

ARTICLES

Gustav Radbruch and Hermann Kantorowicz: Two Friends and a Book – Reflections on Gnaeus Flavius’ *Der Kampf um die Rechtswissenschaft* (1906)

By Frank Kantorowicz Carter*

A. Two Scholars

*That which we are, we are
One equal temper of heroic hearts,
Made weak by time and fate, but strong in will
To strive, to seek, to find, and not to yield.¹*

I. Introduction

Gustav Lambert Radbruch (1878-1949) and Hermann Kantorowicz² (1877-1940) were undoubtedly two of the greatest legal scholars in Germany in the first half of the twentieth century; for some of this time arguably *the* greatest. It is a happy coincidence that they both attended the seminar of the criminologist Franz von Liszt in Berlin at the same time in 1903. Although very different in temperament and not always in agreement, they were immediately drawn to each other, highly respectful of each other’s undoubted intellect, never jealous of the other’s achievements but always altruistically supportive. Though together for only four months initially, they maintained regular contact through letters and quickly forged a close and life long friendship.

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¹ This extract from Tennyson’s poem *Ulysses* and the extract from the same poem at the head of the Epilogue, discussed below, were quoted by Radbruch in a 60th birthday greeting to Kantorowicz. It is not known from which edition Radbruch’s quote came, *but see* Alfred Lord Tennyson, *Ulysses*, in *VICTORIAN PROSE AND POETRY* 416-418 (Lionel Trilling and Harold Bloom eds., 1973).

² Kantorowicz only had one first name, though from 1904 to 1922 he regularly added the initial “U.” to distinguish himself from another Hermann Kantorowicz. Most authors recently have interpreted this as “Ulrich,” which is totally unfounded and seems to have been “invented” by Adolf Berger in his otherwise fine tribute to Kantorowicz. *See* Adolf Berger, *In memoriam - Hermann Ulrich Kantorowicz (1877-1940)*, 68 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE (ROMANISTISCHE ABTEILUNG)* 624 (1951).

They appreciated that they were living in the dawn of a new era, not just a new century. In particular they were concerned that the majority of legal thinkers in Germany, France and Italy were still entrenched in the legal science of the 19th century, dominated by Napoleon's Civil Code. According to this paradigm, the law was complete and every legal question could be answered automatically by reference to it. The two scholars, neither of them yet 28 years old, decided to launch a methodological challenge to this view in the form of a manifesto, which Kantorowicz published exactly one hundred years ago, entitled *Der Kampf um die Rechtswissenschaft* (The Battle of Liberation for Legal Science).³ The manifesto had an immediate impact, arousing heated debate and bitter controversy, as had been the intention. It was claimed by Arthur Goodhart in 1958 that "it has probably been cited more frequently than any other legal essay published during the present century."⁴ It is the creation of this manifesto, and the *Freirechtsschule* (Free Law Movement) to which it gave birth, that this essay will consider.

II. *The Two Lives Compared and Contrasted*

In view of their similar ages, abilities, academic aspirations and fearless battles for truth and justice one might have expected their careers to reflect many more similarities, but in fact they each followed quite distinctive paths.

Gustav Radbruch was born 21 November 1878 in Lübeck, near Kiel, where his father and grandfather before him had been provision merchants. He was the youngest of three children; his sister Aline, who remained single all her life, was 7 years older; his brother Hermann was 10 years older and developmentally disabled. Radbruch turned out to share little of daily life with his siblings, instead spending most time close to his mother. At the same time, his father Heinrich, a dealer with old-fashioned values had by far the greater influence on him. His young life however may explain why he remained reserved and shy until his early thirties. After leaving *Gymnasium* with his *Abitur* as *primus omnium* he originally

³ GNAEUS FLAVIUS, *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (1906). See also HERMANN KANTOROWICZ (Gnaeus Flavius), *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (With an Introduction by Karlheinz Muscheler, Nomos Verlagsgesellschaft 2002). See also Gnaeus Flavius, *Der Kampf um die Rechtswissenschaft*, in *RECHTSWISSENSCHAFT UND SOZIOLOGIE* 13-39 (Thomas Würtenberger ed., 1962).

⁴ HERMANN KANTOROWICZ, *THE DEFINITION OF LAW* (Arthur Goodhart ed., 1958). See also HERMANN KANTOROWICZ, *THE DEFINITION OF LAW* (Octagon Books 1980); HERMANN KANTOROWICZ, *LA DEFINIZIONE DEL DIRITTO* (Enrico di Robilant trans., 1962); HERMANN KANTOROWICZ, *DER BEGRIFF DES RECHTS* (Werner Goldschmidt and Gerd Kastendieck trans., 1963); HERMANN KANTOROWICZ, *LA DEFINIÇÃO DEL DERECHO* (J.M. de la Vega trans., 1964). Kantorowicz intended this essay to serve as an introduction to a proposed *Oxford History of Legal Science*, a project which had to be abandoned on his death in 1940.

dreamt of becoming “a fencer, dancer and then a great poet.”⁵ He had great literary ability and, in his earlier career, was torn between writing and the law. He wrote to his father on 4 June 1903, “You know that I am not body and soul a jurist,⁶ and three years later was still undecided about his career, though at that point his inclination was towards the prison service. However, once he had finally set out on a career in law he pursued it with steadfast purpose, outstanding scholarship and a steady stream of learned works. He progressed with distinction through the various academic stages, obtaining his Doctorate, *summa cum laude*, in 1902 with a much-acclaimed dissertation (*Die Lehre von der adäquaten Verursachung*) and achieved his Habilitation⁷ at the age of 25 in Heidelberg. Here he stayed, rather reluctantly as a *Privatdozent*, until 1914, though belatedly receiving the titular rank of *a.o.Professor (außerordentlicher* or “extraordinary”) in 1910.

He was a man of deep integrity and conscience, thoughtful and measured in all that he did. His intensity frequently led him into periods of depression in which he doubted his own ability and suitability for the law. He unburdened himself on this in many of his letters to his friend, so much so that Kantorowicz wrote “Litanie” (lamentation) as a comment to himself in the margin of one of Radbruch’s letters. The latter’s spiritual dependence in the early days on Kantorowicz, his slightly older and more experienced friend, is shown in several letters. In his tribute in 1946 Radbruch wrote,

All his conversations were filled with his love of jokes and harmless fun, which included intellectual irony as is repeatedly evident in his scholarly works also. I have never met another person whose whole life has been so closely intertwined with his intellect. Every conversation with him was an erudite discussion, with an absence of dogmatic views and a constant readiness to give way unreservedly to a stronger argument; so one

⁵ GUSTAV RADBRUCH, *DER INNERE WEG* 38 (1951).

⁶ Letter from Gustav Radbruch to his parents (4 June 1903) (GRGA.17.24). Most of the letters from Radbruch to Kantorowicz referred to in this article (and some to his parents) have been published, with a comprehensive commentary in *17 GUSTAV RADBRUCH GESAMTAUSGABE* (Günter Spindel ed., 1991) [hereinafter “GRGA.17”] (the letter referred to here is no. 24 in that volume and is thus indicated as GRGA.17.24). See also Letter from Gustav Radbruch to Hermann Kantorowicz (22 January 1907) (GRGA.17.109).

⁷ Habilitation, *Habilitate*: formal admission of an academic as a lecturer (*Privatdozent*), into a faculty where he or she hopes to be granted *venia legendi* (authority to lecture) in specified subjects.

regularly left his company, stimulated and enriched.⁸

The closeness of their friendship was mutual and is strikingly summarised by Kantorowicz in one of the last of his numerous letters to Radbruch: “Just for this reason has the relationship to one of the few men who have found a place in my heart been of such enormous value; and among these you have for decades occupied the first place and will retain it for ever.”⁹

Hermann Kantorowicz was born 18 November 1877 in Poznan, then named Posen and under Prussian rule. He was the eldest of four children of Wilhelm Kantorowicz who moved his Alcohol firm to Berlin in 1887, where his business thrived. Though he described himself as Jewish on his son’s birth certificate, the family members were not practicing Jews and preferred to think of themselves as German.¹⁰ On his wedding certificate Hermann stated his “religion” as “dissident.” His wife, Thea Rosenstock, described herself as “Jewish,” but most of the Rosenstock family were actively “non-Jewish.” Wilhelm was a highly intelligent and cultivated man and wrote highly regarded books’ for example, on the *Psychologie der Kartelle* and on art. He held strong liberal and pacifist views and greatly influenced both his sons (Hermann’s brother Alfred became a renowned Professor of Dentistry in Bonn). However, the two sons rebelled against his dominating manner and there were fierce arguments within the household, during which Wilhelm often exclaimed, “My grandchildren will avenge me!” I am glad to report, in spite of this history with his father, that Hermann’s relationship with his five children, including myself, was excellent.

Hermann also left Gymnasium as *primus omnium*. At university Kantorowicz immediately became quite involved in politics and literary studies. Unlike Radbruch, he actually joined the *Sozialdemokratische Partei Deutschlands* (SPD – Social Democratic Party of Germany) but resigned from it early in 1904 as he

⁸ Gustav Radbruch, *Nachruf Hermann Kantorowicz*, 60 SCHWEIZERISCHEN ZEITSCHRIFT FÜR STRAFRECHT 262-276 (1946).

⁹ Letter from Hermann Kantorowicz to Gustav Radbruch, (21 November 1937) (on file in the Archives of Freiburg University).

¹⁰ The personal statements here and elsewhere in the article are based on my own recollections and conversations with family members, supplemented by extensive memoirs written by my mother, Hilda Kantorowicz, which I have on file. I also rely on a biographical sketch of Kantorowicz, written by his son, my brother Tom Carter, which is available at www.Kantorowicz.com. As one of the few people still alive who was personally acquainted with both Gustav Radbruch and Hermann Kantorowicz, I feel my personal recollections are worth recording.

considered it too doctrinaire; however he “retained a platonic love of Socialism.”¹¹ His father had wanted him to follow in his footsteps as a merchant, but for him the study of law in all its forms had always been his intention and he had a clear vision from the beginning of what he wanted to achieve in his scholastic career.¹² He achieved his Doctorate in 1900 *insigni cum laude*, exceptionally without having to submit a dissertation. Though almost exactly one year older than Radbruch, Kantorowicz was rather behind him in career development when they first met in 1903. Kantorowicz was in no hurry to complete his studies and, unlike Radbruch, able to rely on financial support from a wealthy father. He did not bother to undertake the almost obligatory service as Referendar (unpaid junior Barrister), which counted against him later, preferring instead to pursue his studies. He intended to take a second Doctorate, in Philosophy but abandoned this in favour of getting married (on 23 April 1904) and a honeymoon in Italy, which actually turned into a two and a half year research stay. Here he laid the foundation for his preeminence in the study of the literary history of medieval law, a field in which he later “had no equal among the living and very few among the dead.”¹³ Radbruch, meanwhile, was desperately trying to earn enough to achieve independence and also be able to get married. He had been firmly established in Heidelberg as a *Privatdozent* for two years before Kantorowicz took any steps to achieve his own *Habilitation*. By then Radbruch was already looking for his first professorship and hoping that his friend could then succeed him as *Privatdozent* in Heidelberg.

