


ORIGINAL ARTICLE

## How Hermann Kantorowicz Changed His Mind About America and Its Law, 1927–34

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### Abstract

Hermann Kantorowicz crossed the Atlantic twice: to take up a visiting professorship at Columbia Law School in the summer of 1927, and to find refuge at New York’s University in Exile in 1933/1934. Between his first and second stay, the German-Jewish émigré changed his mind about America and its law fundamentally. While he had—patronizingly—praised his US colleagues for “catch[ing] up... intellectually” in 1927, he accused them of “destroy[ing] the Law itself” in 1934. Reconstructing Kantorowicz’s change of heart, my article uncovers just how open the transatlantic 1930s still were in jurisprudential matters. As leader of the so-called “free law” movement, Kantorowicz had sparked a turn to “life” in German legal science in the years before World War I. Throughout the 1920s, he had then watched contentedly, as American “realist” scholars drew on free law ideas for their own critical projects. By 1934, however, Kantorowicz could not help but notice parallels between New Deal and Nazi law. To his mind, both Roosevelt’s and Hitler’s jurists had started turning his moderate free law ideas into a radical—and dangerous—legal nihilism: in designating law as life’s only source, they shunned scientific legal methods. In light of these concerns, my article excavates life-law’s delicate suspension between peril and potential. My sources reveal a striking, triangular relationship between German free law, American legal realism, and Nazi life-jurisprudence.

Two Kantorowiczs left their mark on modern legal thought. Both came from what was then called Posen and studied the medieval state. Comparable in erudition only to each other, they shared a taste for agitation. Because they were Jewish, both fled Hitler and died in exile. Ernst Kantorowicz, whose reputation as a Nazi sympathizer has only recently been challenged, is the more famous of the two.<sup>1</sup> This article explores the life and work of the lesser-known Hermann

<sup>1</sup> See generally Robert E. Lerner, *Ernst Kantorowicz: A Life* (Princeton: Princeton University Press, 2017).

Kantorowicz, who was nominated for a Nobel Peace Prize alongside Hans Kelsen. Like Ernst Kantorowicz and Kelsen, Hermann Kantorowicz went into exile in America. Although he had shown himself impressed by US legal science during a 1927 visit to Columbia Law School, he denounced the country and its law as “terribly backward” when he returned 6 years later.<sup>2</sup> Reconstructing how he changed his mind between his first stay in 1927 and his second in 1933/1934, this article recovers a period of extreme jurisprudential contingency on both sides of the Atlantic.

Kantorowicz is today best known for his 1934 article “Some Rationalism about Realism,” written during his brief stint at New York’s University in Exile.<sup>3</sup> In it, he charged the realists—a group of younger scholars whose critique of rational legality was taking elite American law schools by storm at the time—with moral and epistemological bankruptcy. His dictum that the realists “destroy[ed] the Law itself” has puzzled scholars since.<sup>4</sup> Realism’s lineage, after all, stretched back to ideas that Kantorowicz himself had developed under the slogan “free law” in the years before World War I. Had he, as Vivian Grosswald Curran suggests, simply misunderstood the realist project?<sup>5</sup> Based on archival research on both sides of the Atlantic, I paint a more complex picture. By 1934, Kantorowicz felt compelled to call out similarities he saw between Nazi and New Deal law. American jurists, first and foremost the realists, were starting to turn away from treating law as science. And this move, the émigré worried, conspicuously paralleled Nazi efforts to create an order based on “life.”

Hitler’s accession to power had turned life’s Protean nature from thrill to threat. In the 1900s, Kantorowicz and his free law allies had mobilized the notion to push against the formal, abstract individualism of imperial German jurisprudence. To modernize their discipline, they had recast it in fashionable, vitalist terms, inspiring critical jurists around the globe to follow suit. By the early 1930s, however, Third Reich jurists had given life an additional meaning: blood.<sup>6</sup> Fusing race, rules, and reproduction, the phrase went on to become Nazi normativity’s central building block. This fact alone, however, could not erase life’s modernist appeal. Unlike contemporary Nazi law analysts, Kantorowicz acknowledged life-law’s delicate suspension between peril and potential.<sup>7</sup> For him, the crux of the matter was not whether life was law’s

<sup>2</sup> Hermann Kantorowicz to Lydia Radbruch, February 27, 1934 (C36 Hermann Kantorowicz Papers [hereafter HKP], Freiburg University Archive, file no. 151).

<sup>3</sup> Hermann Kantorowicz, “Some Rationalism about Realism,” *Yale Law Journal* 43 (1934): 1240–53.

<sup>4</sup> *Ibid.*, 1251.

<sup>5</sup> Vivian Grosswald Curran, “Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism,” in *Rethinking the Masters of Comparative Law*, ed. Annelise Riles (Oxford: Hart Publishing, 2001), 66–91.

<sup>6</sup> See especially Johann Chapoutot, *The Law of Blood: Thinking and Acting as a Nazi*, trans. Miranda Richmond Mouillot (Cambridge, MA: Belknap Press, 2018) as well as Joachim Rückert, “Der Rechtsbegriff der Deutschen Rechtsgeschichte in der NS-Zeit: der Sieg des ‘Lebens’ und des konkreten Ordnungsdenkens, seine Vorgeschichte und seine Nachwirkungen,” in *Unrecht durch Recht: Zur Rechtsgeschichte der NS-Zeit*, ed. Joachim Rückert (Tübingen: Mohr Siebeck, 2018), 101–62.

<sup>7</sup> For contrasting analyses of Nazi law, see Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. Edward A. Shils, in collaboration with Edith Lowenstein and Klaus Knorr (New York: Oxford University Press, 1941); and Franz L. Neumann, *Behemoth: The Structure*

source, but whether science was its method. Unmasking realism's power problem, he sketched the contours of an antifascist jurisprudence based on a robust vision of law as both life and science.

Reading "Some Rationalism" in context forces us to re-evaluate law's relationship with method and ideology in modern legal thought. As such, my article uncovers a surprising, triangular relationship between German free law, American legal realism, and Nazi life jurisprudence. Tracing continuities between Kantorowicz's legal vitalism and Nazi legal biologism, I show that 1933 was no hard stop, jurisprudentially speaking. In this way, I challenge received narratives of rupture in modern German legal history.<sup>8</sup> Recovering just how transatlantic the 1930s still were in jurisprudential matters, I also push against parochial accounts of US legal history.<sup>9</sup> In 1934, Nazis and New Dealers, Jews and Jim Crow racists all considered themselves realists of sorts.<sup>10</sup> And their responses to each other prove their awareness of what they had in common. Identifying "Some Rationalism" as a lost episode within New Deal America's twin crises of "legal orthodoxy" and "democratic theory," my article asks uncomfortable questions about US jurists' reluctance to reckon with their own realities.<sup>11</sup>

Part one introduces Kantorowicz's free law program as the source of US jurists' interest in him. Parts two and three then reconstruct how Kantorowicz changed his mind about America and its law between his first visit in 1927 and his second 6 years later. Based on notes he took in preparation for "Some Rationalism," part four highlights Kantorowicz's growing concern that the realists—just like the Nazis—were turning his moderate free law ideas into a dangerous legal nihilism. Drawing on Karl Llewellyn's annotated copy of "Some Rationalism," part five explores how the realists responded to Kantorowicz's critique. Part six then sketches the contours of Kantorowicz's jurisprudential antifascism.

### **"[The Struggle for Legal Science] Set the Powder Keg Ablaze"**

Hermann Kantorowicz was born on November 18, 1877 into an assimilated German-Jewish family from the eastern Prussian province of Posen.<sup>12</sup> His

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*and Practice of National Socialism* (London: V. Gollancz Ltd., 1942). For discussion, see Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018); and Douglas G. Morris, *Legal Sabotage: Ernst Fraenkel in Hitler's Germany* (Cambridge: Cambridge University Press, 2020).

<sup>8</sup> For a similar reperiodization project, see Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton: Princeton University Press, 2015).

<sup>9</sup> On the transatlantic 1930s, see Wolfgang Schivelbusch, *Three New Deals: Reflections on Roosevelt's America, Mussolini's Italy, and Hitler's Germany, 1933-1939* (New York: Picador, 2006); and Kiran Klaus Patel, *The New Deal: A Global History* (Princeton: Princeton University Press, 2016).

<sup>10</sup> See James Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* (Princeton: Princeton University Press, 2017).

<sup>11</sup> On America's twin crises, see Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, KY: University Press of Kentucky, 1973); and Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).

<sup>12</sup> On Kantorowicz's life and work, see generally David Ibbetson, "Hermann Kantorowicz (1877-1940) and Walter Ullmann (1910-1983)," in *Jurists Uprooted: German-Speaking Émigré Lawyers in*

father, a pacifist-progressive who ran a liquor business, soon moved the family to cosmopolitan Berlin, where he sent his oldest son to study law at university. Like many of his contemporaries, Kantorowicz yearned to liberate himself from Wilhelmine society's patriarchal strictures. Alongside his close friend, future Weimar Minister of Justice Gustav Radbruch, he dabbled in socialist politics and—like his namesake Ernst Kantorowicz—the symbolist poetry of Stefan George. More than any other field, however, Kantorowicz found justice in need of modernist intervention. Law's formal-historical methods bored the young law student so much that he took it upon himself to change them.<sup>13</sup> His 1906 manifesto *The Struggle for Legal Science*, in the words of French jurist François Géný, “set the powder keg [of turn-of-the-century legal science] ablaze.”<sup>14</sup>

In *The Struggle*, Kantorowicz raged against Germany's new civil code of 1900.<sup>15</sup> Channeling almost a century of debate, its drafters had designed the code as rational legal science's showpiece. To lawyers and laypeople alike they had touted it as a seamless web of rules providing one—and only one—right answer for every legal question. Against this, Kantorowicz asserted that the compilation had “no fewer gaps than words.”<sup>16</sup>

Not only was it clumsy; it was also behind the times. The code's verbalism, its fetishization of concepts, clashed with people's yearning for will and life—the voluntarist-vitalist spirit of the times. Following Nietzsche, will and power had replaced history and reason as sources of normative guidance. And natural scientists' empirical methods had shown life to have a logic of its own. Faith in rational legality was waning and formal ways of thinking were falling out of fashion.

