche Reihe, Band 7. Frankfurt am Main: Vittorio Klostermann, 1953. Pp. 254.

On October 3rd and 4th, 1936, a conference was held in Berlin by the Reich Group of University Teachers of the National Socialist Lawyers' Guild on the topic "Jewry in Jurisprudence." The speakers were unanimous in describing the contribution of Jewish scholars to German law and jurisprudence as "peculiarly Jewish," meaning, "nonspiritual," destructive, conceived in the "disruptive philosophy of liberalism and individualism," and consisting in "a sham over-concrete, so-called objective observation." The conference, accordingly, issued a manifesto, banning the writings of Jewish legal scholars from German universities and German life. In answer to this manifesto, Hugo Sinzheimer, a prominent German expert on labor law, then in exile, wrote a series of biographical essays, which appeared in 1938 in Holland (in German) under the

title "Jewish Classics of German Jurisprudence." In it, the author purported to prove that, contrary to the allegations of the conference, the Jewish contribution to German law and jurisprudence was not "distinctively Jewish," disruptive, but rather consisted in a variety of opinions, rooted in and productive of German thought in its historical development. In 1953, the volume was reprinted in a series issued by the Law Faculty of the University of Frankfurt. The preface to this second printing was written by Franz Boehm.[1]

The tone of the book is dispassionate or—as a German would say—"scientific." Yet it is a book written with a tendency, and that tendency is disturbing. Unless the aim is to show that the Jewish background of certain writers, e.g., their knowledge of the Talmud, influenced their thought, so that their contribution is "distinctively Jewish"[2]—Sinzheimer attempts to demonstrate the very opposite—there is neither need nor, indeed, justification for books such as Five "Jewish" Lawyers of the Common Law[3] or "Jewish" Classics of German Jurisprudence. This for two reasons.

In the first place, no individual or group of individuals should be required to prove his or its claim to equal protection and to freedom of expression by showing that he or it is particularly excellent (or equally excellent with others),[4] representative of the community, or useful.[5] An attempt to adduce such proof tends to weaken rather than strengthen this essential postulate.

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[1] Franz Boehm was the representative of the Bonn Government in its conferences with Israel concerning reparations.

[2] For a brilliant study of the role played by Jewish law in the development of German law, see Guido Kisch, Sachsenspiegel and Bible (1941).

[3] Goodhart, Five Jewish Lawyers of the Common Law (1949). See Weitzner's review of this book in 13 Jewish Social Studies 263 (1951).

[4] Whether Negro, Indian, Asiatic, Catholic, or Jew, an individual should be judged solely on his merits as an individual to the extent that particular merits are pertinent to a particular issue.

[5] This is perhaps best expressed in a document reproduced in the book under review. Pp. 69–72. The document consists in a letter written by Levin Goldschmidt, the Lord Mansfield of the German Law Merchant, to the historian Heinrich von Treitschke on May 4, 1881, and appearing as annex to the biography of Goldschmidt. Treitschke, who had been a friend of Goldschmidt for many years, published a series of antisemitic statements, attributing to Jews numerous reprehensible qualities, but granting to Goldschmidt and several others the status of exceptions. Moreover, he invited Jewish scholars to prove their detachment by expressing agreement with him. After rejecting treatment as an "exception," Goldschmidt wrote:

> "I feel perhaps more vividly than anyone else the damage done not to Jewry but to the Jewish population. While not a historian myself, I believe that the history scholar, who knows how to differentiate the essential from the accidental, who investigates the causes of a complicated process with impartiality and calm coupled with a knowledge of the subject-matter, must arrive at entirely different conclusions from those which you have reached.
>
> "In my opinion, there are only two ways to reach these conclusions: either by finding the source of the evil in the inadequacy, nay, perhaps wrongfulness of the religious views of the Jews, hence by declaring them to be members of a bad religious community, beyond improvement—or by finding that source in the race, the original nationality.
>
> "You seem to assume essentially the second position; but you admit a more or less large group of exceptions. As against that, I emphatically declare it utterly inadmissible that each

Secondly, books should not be banned or burnt under any circumstances, whether on the ground that they are bad or on the ground that their authors are wicked. Ideas expressed in books should be vanquished by other books, not by burnings.[6] For nowhere has Georg Jellinek's statement, "Causality is the justice of world history,"[7] proved more true than in the realm of books. The history of culture shows that the judgment on the virtue or vice of a book often changes in the course of time. That history also demonstrates that many a book adjudged "good" was written by a man adjudged "wicked."[8] An attempt to save a book from burning by showing that it is a good book written by a good man does violence to the stated fundamental principle.