Kantorowicz’s failure to achieve his *Habilitation* in Heidelberg, despite his outstanding ability and the altruistic efforts on his behalf by Radbruch, was mainly due to the strong anti-Semitic feeling in this and many German universities at the time, but partly also to his personal behaviour, as Radbruch wrote to him quite brutally.¹⁴ It is evidence of their close friendship that they were able both to encourage and criticise each other mercilessly without any fear of upsetting the other. Kantorowicz had none of Radbruch’s diffidence about his own ability and

¹¹ Letter from Hermann Kantorowicz to Gustav Radbruch (10 January 1904) (on file in the Archives of Freiburg University) (Kantorowicz describing his farewell to the Social Democratic Party of Germany (SPD)).

¹² Letters from Hermann Kantorowicz to Gustav Radbruch (27 November 1903 and 11 October 1904) (on file in the Archives of Freiburg University). In the first of these letters, at the age of 26, Kantorowicz wrote, “My main work, ‘The Study of Legal Science’, will also have an historical basis.” Thirty-five years later he was on the point of achieving his ambition when the war broke out, see *infra* notes 105 and 106. In the second of these letters, Kantorowicz wrote: “I will only be able to achieve something really worthwhile if I familiarise myself thoroughly with the spirit of jurisprudence in all its epochs.”

¹³ Francis de Zulueta, *Dr. Hermann Kantorowicz*, CCXXII LAW QUARTERLY REVIEW 171 (April 1940).

¹⁴ Letter from Gustav Radbruch to Hermann Kantorowicz (3 April 1906) (GRGA.17.84).

gave the unfortunate impression that he felt competent to lecture on almost any aspect of law and related subjects; clearly this had upset many local academics. Efforts to find a post elsewhere were equally unsuccessful for a time and Radbruch even suggested that he consider settling in Italy instead, where he obviously felt so much at home.¹⁵ He took all these setbacks over his career prospects philosophically and never became depressed nor lost his good humour, as his letters to Radbruch show. On 5 May 1906 he wrote to Radbruch, "We have just returned from Raphael's wonderful house, the Villa Madonna; after that I really couldn't care less about a trifle like a career!" And when Radbruch continues his commiserations, Kantorowicz is more concerned for his friend than for himself; he replies on 27 May 1906: "Now I shall really have to write you a condolence letter! I fear it is affecting you more closely than me....We must see to it that no harm accrues to you out of all this." Kantorowicz's eventual return to Berlin and *Habilitation* in Freiburg at the late age of 30 is described below in section G.

B. The Seed of the Free Law Movement

I. The "Society for Legal Science"

The ideas contained in the *Kampf um die Rechtswissenschaft* [hereinafter "Manifesto"] originated in 1903, as Radbruch stated in his autobiography,¹⁶ from an informal discussion group of freethinking law students of Berlin University, all members of Franz von Liszt's seminar. Kantorowicz, who had founded the group with Radbruch, grandly dubbed it "The Society for Legal Science." The original members, apart from the two founders, were Felix Genzmer and Ernst Wolff. Most commentators wrongly assume that Ernst Delaquis was also a member; he is frequently mentioned in the letters as a good friend and colleague but the correspondence, in particular Radbruch's letter to his parents of 3 July 1903,¹⁷ and Kantorowicz's letters to Radbruch of 22 September 1903 and 27 November 1903 show conclusively that he was not a member of the Society.¹⁸ Radbruch left Berlin in October 1903 for Heidelberg but the numbers were soon restored to four by the inclusion of Theodor Sternberg. It seems in fact that they deliberately kept the active membership at four, presumably because this was considered an ideal number for constructive discussion.

¹⁵ Letter from Gustav Radbruch to Hermann Kantorowicz (27 May 1906) (GRGA 17.93).

¹⁶ See RADBRUCH, *supra* note 5, at 96.

¹⁷ Letter from Gustav Radbruch to his parents (3 July 1903) (GRGA17.23).

¹⁸ Letters from Hermann Kantorowicz to Gustav Radbruch (22 September 1903 and 27 November 1903) (on file in the Archives of Freiburg University).

This group of comparatively young jurists had the vision and audacity to think the unthinkable: how to revolutionise the German legal system. The group debated legal methodology and in particular attacked the orthodox nineteenth century Franco-German approach, which treated the codified law as complete in itself, a system that could be applied by judges to any case that might be put before them.¹⁹ This, they felt, no longer promoted justice, if applied strictly. Instead, they put forward a doctrine, later called the “free law doctrine,” which recognised the so-called gaps in the law usually ignored by other schools; these, they suggested, needed to be filled with judge-made law. This, as David Ibbetson pointed out, “was not in itself a new theory; the arguments, and even the terminology of “free” law, had been very clearly prefigured by Franz Adickes in 1872.”²⁰ Kantorowicz seems to have recognised this rather belatedly, as is shown by his comments in a critique of one of Adickes’s later works.²¹ Kantorowicz did, however, refer to notable jurists who had more recently put forward similar views to Adickes - in particular, Julius Kirchmann, Rudolf von Jhering, Josef Kohler, Oskar Bülow, Max Rümelin, and most recently Eugen Ehrlich and Rudolf Stammler. But these commentators were isolated voices that he sought to unite in the Manifesto, using forceful and fiery arguments, into the new and potent Free Law Movement. It is difficult for English and American readers accustomed to the common law to appreciate what the *furor* was about. But to German, French and Italian jurists the proposals sounded like a heresy, if not high treason.

The turn of the century had, of course, been a period of great change in many aspects of life, social as well as academic, and in law the new *bürgerliches Gesetzbuch* (German Civil Law Code) had come into force on 1 January 1900. Kantorowicz said later in the Manifesto that he was writing for the twentieth century as a “son of the nineteenth century, for whom the world is in a state of unceasing change and evolution.”²² Later on, in urging immediate publication of the Manifesto, Radbruch

¹⁹ For a brief overview of the position at the turn of the century, see J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* (1992). Vivian Curran has expounded on the continuing impact of formalism and the Code Civil. Vivian Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 *CORNELL INTERNATIONAL LAW JOURNAL* 273 (2002).

²⁰ See David Ibbetson, *Hermann Kantorowicz (1877) and Walter Ullmann(1910-1983)*, in *JURISTS UPROOTED* 273 (Jack Beatson and Reinhard Zimmermann eds., 2004).

²¹ FRANZ ADICKES, *GRUNDLINIEN DURCHGREIFENDER JUSTIZREFORM* (1906). For Kantorowicz’s critique, see Hermann Kantorowicz, 31 *JAHRBUCH FÜR GESETZGEBUNG, VERWALTUNG UND VOLKSWIRTSCHAFT IM DEUTSCHEN REICH* 375-376 (Gustav Schmoller ed., 1907) (hereinafter “*Schmollers Jahrbuch*”). In the critique Kantorowicz states that Adickes’s “youthful writing (*Zur Lehre von den Rechtsquellen*) was passed over when it appeared (1872!) without a trace, and has only now been noted again.”

²² See FLAVIUS, *supra* note 3, at 12.

wrote, "Every single day new developments can occur in such live issues; so the earlier it appears the more it will achieve."²³

II. *First Steps*

Kantorowicz got married in April 1904 and went on his honeymoon to Italy with the intention of researching material for a book he was writing on torture. His humanitarian outlook had long rebelled against this practice, which had been a regular feature of criminal trials in medieval times, and he returned to this theme in the conclusion of the Manifesto. His research on torture led him to the work of the thirteenth century judge and legal scholar Albertus Gandinus, which quickly took over as his main activity and he spent another two and a half years in Italy in research for his book on Gandinus. This also linked with his existing methodological interests; in his letter to Radbruch of he wrote: "For me personally the most important aspect [of Gandinus] will be the evidence of how 'free jurisprudence' rose victorious in opposition to the dogmatism of the Glossators."²⁴ Though this is a far cry from "free law," he must have been attracted by this association with the ideas that had originated in the discussion evenings of the Society for Legal Science and that he later propounded in the Manifesto. Kantorowicz's letters show he was concerned that once he and Radbruch had moved away from Berlin, the impetus he had established in the Society towards methodological reform, or rather revolution was petering out. On it he wrote that he would have to "proclaim a decree that Legal Science shall change direction, otherwise my priorities have had it."²⁵

III. *The Manifesto is Born (Plus a "Mystery" Article)*

In March 1905 Radbruch stayed for four weeks with Kantorowicz in Florence and it was at this point, as becomes clear from their subsequent correspondence, that the two friends decided that Kantorowicz should write a manifesto, feeling that this would be the best way to achieve their methodological aspirations. What commentators have not realised is that it was also agreed that Kantorowicz should first write an article (for *Schmollers Jahrbuch* in which he had a regular column) on "The Anti-dogmatic Movement in Legal Science." This presumably would have been a more factual essay, intended to flush out the opposition who could then be

²³ Letter from Gustav Radbruch to Hermann Kantorowicz (8 January 1906) (GRGA17.78).

²⁴ Letter from Hermann Kantorowicz to Gustav Radbruch (11 October 1904) (on file in the Archives of Freiburg University).

²⁵ Letter from Hermann Kantorowicz to Gustav Radbruch (19 December 1904) (on file in the Archives of Freiburg University).

knocked out by the Manifesto itself. Unfortunately references to the article in letters are vague and confusing; not surprisingly, really, as the correspondents themselves knew what they were talking about and did not need to be explicit. Consequently, only by reading *all* the letters by both friends does one discover that more than one work is involved, including the article that must be distinguished from the Manifesto. Inevitably, commentators take mention of the article as references to the Manifesto. To make matters even more obscure, the article was never actually published. In his letter of 12 January 1906 Kantorowicz wrote to Radbruch that he would have to withhold the *Schmollers Jahrbuch* article, explaining that: “If I allowed it to be published, everybody would realise who the anonymous author [of the Manifesto] was.”