To modernize German legal thought and practice, Kantorowicz insisted, judges had to shift their focus from rules to reality. To fill in the gaps they inevitably encountered, officials had to look beyond the code to what he called free law. Spontaneous, dynamic, ephemeral free law lived not in the statute book, but in people's hearts and minds. It alone could mediate between nineteenth-century law and twentieth-century life.

Kantorowicz's *Struggle* sparked a revolution in law and legal thought whose effects could be felt around the world. Mainstream jurists had kept life off-limits. Kantorowicz, by contrast, made it law's main source, promoting general interest in vitalist thought and language. His manifesto showed that judging was not mechanical, but a mental—and manipulable—process. Cracking open law's black box, he challenged modern states' claims of governing through laws, not through men.

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*Twentieth-Century Britain*, ed. Jack Beatson and Reinhard Zimmermann (Oxford: Oxford University Press, 2004), 269–98 as well as Karlheinz Muscheler, *Hermann Ulrich Kantorowicz: Eine Biographie* (Berlin: Duncker & Humblot, 1984).

<sup>13</sup> For an autobiographical account of Kantorowicz's legal-modernist discontent, see Hermann Kantorowicz, *Forschungen zur Geschichte der Freirechtslehre (mit einem Bildnis Jherings?)*, unpublished manuscript, ca. 1904–19 (HKP, files no. 35–38).

<sup>14</sup> François Géný, *Méthode d'interprétation et sources en droit privé positif: essai critique*, 2nd ed. (Paris: Librairie Générale de Droit & de Jurisprudence, 1919), 2:369.

<sup>15</sup> Gnaeus Flavius (Hermann Kantorowicz), *Der Kampf um die Rechtswissenschaft* (Heidelberg: C. Winter, 1906).

<sup>16</sup> *Ibid.*, 15.

Both his negative code-critique and his positive program for change quickly gained global attention. In German-speaking central Europe, free law coalesced into a movement centered on penal lenience, lay justice, interdisciplinary legal research, and experiential legal pedagogy.<sup>17</sup> *The Struggle* also made its way to France, Italy, and Britain, to Russia, East Asia, Latin America, and—not least—the United States, where Roscoe Pound, future dean of Harvard Law School, read “the brilliant booklet” immediately upon publication.<sup>18</sup>

During his heady free law days, Kantorowicz had been quick to assert that method, not politics, was his *métier*—although few were oblivious to *The Struggle*’s subversive implications. Following World War I, during which Kantorowicz avoided active combat, his agenda became more pronounced. Unlike many of his contemporaries, he supported the republic, approved of the Versailles Treaty in principle, and called for German accession to the League of Nations. Most egregiously, he blamed his compatriots for their own misfortune. In *The Spirit of British Policy*, published in 1929, Kantorowicz praised not only the culture of Germany’s archenemy England, but advanced what he called “the myth of the encirclement of Germany.”<sup>19</sup> Drawing on his work as expert on a parliamentary “war guilt” commission, he argued that Wilhelmine ruling elites had fabricated Anglo–German hostilities as a *casus belli* before 1914—a claim bound to alienate even those who were politically in his corner.

Kantorowicz’s provocative tendencies clashed with both his academic aspirations and the responsibility he owed to his growing family. In order to protect his budding university career, he had published *The Struggle* under a pseudonym. Soon enough, however, his identity was revealed, and his job prospects—meager as they were due to his Jewish background—dwindled. He consequently spent a humiliating two decades as an untenured professor in Southern-German Freiburg where anti-republican students gave him a hard time.<sup>20</sup> It was not until 1929 that he received a full professorship in Northern-German Kiel, through Radbruch’s intervention. But only 4 years

<sup>17</sup> For a detailed history of the free law movement, see Katharina Isabel Schmidt, “*The Law That We Feel Living Within Us*: German Jurists and the Search for “Life” in Modern Legal Science, 1900–1946 (Unpublished PhD diss., Princeton University, 2021).

<sup>18</sup> Roscoe Pound to Francis de Zulueta, January 23, 1935 (Roscoe Pound Papers [hereafter RPP], Part I, Harvard University Archives, folder 001766-024-0422, available through ProQuest History Vault). Legal realism’s global history remains to be written. For a starting point, see Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850–2000,” in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (Cambridge: Cambridge University Press, 2006), 19–73. For legal-realist projects beyond Western Europe and North America, see Bartosz Brożek, Julia Stanek, and Jerzy Stelmach, ed., *Russian Legal Realism* (Cham: Springer, 2018); and Colin Jones, *Living Law in Japan: Social Jurisprudence in the Interwar Period* (Unpublished PhD diss., Columbia University, 2017).

<sup>19</sup> Hermann Kantorowicz, *Der Geist der englischen Politik und das Gespenst der Einkreisung Deutschlands* (Berlin: E. Rowohlt, 1929). For an English version, see Hermann Kantorowicz, *The Spirit of British Policy and the Myth of the Encirclement of Germany*, trans. Walter Henry Johnston (London: G. Allen & Unwin, 1931).

<sup>20</sup> In this sense, Kantorowicz, too, had many exiles, see Assaf Likhovski, “The Many Exiles of Max Laserson,” *Clio@Themis* 22 (2022): 302–323.

later the Nazis came to power. Kiel became one of the Third Reich's "shock troop" faculties of law, and Kantorowicz was among the first cohort of professors to be removed from office. Dismissed without notice during a visiting professorship in Florence, he never set foot in Germany again.

Kantorowicz's international reputation grew in proportion to his status as *persona non grata* at home. Following publication of *The Struggle*, jurists from all over had consulted him on their own critical projects. In Kantorowicz's principal area of research, the increasingly politicized field of Roman law, colleagues considered him to have "no equals among the living and very few among the dead."<sup>21</sup> His 1933 *Crime and Culpability*, published by a Swiss press, further cemented his authority in the realm of criminal law.<sup>22</sup> It was his pacifist politics, however, that earned him the most recognition. In 1934, Swedish economist Gunnar Myrdal, who would rise to fame 10 years later for his work on US race relations, nominated Kantorowicz for a Nobel Peace Prize, alongside Hans Kelsen.<sup>23</sup> Although the committee chose someone else in the end, it recognized Kantorowicz's "pioneering" role in the free law movement as well as his "absolute independence from national German views."<sup>24</sup>

### **"America Is Starting to Catch Up [to Us] Now Intellectually as Well"**

It is not clear who at Columbia invited Kantorowicz to spend the summer of 1927 in New York. Dean Pound, who counted Kantorowicz "among the outstanding thinkers" of modern jurisprudence, had been trying to raise money to bring the Freiburg professor to Harvard for some time.<sup>25</sup> Anti-German sentiment may have been weaker in New York than in Cambridge, and Columbia was in constant need of outside faculty to teach its summer classes.<sup>26</sup> Kantorowicz made the most of his stay in any case. He ran a graduate seminar on the

<sup>21</sup> Francis de Zulueta, "Dr. Hermann Kantorowicz," *Law Quarterly Review* 56 (1940): 171.

<sup>22</sup> Hermann Kantorowicz, *Tat und Schuld* (Zurich: Orell Füssli, 1933).

<sup>23</sup> Einar Tegen, Åke Holmbäck, and Gunnar Myrdal to the Nobel Prize Committee, January 27, 1934 (Nomination Archive of the Norwegian Nobel Committee, the Norwegian Nobel Institute, Oslo). The prize was to be jointly awarded to Kantorowicz and Kelsen, or to one of the two individually. On Kantorowicz and Kelsen, see Jacob Giltaij, "Hermann Kantorowicz and Hans Kelsen: From Debating Legal Sociology to Constructing an International Legal Order," *History of European Ideas* 48 (2022): 112–28. On the relationship between German, American, and Scandinavian legal realism, see Heikki Pihlajamäki, "Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared," *American Journal of Comparative Law* 52 (2004): 469–87 as well as Toni Malminen, "Scandinavian Legal Realism—Some Unfinished Business," *Retfærd* 155 (2016): 57–71.

<sup>24</sup> Det Norske Stortings Nobelkomité, *Redegjørelse for Nobels Fredspris XXXIV* (Oslo: Steenske Boktrykkeri Johannes Bjørnstad A/S, 1934), 29–30.

<sup>25</sup> On Pound's high opinion of Kantorowicz, see Roscoe Pound to Francis de Zulueta, January 23, 1935. On Pound's attempt to get Kantorowicz to Harvard, see Roscoe Pound to Morris Cohen, June 24, 1926 (Morris Raphael Cohen Papers [hereafter MRCP], Hanna Holborn Gray Special Collections Research Center, University of Chicago Library, box 10, folder 11).

<sup>26</sup> On the situation at Columbia Law School in the mid-1920s, see generally Julius Goebel, Jr., *A History of the School of Law, Columbia University* (New York: Columbia University Press, 1955).

“Theory of Judicial Decisions,” gave talks on the future of Germany’s republic, and befriended US political elites like Belle and Henry Moskowitz.<sup>27</sup> On the whole, his first US visit left him with the reassuring feeling that German law and learning, embodied not least by him, were still respected. His travelogues brimmed with old-world condescension. Still, they showed that, at least in 1927, he had few reasons not to like America and its law.