As against the position taken in this review, the argument might be advanced that while there was perhaps no need in the United States or in England for Goodhart's demonstration that the Jewish contribution was an asset to the common law,[9] the Nazis' express challenge of the Jewish contribution to German legal science did call for a refutation. I believe that it did not. On a scientific level, the National Socialist declaration raised no issue.[10] Nazi "science" was patently absurd. Refuting it was raising it to the level of a proposition which, though it might be shown to be erroneous, posed a scientific problem.

In this context, it might be interesting to note a view expressed by Franz Boehm in the preface to the second printing of the book under review.[11] Boehm feels that the spirit of inhumanity and brutality, prevailing in the Nazi era, as that of any inhumanity and brutality, is an outgrowth of a primitive human urge which is independent of any scientific or political rationale. It can associate itself with one doctrine as well as with another. For that reason, it is idle to fight it by demonstrating the falsity of its doctrinal or factual basis.[12]

member of a race or religious community, which is in itself bad, should have to prove that he is an exceptionally decent human being. I find in this assumption the heaviest assault upon the legal and social equality of citizens—, worse, because the accusations you raise essentially belong to the sphere of ethics."

[6] Luther's pronouncement is particularly apposite: "But heretics should be vanquished with books, not with burnings." Bainton, Here I Stand, a Life of Martin Luther (1950), p. 154.

[7] Cited in Sinzheimer, Jüdische Klassiker, p. 181.

[8] Perhaps, had Plato lived in our times, he might have been indicted of crime against nature. Yet many of our moral judgments may be traced back to him. Rousseau's own "Confessions" do not make him appear a model of a virtuous man. Yet the roots of many of our political and educational views may be found in his writings. Freud has shown that there is, indeed, an affinity between genius and neurosis, which is sometimes expressed in behavior of which society disapproves. See, Eine Kindheitserinnerung des Leonardo Da Vinci, 3rd rev. ed., 1923.

[9] Cited *supra*, note 3.

[10] In fact, most of its statements were self-contradictory. The Nazis accused the Jews of both hair-splitting conceptualism and over-concreteness, both of communism and capitalism.

[11] *Op. cit.*, pp. xi, xii.

[12] Of course, abroad where the work of German scholars was not well known, there may have been reason for counteracting the elaborate antisemitic propaganda of the Nazi regime by demonstrating wherein the contribution of Jewish scholars actually consisted. From this

However, as a study of the "Jewish" Classics of German Jurisprudence, Sinzheimer's book is justified by one redeeming feature. This feature is summarized in two words printed between the title page and the table of contents: "*In Memoriam.*" The book was dedicated to the memory of twelve legal scholars at a time when their memory was being slandered. It was reprinted in this spirit, "*in memoriam.*"

The twelve scholars whose memory is thus being honored are: Friedrich Julius Stahl, Levin Goldschmidt, Heinrich Dernburg, Josef Unger, Otto Lenel, Wilhelm Eduard Wilda, Julius Glaser, Paul Laband, Georg Jellinek, Eugen Ehrlich, Philipp Lotmar, and Eduard von Simson. The author's references to their Jewish background as well as his attempts at showing that they were not "distinctively Jewish" could be easily eliminated without detracting from the relevancy of the book as a study in the history of legal culture. Is there anything other than their Jewish background that unites them, so as to justify inclusion of their contributions in one volume?

They were "men of the 19th century," meaning that they not only lived during that century but also spiritually belonged to it.[13] They are actually "representative," in that their work affords a cross-section of the political, jurisprudential and legal opinion of the era.

Politically, it was an era in which the verbal symbols of the French Revolution had passed the stage of ethical-philosophical rationalization (Kant) and developed from fighting slogans to fixed assets of the legal and institutional-political vocabulary. It was also an era of awakened constitutionalism and rising nationalism. The stirring of the "masses" began. New ideas were shaping in the field of human liberty; the notion of social and economic protection of the individual, as an incident of individual right, evolved, proving how little Marx knew about the inventiveness of the human mind.

Jurisprudentially, reaction to Savigny's historical school was passing from adoration to skepticism. The contest of the Romanists and the Germanists[14] was active. Hegel's sham "world of reality" began crumbling, and Jhering declared his war on conceptualism. "Sociology" was growing increasingly meaningful.