Kantorowicz promised Radbruch that he would write the Manifesto during the summer vacation, and a postcard from 23 July 1905 at first seems to confirm this. On the postcard Kantorowicz wrote “I am working on the essay but hard, hard; do you think that a succession of verbal extracts, just with accompanying text would make a good impression?” One of the main commentators on the Manifesto, Karlheinz Muschler, naturally assumed, as I also did at first, that Kantorowicz was referring to the Manifesto and so suggested that he had changed his mind several times about the basic concept of the Manifesto, “wavering at first between a succession of verbal extracts ... and a work which would be completely individual and his personal responsibility.”²⁶ Now that I have been able to study the complete correspondence, I am convinced that Kantorowicz was, in fact, working on the article for *Schmollers Jahrbuch*, which had been due to appear in its October issue. Moreover a “succession of verbal extracts” would have well have been more suitable for the article than for the projected Manifesto. Early in September 1905 Kantorowicz wrote, “I was unable to complete the work for *Schmoller*, so it must wait till Christmas.” A month later he referred to it again: “After publication of my article for *Schmoller*, on which I am working every evening and shall definitely complete, I may well be an outcast as a result of offending the holy of holies - dogmatism!”²⁷ This letter gave the first signs of concern that his radical methodological views in the article, let alone in the more sweeping, forthcoming Manifesto, could jeopardise the *Habilitation* he hoped for in Heidelberg.

If I am right, why did Kantorowicz change his mind in July and start working on the article instead of the Manifesto as he had promised? And why did he find it

²⁶ Karlheinz Muschler, *Introduction*, in *DER KAMPF UM DIE RECHTSWISSENSCHAFT* p. X (Karlheinz Muschler ed., Nomos Verlagsgesellschaft 2002).

²⁷ Letter from Hermann Kantorowicz to Gustav Radbruch (24 October 1905) (on file in the Archives of Freiburg University).

“hard, hard”? The correspondence shows Radbruch frequently bemoaning various difficulties, whereas Kantorowicz almost invariably took everything in stride. The answer, in my opinion, is that his baby son Lorenzo was in the final, distressing stages of tuberculosis and he would have found it “hard, hard” to concentrate on anything else. To attempt to compose the ground-breaking Manifesto under such circumstances would have resulted in disaster, whereas a straightforward article, “with a succession of verbal extracts and accompanying text,” would have been achievable. Even this had to be abandoned when, just a week later, Lorenzo died and the couple departed on a much needed holiday. None of this, however, can be proved conclusively; no record of the proposed article for *Schmollers Jahrbuch* has survived and it does not appear anywhere in Kantorowicz’s personal handwritten list of all his publications, which is deposited with his *Nachlaß* in Freiburg.²⁸

IV. The “Free Law” Slogan

A further significant point appeared on the card mentioned above. Kantorowicz asked Radbruch: “What do you think of ‘free law’ as a slogan, instead of ‘non-statutory law’?” What is not generally realised is that Radbruch was not happy with the term “free law.” His reply to the card, which, unfortunately, was not published by Günter Spindel, contains this conclusion: “‘*außerstaatliches Recht*’ I still find better than ‘*freies Recht*’.”²⁹ Perhaps Radbruch, much more a diplomat than his friend, anticipated the way this term could be abused, but Kantorowicz stuck with his suggestion, which, of course, had a much better ring to it as a battle cry. As it turned out, he had not anticipated the extent to which his ideas might be misunderstood. Arthur Goodhart wrote in 1958 that

Unfortunately the term “free law doctrine” was an unhappy one as it led to misunderstanding, especially among those who had not read Kantorowicz’s article. It was misinterpreted to mean that a judge was always free to decide a case as he thought fit, and that the traditional view that there could be obligatory rules which bound the judges to reach particular conclusions was based on a fiction.³⁰

²⁸ The author has a copy of the list.

²⁹ This card of 23 July 1905 was not published and the author is grateful to Manfred Stange (editor of the comprehensive *Nachlaßverzeichnis Gustav Radbruch* (2001) for making available to him his provisional transcripts of Radbruch’s unpublished letters to Kantorowicz from 1903-1907.

³⁰ See KANTOROWICZ, *supra* note 4, at xvii.

These misunderstandings eventually led to what Kantorowicz called the “*contra legem* myth,” which dogged him for the rest of his life; even worse, some scholars have claimed that the free law theory indirectly paved the way to Nazi legal theory and practice, but this claim has been conclusively debunked by Vivian Curran.³¹

V. Reason for Anonymity

The anonymity Kantorowicz assumed when publishing the Manifesto is usually portrayed as a clever ploy that enhanced the interest in the book. It is generally assumed that anonymity had been an integral part of the original plan. However, the correspondence clearly shows that Kantorowicz, true to his fighting spirit, originally had every intention of publishing it in his own name, despite the animosity it would undoubtedly arouse against him. When he sent Radbruch the completed manuscript he asked his advice, “Above all my question to you is: can I publish the work before my *Habilitation*. Is it better for the work if it has been written by a man who has a post [as *Privatdozent*]?”³² A week later, after his first review of the manuscript, that Radbruch, realising the enormity of the impact the Manifesto would have, recommended publication as soon as possible in view of the existing climate of progressive thinking. “Every single day,” Radbruch wrote, “new developments can occur...; so the earlier it appears the more it will achieve.”³³ He therefore suggested immediate but anonymous publication. Here Radbruch again showed clearly that he had the foresight and keen political appreciation to assess the situation accurately. As he said in his autobiography: “The anonymity paid off. There were the most varied guesses about the authorship and leading jurists entered the arena who would not have bothered with the work of a young and unknown author. For us of course the daring escapade (*Husarenstreich*) was a great triumph.”³⁴ Various reasons are given by commentators for the pseudonymous anonymity that are interesting but must be seen alongside the fact that Kantorowicz had not even contemplated using a pseudonym until Radbruch suggested it shortly before approaching a publisher.

³¹ See Curran, *Fear of Formalism*, *supra* note 19, at 162. See also Vivian Curran, *Rethinking Hermann Kantorowicz*, RETHINKING THE MASTERS OF COMPARATIVE LAW 80-82 (Annelise Reles ed., 2001).

³² Letter from Hermann Kantorowicz to Gustav Radbruch (29 December 1905) (on file in the Archives of Freiburg University).

³³ Letter from Gustav Radbruch to Hermann Kantorowicz (8 January 1906) (GRGA.17.78).

³⁴ See RADBRUCH, *supra* note 5, at 97.

VI. *The Pseudonym*

Before deciding on Gnaeus Flavius as a pseudonym, Kantorowicz had, according to my mother's transcription of his letter, suggested "Haereticus" or "Gnoti scanton." But the latter does not seem to make any sense and is, in fact, ignored by Karlheinz Muscheler, who only mentions "Haereticus."³⁵ So what could it mean? "Gnoti" could mean "kinsmen" or "pupils," Greek or Latin, and "scanton" looks like a Greek genitive plural. A closer look at the original letter suggests the word could be read as "scianton," (the letter "i" is sometimes indiscernible in Kantorowicz's handwriting) perhaps meaning the "shadowy ones" (kinsmen of the shadowy ones?). Could it be a reference to the allegory of the cave in Plato's Republic with the "forms" as the models for natural law?

The first recorded use of the pseudonym is in a letter to Radbruch of 28 February 1906, which Kantorowicz sent Radbruch along with the proposed press notice. Kantorowicz signed the letter, "Your Gnaeus (not Gnäus) Flavius." This seems to indicate that Radbruch had written "Gnäus" somewhere; or perhaps they had discussed this earlier in the month when Kantorowicz visited Heidelberg. It is in this proposed press notice that Kantorowicz gave the reason for choosing this pseudonym, stating that Gnaeus Flavius "scribe of the elder Cato, smote with his axe the pontifical jurisprudence of the Romans."³⁶ He was actually the clerk of Appius Claudius Caecus, Censor and Pontifex Maximus, a minor and untypical error by Kantorowicz.

VII. *The Title of the Manifesto*

The title, like the pseudonym, seems to have been a late addition. The first mention of it in the correspondence is by Radbruch after he received the manuscript, which included a title page written in flourishing style by Kantorowicz.³⁷ Of course, the word *Kampf* ("battle" or "fight") was very much in general use, not just in law, as

³⁵ Letter from Hermann Kantorowicz to Gustav Radbruch (19 January 1906) (on file in the Archives of Freiburg University). For Karlheinz Muscheler's comments, see *supra* note 3, at pp. XI, XII.

³⁶ Letter from Hermann Kantorowicz to Gustav Radbruch (28 February 1906) (on file in the Archives of Freiburg University). Kantorowicz sent Radbruch his proposed Press Notice (see section D.1.) with this letter.

³⁷ For a reproduction of the title page and preface from the original manuscript (see section C.1. below), see Curran, *Rethinking Kantorowicz*, *supra* note 31, at 62-64. The handwriting style shows that it was written by Kantorowicz himself and not (like most of the text) by his wife Thea. Note the two distinctly different ways of writing the letter "r".

Karlheinz Muscheler points out.³⁸ For instance, it linked with Jhering's famous 1872 book *Der Kampf ums Recht*. The final phrase of the Manifesto's *Vorwort* (as it stood in the original manuscript version) comes close to the eventual title with "*d[er] Befreiungskampf der Rechtswissenschaft*" ("the battle of liberation for legal science") and I have therefore incorporated it in my version of the title. The usual translation "The Battle concerning Legal Science"³⁹ does not fully convey the German meaning. Despite having decided on the title, however, it is not mentioned in later letters. When Kantorowicz and Radbruch did refer to the Manifesto in correspondence, it was usually as "the Flavius," "Gn. F.," or similar. Thirty years later, Kantorowicz used this pseudonym again when writing to Radbruch's wife Lydia from England to Nazi Germany, to avoid the attention of a latter-day censor.