By Kantorowicz’s own account, his Columbia Law School seminar was a hit.<sup>28</sup> He covered epistemological questions about the nature of legal knowledge alongside concrete topics like the sterilization of America’s “inferiors,” an issue he seemed to lack strong feelings about.<sup>29</sup> Despite the challenging subject matter of the course, about twenty participants held out until the end. Although he lamented the absence of women, Kantorowicz noted that not only law students and practitioners but also law professors from across the country, including some “masters of their craft,” had come to hear him hold forth.<sup>30</sup> We know for sure that Columbia’s Edwin W. Patterson as well as Yale’s Charles E. Clark, who showed himself “favorably impressed” with the German visiting scholar, were among them.<sup>31</sup> There is also good reason to think that Columbia’s Karl Llewellyn and City College’s Morris Cohen, both of whom certainly met Kantorowicz that summer, attended some of his classes.<sup>32</sup>

The success of Kantorowicz’s seminar speaks to the fact that the idea of a voluntarist-vitalist law had made its way across the Atlantic by the later 1920s.<sup>33</sup> Indeed, American jurists were at the time embroiled in their own “crisis of legal orthodoxy,” which they had reason to hope the author of *The*

<sup>27</sup> See Hermann Kantorowicz, “Eindrücke einer Reise nach New York. August-September 1927” (HKP, file no. 147).

<sup>28</sup> See generally Hermann Kantorowicz, “Vom Geiste Amerikas: Reiseeindrücke,” *National-Zeitung*, no. 574, 576, and 578 (December 8, 9, and 11, 1927).

<sup>29</sup> For a strikingly neutral account, see Hermann Kantorowicz, “Die Sterilisierung von Minderwertigen in den Vereinigten Staaten,” *Zeitschrift für die gesamte Strafrechtswissenschaft* 49 (1929): 524–31.

<sup>30</sup> Kantorowicz, “Vom Geiste Amerikas.”

<sup>31</sup> Herman [sic] U. Kantorowicz and Edwin W. Patterson, “Legal Science—A Summary of Its Methodology,” *Columbia Law Review* 28 (1928): 679–707 establishes Patterson’s attendance. For Clark’s attendance, see Charles E. Clark to Max Radin, May 19, 1933, reprinted in Max Radin, *Cartas Romanísticas (1923–1950)*, ed. Carlos Petit (Naples: Jovene, 2001), 91–92.

<sup>32</sup> See Hermann Kantorowicz to Morris Cohen, August 5, 1929 (MRCP, box 7, folder 13) and Karl Llewellyn to Hermann Kantorowicz, September 15, 1927, reprinted in Kristina Schönfeldt, “Der Briefwechsel zwischen Hermann Kantorowicz und Karl Nickerson Llewellyn—ein Beitrag zum transatlantischen Dialog um Recht und Methode,” in *Hermann Kantorowicz’ Begriff des Rechts und der Rechtswissenschaft*, ed. Ino Augsburg, Saskia Lettmaier, and Rudolf Meyer-Pritzl (Tübingen: Mohr Siebeck, 2020), 269–70.

<sup>33</sup> On the relationship between German and American legal thought during this time, see James E. Harget and Stephen Wallace, “The German Free Law Movement as the Source of American Legal Realism,” *Virginia Law Review* 73 (1987): 399–455; Christian Joerges, “On the Context of German-American Debates on Sociological Jurisprudence and Legal Criticism: A History of Transatlantic Misunderstandings and Missed Opportunities,” in *European Yearbook in the Sociology of Law*, ed. Alberto Febbrajo and David Nelken (Milan: Giuffrè, 1993): 403–18; and Katharina Isabel Schmidt, “Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to ‘Life,’ 1903–1933,” *German Studies Review* 39 (2016): 121–40.

*Struggle* could help them solve.<sup>34</sup> Although America had no comprehensive civil code of its own, nineteenth-century jurists had channeled judicial thinking into what detractors charged were categories devoid of life and soul.<sup>35</sup> Drawing on Kantorowicz's manifesto, Pound had criticized American jurisprudence as "mechanical" as early as 1908.<sup>36</sup> In the following years, jurists from Boston to Berkeley had grown increasingly "sympathetic" to free law and its teachings.<sup>37</sup> This was particularly the case at Columbia where faculty had started debating curriculum reform in line with Kantorowicz's demands for more experiential life in legal education.<sup>38</sup>

Patterson published an annotated summary of Kantorowicz's seminar in the *Columbia Law Review*.<sup>39</sup> The piece reflected just how asymmetrical transatlantic conversations on jurisprudential matters still were at the time. Following World War I, German academics had lost some of their reputation as intellectual trendsetters.<sup>40</sup> In the field of law, however, scholars still looked across the Atlantic mostly just one way. Patterson presented "Legal Science—A Summary of Its Methodology" as a "joint product."<sup>41</sup> The main text, however, reflected Kantorowicz's ideas, while only the footnotes were based on class discussion. Expressing his hope that "[t]his somewhat novel method of presenting Continental legal thought in English [would] prove interesting to American readers," Patterson gave voice to a hierarchical division of labor in which the free law professor from Freiburg taught and American students took note. How to integrate law and life, the article suggested, was a universal problem—but not one German jurists could not solve through vitalized legal science.

Of course, Kantorowicz saw things he did not like during his stay in New York. Overall, however, he had a "splendid time."<sup>42</sup> America's ambivalent approach to pleasure—with Prohibition on the one hand, addiction to sports and spectacle on the other—made the liquor scion question the country's

<sup>34</sup> See generally Horwitz, *The Transformation of American Law*.

<sup>35</sup> On so-called classical legal thought, see Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45 (1983): 1–53; and William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937* (Oxford: Oxford University Press, 1998).

<sup>36</sup> Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908): 607 fn. 9. On Pound's German sources, see David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge: Cambridge University Press, 2012), 423–71.

<sup>37</sup> Max Radin to Ernst Fuchs, March 11, 1925, reprinted in Ernst Fuchs, *Gesammelte Schriften über Freirecht und Rechtsreform*, vol. 3, ed. Albert S. Foulkes (Aalen: Scientia, 1975), 421.

<sup>38</sup> On the situation at Columbia Law School in the later 1920s, see especially Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill: University of North Carolina Press, 1986), 67–97; and William Twining, *Karl Llewellyn and the Realist Movement*, 2nd ed. (Cambridge: Cambridge University Press, 2012), 41–55.

<sup>39</sup> Kantorowicz and Patterson, "Legal Science."

<sup>40</sup> See generally Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Belknap Press, 1998) as well as Emily J. Levine, *Allies and Rivals: German-American Exchange and the Rise of the Modern Research University* (Chicago: University of Chicago Press, 2021).

<sup>41</sup> Kantorowicz and Patterson, "Legal Science," 679 fn. \* (editor's note).

<sup>42</sup> Hermann Kantorowicz, "Der offene Abend: Mitteilungsblatt für meine ehemaligen Hörer und Hörerinnen: Bericht über das Jahr 1926/1927" (Freiburg, March 1928) (HKP, file no. 57).



moral foundations.<sup>43</sup> And the execution of Sacco and Vanzetti, which coincided with his trip, led him to doubt the integrity of its judges and journalists.<sup>44</sup> American universities, however, were top notch. The level of discussion in his seminar had been “much higher” than he had ever experienced in Europe.<sup>45</sup> It was, indeed, “wholly unthinkable” to convene such a class in his native country, where professors were too proud to sit in on other men’s academic events.<sup>46</sup> Back in Freiburg, he reported to his students—both men and women—enthusiastically that “America is starting to catch up [to us] now intellectually as well.”<sup>47</sup> America, in terms of its academic life, was in the process of transforming itself from a “debtor-state” into a “creditor-state.”<sup>48</sup>

### “Thus [the Realists] Destroy the Law Itself”

During his first stay, Kantorowicz had assured American audiences that any attempt to make Weimar a dictatorship was “doomed to failure.”<sup>49</sup> Six years later he found himself in the United States again, not as a visitor, but on the run from Hitler. Between 1933 and 1934, he was part of the first cohort of European émigré intellectuals assembled in the New School’s University in Exile.<sup>50</sup> During his time on the faculty, Kantorowicz produced one major publication, an article titled “Some Rationalism about Realism,” published in the June 1934 issue of the *Yale Law Journal*. In it, he charged American jurists with “destroy[ing] the Law itself.”<sup>51</sup> “Some Rationalism” goes some way towards explaining why Kantorowicz had changed his mind about America and its law since 1927. A close reading of the piece reveals that he was growing increasingly concerned that American jurists were abandoning German legal science to turn his moderate free law ideas into a radical—and dangerous—legal nihilism.

Officially ousted from the country in which “all [his] interests [were] rooted,” Kantorowicz continued to find appreciation in the United States.<sup>52</sup> Writing from Park Avenue shortly after his arrival in New York, he reported to his friend Lydia Radbruch that he had been received “very cordially” and was now living “in the most pleasant environment.”<sup>53</sup> At the University in Exile, he worked alongside luminaries like economist Emil Lederer, sociologist Hans Speier, and psychologist Max Wertheimer. He taught at the New School, including a seminar on “The Crisis of Democracy,” stood in for Cohen at City College, and co-organized a widely noted symposium on the question “Has

<sup>43</sup> See Kantorowicz, “Eindrücke” and “Vom Geiste Amerikas.”

<sup>44</sup> Kantorowicz, “Eindrücke.”

<sup>45</sup> Kantorowicz, “Vom Geiste Amerikas.”

<sup>46</sup> *Ibid.*

<sup>47</sup> Kantorowicz, “Der offene Abend.”

<sup>48</sup> Kantorowicz, “Vom Geiste Amerikas.”

<sup>49</sup> “Declares Germany Will Stay a Republic,” *New York Times*, July 31, 1927, 27.

<sup>50</sup> See generally Judith Friedlander, *A Light in Dark Times: The New School for Social Research and Its University in Exile* (New York: Columbia University Press, 2019).

<sup>51</sup> Kantorowicz, “Some Rationalism,” 1251.

<sup>52</sup> Hermann Kantorowicz to Lydia Radbruch, October 30, 1933 (HKP, file no. 151).

