

Re(dis)covering Free Law, ca. 1968

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It's doubly curious for me to be part of a panel on "Contemporaneous Movements, 1970-1990." Not only was I born at the tail end of this period, my scholarly work ends long before it begins: with the end of World War II. My dissertation recovers the lost history of what I call "German legal modernism" from the decade before World War I to the end of the Third Reich. Putting German-Jewish legal scholars like Hermann Kantorowicz in conversation with Nazi lawyers like Carl Schmitt, I show that what early twentieth-century alternative jurists had in common was a desire to free legal science from the shackles of liberal legal positivism, and to infuse it with more life. Life, however, meant different things to different people. In light of this, my dissertation demonstrates the promise and the peril of opening law and legal science to the world.

My story centers on the so-called free law-movement, a group of late-Wilhelmine jurists who criticized the Civil Code of 1900 for being out of touch with life. Tracing what happened to their ideas in Weimar and the Third Reich, I highlight continuities in German legal thought before and after 1933. The argument I would like to contribute to our panel, then, is the following: when German jurists around 1968 began developing increasingly critical perspectives on law, legal education, and judging, they did not do so from scratch. Instead, they recovered, and revived Germany's own critical tradition, which went back to the free law-movement. The tradition in question, however, was a complicated one. Because both free lawyers and Nazis had promoted a vision of law as life, postwar scholars carelessly lumped them together. The movement thus confronted 1968ers with complex questions about the limits of critique.

1. *The Free Law-Movement*

The German free law-movement, which paralleled and influenced the American legal realist movement, took off in the first decade of the twentieth century.¹ In his 1906 manifesto *The Battle for Legal Science*, Kantorowicz had criticized the—in theory comprehensive—Civil Code for having "more gaps than words." Judges, he insisted, were not supposed to fill these gaps by reference to their own subjective values. Instead they were to do so by reference to life. Jurists were to look beyond the Code to norms existing freely in the world. A diverse group of scholars and practitioners joined in Kantorowicz's critique of abstract, unpragmatic, and positivistic German law. Among the free lawyers were scholars and practitioners, Jews, Austrians, and Germans, socialists, anarchists, liberals, conservatives, and some who later supported the Nazis.

Despite their differences, the free lawyers shared a commitment to bridging the gap between norm and fact, rule and reality, law and life. As such, they wrote on law's relationship to the market, the masses, and the mind, to peace and poverty, to science, art, and sex. Charisma and intuition were, to them, the soundest basis of decision, and local usages and customs superior to codified law. While mainstream jurists thought of judges as machines, Kantorowicz and his allies emphasized their "all too human" nature. The free lawyers also tried to bring law closer to

¹ On the German free law movement and its relationship with American legal realism, see Katharina Isabel Schmidt, "Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to 'Life,'" 39 *German Studies Review* (2016), pp. 121 ff.

the people, and the people closer to their law. They made civics part of public education, and promoted the teaching of technical and commercial skills in law school. They founded legal aid societies, and lobbied for prison, marriage, and university reform. The movement dissolved in 1914. What happened to free law-ideas in Weimar and the Third Reich remains to be seen.

2. *Re(dis)covering Free Law-Ideas, ca. 1968*

Back from the archive, I recently started delving into the historiography. What struck me was that free law experienced something of a revival around 1968. Presses at the time reissued the works of central free law-figures like Hermann Kantorowicz,² Eugen Ehrlich,³ Ernst Fuchs,⁴ and Max Rumpf.⁵ In addition, they reissued the writings of Arthur Nußbaum⁶ whose sociological inquiry into “legal facts” reflected free law-commitments. Between 1968 and 1970, we also find reprints of free law-inspired books on judicial psychology, written by Weimar scholars like Carl Schmitt⁷, Hermann Isay,⁸ and Ludwig Bendix⁹. It is around this time, too, that free law as a movement first became the subject of serious scholarly inquiry. In addition to several dissertations dedicated to the movement’s history and theory, scholars published articles on the question whether its core ideas had survived World War I, let alone World War II.¹⁰

We can find reasons for free law’s re(dis)covery in the history of the Federal Republic around 1968. Student protests and other forms of extra-parliamentary agitation drew attention to life itself as a catalyst for social change. As social democrats and Christian conservatives joined in a governing coalition, contentious issues were increasingly left for judges to decide. After two decades of more or less consensus-based postwar justice, German jurists once more became conscious of courts’ political function. In line with more general calls for university reform, the

² Thomas Würtenberger (ed.), *Hermann Kantorowicz: Rechtswissenschaft und Soziologie. Ausgewählte Schriften zur Wissenschaftslehre* (Karlsruhe: C.F. Müller, 1962).

³ Eugen Ehrlich, *Grundlegung und Soziologie des Rechts* (3rd ed., Duncker & Humblot, 1967); Eugen Ehrlich (Manfred Rehinder, ed.), *Recht und Leben: Gesammelte Schriften zur Rechtstatsachenforschung und zur Freirechtslehre* (Berlin: Duncker & Humblot, 1967). See also Manfred Rehinder, *Die Begründung der Rechtssoziologie durch Eugen Ehrlich* (Berlin: Duncker & Humblot, 1967).

⁴ Ernst Fuchs (Albert S. Foulkes & Arthur Kaufmann, eds.), *Gerechtigkeitswissenschaft: Ausgewählte Schriften zur Freirechtslehre* (Karlsruhe: C.F. Müller, 1965); Ernst Fuchs (Albert S. Foulkes, ed.), *Gesammelte Schriften über Freirecht und Rechtsreform* (Aalen: Scientia Verlag, 1970-1975).