C. The Original Manuscript and the Manifesto

*Habent sua fata libelli*⁴⁰

I. Discovery of Manuscript and its Composition

In 2001 the Author inherited his father's bookcase. Among the contents he discovered a small monogrammed case containing the original manuscript of Kantorowicz's Manifesto, *Der Kampf um die Rechtswissenschaft*. It was not his practice to keep the manuscript of a book once it had been published, so why did this one survive? The answer is that it was a 60th birthday present from Radbruch, who must have kept it after having laboriously steered the Manifesto through publication. It is very fortunate that he did, because it has given me the opportunity to shed new light on this work, which greatly excited the legal world exactly one hundred years ago. A detailed textual criticism of the Manifesto will be undertaken in my forthcoming book on the correspondence between Radbruch and Kantorowicz. Here I would simply like to consider a few of the more important issues arising from *Der Kampf um die Rechtswissenschaft*, especially as the discovery of the original manuscript helps to clarify aspects that have not previously been appreciated. The first thing that strikes one on flipping through the pages of the manuscript is that, for a book of this nature, there are comparatively few corrections to the original text; next that the "hand" changes frequently with about

³⁸ Karlheinz Muscheler, *Introduction*, in *DER KAMPF UM DIE RECHTSWISSENSCHAFT*, *supra* note 3, at p. XII.

³⁹ See e.g. Arthur Goodhart, *Introduction*, in *THE DEFINITION OF LAW*, *supra* note 4, at p. xiii.

⁴⁰ Kantorowicz uses this Latin phrase in the introduction to his book *Goblers Karolinen Kommentar, Geschichte eines Buches*. See HERMANN KANTOROWICZ, *GOBLERS KAROLINEN KOMMENTAR, GESCHICHTE EINES BUCHES*. GUTTENTAG 9 (1904).

three quarters written in one, very neat hand, and the remainder in another. The mystery is solved in a letter to Radbruch in which Kantorowicz wrote that he “dictated it to [his] wife just as it came to me.”⁴¹ It seems pretty clear that Kantorowicz chose this method, which was not his normal practice, not to save himself the effort but with the deliberate intention of creating a demagogic style in keeping with a ‘campaign article’ (“*Brandschrift*,” “*Streitschrift*,” “*Programmschrift*,” or “*Agitationsschrift*,” as he variously called it). This can be confirmed, in my opinion, by studying the style of those lengthier passages that remained completely unaltered from the original dictation, and comparing these with other lengthy passages written entirely in Kantorowicz’s own hand. Further confirmation comes from the only example I can find in the correspondence of a passage written in his wife Thea’s, “neat hand,” which is on a sheet containing the proposed press notice, and which he apparently dictated to her because he wished to sound demagogic.⁴²

Kantorowicz’s letters to Radbruch describe how he dictated the Manifesto in less than two weeks and only during his leisure time, that is, in the evening and on weekends between his main studies in Bologna. Equally remarkable is the fact that, of the 130 manuscript pages, he left three quarters completely unaltered from the original dictation, but for a few words here and there. Thirty pages contain not a single correction! It certainly seems to have “poured” almost spontaneously out of his head. To maintain the liveliness and continuity of the writing, Kantorowicz refrained, at this stage, from physically referring to any relevant books and relied entirely on his (excellent) memory.

II. *En Route to the Publisher*

After he had finished the dictating, Kantorowicz made amendments in his own hand, which varied from single words to passages several pages long. He had more time for this stage, which included the insertion of references to relevant literature, than he had anticipated. On 4 December 1905 he wrote to Radbruch asking if he could send him the completed manuscript for his appraisal, but Radbruch replied with a surprisingly curt, almost rude, letter saying that he was too busy to look at it before the new year.⁴³

⁴¹ Letter from Herman Kantorowicz to Gustav Radbruch (4 December, 1905) (on file in the Archives of Freiburg University).

⁴² The Press Notice was enclosed with Kantorowicz’s letter to Radbruch, *supra* note 36.

⁴³ See *supra* note 29. Letter from Gustav Radbruch to Hermann Kantorowicz (20 December 1905) (on file in the Archives of Heidelberg University).

However, when Radbruch did receive the manuscript at the beginning of January 1906 he was enthusiastic about it and urged publication “as soon as possible.” Radbruch did not, at this stage, make any amendments before sending the manuscript, as requested by Kantorowicz, to Theodor Sternberg in Lausanne, one of the five (not six as generally thought) members of the Society for Legal Science. Sternberg, made a few, mainly minor amendments to the text of the manuscript and returned it to Kantorowicz who must have seen them before sending the manuscript back to Radbruch, but remarkably accepted them all without question, as later he also did with Radbruch’s. There cannot be many scholars so willing to incorporate the views of others into their own work without remonstrance or taking offence, a characteristic of his that Radbruch commented on several times.⁴⁴ There was one significant and critical addition by Sternberg, who was based in Switzerland. At the end of the paragraph on the impartiality and independence of judges,⁴⁵ Sternberg added to the manuscript the words: “*vielleicht durch Volkswahl der Richter etwa nach schweizerischem Vorbild*” (“perhaps through popular election of judges, on the Swiss model”). Kantorowicz deleted this point two years later when he revised the Manifesto for the Italian edition.

When the manuscript was returned to him, Radbruch made his own amendments, some quite substantial, and then he began the main, laborious, task of preparing the work for the Publisher, undertaken entirely by himself in order to preserve the author’s anonymity: Radbruch’s own amendments, as well as those by Sternberg, can easily be detected in the text of the manuscript, as their handwriting is quite distinctive from both Kantorowicz’s and his wife’s. The manuscript also reveals a few pencil alterations by the publisher that deserve special mention.

III. Amendments by the Publisher

Radbruch reported to Kantorowicz that Carl Winter⁴⁶ insisted on alterations to two passages that “offended” his orthodox views. These were:

1. Kantorowicz had written, “*beides Wesen [Gott und der Gesetzgeber] geschaffen vom Menschen zu seine Ebenbilde*” (“both Beings [God and Law Maker] created by Man in his own image”). Winter changed this to, “*für die Erfahrung unzugängliche*

⁴⁴ See RADBRUCH, *supra* note 5, at 97.

⁴⁵ See FLAVIUS, *supra* notes 3, at 46.

⁴⁶ Letter from Gustav Radbruch to Hermann Kantorowicz (21 February 1906) (GRGA17.80).

Wesen" ("both Beings which cannot be experienced").

2. Kantorowicz had written, "die himmelschreienden Verdrehungen, die sich die Theologie zumal mit den Worten Christs erlaubt hat" ("the heaven-rending distortions, especially of Christ's words, that theology has permitted itself"). Winter deleted "*himmelschreienden*" and "*zumal mit den Worten Christs*" so that it just reads, "*die Verdrehungen die sich die Theologie erlaubt hat*" ("the distortions that theology has permitted itself").⁴⁷

IV. Critical Analysis of the Manuscript

Study of the written pages and the handwriting reveals interesting changes made by Kantorowicz during the first two stages of the compilation of the manuscript. He started, naturally, with the Preface, but only dictated the first few lines (up to: "*mit ihren Idealen im besten Einklang.*" ["fully in harmony with your ideals."]). Then he left these "on hold" (perhaps for further inspiration), until after the rest of the manuscript had been completed and instead started dictating the Introduction.

A number of orthographical errors occur, some by Kantorowicz himself and some by his wife, which were corrected later. One is worth mentioning here: a significant "dictation" error seems to have occurred, which passed unaltered into the final text. In the Preface Thea wrote "*theologischen*" ("theological") when Kantorowicz had probably dictated "*teleologischen*" ("teleological"), which would have been much less familiar to her, but sounded very similar. Both make sense, but Radbruch, after the work had been published, spotted the possible "error," as he considered it, and pencilled "?teleol." in the margin of his personal copy of the Manifesto. This "correction" was passed on by my mother to Thomas Würtenberger and accepted by him for his 1962 edition of the Manifesto.

V. Amendments by Radbruch

Radbruch made quite a number of alterations and additions, some quite substantial, to the manuscript, prior to submitting it to the publisher. There is no suggestion in their correspondence that the two friends discussed the amendments; Kantorowicz seems to have trusted his friend entirely to make whatever alterations

⁴⁷ See FLAVIUS, *supra* note 3, at 35.

he deemed desirable. “Criticism without any reservation;” he wrote to Radbruch, “you know that my feelings for you are on such a firm foundation that not even an unfavourable critique could upset them.”⁴⁸ The only guideline Kantorowicz seems to have given Radbruch appears in his next letter, “I expect you to delete or alter anything [you consider] irresponsible; in particular anything that smacks of ignorance of legal practice.”⁴⁹

VI. Later Amendments to the Text

Finally, a number of further amendments made to the text during the printing stages, and not recorded in the manuscript, are revealed by the correspondence as Kantorowicz’s final “after thoughts.” These will be examined in chronological order. First it should be mentioned that a family tragedy (the sudden death of his youngest brother, aged 7, from appendicitis) had called Kantorowicz back to Berlin at the end of January. He then stayed with Radbruch in Heidelberg for nearly a week and no doubt had discussions about the Manifesto, but we have no record of these, as, of course, there is a gap in the correspondence.

On his journey back to Rome, Kantorowicz stopped in Bern for discussions with Theodor Sternberg. As a result of these discussions, Kantorowicz requested that Radbruch make some minor amendments to the Preface and to the Conclusion;⁵⁰ also that Radbruch add two further names to the list of supporting authors in the Annex.⁵¹

Of much greater significance, is a request that Radbruch add a final phrase to the Preface.⁵² The final sentence of the Preface in the manuscript itself ends with the words, “... *den Befreiungskampf der Rechtswissenschaft*” (“the fight for liberation of legal science”), a phrase Kantorowicz used several times, including at the end of the proposed press notice. Kantorowicz asked Radbruch to:

⁴⁸ See Letter from Hermann Kantorowicz to Gustav Radbruch (29 December 1905) (on file in the Archives of Freiburg University).

⁴⁹ See Letter from Hermann Kantorowicz to Gustav Radbruch (12 January 1906) (on file in the Archives of Freiburg University). Kantorowicz had not undertaken the normal *Referendardienst*, which would have given him practical experience with a Solicitor or Barrister.

⁵⁰ See letters from Hermann Kantorowicz to Gustav Radbruch (22 and 23 February 1906) (on file in the Archives of Freiburg University).

⁵¹ The list of supporting authors in the annexe to the original edition is unfortunately not included in either of the later reprints of the Manifesto.

⁵² Letter from Hermann Kantorowicz to Gustav Radbruch (28 February 1906) (on file in the Archives of Freiburg University).

add at the end of the Preface, "*für den Sturm auf die letzte Bastion der Scholastik*" ["for the assault on the final bastion of Scholasticism"]. This concept has been completely overlooked [by me in writing the Manifesto], but it is not possible to work it into the text any more.