<sup>53</sup> *Ibid.*

Capitalism Failed?”<sup>54</sup> At Harvard, he spoke on “Types of Modern Dictatorship” before the university’s Liberal Club, and also finally met Pound, whose seminar he reportedly “[took] over.”<sup>55</sup> The meeting “confirmed the high opinion” Pound had previously formed based on his German colleague’s writings.<sup>56</sup> To Lydia Radbruch, Kantorowicz thus proudly reported that the Harvard dean had subsequently insisted on adding his portrait to the Law School gallery—a “display in effigy” that seemed to please the German jurist.<sup>57</sup>

Although he had reason to be content, given the circumstances, Kantorowicz resented his new life. It was what mattered to him most—his family, an intellectual community, and the integrity of law as science—that proved painfully lacking. He had left his wife and children in England, and cherished friends were now scattered across the globe. He disliked his New School colleagues’ Jewishness and socialist leanings, and, as the only jurist on the faculty, felt “rather lonely.”<sup>58</sup> He was especially appalled, however, at American jurists’ disregard for normative jurisprudence. A couple of weeks into the fall semester, he complained that his students, although talented, failed to appreciate “certain problems” that interested him and other Germans “passionately.”<sup>59</sup> By the start of the spring semester, he had grown completely disillusioned. “American legal science,” he griped, “is terribly backward.”<sup>60</sup> It is this same sense of exasperation that Kantorowicz subsequently broadcast to America’s legal and intellectual elite in his *Yale Law Journal* article.

Picking “Some Rationalism” as his title was a strategic move. With it, Kantorowicz inserted himself into the most recent episode of America’s “crisis of legal orthodoxy”: a spat between Llewellyn and Pound.<sup>61</sup> In 1930, Llewellyn had laid out the “next step” of what he called “a realistic jurisprudence.”<sup>62</sup> Because law was “as broad as life,” he argued, jurists had to concern themselves with judicial behavior, not “rules and precepts and principles.”<sup>63</sup> Against this, Pound argued the following year that what Llewellyn had

<sup>54</sup> On Kantorowicz’s New School activities, see “Graduate Faculty 1933–1934” and “Graduate Faculty Supplementary Announcement, 1934 Spring” (The New School Archives and Special Collections, Digital Collections). See also “Gets City College Post,” *New York Times*, January 31, 1934, 15 as well as Hermann Kantorowicz, “Has Capitalism Failed in Law?” in *Law: A Century of Progress 1835–1935 (Contributions in Celebration of the 100<sup>th</sup> Anniversary of the Founding of the School of Law of New York University)* (New York: New York University Press, 1937), 320–31.

<sup>55</sup> See “Kantorowicz to Address Meeting of Liberal Club,” *The Harvard Crimson*, February 16, 1934 as well as Roscoe Pound Diary, February 19, 1934 (RPP, Part II, folder 001767-041-0377).

<sup>56</sup> Roscoe Pound to Francis de Zulueta, January 23, 1935.

<sup>57</sup> Hermann Kantorowicz to Lydia Radbruch, February 27, 1934.

<sup>58</sup> Hermann Kantorowicz to Lydia Radbruch, October 30, 1933 (HKP, file no. 151).

<sup>59</sup> *Ibid.*

<sup>60</sup> Hermann Kantorowicz to Lydia Radbruch, February 27, 1934.

<sup>61</sup> On this spat, see N. E. H. Hull, “Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism,” *Duke Law Journal* 1989 (1989): 1302–34 as well as N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997).

<sup>62</sup> Karl N. Llewellyn, “A Realistic Jurisprudence—The Next Step,” *Columbia Law Review* 30 (1930): 431–65.

<sup>63</sup> *Ibid.*, 432 and 464.

disparaged as “paper rules” mattered.<sup>64</sup> Whosoever excluded questions of “ought,” the Harvard dean rebuked, had “only an illusion of reality.”<sup>65</sup> In “Some Realism about Realism,” Llewellyn again defended himself, suggesting that he had proposed but a “temporary divorce” that would ultimately “bring[] to the reunion [between ‘is’ and ‘ought’] a sharper eye, a fuller equipment, [and] a sounder judgment.”<sup>66</sup>

By the time Kantorowicz joined the New School, the debate had largely died down, and Pound did not respond again until his “gentl[e] chid[ing]” of the realists in December 1933.<sup>67</sup> Kantorowicz, however, smelled smoke, and—entirely in character—poured fuel on a dying fire. Instead of staying mired in the debate’s minutiae, he took a step back, considered the realist movement as a whole, and found it intellectually wanting, even dangerous. In “Some Rationalism,” he ascribed two “fundamental postulates” to the realists only to then dismantle both categorically.

The first, “substantive,” postulate Kantorowicz ascribed to the realists took Llewellyn’s “next step” at its word without crediting his later qualifications. The realists, on the German émigré’s reconstruction, believed law to be “not a body of rules, not an Ought, but a factual reality.”<sup>68</sup> As a consequence they were interested only in “the real behavior of certain people, especially of the officials of the Law, more especially of the judges who make the Law through their decisions.”<sup>69</sup> In *The Struggle*, Kantorowicz had done his part in popularizing the idea that law was also “factual reality,” and that studying judicial will and value judgments was necessary for understanding it. He had subsequently taken pride in the fact that free law voluntarism and vitalism were also at the heart of America’s successor movement. At the same time, he took issue with the claim that law was *only* “factual reality” and not also ideal rules. As such, he showed himself unconvinced by Llewellyn’s heuristic of a “temporary divorce.”

Implicitly accusing the realists of fetishizing judges, Kantorowicz identified six “unconscious prejudices” on which their “substantive postulate” rested.<sup>70</sup> The realists, on his reading, presupposed an artificial distinction between the rule-based application of formal law and the—supposedly—rule-less exercise of discretion (“formalistic prejudice”). They also reduced law to printed documents (“verbalistic prejudice”) to be mined for the subjective will of a legislator (“historical prejudice”). This, however, left no room for objective meaning which, in Kantorowicz’s eyes, was the real “‘life’ of the Law.” The realists overlooked that statutory language related to “classes of things,” not “individual

<sup>64</sup> Roscoe Pound, “The Call for a Realist Jurisprudence,” *Harvard Law Review* 44 (1931): 697–711.

<sup>65</sup> *Ibid.*, 703.

<sup>66</sup> Karl N. Llewellyn, “Some Realism about Realism: Responding to Dean Pound,” *Harvard Law Review* 44 (1931): 1254.

<sup>67</sup> On Pound’s “gentl[e] chid[ing]” of the realists, see Hull, *Roscoe Pound and Karl Llewellyn*, 255. Notably, Pound began his response by quoting Kantorowicz in his very first sentence, see Roscoe Pound, “Law and the Science of Law in Recent Theories,” *Yale Law Journal* 43 (1934): 525: “‘Rechtswissenschaft,’ says Kantorowicz, ‘ist Wortwissenschaft.’”

<sup>68</sup> Kantorowicz, “Some Rationalism,” 1243.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, 1244–47.

objects” (“nominalistic prejudice”). And their judge-focused empiricism only scratched the surface of law as a social phenomenon: it obscured actors’ internal viewpoints (“sociological prejudice”) and had nothing of interest to say about law in everyday life (“professional [prejudice]”).

Equally unsatisfying was the realists’ second, “formal,” postulate, which he summarized as follows: For the legal realists, “legal science is not a rational and normative science which tries to transform the given law into a more or less consistent system of rules... [it] is empirical, the method of which is observation; the purpose, foretelling effects; the model, natural science.”<sup>71</sup> This postulate, Kantorowicz excoriated, clashed with “the oldest teachings of logic as well as with modern conceptions of methodology.”<sup>72</sup> It rested on—once more—six categorical “confusions.”<sup>73</sup> The realists, on Kantorowicz’s reading, conflated “natural science” with “cultural science,” “explanation” with “justification,” “law” with “ethics,” “realities” with their “meaning,” “concepts” with their “elements,” and “cases” with “case law.” Because their method showed only cause and effect, not motive or motivation, they could not distinguish lawful from unlawful acts. Realism “plac[ed] the cart before the horse” by talking about courts without talking about law.<sup>74</sup> “The law,” Kantorowicz concluded, “is not what the courts administer but the courts are the institutions which administer the law.”<sup>75</sup>

The realists, however, were to be judged not only by the quality of their argument, but also by the consequences of their theses. In a section titled “*Reductio ad Absurdum*,” Kantorowicz showed that their postulates implied that law could not exist before or outside of judicial decisions.<sup>76</sup> If law, according to realist forerunner Oliver Wendell Holmes, Jr., was the “prophecies of what the courts will do in fact,” then no functioning legal system could ever get off the ground because law lacked a starting point. “[E]very case,” Kantorowicz explained, “was at one time undecided” and “every statute was once a new statute.”<sup>77</sup> Realism, in short, implied a normative and decisional vacuum that was intolerable from the standpoint of modern democratic governance, committed as it was to legal certainty and the rule of law. By rejecting rules and promoting facts as the decisive motor that drove judging, Kantorowicz concluded somewhat dramatically: the realists “destroy the Law itself.”<sup>78</sup>

### “Denying the Ideal Character of the Law Leads Directly Towards Fascism”

Why did Kantorowicz change his mind about America and its law? Notes he took in preparation for “Some Rationalism” shed new light on his claim that

<sup>71</sup> Ibid., 1248.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid., 1248–51.

<sup>74</sup> Ibid., 1250.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid., 1251–52.

<sup>77</sup> Ibid., 1251.

<sup>78</sup> Ibid.

the realists “destroy[ed] the Law itself.” US jurists had changed since Kantorowicz’s first visit. Not only had they become more radical, they had also turned their backs on German legal learning. But Kantorowicz, too, had changed. No longer just a visitor, he needed a new home for his family. Looking at America and its law through exile eyes, he could not help but notice what he perceived to be the realists’ inability to criticize Jim Crow. Finally, the world had changed. Racism ruled no longer just the American South but central Europe as well. In light of this, Kantorowicz started seeing parallels between Nazi and New Deal law. Realism’s turn away from law as science, he worried, conspicuously paralleled Third Reich efforts to create an order based on racial life. In that sense, American legal science was less “terribly backward” than frighteningly timely.

