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Demos vs. Ethnos in Private Law: Friedrich Kessler and His German Heritage

Christian Joerges[†]

In a recent tribute to legal scholars who emigrated from Germany to the United States during the Nazi period,¹ no fewer than four contributors honored Friedrich Kessler. One of them, Professor Herbert Bernstein of Duke University Law School, focused on Kessler's impact on American legal thought in general and contract law in particular.² Two others had studied with Kessler at Yale (Professor Otto Sandrock of Münster³) and Berkeley (Professor Johannes Köndgen of St. Gallen⁴). The editors had assigned to them the task of documenting Kessler's importance for Germany. This proved to be surprisingly difficult. Kessler had, from 1952 onward, published continuously and visibly in Germany;⁵ legions of younger and older academics who took degrees or spent their sabbaticals in the United States came to know his work. Those who attended his classes or discussed their research with him testify as to how impressed they were by those encounters.⁶ Yet Kessler's articles and arguments have rarely been integrated into the postwar legal

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1. DER EINFLUß DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND (Marcus Lutter et al. eds., 1993) [hereinafter DER EINFLUß DEUTSCHER EMIGRANTEN].

2. Herbert Bernstein, *Friedrich Kessler's American Scholarship and Its Political Subtext*, in DER EINFLUß DEUTSCHER EMIGRANTEN, *supra* note 1, at 85; see also JUTTA KLAPISCH, DER EINFLUß DER DEUTSCHEN UND ÖSTERREICHISCHEN EMIGRANTEN AUF CONTRACTS OF ADHESION AND BARGAINING IN GOOD FAITH IM US-AMERIKANISCHEN RECHT (1991).

3. Otto Sandrock, *Friedrich Kessler und das anglo-amerikanische Vertragsrecht*, in DER EINFLUß DEUTSCHER EMIGRANTEN, *supra* note 1, at 475.

4. Johannes Köndgen, *Friedrich Kessler—Ein Grenzgänger zwischen den Disziplinen*, in DER EINFLUß DEUTSCHER EMIGRANTEN, *supra* note 1, at 287.

5. See, e.g., Friedrich Kessler, *Freiheit und Zwang im nordamerikanischen Vertragsrecht*, in Festschrift für Martin Wolff 67 (Ernst von Caemmerer et al. eds., 1952); Friedrich Kessler, *Einige Betrachtungen zur Lehre von der Consideration*, in 1 Festschrift für Ernst Rabel 251 (Hans Dolle et al. eds., 1954); Friedrich Kessler, *Die soziale Funktion des Vertrages zugunsten Dritter im nordamerikanischen Recht*, in Festschrift für Eduard Wahl 81 (Klaus Müller & Herman Soell eds., 1973); Friedrich Kessler, *Der Konflikt zwischen Antitrustrecht und Vertragsfreiheit im nordamerikanischen Recht*, in Festschrift für Ludwig Raiser 437 (Fritz Bauer et al. eds., 1974) [hereinafter Kessler, *Der Konflikt zwischen Antitrustrecht und Vertragsfreiheit*]; Friedrich Kessler, *Der Schutz des Vertrauens bei Vertragsverhandlungen in der neueren amerikanischen Rechtsprechung*, in Festschrift für Ernst von Caemmerer 873 (Hans Claudius Ficker et al. eds., 1978); Friedrich Kessler, *Metamorphosen im amerikanischen Vertragsrecht*, 43 JURISTEN ZEITUNG 109 (1988).

6. See, e.g., Otto Sandrock, *Friedrich Kessler 80 Jahre*, 36 JURISTEN ZEITUNG 638 (1981).

discourse of the Federal Republic.⁷ This author, the fourth contributor to the collection, accordingly entitled his narrative "History as Non-History."⁸ Must we Germans simply appreciate Kessler's academic standing within the United States and praise his contributions to comparative law? Or should his non-history in Germany tell us a more disquieting story?