"Bastion" is really an Italian rather than German term; as an alternative he had at first suggested "*Zwingburg*," which would actually have been quite appropriate as it denotes a fort used for the subjugation of a people; but then he struck it out again. Presumably he felt that "Bastion" had a better ring to it, as befitted a manifesto; at the end of the proposed press notice, Kantorowicz used "*Bollwerk*." Kantorowicz's use of the phrase in the press notice, which he enclosed with the same letter, could have prompted his asking for this concept to be added to the main text.

Finally, Kantorowicz asked Radbruch to, "correct in Greek letters, '*dos moi pou sto*' (give me somewhere to stand)."⁵³ Radbruch replied that the phrase, "still appears in Roman script because my Greek did not extend to accents and a better Greek scholar was not to be found here [in Bruchsal]."⁵⁴ Radbruch can be partly excused as Kantorowicz had made an error in his letter (he placed an accent on "*pou*," which, as an enclitic, should not carry one). This must have confused Radbruch. Their "school" Greek should have kept them straight and Kantorowicz originally got the accents correct in the manuscript. There are actually quite a few instances where Kantorowicz made careless mistakes in his letters, something he would not permit in a finished document where his accuracy was renowned.⁵⁵ He wrote very rapidly and seemingly did not bother to re-check informal letters, such as those to his friend.

⁵³ Letter from Hermann Kantorowicz to Gustav Radbruch (12 March 1906) (on file in the Archives of Freiburg University). For the Greek passage in the Manifesto, see FLAVIUS, *supra* note 3, at 34 (recording a saying attributed to the Greek philosopher and mathematician, Archimedes c. 287-212 B.C.).

⁵⁴ Letter from Hermann Kantorowicz to Gustav Radbruch (29 March 1906) (on file in the Archives of Freiburg University).

⁵⁵ Archibald Campbell, *Preface*, in DEFINITION OF THE LAW, *supra* note 4, at x.

D. The Manifesto is Published

I. Press Notice

With the Manifesto ready to be launched, the battle lines were drawn for the fight to establish the Free Law Movement, as Kantorowicz called it.

In his letter of 28 February 1906 Kantorowicz sent Radbruch his proposed press notice ("*Waschzettel*," which literally means "laundry bag label") and added, "You may alter it if you wish." As it turned out, Radbruch altered it radically because he thought it "unsuitable" and took it for granted that Kantorowicz would not be upset: "*Den Waschzettel habe ich ganz neu geschrieben (Sie nehmen's ja nicht übel); der Ihre schien mir ungeeignet.*"⁵⁶ This episode illustrates graphically how completely the two friends trusted and relied on each other, but it also shows how completely different their approach and style of writing were. Radbruch's typewritten version of the press notice and described as "in its final form" was fortunately preserved among my mother's papers. Clearly, Radbruch thought it needed to be more "diplomatic," but, in effect, eliminated its deliberately demagogic style and made it read much more like one of his own theses, where he prided himself on a precise and economical use of words: "I shall not let [the work] out of my hands until it no longer contains a single superfluous word."⁵⁷ This exemplifies the difference in approach between the two scholars and one is left wondering how different the pamphlet would have been if Radbruch had written it instead; it would possibly have read more like a thesis than a manifesto and the reaction to it by the academic world might, as a result, have been more reasoned and less heated. Whether Radbruch's authorship would have set the debate alight in the way that the actual version did is questionable. As the differences in style can only be appreciated fully in the original, and this is a unique opportunity of seeing how differently the two scholars handled an identical subject, both versions are reproduced in Appendix A to this article in the original German and with my English translation of the press notice in its final form.

At this point it will be useful to give a translation of Kantorowicz's proposed version. As was mentioned above, the original, sent with the letter of 28 February 1906 was written in Thea's neat hand, unlike anywhere else in the correspondence, indicating that Kantorowicz had dictated it to her. Undoubtedly this procedure

⁵⁶ Letter from Gustav Radbruch to Hermann Kantorowicz (11 March 1906) (*see supra* note 29).

⁵⁶ *Id.*

⁵⁷ Letter from Gustav Radbruch to his parents (13 March 1903) (GRGA.17.20).

enabled him to heighten the demagogic nature of the text, as it had with the text of the Manifesto itself.

As Gnaeus Flavius, scribe of the elder Cato, smote with his axe the pontifical jurisprudence of the Romans, disclosing to the laity the formulae of the law that had been kept secret until then, so does the author of the manifesto here presented undertake to manifest the special techniques of judicial trickery in all their inadequacy. Conscious of the new free law movement, and in conjunction with its main representatives Bülow, Stammler, Ehrlich, *et al.*, he discusses in three parts the new conception of law, of legal science and of legal decision-making.

In the first part he establishes the existence of non-statutory "free" law and in this respect approaches the old natural law but distances himself from it and other theories in that he disputes that it can properly decide every legal case. In conformity with this dogma-free standpoint, he unravels the prevailing judicial methods in the second part. In doing so he nevertheless emphasises that he is taking issue with theory rather than with legal practice, which has instinctively on the whole already taken the right line. Particularly noteworthy is the evidence that in legal decision-making volition plays a far more important role than understanding, and also the striking parallels that the contested methods share with those of orthodox theology. Finally, the author who, following the good example of other reforming jurists, has not yet identified himself, demands recognition of the free, creative position of legal decision-making as contrasted with statutes, which inevitably have gaps and rapidly become outdated. In this way he hopes that the unfortunate alienation between law and people, between jurisprudence and life will be set aside.

The pamphlet, which is couched in easily understood language, and composed with fiery eloquence, will interest anyone who is in sympathy with the battle of liberation for legal science and welcomes it as an attempt to drive mediaeval scholasticism out of its last bulwark.⁵⁸

II. The Manifesto in Brief

Many readers will be unfamiliar with the Manifesto and, remarkably, no translation into English has as yet been published. To give some idea of the content and nature of the work, I give here my translation of certain key sections of the Manifesto, which tries, however inadequately, to retain the “fiery eloquence” of the original prose. In addition, I give below a brief outline of the main points of the work.⁵⁹

1. Preface and Introduction

The Preface:⁶⁰ Attention all judges and lawyers! There is a new movement in legal science, which calls upon you to take a good, hard look at yourselves. Do you really imagine that your actions are fully in harmony with your ideals? If you do, this movement will shatter your illusion; it undertakes to justify in our own eyes and in the light of new and less modest ideals, the task in which we are all engaged, all the time: the creation of law. But our movement, despite proclaiming its presence loud and clear in the most varied fields simultaneously, still lacks a sense of coherence and consciousness of its power. That is why the attempt is being made in this manifesto to consolidate all the best forces in the Movement into a unified approach: an approach that does not expect to be accepted as the system of any one individual nor as

⁵⁸ See *supra* note 36. The translation into English is by the Author, as are the translations of all other German texts.

⁵⁹ The translation follows the Italian edition, see section E II below. Where this varies from the original German version, the changed wording is shown in italics.

⁶⁰ The Preface (*Vorwort*) is in FLAVIUS, *supra* note 3, at 5-6. The Conclusion (*Schluss*) is in *id.*, at 48-49.

the programme of all of them, but deliberately transcends the differences between the various writers, and for this reason is put forward here as an approach which takes full personal responsibility.

You cannot expect total clarity down to every last detail; no new movement has ever known exactly what it wanted, nor wanted exactly what it achieved. Nor can you demand of an essay, which must rush through the widest of fields in the shortest of time, that every point is carefully and comprehensively argued. We must content ourselves with referring to what has already been achieved, and is still to be expected from the pens of our associates, and have only been more explicit where we have had new and original ideas to offer, *e.g.* in the interpretation of natural law, in the emphasis on the voluntaristic moment, in the debates on logical and teleological issues. Finally we must leave to others the task of proclaiming in detail the contributions that this or that individual can claim to have originated within the whole range of ideas we have presented here.

May this essay recruit new fighters for the battle of liberation for legal science, for the storming of the last bastion of scholasticism.

The Introduction:⁶¹ The prevailing conception of the ideal jurist is as follows: a high ranking civil servant with academic training, he sits in his cell, armed only with a thinking machine, naturally of the finest type. The only furniture is a green table on which he has the Code. Present him with any case you like, real or imaginary, and he will be able, in accordance with his duty and purely with the aid of logic and a secret technique that only he understands, [note that the Italian Edition omits the

⁶¹ The Introduction (*Einleitung*) is in *id.* at 7-9.

phrase “and with absolute precision”], to point out the decision intended in the Code and foreseen by the legislator.

This ideal, which was foreign to the Romans of the best epoch, had its origin in the period of their deepest political decadence, under the violent rule of deified Emperors. The Middle Ages and the Renaissance adopted this ideal in their theory but rejected it unreservedly in legal practice, and partly also in legislation: they entrusted the development and reworking of law to judges and academics. It was the centralised bureaucracy of modern absolutism that first restored validity to the Byzantine ideal and provided the theoretical basis it needed in Montesquieu’s doctrine of the separation of judicial and legislative power. But it was a complete mistake to ascribe this doctrine to legal life in England, as is attested by the freedom that has always been accorded to their judges and by the horror the Anglo-Saxon world would feel even today, if confronted with the ideal we have described. Continental Europe, on the other hand, has not only made this ideal its own, it has placed it in the centre of its political convictions and encompassed it with the strongest possible guarantees and a semi-religious solemnity. Naturally there has never been an absence of opposing voices especially in France, though some can also be named in Germany: especially *Jordan (1825) and Kirchmann (1848)* among the stragglers of the natural law movement; also in particular, *Adickes (Zur Lehre von den Rechtsquellen, 1872 [On the Theory of the Sources of Law])*, *Kohler, (Shakespeare vor der Forum der Jurisprudenz, 1883 [Shakespeare before the Tribunal of Jurisprudence])*, *O. Bülow etc.* From quite different motives, also the Catholic legal philosophers; and *Jhering* in his last period, who passed overhead like a meteor making a bright show, but leaving no lasting impression in this field. Later, other preachers also appeared in the wilderness, especially *Kohler, Bülow (Statutes and*

the Judicial Office, 1885) and G. Rümelin (Value Judgements and Decisions of the Will, 1891). But it is only in the last few years that the position has altered radically. Ever since Stammler has refloated the bark of legal philosophy and Ehrlich has set its rudder towards the new goal, voices have made themselves heard on all sides, from theory and from practice, in legal philosophy and in jurisprudence, in public and in private law, both in Germany and in France; voices that are growing daily in number and determination and are preaching change for jurisprudence. This new Movement, which we can call "new" because it is appearing for the first time, no longer in the form of isolated voices, but as a *true* movement and is displaying the distinguishing mark of every genuine movement, namely, that almost all of its ideas are being proclaimed simultaneously *by various independent voices*. This movement has no less an aim than the total destruction of the existing ideal and its replacement with one that is its opposite in every respect; so it appears radical and doomed to failure like every radicalism, because of its failure to understand historical values. But it only seems so, because our unanimous conviction is that *our battle has constitutive and not declarative significance*: all that is required is an acknowledgement of what has always been the universal practice - unconsciously and for that reason imperfectly - in other words, *to give expression to what already exists*.