Kantorowicz despised how unscientific American legal science had become in the wake of Llewellyn’s and Pound’s debate. As a visitor in 1927, he had witnessed realism’s early rumblings. And based on his experiences at Columbia, he had surmised two things: that realism was moderate, and that it was committed to law as normative science. In his absence, however, the mood had changed. American jurists had started finding their “own voice.”<sup>79</sup> And, to Kantorowicz at least, that voice sounded radical, empirical, and factious. His notes were consequently full of caustic judgments about his US colleagues. “L[ewellyn] refutes [Pound’s reconstruction of what the Realists ‘meant’] by showing what they ‘said,’” read one; “[h]is polemic only proves that Realism cannot pursue interpretation.”<sup>80</sup> Another referred to Pound’s rival program as “not always clear and never deep [?].”<sup>81</sup> Although the realists were “brilliant critics,” Kantorowicz exhorted that they ought to have “heeded Goethe’s advice to attend first *collegium logicum*”—a kind of foundational course that disciplined young students to keep their minds from wandering aimlessly.<sup>82</sup>

Kantorowicz was also furious that US jurists had started treating German legal learning with less reverence. Instead of gratefully receiving the entirety of his ideas, they had cherry-picked from them to suit their needs. In “Some Rationalism,” he recognized realism’s Franco-German roots, all the while eschewing its “exaggerations.”<sup>83</sup> Earlier that year, Llewellyn had credited “a certain ‘non-Aryan’ Kantorowicz” not only with “rema[king] ‘Aryan’ German legal theory,” but with laying the groundwork for a fundamental challenge to US constitutionalism as well.<sup>84</sup> Kantorowicz, by contrast, wanted nothing to do with such a challenge, expressing his indignation in aggressively sexualized language: “It is disagreeable enough for a man to have to pay alimony for his own illegitimate issue; but he cannot be expected to pay for other men’s bastards, and like it.”<sup>85</sup> In light of American legal science’s recent wrong

<sup>79</sup> Hull, “Reconstructing the Origins of Realistic Jurisprudence,” 1302.

<sup>80</sup> Hermann Kantorowicz, “Materialien zum Rechtsrealismus” (HKP, file no. 5).

<sup>81</sup> *Ibid.*

<sup>82</sup> Hermann Kantorowicz, “Review of *Law and the Social Order*,” *Columbia Law Review* 34 (1934): 189.

<sup>83</sup> Kantorowicz, “Some Rationalism,” 1242.

<sup>84</sup> Karl N. Llewellyn, “The Constitution as an Institution,” *Columbia Law Review* 34 (1934): 10.

<sup>85</sup> Kantorowicz, “Some Rationalism,” 1242.

turn, he hoped that German émigrés like himself would “exert a fruitful influence.”<sup>86</sup>

As a refugee from Nazi Germany, Kantorowicz also started looking differently at US racism and the legal system that upheld it.<sup>87</sup> During his first visit in 1927, he had spotted “some dark clouds” on America’s horizon.<sup>88</sup> In addition to pointing out government corruption, popular disillusionment with politics, and an intensifying agrarian crisis, he had tut-tutted the exclusion of certain ethnic and religious groups—Catholics, Italians, and Eastern European Jews—from American public life.<sup>89</sup> Through his acquaintance with Henry Moskowitz, co-founder of the National Association for the Advancement of Colored People (NAACP), he would also have been aware of what Myrdal went on to call America’s “dilemma.”<sup>90</sup> While these “dark clouds” did not seem to bother Kantorowicz in 1927, he could no longer ignore them in 1934. Like many German Jews who had lost their livelihoods for racial reasons, Kantorowicz was struck by the violence of Jim Crow.<sup>91</sup> Because he considered the realists unable to confront the regime’s racist reality, he called them out in “Some Rationalism.”

On a notecard titled “Realism (moral implications),” Kantorowicz commented on the notorious under-enforcement of murder statutes against Southern lynch mob participants.<sup>92</sup> It was “a sad but undisputable fact,” he explained, that those convicted of homicide on occasion escaped sanction despite the legislative mandate that “[m]urder in the first degree is punishable by death.” This was especially the case where Jim Crow juries acquitted lynchers, “be it out of sympathy or out of fear.” If law, as Llewellyn and his followers would have it, was whatever the judge, or in this case the jury, said it was, then realism implied “that the legislator lies.” This dilemma, Kantorowicz explained, would disappear, if one were to reinterpret the murder statute in question as meaning: “ought to be punished by death.” In the margins of the same card, Kantorowicz noted despondently: “The Realists don’t see the reality.”

Another reality that the realists failed to see was Hitlerism. In “Some Rationalism,” Kantorowicz made only passing reference to “present events in Germany,” although, of course, the Nazis were on his mind.<sup>93</sup> Kantorowicz’s dismissal from Kiel epitomized their subordination of science under politics, and his own family had been “severely stricken” by the new regime: some

<sup>86</sup> Hermann Kantorowicz to Lydia Radbruch, February 27, 1934.

<sup>87</sup> On the illiberal compromises that New Dealers struck at the time, see Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright, 2013). For the longer history of such compromises, see Thomas C. Leonard, *Illiberal Reformers: Race, Eugenics, and American Economics in the Progressive Era* (Princeton: Princeton University Press, 2016).

<sup>88</sup> Kantorowicz, “Vom Geiste Amerikas.”

<sup>89</sup> *Ibid.*; and Kantorowicz, “Eindrücke.”

<sup>90</sup> Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, with the assistance of Richard Sterner and Arnold Rose (New York: Harper & Row, 1944).

<sup>91</sup> See especially Gabrielle Simon Edgcomb, *From Swastika to Jim Crow: Refugee Scholars at Black Colleges* (Malabar, FL: Krieger, 1993).

<sup>92</sup> Kantorowicz, “Materialien zum Rechtsrealismus.”

<sup>93</sup> Kantorowicz, “Some Rationalism,” 1253.

had lost their jobs while others had lost their lives.<sup>94</sup> To alert Americans to the gravity of the situation, he used his time at the New School to write a—once more pseudonymous—op-ed on Hitlerism for a Jewish cultural magazine.<sup>95</sup> He also completed preliminary research for a “sociological study” on dictatorships, some results of which he presented at Harvard and the New School.<sup>96</sup> But fears about where Nazi Germany was headed were behind “Some Rationalism” as well. His preparatory notes evidence that the German-Jewish émigré had come to think of both Nazi and New Deal law as instances of a dangerous might-makes-right jurisprudence.

On a notecard titled “Realism (political implications),” Kantorowicz attacked the realists’ obsession with judicial behavior.<sup>97</sup> “R[ealism],” he lamented, “simply means that there is no law, but merely power.” It was true, he conceded, that judges could in theory do whatever they wanted. But if their ability to browbeat was what mattered, why not modify the institution to maximize its punch? “Why not staff the Supreme Court with 9 Prussian Generals? They’ll know to enforce their decisions.” The answer, he asserted, was “easy” for “an Idealist.” The “ranks of the law” were filled not with men resolved to decide at will but with men “who have learned how they ought to decide.” In the same vein, jurors were not left to their own whims but “charged by a learned man how they ought to find the verdict.” If the realists were right, judges and jurors would have to be selected based on how they were “going [?] to decide.” “Therefore,” he concluded, “denying the ideal character of the law leads directly towards fascism or other forms of dictatorship.”

Kantorowicz’s handwritten notecard, which becomes increasingly illegible, ends without so much as a period, and he did not elaborate on the relationship he saw between realism, fascism, and other forms of dictatorship in 1934. We can, however, reconstruct how he may have thought about this relationship by reference to what remains of his unfinished philosophical work, *The Definition of Law*, written in Cambridge, England, 4 years later.<sup>98</sup> To give his readers a sense of what law was, Kantorowicz listed some negative examples of what it was not. Among those examples was that “misuse” of the term that designated law as “not a body of rules, but a mass of *real facts*, for example the behavior of

<sup>94</sup> Hermann Kantorowicz to Max Radin, April 2, 1933, reprinted in Radin, *Cartas Romanísticas*, 89–90.

<sup>95</sup> Cassander (Hermann Kantorowicz), “Current Misunderstandings of Hitlerism,” *B’Nai B’Rith Magazine* 48 (1933), 90, 99, and 111. For attribution of this piece to Kantorowicz, see Karlheinz Muscheler, *Relativismus und Freirecht: Ein Versuch über Hermann Kantorowicz* (Heidelberg: C.F. Müller, 1984), 249.

<sup>96</sup> Hermann Kantorowicz, *Dictatorships: A Sociological Study*, with a bibliography by Alexander Elkin (Cambridge: W. Heffer & Sons Ltd., 1935).

<sup>97</sup> Kantorowicz, “Materialien zum Rechtsrealismus.”

<sup>98</sup> Hermann Kantorowicz, *The Definition of Law*, ed. Archibald H. Campbell (Cambridge: Cambridge University Press, 1958). The work remained a fragment and was not published until 1958. The original manuscript seems to have been lost and with it, unfortunately, Kantorowicz’s extensive treatment of Nazi legal thought. The book’s editor thus “suppress[ed] a short passage of detailed exposition and refutation of one of [the Nazis’] theories,” which he considered “now not worth remembering” (viii). I would be grateful for any hint as to where a copy of the original manuscript might be found.

judges.”<sup>99</sup> Echoing his earlier claim that Llewellyn and his followers were “destroy[ing] the Law itself,” Kantorowicz accused “the extremists among the American ‘realists’” of “extirpat[ing] legal science as it has hitherto been cultivated in every country.”<sup>100</sup>

*The Definition of Law*, however, went even further than “Some Rationalism” in explicating parallels between American legal realism and Nazi life jurisprudence. In the same paragraph in which Kantorowicz accused the realists of “extirpat[ing] legal science,” he also mentioned Carl Schmitt, the Third Reich’s “crown jurist,” who had in his youth dabbled in free law ideas.<sup>101</sup> Schmitt, Kantorowicz explained, had attempted to “replace the ‘liberalistic’ dualism of rules and facts by the ‘living’ unity of the law as a ‘konkrete Ordnung’ [concrete order].”<sup>102</sup> This, for Kantorowicz, was not so different from the realist project—a point he made clear when he mentioned the Nazis once more later on in the book. The dualism of facts and rules, he asserted, was “too fundamentally true to be combated with success,” although Nazi jurists had recently “derided [this dualism] as ‘liberalistic.’”<sup>103</sup> For Kantorowicz, in 1934 as in 1938, Nazi and New Deal realism were cut from the same cloth.