⁵ Max Rumpf, *Gesetz und Richter: Versuch einer Methodik der Rechtsanwendung* (2nd ed., Aalen: Scientia, 1970).

⁶ Arthur Nußbaum (Manfred Rehinder, ed.), *Die Rechtstatsachenforschung. Programmschriften und praktische Beispiele* (Berlin: Duncker & Humblot, 1968 [1906]).

⁷ Carl Schmitt, *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis* (Munich: C.H. Beck, 1968 [1912]).

⁸ Hermann Isay, *Rechtsnorm und Entscheidung* (Aalen: Scientia, 1970 [1929]).

⁹ Ludwig Bendix (Manfred Weiss, ed.), *Zur Psychologie der Urteilstätigkeit des Berufsrichters und andere Schriften* (Berlin: Neuwied, 1968).

¹⁰ Arthur Kaufmann, “Freirechtsbewegung—lebendig oder tot?,” *Juristische Schulung* (1965), pp. 1 ff.; Hans Thieme, “Was bleibt von der Freirechtsschule?” (held at the 10th Conference for Legal Historians in Budapest, 1967, printed in: *Die Entwicklung des Privatrechts in Mitteleuropa*, A. Csímadia & K. Kovács, eds., 1970); Luigi Lombardi Vallauri, *Saggio sul Diritto Giurisprudenziale* (Milan: A. Giuffrè, 1967); Rüdiger Lautmann, *Freie Rechtsfindung und Methodik der Rechtsanwendung* (Diss., Würzburg, 1967); Klaus Riebschläger, *Die Freirechtsbewegung: Zur Entwicklung der soziologischen Rechtsschule* (Berlin: Duncker & Humblot, 1968); Joachim Schmidt, *Das “Prinzipielle” in der Freirechtsbewegung—Studien zum Freirecht, seiner Methode und seiner Quelle* (Bonn: H. Bouvier u. Co., 1968); Dieter Mönch, *Die methodologischen Bestrebungen der Freirechtsbewegung auf dem Wege zur Methodenlehre der Gegenwart* (Diss., Frankfurt 1971); Werner Krawietz, “Freirecht,” in: J. Ritter, ed., *Historisches Wörterbuch der Philosophie*, vol. II (Darmstadt:, 1972), pp. 1098-1101.

period around 1968 also saw a host of calls for making legal education more interdisciplinary and more practical. Legal sociology, for one, which traced its lineage back to Ehrlich and Kantorowicz, was to make jurists in training aware of how law and life intersected.

3. *Free Law's Troubled Legacy*

Free law's legacy, however, was a troubled one, which explains some of the ambivalence and caution with which critical jurists around 1968 mobilized it. Kantorowicz and other free lawyers were Jewish and left-wing. Still, the movement had come to be associated with Nazi visions of order. Jurists under Hitler celebrated life as a source of law. Carl Schmitt thus famously insisted that concrete situations called for exceptional forms of justice. Nazi judges disregarded the Code when it clashed with the needs of the people. And legal education after 1933 was more practical and interdisciplinary than it had ever been before. Over the course of the Third Reich, legal science itself became anathema. Opposed to law as an ordered system of rules, the Nazis developed a simple formula: "law is what Aryan men declare to be law."

Short of blaming free law for Hitler, jurists after 1945 implied that the movement's worldly focus had left law liable to ideology. Prioritizing legal science over legal life consequently became part of Germany's postwar consensus. Jurists abandoned realistic approaches and sought solace in the transcendental values of an older, natural law tradition. This, then, explains why critical German jurists around 1968—more so than their American colleagues in any case—held on to an ideal of law that was at least potentially certain, predictable, determinate, neutral, and objective. Bernd Rüthers's 1968 *Unlimited Interpretation* exemplifies the compromise critical scholars struck at the time.¹¹ On the one hand, Rüthers employed free law-ideas about legal indeterminacy and judicial power to shed light on Nazi law. On the other hand, he insisted that law and ideology were completely separate in democratic legal systems.

The long and complicated history of critical legal thought in Germany has a number of things to contribute to our understanding of CLS. Some have seen CLS as an "outgrowth" or "direct descendant" of legal realism, which was itself the product of critical discourses that spanned the Atlantic.¹² Others have seen in CLS a "recurrence" of anti-positivist German philosophy.¹³ Connecting CLS not only to its contemporaneous German equivalent, but to the longer jurisprudential traditions of which it forms a part holds promise for this reason alone.¹⁴ Looking beyond North America and the period around 1968 also helps us think more generally about law as both object and practice of critique. Historically, criticism in and through law has taken different forms. How does CLS fit into narratives beyond the postwar period? Parallels between free law and Nazi law, finally, urge us to think critically about criticism itself. What are the limits of critique? And what, if anything, is the value of doing law scientifically?

¹¹ Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (Tübingen: Mohr Siebeck, 1968).

¹² For discussion, see G. Edward White, "From Realism to Critical Legal Studies: A Truncated Intellectual History," 40 *Southwestern Law Journal* (1986), pp. 819 ff. (citing David Trubek and Mark Tushnet).

¹³ See e.g. Jeffrey A. Standen, "Critical Legal Studies as an Anti-Positivist Phenomenon," 72 *Virginia Law Review* (1986), pp. 983 ff.

¹⁴ For previous attempts at connecting German and American critical legal traditions, see Christian Joerges & David Trubek (eds.), *Critical Legal Thought: An American-German Tradition* (Baden-Baden: Nomos, 1989).