In the Annexe we have assembled writings in which the friends of our Movement have professed their beliefs. We have excluded: older writings which have no clear connection; also those which are of no significance or could compromise the Movement; those that arise from the assumptions of Catholic legal philosophy; and finally the no doubt numerous writings we have not known about, due to the regrettable lack of bibliographies and legal journals.

But far more important than the agreement of scholars, is the fact that thousands of our judges and attorneys are favourably inclined to the new conception. Unfortunately this does not become apparent for the simple reason that these practitioners do not consider it worth getting heated over doctrines that they themselves have long considered self-evident.

2. *Summary of the Main Body of the Manifesto*

Kantorowicz proceeded, in the main body of the manifesto, to consider, as he said in his proposed press notice, "in three parts the new conception of law, of legal science and of legal decision-making." The first part established the existence of non-statutory 'free law', in which Natural Law is resurrected but in a cogent new form. Judges had instinctively, he claimed, drawn on this material to make judgements when there were 'gaps' in the law, although the orthodox 19th century approach to law still regarded enacted law as complete and capable of being applied by judges to any given set of facts. He exposed the nonsense of Article 4 of the French Code Civil which says, "The judge who refuses to make judgement on the pretext that the statute is silent, obscure or insufficient, may be prosecuted as guilty of a denial of justice." He graphically unmasked the 'megalomania' of the orthodox legal view that the law is complete and called it a distressing characteristic of jurisprudence which is not shared by other sciences. Which botanist, for example, or astronomer had the arrogance to believe that they had the answer to every question and that nothing new would ever be discovered? Orthodox religion once held such a view, but no longer.

In the second part, Kantorowicz exposed the fictions and constructions used by orthodox jurists to extract decisions from the Code - almost like a torturer extracting a confession - on issues where, in reality the Code had 'gaps'. Kantorowicz outlined the voluntaristic phase in legal decision-making, where the Will rather than Reason becomes the dominant factor, and accepted that legal practice, as opposed to theory, had instinctively already taken the right line. After outlining the historical approach, he compared the dubious methods of legal reasoning with the equally dubious methods of orthodox religion in the past, but pointed out that, whereas the new direction in theology has made 'fictions and constructions' redundant, jurisprudence still had to take this step.

In the third part, Kantorowicz examined the existing postulates of legal decision-making, which seem at first sight to be irreconcilable with the ideals of the Free Law Movement, namely: all judges' decisions should be based on statute alone and

should be foreseeable; they must be objective and have been arrived at by rigorous scientific thinking; entirely free from emotion. "But fortunately," as he pointed out, "it can be shown that all these ideals have in part not been realised, and in part are not even worth realising."⁶² Instead, Kantorowicz identified circumstances under which the judge should be allowed to deviate from statutory law.⁶³

Having hopefully disposed of the above existing postulates, which he claimed were undesirable or unattainable, or in part not even threatened by Free Law, Kantorowicz suggested in their place new postulates, or rather ideals, "which have already been realised, and which will be even better realised, once the day came for the Free Law Movement to prevail."⁶⁴ These are the postulates of 'appropriateness to the values of the people,' of 'professionalism,' of 'impartiality,' and of 'fairness.' Of course it all hinged on the quality of the judges and here Kantorowicz stressed the "need for judges who were familiar with the prevailing legal attitudes of the people, as well as with the facts of life and issues in adjoining disciplines..... [who] knew how to pronounce judgement in full knowledge of the social function of every legal proposition and of the social effects of their decision."⁶⁵ When this had been achieved, Kantorowicz suggested that the movement could strive "toward the highest goal of all that occurs in the realm of law - **Justice!**"⁶⁶

I end this summary of the Manifesto by quoting in full a translation of the conclusion.

Conclusion:⁶⁷ This is our movement; these are our ideals which we confidently and firmly pit against the current situation.

And yet we are the last to want to recognise nothing but abuse in all the previous centuries of judicial practice. Indeed, if we look at the two greatest nations, the Romans and the British, we can see the

⁶² See *id.* at 39. Compare *id.* at 44.

⁶³ *Id.* at 45-46. According to Kantorowicz, this section of the Manifesto was misunderstood by his later critics and he altered it substantially in his revised Italian edition. See section E.I. below.

⁶⁴ See *id.* at 44.

⁶⁵ See *id.* at 45.

⁶⁶ See *id.* at 47.

⁶⁷ See *id.* at 48-49.

justification for juristic dogmatics and its attendant patterns, unknown to those two nations, because it is a device, albeit a clumsy one, for applying a drag chain to any rash desire on the part of judges to be innovative in their judicial discussions. Only in those nations where the political standing of the judiciary was high enough never to short-change the conservative qualities in such discussions, was such a device not required. But our own judiciary is probably also mature enough now to do without its old harness; in any case, far more mature than the majority of party hacks who now serve as Legislators!

In the last analysis, all progress in legal developments depends on the cultural level of judges. And here, in concluding this manifesto, we would like to add an historical comparison. We no longer believe, as the rationalistic conception of history once did, that the dominance of *the formalistic theory of proof* was just a mistake. Rather we know that the responsibility for establishing guilt had to be dependent on external circumstances, such as confession and the two-witness requirement, as long as the cultural level of the judiciary did not give judges an independent conception of the logical, psychological and sociological facts of the case. But then an intellectual ecstasy came upon mankind, which began in the 17th century with the birth of the mathematical and exact natural sciences and, with the Age of Enlightenment in the 18th century, acquired a stature of universal and historical quality. The hour also struck for legal decision-making that could now develop a free-exploratory, unprejudiced, scientific function. Just as the judge no longer has to abuse the body of the accused with ropes, and pincers and hot irons in order to extract a confession about the *facts of the case*, which he can now establish independently by putting into words *his own reasoning*; so too the time will come when the jurist no longer has to abuse the law with

fictions and interpretations and constructions in order to extract a *Rule* which he can establish independently through his own awakened *Will*.

For now that we have completed the 19th century, that age of imperfection and compromise, we are advancing towards a 20th which, if the signs do not deceive us, will be a century of feeling and will in art, in science and in religion. From the ruins of torture there arose triumphantly, and to the dismay of those lacking in courage, **Free Evaluation of Evidence**, the pride of the present day; from the ruins of dogmatism there will arise, to the dismay of the unenlightened, the **FREE CREATION OF LAW!**

E. The Manifesto Revised

I. *The Role of the Judges*

The passages in the Manifesto relating to the role of judges evoked more criticism than any other section, mainly because, according to Kantorowicz,⁶⁸ a large part of the legal profession had misunderstood what he was saying. He had probably been aware of this danger and had tried, unsuccessfully, to pre-empt it by careful wording. What can only be appreciated through a study of the manuscript itself, is that these particular passages had been heavily altered and re-altered, much more than any other passages, by Kantorowicz himself and to a lesser extent by both Radbruch and Sternberg. In fact two manuscript pages, both in Kantorowicz's own hand, were in such a mess that they had to be completely rewritten by Thea as a "fair copy!" Intriguingly, this included the controversial passage, (already referred to in the summary of the Manifesto above) "*Von diesem darf und soll er absehenRechtsnorm zu entbinden.*"⁶⁹ This is the passage in which Kantorowicz outlined

⁶⁸ Letter from Hermann Kantorowicz to Gustav Radbruch (12 July 1906) (on file in the Archives of Freiburg University) commenting on the adverse reaction in some quarters, in particular with regard to the role of judges). Kantorowicz anticipated this, but he was particularly upset by the almost wilful misunderstanding of the role of the judge by Oskar Bülow whom he had regarded as one of his main supporters. For other critical comments on the Manifesto, see Joseph Unger, *Der Kampf um die Rechtswissenschaft*, ALLGEMEINE ÖSTERREICHISCHE GERICHTSZEITUNG 296 (1906); Franz Klein, *Der Kampf um die Rechtswissenschaft*, ALLGEMEINE ÖSTERREICHISCHE GERICHTSZEITUNG 265 (1906). A selection of critiques of the Manifesto are conveniently reproduced in an appendix to a recent book. See SEBASTIAN SILBERG, *HERMANN KANTOROWICZ UND DIE FREIRECHTSBEWEGUNG* (2004).

⁶⁹ See FLAVIUS, *supra* note 3, at 34.

the circumstances under which a judge should be allowed to deviate from statute and decide according to “free law.” Two years later he felt it necessary to delete this passage altogether in the Italian edition, and replace it with an entirely new and longer section in which he stressed that the judge’s decision must be “*praeter legem*” and not “*contra legem*.”⁷⁰ But even this did not protect Kantorowicz from being misunderstood and, as has been mentioned above, the “*contra legem* myth” dogged him for the rest of his life ... and beyond.

II. *La Lotta per la Scienza del Diritto*

In January 1907 Kantorowicz wrote to Radbruch,

I have received a great delight from Italy: Judge Mainetti [sic: misread by Kantorowicz for Majetti] from Campobasso (Apulia!) has written Winter an enthusiastic letter about Gn[aeus] Fl[avius] and has asked to be allowed to translate the book [into Italian]. I shall agree on certain conditions: my own name, new foreword, etc.) In Italy it is sure to achieve far greater acclaim even than in Germany.⁷¹

He later insisted on more radical changes, turning it, in effect, into a second edition of the Manifesto which he had always wanted but Carl Winter had ignored his request.⁷² Kantorowicz wrote the revised sections in Italian himself (one of five languages that he could speak and write fluently, he tells Radbruch, “I have significantly altered the question of the Judge in the translation; made it milder and better!”⁷³ Kantorowicz found Majetti’s translation, in general, “really good but all the same some droll misunderstandings, e.g. ‘*Werturteile*’ [translated as] ‘*sentenza rispettabile*’, [‘value judgements’ translated as ‘valuable judgements’] and many others.”⁷⁴ An Italian reviewer, however, considered that the translation had lost

⁷⁰ The Italian edition was published as: HERMANN U. KANTOROWICZ (GNAEUS FLAVIUS), *LA LOTTA PER LA SCIENZA DEL DIRITTO* (Remo Sandro 1908). *Id.* at 137.