### “Here the Rub. Science Is also of Many Kinds”

Kantorowicz’s critique that the realists “destroy[ed] the Law itself” was so scathing that contemporaries wondered if and when Llewellyn “[would] explode.”<sup>104</sup> Llewellyn, however, found “Some Rationalism” more “painful” than infuriating.<sup>105</sup> Until 1933, he had considered Kantorowicz a collaborator—and a friend. The German émigré’s supercilious intervention in his dispute with Pound then seemingly led the Columbia lawyer to change *his* mind. Llewellyn’s annotated copy of “Some Rationalism” speaks not only to his deteriorating image of Kantorowicz but also to a widening transatlantic rift in jurisprudential matters. The realists, Llewellyn intimated, no longer had much interest in European precedents. They had embarked on an idiosyncratically American endeavor. And Kantorowicz’s insistence on law as science failed to acknowledge the complexity of their task. Unsettlingly for Llewellyn, however, the Nazis wanted in on his legal-realist project.

<sup>99</sup> *Ibid.*, 18.

<sup>100</sup> *Ibid.*

<sup>101</sup> See Schmitt’s references to free law texts and authors in *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis* (Berlin: Liebmann, 1912). For an English version, see Carl Schmitt, “Statute and Judgment: An Investigation into the Problem of Legal Practice,” in *Carl Schmitt’s Early Legal-Theoretical Writings*, trans. and ed. Lars Vinx and Samuel Garrett Zeitlin (Cambridge: Cambridge University Press, 2021), 39–155.

<sup>102</sup> Kantorowicz, *The Definition of Law*, 18.

<sup>103</sup> *Ibid.*, 26.

<sup>104</sup> Walter G. Becker to Max Radin, December 18, 1934 (Bancroft Library, Mss. 76/165c, carton 1).

<sup>105</sup> Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana Publications, 1951), 10.



Kantorowicz and Llewellyn had initially hit it off. Following their first meeting in 1927, the free lawyer had helped his American colleague spend some time in Leipzig the following year. As a guest at Kantorowicz's house in Kiel, Llewellyn had been made privy to the German jurist's "grand plan of what he was to write."<sup>106</sup> He had returned the favor by sending Kantorowicz a copy of "A Realistic Jurisprudence," to which he regarded the free lawyer as having made some sort of contribution.<sup>107</sup> When Llewellyn visited Germany again in winter of 1931, he was looking forward to "enjoying [Kantorowicz's] critique."<sup>108</sup> After that, their relationship soured. The two jurists met again at Llewellyn's Columbia seminar in April 1934 where Kantorowicz presented what would become "Some Rationalism."<sup>109</sup> Confronted with the piece in print, sent by the author "with compliments," Llewellyn "appreciated" the "inference that [he could] take it," but regretted Kantorowicz's failure to engage with "the criticism (...) rec'd" in his class.<sup>110</sup>

Llewellyn's first misgiving concerned genealogy. In "Some Rationalism," Kantorowicz had traced legal realism back to European scholarship, especially his own free law ideas and the works of his French colleague Géný. Llewellyn, however, was not so sure. "Didn't Holmes beat them?" he wrote in the margins, reminding himself to "[c]heck Géný's dates."<sup>111</sup> Priority was a sensitive issue for Kantorowicz, and Llewellyn would have known this. His attempt to trace realistic ideas about law and legal science back to Holmes was, however, not just a jibe at Kantorowicz; it also spoke to Llewellyn's desire to emphasize legal realism's nature as a profoundly and idiosyncratically American project. Not only did Europeans, first and foremost the Germans, no longer have anything to teach the Americans. US scholarship had led jurisprudential innovation all along. Perhaps the time had come for Kantorowicz and his free lawyers to take note.

Llewellyn had substantive complaints as well, most importantly that his German colleague had willfully misunderstood, or at least misrepresented, the realists. In his preparatory notes for "Some Rationalism," Kantorowicz had accused Llewellyn of attempting to refute Pound's reconstruction of

<sup>106</sup> *ibid.*, 153.

<sup>107</sup> Although the first line of the letter in question is illegible, Schönfeldt suggests that Llewellyn was referring to "A Realistic Jurisprudence." See Karl Llewellyn to Hermann Kantorowicz, October 11, 1929, reprinted in Schönfeldt, "Der Briefwechsel," 274 fn. 139.

<sup>108</sup> Karl Llewellyn to Hermann Kantorowicz, December 10, 1931, reprinted in Schönfeldt, "Der Briefwechsel," 282.

<sup>109</sup> Kantorowicz, "Some Rationalism," 1240 fn. †.

<sup>110</sup> Hermann Kantorowicz, "Some Rationalism About Realism," Preprint from the *Yale Law Journal* [hereafter: "Preprint"], June 1934, Karl N. Llewellyn Papers, Hanna Holborn Gray Special Collections Research Center, University of Chicago Library, box 25, folder 16, annotation to 1240 fn. †.

<sup>111</sup> *ibid.*, annotation to 1240. On Géný's influence on US legal thought, see Duncan Kennedy and Marie-Claire Belleau, "François Géný aux États-Unis," in *François Géný, mythe et réalités: 1899-1999, centenaire de Méthode d'interprétation et sources en droit privé positif, essai critique*, ed. Claude Thomasset, Jacques Vanderlinden, and Philippe Jestaz (Quebec: Editions Yvon Blais, 2000), 295-320; and Ward Alexander Penfold, "An Ineluctable Minimum of Natural Law: François Géný, Oliver Wendell Holmes, and the Limits of Legal Skepticism," *History of European Ideas* 37 (2011): 475-82.

what the realists “meant” by showing what they “said.” Llewellyn now similarly accused Kantorowicz of an unwillingness to “try to get at what is meant.”<sup>112</sup> In “Some Rationalism,” Kantorowicz had availed himself freely of quotes taken from various realist scholars to demonstrate that they contradicted themselves constantly. Llewellyn’s copy of the article shows that he took offense at his German colleague’s implication that American scholarship lacked analytic rigor. “Why not read these [contradictions] as qualifications [?],” he complained in the margins.<sup>113</sup>

Most importantly, Llewellyn rejected the two “postulates” that Kantorowicz had ascribed to the realists only to reduce them to absurdity. An incredulous “What?” graced the margins of Kantorowicz’s discussion of the “substantive postulate.”<sup>114</sup> Llewellyn obviously did not see his own position reflected in the claim that his German colleague ascribed to him: that law was “factual reality” rather than a “body of rules.” To Kantorowicz’s “formal postulate,” he responded at slightly greater length, although no less caustically. On Kantorowicz’s reconstruction, the realists thought of legal science not as a normative endeavor concerned with systematizing rules, but rather as an empirical one concerned with observing facts. Not only was the realist position more nuanced than that, Llewellyn suggested in his annotations, but Kantorowicz’s conception of legal science was excessively rigid and failed to capture the variety of viewpoints from which to look at law.

Kantorowicz was wrong to speak of science as singular. Science had many meanings, and *legal* science encompassed a variety of things. Kantorowicz’s assertion that realistic legal science was “not the legal science of which [he was] speaking” left Llewellyn indignant. He underlined the “the” in front of “legal science” and commented frustratedly: “!!Why [speak] of *one* [legal science]?”<sup>115</sup> In an annotation that stands out in terms of both rhetoric and placement, Llewellyn summarized the crux of his disagreement with the German free lawyer: “Here the rub. Science is also of many kinds.”<sup>116</sup> Through insertions, Llewellyn modified Kantorowicz’s claim that “[t]o the realists, legal science is empirical” so as to read: “[t]o the realists, *that portion* [?] of legal science *which interests them* is empirical.”<sup>117</sup> Because of this multiplicity, the nihilistic conclusions presented in Kantorowicz’s “*Reductio ad Absurdum*” section seemed nothing short of “[c]razy” to the American scholar.<sup>118</sup>

Although “Some Rationalism” did not expressly articulate Kantorowicz’s view that realism “leads directly towards fascism or other forms of dictatorship,” Llewellyn still had to reckon with parallels between Third Reich realism and his own. In 1933, following his second stay in Leipzig, he had published a book explaining America’s precedent system to German civil lawyers based on

<sup>112</sup> Preprint, annotation to 1240.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, annotation to 1250.

<sup>116</sup> *Ibid.*, annotation to 1247. The annotation appears as a direct reaction to Kantorowicz’s invocation of Herman Oliphant’s “any truly scientific study of law” in fn. 21.

<sup>117</sup> *Ibid.*, annotation to 1248 (italics reflect Llewellyn’s insertions).