In law itself, the 19th century was the period of the great codifications in Europe. But while new drafting techniques were developed, doubts arose concerning the omnipotence of statutes. The judicial function gained in significance. New fields of law—notably labor law—were emerging, in which the traditional distinction of statute and contract appeared to be waning.

point of view, Sinzheimer's book might have been useful had it been written in languages accessible to people other than German-speaking. For purposes of an effective counter-propaganda, moreover, it would have been preferable had Sinzheimer not attempted to refute many of the Nazi allegations which were, in fact, laudatory, although not meant to be such.

[13] Of course, several of these men, Ehrlich particularly, also belong to the 20th century.

[14] "Romanists" are called the students, and sometimes, the adherents, of Roman law, "Germanists" those of the native German law.

In this world of motion and variety, the group of twelve men to whom Sinzheimer's volume is dedicated does not represent a distinctive wing. At best, a common emphasis may be discovered. While none of these men believed in a completely self-sufficient individual, an individualistic component, varying in shade and degree, is present in the writings of each of them. Many of them, including Ehrlich, celebrated legal sociologist or sociological jurist,[15] were Romanists.[16] Nevertheless, they do not figure in the "Heaven of Jurisprudential Concepts"—Jhering's famed satire on conceptualism[17]—in which Romanists occupy a paramount position.[18] In fact, to those who were Romanists, the Roman law served not as an exercise in legal dialectics but as the very means for the discovery of the significance of legal reality. Of course, "reality" is a term of many meanings. Stahl first pointed out the logical errors of Hegel's logic and the absurdity of his concept of "reality," the reality discoverable by a purely logical process.[19] But the "institutional" reality he substituted therefor was quite different from the social reality of Eugen Ehrlich, more different perhaps than the latter is from the reality of American legal realism. Yet there is in the writings of the twelve scholars a distinct movement toward increasing concreteness and diversity of "reality."

When we turn from the equivocal notion of "reality" to the somewhat less equivocal notion of "practical thinking," we may find that, in varying degrees, all these men approached the law from the point of view of its application. Many were active in the political life and in the legislative work of their countries.[20] They were instrumental in developing constitutional ideas (Stahl, Laband, Jellinek) as well as in shaping the reform of the civil (Dernburg,

[15] Ehrlich has won much more acclaim in the United States than in Germany. Sinzheimer remarks (*op. cit.*, p. 206): "There was silence when Eugen Ehrlich passed away. No memorial addresses were delivered; until the present time, many German legal scholars do not know him even by name." This may be explained by the general distrust of sociology prevailing in Germany rather than, as Patterson states (see his article, "Ehrlich, Eugen," in Encyclopaedia of the Social Sciences), by Ehrlich's "unreliability" as a scholar.

[16] Romanists were frequently accused of conceptualism.

[17] See Jhering, Scherz und Ernst in der Jurisprudenz, 9th ed., 1904, pp. 245 *et seq.* Sinzheimer (*op. cit.*, p. 241) notes that but for one exception the "Heaven of Jurisprudential Concepts" was populated by "aryan" spirits, contrary to the Nazi claim that Jewish scholars engage in hair-splitting.

[18] Both Jhering and Ehrlich, perhaps the most realistic of European legal scholars, devoted a major part of their lives to the study and analysis of Roman law. This fact sheds an interesting light on the meaning and function of Roman law in European jurisprudence. It shows that in Europe Roman law is not a dead letter but an integral part of legal reality. It is, therefore, regrettable that in our study of comparative law we neglect this significant spiritual source of European legal thought.

[19] On Stahl's critique of Hegel, see Sinzheimer, *op. cit.*, pp. 17 *et seq.* Thisritique is in many respects similar—in essence, not in tone—to that later applied by Bertrand Russell. See Russell, Unpopular Essays (1950), pp. 10 *et seq.* Sinzheimer points out that in successfully criticizing Hegel, Stahl indirectly shattered the ideological basis of the doctrine of Karl Marx.

[20] Not all were active in Germany. Unger and Glaser taught in Austria, Ehrlich in what before the first World War was Austria. Lotmar taught in Switzerland.

Unger, Lenel), commercial (Goldschmidt), and labor (Lotmar) law, as well as of criminal procedure (Glaser). It is a credit to them that in their work they did not limit themselves to the confines of a narrow-minded nationalism, but drew upon experiences of other nations, among them England and America (Goldschmidt, Glaser, Jellinek).[21] For so doing, they were labelled as "Jewish internationalists." But no Nazi abuse and, indeed, nothing can eradicate their memory from the history of legal culture, for they contributed to its making. Nor can books be burnt. Like the Phoenix, they rise from their ashes.

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[21] Note particularly Glaser's work on the jury system and Jellinek's work on civil liberties.

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