⁷¹ Letter from Hermann Kantorowicz to Gustav Radbruch (undated letter, probably end January 1907) (on file in the Archives of Freiburg University).

⁷² Letter from Hermann Kantorowicz to Gustav Radbruch (undated letter, probably end January 1908) (on file in the Archives of Freiburg University).

⁷³ Letter from Hermann Kantorowicz to Gustav Radbruch (4 June 1907) (on file in the Archives of Freiburg University).

⁷⁴ *See id.*

much of the liveliness and forcefulness that had contributed so much to the appeal of the original and blamed this in part for the failure of the Italian version to have as great an impact in Italy as it had done in Germany (contrary to Kantorowicz's expectations).⁷⁵

The author has listed the substantial and quite numerous amendments Kantorowicz introduced into the Italian edition, details of which will be presented, translated into both German and English, in the book I am writing about the correspondence between Radbruch and Kantorowicz. This compilation and translation of the passages has been made possible by the recent discovery of my mother's notes in which she listed the amendments for the Italian edition and translated them into German. The notes also recorded the news from her friend Lydia, Radbruch's widow, that her husband, in the last year of his life, had intended to publish a new edition of the Manifesto incorporating the revisions for the Italian edition. With the help of Radbruch's notes my mother was able to compile, and translate into German, the main amendments, which she hoped, in vain, would be incorporated into Thomas Würtenberger's reprint of the Manifesto in 1962. Nevertheless, her work will enable the Author to present a complete compilation of the amendments, translated into both German and English in my forthcoming book, and thus in a small way fulfil one of Radbruch's last intentions. Some of the more important revisions relating to the role of judges have been quoted and discussed by other scholars, in particular by Karlheinz Muscheler in his section on the "*contra legem* myth,"⁷⁶ but no complete collection of the revisions has appeared anywhere.

F. The Correspondence

Frequent mention has been made of the correspondence between Radbruch and Kantorowicz which sheds invaluable light, much of it so far unknown to scholarship or misunderstood, on every stage of the conception, composition and publication of the Manifesto. We are fortunate in having a large and fascinating collection of letters passing between the two friends and covering the whole of their friendship, 1903-1940, with at least 527 letters, cards, *etc.* extant. Although the originals of Radbruch's letters to Kantorowicz have been available in the university archives of Heidelberg, and Kantorowicz's to Radbruch in Freiburg (together with transcripts of the latter, typewritten by my mother, in the archives of both

⁷⁵ Donato Donati, *La Lotta per la Scienza del Diritto*, ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE 286-288 (1909/10).

⁷⁶ KARLHEINZ MUSCHELER, RELATIVISMUS UND FREIRECHT, EIN VERSUCH ÜBER HERMANN KANTOROWICZ 125-135 (1984).

Universities), no one, to my knowledge, has studied *all* the letters by *both* scholars; certainly no one has published anything that demonstrates knowledge of the whole correspondence. I have been in the fortunate position of being able to study, and translate into English, at least the 187 letters from the period 1903-1907, when the correspondence was at its richest and most frequent. Of these only three of Kantorowicz's and less than one third of Radbruch's, have been published anywhere;⁷⁷ though a few of Kantorowicz's have been quoted in extracted form, especially by Muscheler in his two books.⁷⁸ Even Günter Spindel, however, points out that the publication of only one side of the correspondence does not present a full picture. Quite apart from the light the correspondence sheds on the creation of the Manifesto, the letters paint a vivid picture of the friends' daily life and work, their achievements and failures, the frustrations and intrigues of academic life, especially with regard to anti-Semitism.

G. The Aftermath of the Manifesto (And its Effect on Kantorowicz's Habilitation Hopes)

"Das Volk steht auf - der Sturm bricht los." ("The people are in revolt, the storm is breaking.") This is how Radbruch reported the public reaction to the appearance of the Manifesto in the bookshops.⁷⁹ It is the first line of a poem and folk song, *"Männer und Buben"* ("Men and Boys") by Karl Körner. No doubt, Radbruch appreciated that the date of the poem, 1813, made it a peculiarly apt quote for the Manifesto, with which he and Kantorowicz hoped to liberate German legal methodology from the yoke of the Napoleonic *Code Civil*. The correspondence described the reaction of the academic world to the "horror evoking" book and the various, sometimes hilarious, attempts by scholars to guess the authorship. Kantorowicz was desperate to keep the truth secret as he was sure that, if it became known, it would adversely affect his chance of habilitating as a junior lecturer in Heidelberg. His hopes in Heidelberg were, in any case, hanging on a thread; partly this was the result of anti-Semitism, rife in German and Austrian universities at the time, though to a lesser extent in traditionally liberal Heidelberg.⁸⁰ Partly it was his

⁷⁷ Mainly by Günter Spindel, *supra* note 6). There are also three letters (from the relevant period) from Kantorowicz to Radbruch, (namely those of 2 January, 1904, 14 November, 1905 and 6 October, 1907 in STRAFRECHTIGKEIT (FESTSCHRIFT FÜR ARTHUR KAUFMANN ZUM 70. GEBURTSTAG 325-6 (Fritjof Hart et al. eds., 1993); also one letter from Gustav Radbruch to Hermann Kantorowicz (24 December 1904), in GUSTAV RADBRUCH BRIEFE 10 (Erik Wolf, 1968).

⁷⁸ See *supra* notes 3 and 76.

⁷⁹ Letter from Gustav Radbruch to Hermann Kantorowicz (12 May 1906) (GRGA.17.89).

⁸⁰ See JURISTS UPROOTED, *supra* note 20, at 23. See also Letter from Gustav Radbruch to Kantorowicz (3 April 1906) (GRGA.17.84).

own fault; in February 1906 against Radbruch's advice,⁸¹ Kantorowicz called on most of the *Ordinarien* (full professors) in the Law Faculty to introduce himself and talk about his work. His high opinion of his own work on Gandinus, which he was intending to use for his *Habilitation*, fully justified though it was, earned him a reputation for arrogance, and strengthened animosity towards him. The correspondence reveals a cesspit of tittle-tattle and intrigue, which Kantorowicz desperately tried to counter in his letters to Radbruch. His interesting letter on his "jewishness" is quoted in part by Muscheler;⁸² I need only add here that Kantorowicz had already broken from the Jewish faith. In this letter he declared his intention of being baptised into the German Evangelical Church while in Rome, which he did in fact do (as is confirmed by the birth certificate for his son Otto, born 19 November 1906). But, of course, anti-Semitism went beyond just religious attachment and most scholars, however eminent, if they were of Jewish descent, were held back from normal progress up the academic ladder.⁸³ One notable exception was his wife's young brother, Eugen Rosenstock-Huessy, who, at the age of 20, became the youngest *Privatdozent* at a German University in 1908, and progressed steadily until he became a full Professor of Legal History at the young age of 35. But then he had not only converted to Christianity, he was an active proselytiser for his new faith; his religious beliefs became a keystone of his teaching and he also had a charming personality, as testified in several letters.⁸⁴ Radbruch had to tell Kantorowicz that his *Habilitation* chances in Heidelberg were caught in an ironic Catch-22 situation; the Faculty feared they might be stuck with him because, "anti-Semitism will prevent your prospects of further promotion away from here."⁸⁵

However, the truth about the authorship of the Manifesto gradually emerged; partly guesswork, partly a result of Radbruch's transparent honesty – he apparently blushed whenever anyone questioned him about it! In particular, Karl von Lilienthal, Dean of the Faculty, who had strongly supported Kantorowicz, eventually extracts the truth from Radbruch and has to inform him that this has finally ruined Kantorowicz's prospects as it was a requirement that applicants for

⁸¹ See Letter from Gustav Radbruch to Hermann Kantorowicz (21 February 1906) (GRGA.17.80)

⁸² See KARLHEINZ MUSCHELER, HERMANN ULRICH KANTOROWICZ - EINE BIOGRAPHIE 13 (1984).

⁸³ See Letter from Gustav Radbruch to Hermann Kantorowicz (3 April 1906) (GRGA.17.84).

⁸⁴ See Letter from Gustav Radbruch to his parents (10 February 1908) (GRGA.17.118); *supra* note 28.

⁸⁵ See Letter from Gustav Radbruch to Hermann Kantorowicz (3 April 1906) (GRGA.17.84). The "catch-22" situation was related to Radbruch by Karl von Lilienthal who was Dean of the Law Faculty at the time. This is incontrovertible proof of the strong anti-Semitic feelings in German and Austrian universities at the beginning of the 20th century.

Habilitation provide a full list of all their publications; so other Law Faculty Professors would realise who the author of the Manifesto was, and their opposition would become even stronger. Kantorowicz accepted this disastrous setback with good grace; he wrote that he and his wife, “have just returned from Raphael’s wonderful house, the Villa Madonna; after that I really couldn’t care less about a trifle like a career!”⁸⁶ His main concern was for his friend: “Now I shall really have to write you a condolence letter! I fear it is affecting you more closely than me.”⁸⁷ In the same letter Kantorowicz also warned Radbruch strongly against continuing to support him in case this has repercussions on Radbruch’s career. As for himself, Kantorowicz assured Radbruch, “Either I shall win through despite all obstacles, or I do not deserve to achieve my goals.”⁸⁸

In June 1906 Kantorowicz returned to Berlin where he belatedly undertook his *Referendardienst*, completed his Gandinus book, cooperated over the Italian edition of the Manifesto, searched in vain for *Habilitation* possibilities and even contemplated a permanent move to Italy.⁸⁹ Eventually, on Lilienthal’s advice, Kantorowicz approached Professor Schmidt of Freiburg University and, in June 1907, received serious consideration for appointment as *Privatdozent* with *venia legendi* (authority to lecture) in Criminal Law, History of Law and Philosophy of Law. But even then the Manifesto proved to be a stumbling block. Schmidt belatedly hears about Kantorowicz’s authorship and as a result he remained happy to accept the book on Gandinus as qualifying Kantorowicz more than adequately for the first two subjects, but was unhappy about Kantorowicz’s methodological views *vis-à-vis* the third subject. To make amends Kantorowicz was required to address Legal Methodology in his “Trial Lecture” on 17 February 1908 for which he chose, “*Zur Lehre vom richtigen Recht*” (a discussion of Stammeler’s views). On the day before the lecture Kantorowicz wrote to Radbruch, “My dear friend, warm greetings to you and your wife, but full of dark forebodings on the day before the decision. [Professor] Rohland wants to examine me thoroughly on criminal law. You know what that means. By 7:30 everything will be decided; if I do not telephone then my academic career is finished and you can send me a condolence

⁸⁶ See Letter from Hermann Kantorowicz to Gustav Radbruch (5 May 1906) (on file in the Archives of Freiburg University).