<sup>118</sup> *Ibid.*, annotation to 1252.

realist methods in their native tongue.<sup>119</sup> The book had made a splash, entitling Llewellyn to reject Kantorowicz's claim that he had misunderstood free law, or worse, had turned it into a dangerous legal nihilism. Yet among those who most revered Llewellyn's book were members of Germany's new regime. In 1934, fellow realist Samuel Klaus reported to Llewellyn that Hitler Germany had "accepted [him] as a true Nazi, fit to be amalgamated into the lifeblood of the new Reich."<sup>120</sup> German jurists considered Llewellyn not only a "fascist," but a "pillar of the fascist New Deal."<sup>121</sup>

In the later 1930s, Nazi allegations of this kind proliferated. But Llewellyn, at least initially, remained committed to his ideas, denying the existence of a shared transatlantic legal-realist project. His comparative research may have led him to think that fascist legalism was a code-based phenomenon without equivalent in America's case law tradition. He himself had in any case a clear conscience when it came to Hitler. Unlike his colleague Pound, who famously hobnobbed with Nazi elites, Llewellyn joined a number of institutions at odds with Hitler's racial politics, including the Sacco-Vanzetti National League, the NAACP, the American Civil Liberties Union, and—later—the Commission on the Rights, Liberties, and Responsibilities of the American Indian.<sup>122</sup>

Most importantly, Llewellyn may simply not have thought that law on its own was powerful enough to make or break democracy. In a poem titled "On the Reichstag Trial," he thus concluded despondently that "Law, Mere Law, is weak."<sup>123</sup>

### **"Sound Methods without a Sound Methodology Are Dangerous"**

Kantorowicz changed his mind about America and its law because he saw parallels between Nazi and New Deal realism. Jurists on both sides of the Atlantic conflated rules and reality to arrive at an order based on "merely power." Although recent studies show that this observation was right on the mark, Kantorowicz's view of the relationship between law, method, and ideology was ultimately more nuanced than that. Around 1933/1934, he noticed not only that American legal realism paralleled Nazi life-jurisprudence, but that

<sup>119</sup> Karl N. Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika: Eine Spruchauswahl mit Besprechung* (Leipzig: Weicher, 1933), published in English as Karl N. Llewellyn, *The Case Law System in America*, ed. Paul Gerwitz, trans. Michael Ansaldi (Chicago: University of Chicago Press, 1989).

<sup>120</sup> Samuel Klaus to Karl Llewellyn, April 21, 1934, quoted in Hull, *Roscoe Pound and Karl Llewellyn*, 237.

<sup>121</sup> *Ibid.*

<sup>122</sup> On Pound's involvement with the Nazis, see Peter Rees, "Nathan Roscoe Pound and the Nazis," *Boston College Law Review* 60 (2019): 1313–47; and Stephen H. Norwood, *The Third Reich in the Ivory Tower: Complicity and Conflict on American Campuses* (Cambridge: Cambridge University Press, 2009), 56–57. On Llewellyn's "liberalism," see Twining, *Karl Llewellyn*, 110.

<sup>123</sup> Karl Llewellyn, "On the Reichstag Trial" (Emma Corstvet Llewellyn Papers, Bryn Mawr College Library, Special Collections), which I would not have seen but for Hull, *Roscoe Pound and Karl Llewellyn*, 238 fn. 38.

his own free law ideas did as well. The fact that this did not seem to bother him reorients our research question. Why did Kantorowicz change his mind about legal realism but not about free law? The answer lies in what the German émigré perceived to be Nazis' and New Dealers' shared indifference to those problems that interested him "passionately," first and foremost law's epistemological status. His anti-fascist "jurisprudence of the future," by contrast, was based on a robust vision of law as both life and science.<sup>124</sup>

Llewellyn was right to take offense at "Some Rationalism." The tone of the article was aggressively patronizing and its method questionable. As in *The Struggle* some 30 years earlier, Kantorowicz had built a straw man, set it on fire, and delighted in the spectacle. His readiness to take quotes out of context spoke to his own sensationalist tendencies. And his attributing to authors implications they could not possibly have intended showed his lack of respect. But Kantorowicz not only misrepresented the realists, he may also have misunderstood them. American comparativist Vivian Grosswald Curran, for one, identified the German émigré's "unarticulated, underlying civil-law perspective" as the real source of his anti-realist critique.<sup>125</sup> Science and systematization were traditionally civilian concerns. His insistence on both in the context of American common law jurisprudence consequently made "Some Rationalism" look ever so slightly inexpert.

And yet, it would be unfair to hold Kantorowicz to higher standards than those he criticized, or those whose critiques of realist "exaggerations" substantively aligned with his own. Kantorowicz's rhetoric was no more incendiary than Llewellyn's, and the German émigré's understanding of the case law system roughly matched the Columbia lawyer's expertise in codes: the pot was calling the kettle black. "Some Rationalism" was also markedly similar to other anti-realist critiques published in the years and months leading up to its publication.<sup>126</sup> Eminent jurists like Cohen, Pound, Mortimer Adler, John Dickinson, Lon Fuller, and Arthur Goodhart had all taken issue with the realist temptation "to let the Ought acquiesce in the Is, to let law surrender to life."<sup>127</sup> In light of American intellectuals' increasing preoccupation with democracy's moral and epistemological foundations, Kantorowicz's article was notable mostly for its author's outsider status.

Reading "Some Rationalism" in context, however, helps us recover an instance of transatlantic legal rapprochement that has long remained hidden. American jurists, led by Pound and Fuller, started echoing Kantorowicz's arguments about realism's Nazi connections around 1940.<sup>128</sup> Edgar Bodenheimer, a German émigré who had secured a position as an attorney at the US

<sup>124</sup> Kantorowicz, "Some Rationalism," 1253.

<sup>125</sup> Curran, "Rethinking Hermann Kantorowicz," 68.

<sup>126</sup> Indeed, Kantorowicz acknowledged as much, see "Some Rationalism," 1242 text accompanying fn. 8.

<sup>127</sup> Lon L. Fuller, "American Legal Realism," *University of Pennsylvania Law Review* 82 (1934): 461. For a list of Llewellyn's other critics, see Llewellyn, *Bramble Bush*, 10.

<sup>128</sup> See generally Edward A. Purcell, Jr., "American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory," *American Historical Review* 75 (1969): 424–46 as well as Purcell, *The Crisis*.

Department of Labor, worried that “the skepticism of realistic jurisprudence” had the potential of “prepar[ing] the intellectual ground for a tendency toward totalitarianism.”<sup>129</sup> Catholic jurists, especially, went even further than that. Fordham law professor Walter Kennedy called realism a “goose-step philosophy” whose “act-first-and-explain-later formula” was “a dominant factor in the jurisprudence of the dictator nations.”<sup>130</sup> And theologian Francis Lucey charted a direct path from progressive legalism to Nazi biologism: “If man is only an animal, Realism is correct, Holmes was correct, Hitler is correct.”<sup>131</sup>

Realism’s “Jesuit” critics were tendentious, concerned less with German fascism than with American liberalism and, increasingly, Soviet communism.<sup>132</sup> As a consequence, conventional narratives of modern American jurisprudence have elided realism’s Nazi parallels, focusing instead on how US jurists modeled their craft in opposition to—not after—law in the Third Reich.<sup>133</sup> James Q. Whitman’s recent *Hitler’s American Model*, by contrast, shows that Kantorowicz’s observations about New Deal and Nazi realism were, in fact, spot on. What Hitler’s jurists admired about American legal thought, Whitman showed, was its “pragmatic,” “flexible,” and “open-ended” orientation.<sup>134</sup> “The ‘realists’ of both countries,” he argued, “shared the same eagerness to smash the obstacles that ‘formalistic’ legal science put in the way of ‘life’ and politics—and ‘life’ in both New Deal America and Nazi Germany...

<sup>129</sup> Edgar Bodenheimer, *Jurisprudence* (New York: McGraw-Hill, 1940), 316, quoted in Purcell, “American Jurisprudence,” 438 fn. 45.

<sup>130</sup> Walter Kennedy’s contribution to *My Philosophy of Law: Credo of Sixteen American Scholars*, ed. Julius Rosenthal Foundation, Northwestern University (Boston: Boston Law Book Co., 1941), 151–52, quoted in Purcell, *The Crisis*, 176 fn. 70.

<sup>131</sup> Francis E. Lucey, “Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society,” *Georgetown Law Journal* 30 (1942): 531, quoted in Kalman, *Legal Realism*, 121. On Lucey and other Jesuit critics, see David H. Burton, “Justice Holmes and the Jesuits,” *American Journal of Jurisprudence* 27 (1982): 32–45; and Ajay K. Mehrotra, “Father Francis E. Lucey and President Franklin D. Roosevelt: A Neo-Scholastic Legal Scholar’s Ambivalent Reaction to the New Deal,” in *FDR, the Vatican, and the Roman Catholic Church in America, 1933–1945*, ed. Richard G. Kurial and David B. Woolner (New York: Palgrave Macmillan, 2003), 105–20.

<sup>132</sup> Kantorowicz himself contributed to the negative association between realism and communism in “Some Rationalism,” see 1252 fn. 25. As such, he reported that one of his former “star” students at Freiburg had gone on to take up a post as an attorney in a Russian provincial town. That same student had subsequently lost all interest in law, caring only about how to “fix” witnesses and officials. This unflattering account of Soviet legal practice tracked how reactionary US jurists maligned realism at the time. For a discussion of, and defense against, such communist charges, see Morris Cohen to Roscoe Pound, September 20, 1938 (MRCP, box 10, folder 11).

<sup>133</sup> For recent studies of how US jurists modeled their craft in opposition to Third Reich law, see Noah A. Rosenblum, “The Antifascist Roots of Presidential Administration,” *Columbia Law Review* 122 (2022), 1–85; and Anne M. Kornhauser, *Debating the American State: Liberal Anxieties and the New Leviathan, 1930–1970* (Philadelphia: University of Pennsylvania Press, 2015).

<sup>134</sup> Whitman, *Hitler’s American Model*, 146. For an earlier discussion of “German realism,” see Richard Hyland, “Evening in Lisbon,” in *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, ed. Andreas Heldrich, Jürgen Prölss, Ingo Koller, Katja Langenbucher, Hans Christoph Grigoleit, Johannes Hager, Felix Christopher Hex, Jörg Neuner, Jens Petersen, and Reinhard Singer (Munich: C.H. Beck, 2007), 1161–80.

also involved racism.”<sup>135</sup> In light of this, Llewellyn’s refusal to engage with Kantorowicz’s critique looks more and more like a missed opportunity.