Three of Kessler's early American articles, published between 1941 and 1944, provide a provocative starting point for this analysis. The most famous among them was *Contracts of Adhesion*, his philippic against the treatment of standardized contracts by traditional law and doctrine.⁹ That topic had already been dealt with quite extensively in Germany. Kessler mentioned but one contemporary, namely Ludwig Raiser, to whom he later dedicated an article in his *Festschrift*.¹⁰ Later American commentators did, however, detect something unusual about Kessler's analysis.¹¹ Why did he pay so little attention to informational asymmetries, to the use of standardized forms within highly competitive markets? Why did he instead focus on the insufficiencies of contract law as indicating and contributing to "the obstruction of the institutional framework of capitalist society";¹² as enabling "enterprisers to legislate in a substantially authoritarian manner"; and as a technique of "powerful industrial and commercial overlords . . . to impose a new feudal order of their own making upon a host of vassals"?¹³ I am not aware of any American analysis that would have placed such emphasis upon links between private governance structures, processes of economic concentration, and the emergence of authoritarianism in the whole of society.¹⁴

7. Notable exceptions include Spiros Simitis, *Soll die Haftung des Produzenten gegenüber dem Verbraucher durch Gesetz, kann sie durch richterliche Fortbildung des Rechts geordnet werden? In welchem Sinne?*, in 1 GUTACHTEN ZUM 47. DEUTSCHEN JURISTENTAG C. 4 (1968) (drawing extensively upon Kessler's theory of enterprise liability); 2 WOLFGANG FIKENTSCHER, *METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG* 141-42, 364-73, 417-19 (1975) (analyzing Kessler's theoretical perspectives).

8. Christian Joerges, *Geschichte als Nicht-Geschichte: Unterschiede und Ungleichzeitigkeiten zwischen Friedrich Kessler und der deutschen Rechtswissenschaft*, in *DER EINFLUSS DEUTSCHER EMIGRANTEN*, *supra* note 1, at 221, translated as Christian Joerges, *History as Non-History: Points of Divergence and Time Lags Between Friedrich Kessler and German Jurisprudence*, 42 *AM. J. COMP. L.* 163 (1994) [hereinafter Joerges, *History as Non-History*]. These pages draw upon that article as well as on Christian Joerges, *Die Wissenschaft vom Privatrecht und der Nationalstaat*, in *RECHTSWISSENSCHAFT IN DER BONNER REPUBLIK* 311 (Dieter Simon ed., 1994); Christian Joerges, *On the Context of German-American Debates on Sociological Jurisprudence and Legal Criticism*, 1993 *EUR. Y.B. SOC. L.* 403; Christian Joerges, *Politische Rechtslehre and Critical Legal Studies*, in *CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE* 597 (Christian Joerges & David M. Trubek eds., 1989).

9. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629 (1943) [hereinafter Kessler, *Contracts of Adhesion*].

10. Kessler, *Der Konflikt zwischen Antitrustrecht und Vertragsfreiheit*, *supra* note 5.

11. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. LEGAL STUD.* 461, 484-96 (1985); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *HARV. L. REV.* 1174, 1215-20 (1983).

12. Kessler, *Contracts of Adhesion*, *supra* note 9, at 641.

13. *Id.* at 640.

14. This holds true even for Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 *COLUM. L. REV.* 603 (1943). Closest to Kessler's critique is Franz Neumann's seminal analysis of the use of general clauses in German law. See Franz Neumann, *Der Funktionswandel des Gesetzes im Recht der bürgerlichen*

Kessler's concern with the political dangers of untamed economic power must be interpreted in the dark light of long-standing German experience. Since the Great Depression of 1873, the government had tolerated noncompetitive economic structures and promoted self-organization of industrial compounds; the judiciary had expressly legalized cartels.¹⁵ Attempts during the Weimar Republic to replace this system of "organized capitalism" and to address the tensions between economic capitalism and political democracy faltered, and were definitely brought to an end after the seizure of power in 1933 by the Nazi regime. It was against this backdrop that formalism in contract law and standardized terms came to have meaning for Kessler.

Other indicators of Kessler's concern for his German heritage can be found in two theoretical essays, one published before and one published after *Contracts of Adhesion*.¹⁶ Both essays are somewhat holistic in their approach. They contrast natural law tradition with positivism, reach back to the roots of this dichotomy in Greek philosophy, Thomistic scholasticism, and early modern social philosophy, and assess the impact of these perspectives on one another over time. Kessler's analysis is clearly motivated by an attempt to identify his own place within this intellectual landscape—a landscape dominated by legal realism. Kessler stressed the links between that movement's legal positivism and liberal social philosophy, and presented the realist critique of formalism as a legitimate heir of the young Bentham's social reformism.¹⁷ This reading enabled him to deepen his critique of the inability of formalism to perceive private instrumentalizations of legal freedoms and to challenge the legality of politically authoritarian regimes.¹⁸ It also enabled him to identify the values of political democracy, "supplemented by an economic and social democracy,"¹⁹ as the normative basis of his search for a unity of freedom and justice.

My reading of Kessler's early American articles and their messages cannot but employ a comparative perspective. The framework of that perspective, however, must differentiate between three stages of German history. Kessler received his legal education during the Weimar Republic. In 1926, he joined the recently founded Kaiser Wilhelm-Institut für Ausländisches und Internationales Privatrecht (Institute for Foreign and International Private Law)

Gesellschaft, 6 ZEITSCHRIFT FÜR SOZIALFORSCHUNG 542 (1937), cited in Friedrich Kessler, *Natural Law, Justice and Democracy—Some Reflections on Three Types of Thinking About Law and Justice*, 19 TUL. L. REV. 31, 48 n.52 (1944) [hereinafter Kessler, *Natural Law*].

15. See Judgment of Feb. 4, 1897, Reichsgericht [RG], 38 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 155 (Ger.).

16. Friedrich Kessler, *Theoretic Bases of Law*, 9 U. CHI. L. REV. 98 (1941); Kessler, *Natural Law*, *supra* note 14.

17. See Kessler, *Natural Law*, *supra* note 14, at 49.

18. *Id.* at 52–54.

19. *Id.* at 60.

in Berlin. Both his dissertation of 1928²⁰ and his “habilitation” of 1932²¹ dealt with his special field of interest: American law. His habilitation, on negligence in American tort law, laid proof of a promising modernist, whose diligence must have been appreciated even by the Institute’s great conservative master, Ernst Rabel. Modernism, however, is a contextual concept. Kessler’s early German writings stood out through their choice of subjects and their attention to foreign legal concepts. But they were strictly legal analyses, not yet affected by, or at least not explicitly engaging in, theoretical queries. Kessler’s early American articles in that sense signal a clear break with his own past and the kind of legal reasoning his academic training had cultivated.

His early American articles were at the same time a response to what had happened within that academic milieu in the decade after Kessler’s habilitation. Academic performance during the Nazi period was certainly not uniform. Universities continued to function, law professors continued to teach students, books were still published and articles still written—even after the legislative fiat of April 7, 1933,²² which removed non-Aryans and newly defined political enemies from academia. This action was extended in 1938, until Germany’s law faculties had lost thirty-six percent of their former academic staff.²³ It would be in vain to search for something like a theoretical basis of that legislation. Germany’s National Socialism was not committed to a particular philosophical or theoretical perspective. It was nevertheless a political system, with a demand for the establishment of a world view [*Weltanschauung*]²⁴—a renewal of law on the basis of a national-racial [*völkisch*] ideal.²⁴ Some attempts to fill this void amounted to a hollow rephrasing of Nazi phraseology. Others were more ambitious. The most important one in the field of private law stemmed from Karl Larenz.²⁵ It is illuminating to contrast Kessler’s work with Larenz’s.²⁶ Both writers dealt with the same topics. Both were unsatisfied with legal formalism. Both viewed laissez-faire capitalism as a betrayal of the common good. Both felt the need to search for a legal theory beyond natural law and positivism.²⁷ Yet their theoretical frameworks and

20. Friedrich Kessler, *Uniform State Laws in den Vereinigten Staaten—Das Recht der Eheschließung*, 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 185, 886 (1927).

21. FRIEDRICH KESSLER, *DIE FAHRLÄSSIGKEIT IM NORDAMERIKANISCHEN DELIKTSRECHT UNTER VERGLEICHENDER BERÜCKSICHTIGUNG DES ENGLISCHEN UND DES DEUTSCHEN RECHTS* (1932).