This, then, begs the question of why Kantorowicz did not make realism’s Nazi connection more explicit in 1934. For one, his dire professional situation may have made him hold his tongue. In 1933/1934 Kantorowicz still had hopes of staying in the United States, or of returning at some later point.<sup>136</sup> Leading American jurists, among them Pound, Cohen, and Berkeley’s Max Radin, were trying to find him permanent employment. In light of this, it was strategic for him to insert himself into America’s own jurisprudential quarrel, and to do so with arguments that paralleled his benefactors’. Challenging popular sentiment that “it can’t happen here,” by contrast, would have been self-sabotaging. Although he did not acknowledge it, Kantorowicz may also have been sympathetic to Llewellyn’s take that law alone was not enough to make or break a democracy as well as to the more general view that a polity’s legal method could not conclusively predict whether or not it would take a fascist turn. New Deal America and Nazi Germany, in spite of their shared realism, were not the same after all. Although the realists “[didn’t] see the reality” of Jim Crow, Kantorowicz agreed with other émigrés that realism was a far cry from Nazi legal biology.<sup>137</sup> In his 1935 study of dictatorships, Kantorowicz consequently asserted that, in spite of Roosevelt’s strong executive government, American democracy was safe, at least for the time being.<sup>138</sup>

Finally, there is evidence to suggest that Kantorowicz’s view of how law, method, and ideology interacted was more nuanced than what he thought Americans could handle in 1934. Faced with the movement’s Nazi parallels, most realists recanted.<sup>139</sup> Kantorowicz, in turn, refused to let Schmitt and others claim ideas that he considered his own. In his 1933 *Crime and Culpability*, he had set out to reform German criminal doctrine based on free law methods. In doing so, he could not help but acknowledge parallels between his free law project and the Nazis’. For one, he conceded that the “subjectivistic thought processes” that his book promoted reflected “recent strong tendencies.”<sup>140</sup> As Third Reich legislation evidenced, free law—with its peculiar brand of anti-dogmatic justice reform—had become the “order of the day.”<sup>141</sup> Instead of backtracking on the jurisprudential project of his youth, however, Kantorowicz explained that he was merely stating an observation, not judging it in any way. Already exiled and without a job, he insisted that it had been “[his] desire to write a book without a single political line.”<sup>142</sup> To his mind,

<sup>135</sup> Whitman, *Hitler’s American Model*, 156.

<sup>136</sup> On German émigrés’ struggle to find work at US law schools, see Kyle Graham, “The Refugee Jurist and American Law Schools, 1933–1941,” *American Journal of Comparative Law* 50 (2002): 777–818.

<sup>137</sup> See, for example, Fritz Morstein Marx, “Juristischer Realismus in den Vereinigten Staaten von Amerika,” *Revue Internationale de la Théorie du Droit* 10 (1936): 32.

<sup>138</sup> See Kantorowicz, *Dictatorships*, 2.

<sup>139</sup> On Llewellyn’s eventual “retreat,” see Horwitz, *The Transformation of American Law*, 247–50.

<sup>140</sup> Kantorowicz, *Tat und Schuld*, viii.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

questions of culpability, unlike questions of punishment, were neither inherently political nor reflective of cultural peculiarities.

Why did Kantorowicz, faced with Nazi life-jurisprudence, change his mind about legal realism, but not about free law? “Some Rationalism” itself contains a hint. Toward the end of the piece, Kantorowicz held out an olive branch to Llewellyn—only to slap him across the face with it. The free lawyers, he conceded, had only “tuned” their instruments, while American realists had “played” them.<sup>143</sup> This, however, was precisely the problem. Americans had forged ahead without attuning themselves to what they were doing—and how. In light of this, Kantorowicz raised a warning finger: “[S]ound methods without a sound methodology are dangerous, not so much in the hands of the master as in the hands of his pupils.”<sup>144</sup> Once more adopting a hierarchical view of transatlantic jurisprudential exchange, the German émigré suggested that his issue was not that both New Deal and Nazi realists had turned to life, but rather that they had done so without reflecting on life’s relationship with science.

A normative-vitalist legal science lay at the heart of Kantorowicz’s antifascist jurisprudence. Out of all those who revered life, Kantorowicz insisted, only the free lawyers had avoided falling prey to an unscientific, dangerous legal nihilism. As a consequence, he expressed his hope that Germans and Americans would “combine their specific gifts”—sound scientific methodology on the one hand and an ability to forge ahead on the other—to craft a “jurisprudence of the future.”<sup>145</sup> Not least because Kantorowicz’s vision paralleled that of other exiles, especially those who shared his interest in Roman law, it had some potential.<sup>146</sup> But competing German traditions of order won out in the end. In the later 1930s, younger, more strategic émigrés like Carl J. Friedrich popularized a vision of US global and domestic power based on Weimar liberalism and a bureaucratic, process-oriented notion of the rule of law.<sup>147</sup>

In light of these developments, Kantorowicz’s American prospects dwindled. Around the time that “Some Rationalism” appeared in print, he returned to England to take up a temporary post at the London School of Economics. Rejoining his wife and children, he subsequently held teaching and research positions—although never again a professorship—at various British institutions, first and foremost the University of Cambridge. Despite the support of a number of prominent British legal scholars, Kantorowicz’s professional situation remained uncertain, and his finances meagre. Although he had expressed misgivings aplenty about America and its law, he considered returning to New York where his daughter had recently moved.<sup>148</sup> When Cohen retired

<sup>143</sup> Kantorowicz, “Some Rationalism,” 1252.

<sup>144</sup> *Ibid.*, 1252–53.

<sup>145</sup> *Ibid.*, 1253.

<sup>146</sup> This is particularly true of Fritz Schulz, see Kaius Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe* (Cambridge: Cambridge University Press, 2020), 40–86.

<sup>147</sup> On Friedrich, see especially Greenberg, *The Weimar Century*, 25–75; and Kornhauser, *Debating the American State*, 149–60.

<sup>148</sup> Hildedore Oldenburg (née Kantorowicz) to Margrit and Eugen Rosenstock-Huussy, March 3, 1940 (MS-522 Eugen Rosenstock-Huussy Papers, Rauner Special Collections Library Repository, Dartmouth Library Archives & Manuscripts, box 4, folder 21).

from City College, Kantorowicz had hopes of being chosen to replace him.<sup>149</sup> World War II, however, made crossing the Atlantic once more impossible, and Kantorowicz died suddenly, in the midst of his work, in 1940.

## Conclusion

In his 1934 review of Cohen's *Law and the Social Order*, Kantorowicz meditated on the legal philosopher's answer to the question of whether distillers and brewers were entitled to compensation because of losses incurred through Prohibition. "A 'no,'" Kantorowicz concluded, "is as obvious for professor Cohen as it would be with regard to Jewish property for a professor of Nazi law in Kiel."<sup>150</sup> The passage is striking in that Kantorowicz connected Cohen's views on "confiscation without compensation" to those of the people responsible for forcing him and his family into exile. Kantorowicz, however, not only knew Cohen personally, he also thought of him as "America's most universal thinker."<sup>151</sup> In addition, he would have known that Cohen was a Russian-Jewish émigré from Minsk. Although Kantorowicz was reluctant to join Jewish organizations himself, he would have been able to appreciate the fact that Cohen had co-founded the Conference on Jewish Relations just the previous year.

The passage in question opens our eyes to a time of extreme jurisprudential contingency shortly before its eclipse.<sup>152</sup> Although Kantorowicz had his suspicions, it was far from obvious, in 1934, what the Third Reich would bring. World war and genocide lay years in the future, and people still had hope that Hitler could be tamed. Nor was it clear if Prohibition and expropriation, charismatic leadership and strong executive government, eugenics and sterilization, racial legislation and realistic jurisprudence were progressive, oppressive, neither, or both. Free law was the brainchild of a German Jew from Posen whose ideology clashed with his namesake's. It became the source of American jurists' struggle with their own "crisis of legal orthodoxy," as realism undergirded Roosevelt's New Deal state. Looking longingly across the Atlantic, the Nazis saw Jim Crow but also a jurisprudence based on life that did not bother with science. Although questions remain, the passage goes some way toward explaining how Pound could accept Third Reich accolades, while displaying Kantorowicz "in effigy" and criticizing Llewellyn.

Another curiosity from this time is the fact that Kantorowicz and Kelsen—whose lifeless "pure" theory had, on the face of it, little in common with free law vitalism—were jointly nominated for a Nobel Peace Prize. The strangeness of this fact disappears, however, once we see their shared commitment to

<sup>149</sup> Hermann Kantorowicz to Morris Cohen, January 24, 1940 (MRCP, box 7, folder 13).

<sup>150</sup> Kantorowicz, "Review," 188.

<sup>151</sup> *Ibid.*, 189.

<sup>152</sup> For another instance of the "glaring irony" that these times produced, see Or Bassok, "The Mysterious Meeting Between Carl Schmitt and Josef Redlich," *International Journal of Constitutional Law* 19 (2021): 694–722.



doing law scientifically.<sup>153</sup> In view of realism’s power problem, “Some Rationalism”’s main takeaway was that legal science mattered. At a time when most of his contemporaries saw only facts, Kantorowicz, like Kelsen, insisted that what was happening in the world needed to be checked against what *ought* to happen ideally. Refusing to see law simply as “politics by other means,” he affirmed jurists’ role in safeguarding democracy. Jews and Nazis could both endorse free law. New Dealers and Southern racists could all be realists. Whether they “destroy[ed] the Law itself” depended not on whether life was law’s source but on whether science was its method.

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<sup>153</sup> For a reappraisal of Kelsen’s vision of law as science, see Natasha Wheatley, *The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty* (Princeton: Princeton University Press, forthcoming 2023).

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