22. Gesetz zur Wiederherstellung des Berufsbeamtentums, 1933 Reichsgesetzblatt [RGBl] I 175.

23. This figure is drawn from C. VON FERBER, *DIE ENTWICKLUNG DES LEHRKÖRPERS DER DEUTSCHEN UNIVERSITÄTEN UND HOCHSCHULEN, 1864–1954*, at 145 (1956).

24. See generally Carl Schmitt, *Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist*, 41 DEUTSCHE JURISTEN-ZEITUNG 1193 (1936).

25. Larenz has only once, in a letter of February 15, 1987, addressed to Professor Ralf Dreier and published posthumously with Larenz’s consent in 48 JURISTEN ZEITUNG 455–57 (1993), commented upon his entanglement. He explains that he was persuaded in May 1933 to make the new regime understand better the “idea of law and state” and then took over that task in the belief that such an effort might still have an impact. For an enervated comment, see Horst Heinrich Jakobs, *Karl Larenz und der Nationalsozialismus*, 48 JURISTEN ZEITUNG 805 (1993).

26. For an elaboration, see Joerges, *History as Non-History*, *supra* note 8, at 175–84.

27. See *id.* at 180.

normative perspectives differed sharply. Larenz's perspective was grounded in post-Hegelian objective idealism, while Kessler drew upon the philosophical heritage of modern positivism and its dialogue with natural law. Larenz saw "concrete orders" as ensuring the conformity of the exercise of individual choices with the requirements of the whole *Volk* and its National Socialist leadership, while, for Kessler, tensions between liberty and justice had to be resolved by social reforms within the democratic process. Larenz emphasized the unity of the individual will and the common will, with law ensured not by any abstract principles but by a legislator whose own thought and volition encompassed the German *Volk's* conception of law. Kessler cautioned that a preoccupation with abstraction would take away from the important task of testing out the desirability, efficiency, and fairness of inherited legal rules and institutions in terms of the present needs of society.

Not only were Kessler's positions antithetical to those of his trend-setting German contemporaries, his focus on American legal culture had at the same time alienated him from a second German legal culture that had survived the Nazi period. After the collapse of the Third Reich, that second culture was again to become the first. How could it now reintegrate—or at least listen to—its emigrés?

Germany's legal academy faced two challenges in the postwar period. It had to look back and consider its involvement in National Socialism; it had to look forward and contribute to the establishment of a new constitutional order. The first task proved to be extremely painful and difficult. One easy answer suggested itself: National Socialism had betrayed fundamental values; it had identified the law with the will of tyranny. The inability to differentiate between *Gesetz* and *Recht*, between arbitrary commands and the rule of law, had contributed to the submissiveness of legal officials and judges. Should not legal positivism take responsibility for these failures? This view was first and most prominently advanced by Gustav Radbruch,²⁸ whose voice was important in light of both his personal integrity and his prior criticism of natural law traditions. Radbruch's thesis was readily supported in many quarters. Even law professors, whose involvement in the meta-positivist National Socialist "renewal" was clearly documented, did not hesitate to identify with the critique of positivism.²⁹ Kessler's articles from 1941 and 1943 had dealt extensively with this agenda. Yet they were not read, and Kessler was not even mentioned in the first postwar review of modern American jurisprudence—a review that betrayed great sympathy for the natural

28. See Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105 (1946).

29. A particularly enlightening document is the *Denkschrift der Leipziger Juristenfakultät* of the year 1945, now published by Karl Michaelis, one of its authors, in 30 DER STAAT 81 (1991).

law critique of the realist movement.³⁰ Nevertheless, with a delay of some decades, Kessler's insights into the practical weakness of natural law theories and the philosophical foundations of positivism today are widely shared and the Radbruch thesis is thoroughly discredited.³¹

The second postwar challenge concerned the future, but was equally related to the past. The legal academy had to identify theoretical bases that were uncompromised by Nazism and at the same time capable of addressing the role of law in the new constitutional state. Again, Kessler had something to offer. In 1952 he contributed to the *Festschrift* of Martin Wolff, once a legendary member of the Humboldt University law faculty in Berlin who had emigrated to Great Britain.³² Kessler's article foreshadowed the introductory chapter of his casebook on contracts, coauthored with Malcolm Sharp in 1953. It dealt with the coexistence of freedom and coercion in modern contract law, contained a methodological and social critique of formalism, pointed to the tensions and contradictions within the American legal system, and pleaded for an articulated judicial policy. Germany's postwar jurisprudence was hardly ready to appreciate such messages. On the contrary, Kessler's analysis and normative perspectives were diametrically opposed to the most important strands of legal thought in this phase of West Germany's reconsolidation. This especially holds true for ordo-liberalism, first advanced by the economists Walter Eucken and Alexander Rüstow during the Weimar Republic, and finding legal proponents and gaining intellectual leadership in the postwar period.³³ In this school, the rule of law was viewed as constituting both a liberal economic and political order. Individual liberties and private law could not be dispositive and their fundamental importance not even subjected to the incalculable outcome of political processes. Ordo-liberalism was no less critical of the formalist tradition than was Kessler's realism. But the two schools could not become allies.

The second nonpositivist tradition that was to be revitalized had much earlier roots. In the first half of the nineteenth century, when Germany began to detect its nationhood without the prospect of becoming a unitary state and French enlightenment stimulated quests for a modern codification of law, the historical school had found its ingenious response: German identity was to be based upon the culture and ethnicity that expressed itself in the *Volksgeist*; legal unity could be achieved without the help of a legislature on the basis of

30. Helmut Coing, *Neue Strömungen in der nordamerikanischen Rechtsphilosophie*, 38 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 536 (1949/50).

31. For an informative retrospective, see Ulfried Neumann, *Rechtsphilosophie in Deutschland seit 1945*, in RECHTSWISSENSCHAFT IN DER BONNER REPUBLIK, *supra* note 8, at 145.

32. Kessler, *Freiheit und Zwang im nordamerikanischen Vertragsrecht*, *supra* note 5.

33. Most notably Franz Böhm; see his WETTBEWERB UND MONOPOLKAMPF (1933). Out of his early postwar publications, see *Die Bedeutung der Wirtschaftsordnung für die politische Verfassung*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 141 (1946), and WIRTSCHAFTSORDNUNG UND STAATSVORFASSUNG (1950).

Roman law; this process of restructuring needed gifted representatives—learned jurists who could synthesize Roman law sources with the *Volksgeist* into a new doctrine. The great tradition of the historical school was still alive. But how was it to cope with the kind of law that Kessler had presented to his German readers?

So far my story has focused on Kessler's alienation from his German heritage. The story could still be continued. One particularly interesting chapter would have to deal with the student revolt in the 1960's against Germany's tradition of legal education, and the rediscovery of Marxism and the emigrated socialists of the Weimar Republic. Fortunately enough, my story is one-sided and thus incomplete. German legal thought has undergone substantial change despite the strength of its traditions. The constant confrontation with American legal culture, to which Kessler has contributed so much, has promoted these changes.

Kessler's work will continue to have tremendous importance for Germany, as well as for Europe as a whole. Indeed, the project of European integration and the debate over Europeanization of private law underscore the contributions of Kessler's writings. Europe's internal market is widely perceived as an economic project that necessitates the establishment of a range of public law regulatory frameworks. The very fact that private law is increasingly attracting attention, however, is illuminating enough. Assuming that Europeans do not once more use ethnicity as a shield against legal integration, how should they come to grips with the differences in their legal cultures, the many mandatory elements of private law, and even mere "default" rules? Through a revitalization of legal formalism? Through a redetection of their common Roman Law heritage? By establishing a European *Privatrechtsgesellschaft*, as recommended by German ordo-liberalism? Kessler's answers would hardly be in the affirmative. Private law, he explained again and again, cannot get rid of its regulatory side. Its dual commitment to freedom and social justice needs to be based on commonly held values, on rationality—and on democratically legitimized political processes. That diagnosis is as valid as it was in the 1940's. It adequately describes the future European agenda.