⁸⁷ See Letter from Hermann Kantorowicz to Gustav Radbruch (27 May 1906) (on file in the Archives of Freiburg University).

⁸⁸ See *ibid.*

⁸⁹ See *supra* note 9. See also Letter from Hermann Kantorowicz to Gustav Radbruch (9 May. 1907) (On file in the Archives of Freiburg University)

letter to Bologna.”⁹⁰ But, Kantorowicz was successful and took up his post in Freiburg. The reference to “telephoning” is significant; once both friends had settled homes, they clearly had their own telephones and as a result the correspondence becomes much more desultory.

H. Epilogue

*You and I are old.
Old age hath yet his honour and his toil.
Death closes all, but something ere the end,
Some work of noble note may yet be done,
Not unbecoming men that strove with Gods.*⁹¹

I. Radbruch

People who knew Gustav Radbruch, or of him, in the post-Great War days, when he served as a fearless and authoritative leader both in the academic world and in politics, will find it hard to reconcile this with the hesitant, often depressed character that is portrayed in his early letters. Despite his undoubted ability, he remained ten years in Heidelberg without an established post; perhaps his outspoken support for his contentious friend really had compromised him, as the latter feared. The Great War period changed everything: his character, his marriage, his career, and he emerged from the War, (in which he served for two years in the trenches, at the end as an officer), a very different person, sure of himself, remarkably brave. A committed Socialist now, as a result of his experience in the rank, he joined the SPD and established his career both academically and politically on a sure footing. Soon after the war he received several offers of “extraordinary” professorships; then at last in October 1919 he was offered a full professorship (*Ordinarius*) in Kiel. Almost immediately he became involved in the turmoil of the Kapp-Putsch where he intervened to prevent bloodshed at great risk to his own life.⁹² A month later he reluctantly allowed himself to be elected to the Reichstag as a SPD representative and a year later served the first of his two periods in the Weimar Coalition Government as Minister of Justice; first in Wirth’s Cabinet and

⁹⁰ See Card from Hermann Kantorowicz to Gustav Radbruch (16 February 1908) (on file in the Archives of Freiburg University).

⁹¹ See *supra* note 1.

⁹² Wolfgang Kapp, born 1858 in New York returned to Germany in 1870. He was a reactionary Prussian politician who led a Putsch in 1920 which attempted to overthrow the young Weimar Republic and establish a rightist dictatorship. However, a general strike called by labour unions led to a collapse of the coup within four days. Radbruch’s part in the events is fully described in volume 16 of the GRGA. See *supra* note 5, at 298-336.

then in Stresemann's. In November 1923 came the Munich Putsch,⁹³ which resulted in Hitler's imprisonment. Radbruch, as Minister of Justice, so my father told us, was in favour of Hitler's release, a point on which the two friends for once disagreed. Radbruch argued that Hitler was a madman who would come to nothing; my father argued that a madman who would not treat his opponents with equal generosity should not be released. In May 1924 Radbruch left the Reichstag and returned full-time to his university post. It is evidence of his political acumen that he had successfully combined politics and his academic career, something that Kantorowicz singularly failed to do.

In 1926 Radbruch became Dean of the Faculty in Kiel but almost immediately transferred to his "dream post," *Ordinarius Professor* in Heidelberg, where he enjoyed a happy and productive five years. This was shattered in May 1933 when the Nazis raided his house, confiscated his books and papers, forbade him to publish anything and dismissed him, as they did other leading Socialists. This led to a frustrating and unhappy twelve years, when he should have been at the height of his academic career. However, he made the best he could of it, throwing himself into literary works he had previously had to put aside. He managed to publish some writings abroad, including his great study of his hero, the criminologist Anselm Feuerbach (1775-1833),⁹⁴ which was hailed as a literary masterpiece by, among others, his former school colleague Thomas Mann. His work continued to be greatly appreciated and translated abroad, especially in Japan.

Kantorowicz tried hard to persuade Radbruch to emigrate to the USA and even procured a provisional offer for him at the so called "Faculty in Exile" in New York.⁹⁵ Radbruch declined, partly because he was unhappy about his fluency in English, but mainly because of an almost Quixotic desire to "stand up and be counted" among those Germans who, at great risk to their freedom, spoke up for justice. He did however accept an invitation to study at Oxford University in 1935-1936 and visited us several times in Cambridge. He only gave one lecture while he was in Oxford, and that was in German, to the German Literary Society on "*Goethe*

⁹³ Adolf Hitler as leader of the National Socialist Party organised the so called Bierkeller Putsch in Munich forcing his way into a right-wing political meeting, and "persuading" the leaders there to join in carrying a revolution to Berlin. However, the next day they met armed police resistance and 16 Nazis were killed leading the rebels to abandon their attempt. Hitler was sentenced to five years' imprisonment of which he only served eight months in prison. During this time he wrote *Mein Kampf*.

⁹⁴ *Paul Johann Anselm Feuerbach. Ein Juristenleben, erzählt von Gustav Radbruch*, Vienna, 1934. Note that Radbruch was not able to publish any legal books in Germany during the Nazi period, 1933-1945.

⁹⁵ The "Graduate Faculty of the New School for Social Research" as it was called officially, was set up in New York by Alvin Johnson to give a refuge, including employment for refugees from Nazi Germany and Austria.

und das Recht." He and Kantorowicz maintained an intermittent correspondence, despite censorship. Radbruch's letters from this period have disappeared but my father's showed the caution they had to exercise. Most of the letters were ostensibly addressed to Lydia and signed Gnaeus Flavius or Gandinus, with Radbruch referred to as "Feuerbach"! Kantorowicz's very last communication, a postcard sent *via* his daughter in New York, was written in January 1940, three weeks before his death. It is quoted here in the original English, unusually faulty but typically humorous:

I have given your love to Susi but who in the world is Mary? I am asking every girl I meet who happens to be one but so far none has been the right girl. We are all keeping fine, and everybody sends his best wishes to you. Who knows how soon we shall be able to see us once more! I have finished my booklet on Bracton and liked it very much. Hope that the others will be of the same opinion.⁹⁶

Radbruch learnt of Kantorowicz's death through a friend in Turkey, and wrote to his son who was serving in the German army on the Eastern front:

You can readily imagine how hard this loss has been for me: for almost 40 years he had been my closest friend. He was the most erudite scholar I ever knew and the most intelligent of beings. Every conversation with him overflowed with inspiration, wit and good humour; I owe him an incalculable debt, both on the academic and on a human level.

Radbruch suffered tragedies in his own family; his daughter Renata was killed by an avalanche in 1939 and his son Anselm died on the Russian front in 1942. These were his only children, so, sadly, he left no offspring to carry on his legacy. However, he deservedly still has a considerable following in Germany and even abroad.⁹⁷ Apart from his scholarly legacy (his complete writings have been

⁹⁶ Letter from Hermann Kantorowicz to Gustav Radbruch (January 1940) (on file in the Archives of Freiburg University).

⁹⁷ Gustav Radbruch was greatly admired in Japan, no doubt helped by the fact that Theodor Sternberg became a professor there in 1913. In a tribute to Radbruch on the 80th anniversary of his birth, Koichi Miyazawa wrote that his reputation increased after his death and a flourishing Radbruch Society was

published in 20 volumes⁹⁸), Radbruch is respected for the efforts he made to remedy the legal monstrosity the Nazis had created and is known internationally for “Radbruch’s Formula”: his dictum that an evil law cannot be considered to be a law.⁹⁹ He had, of course, been restored to his post in Heidelberg at the end of the war and was almost immediately elected Dean of the Law Faculty. For the next three years, though beset by Parkinson’s disease, he lectured with zest to enthusiastic audiences and also published a backlog of works.¹⁰⁰ On his 70th birthday, now retired and accorded the rank of “Emeritus,” he was greatly and justly honoured as befitted Germany’s most highly regarded jurist of his time.

Radbruch’s first marriage with Lina had not been a success; they had both been too immature emotionally to choose sensibly. However, even after their divorce, he retained an attachment to her for the rest of his life, to the intense jealousy of his second wife who destroyed all letters and photographs of Lina. Radbruch and Lina separated in 1913 and the seemingly straight-laced Radbruch had an adulterous affair with his future second wife Lydia by whom he had a daughter two months before they married in November 1915. Even this marriage ran into difficulties about which, according to my mother who had read all the letters, he whined repeatedly in his correspondence with Kantorowicz. Perhaps this is why virtually none of his post 1918 letters to Kantorowicz have survived. However towards the end of his life when he suffered from Parkinson’s disease, Lydia gave him staunch support and after his death vigorously advocated his legacy and his writings. In the latter task she was strongly encouraged by my mother who was engaged on a similar mission as Kantorowicz’s widow. The two wives had always been good friends and became even closer after their husbands’ deaths.

formed in Japan. Koichi Miyazawa, RHEIN-NECKAR ZEITUNG, at 7 (The main Japanese text book on law was greatly influenced by Radbruch’s *Einführung in die Rechtswissenschaft* and his major work *Rechtsphilosophie*).

⁹⁸ GUSTAV RADBRUCH GESAMTAUSGABE (Arthur Kaufmann ed., 1988).

⁹⁹ Originally published: Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, SÜDDEUTSCHE JURISTENZEITUNG 105 (1946). For a discussion of the contemporary relevance of the Radbruch formula to Germany, see, e.g., Russell Miller, *Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership*, 14 LEIDEN JOURNAL OF INTERNATIONAL LAW 653 (2001).

¹⁰⁰ KURT ROßMANN, *DER GEIST DES ENGLISCHEN RECHTS* (1946). See a number of minor works in the *Kleine Vandenboeck-Reihe*, for example LYRISCHE LEBENSLEITE (1946), KARIKATUREN DER JUSTIZ (1947). See also *DER INNERE WEG*, *supra* note 5.

II. Kantorowicz

Hermann Kantorowicz had also volunteered for military service at the beginning of the Great War, but in his case this brought about no character transplant, though it did greatly influence his political views and activities. Unlike his friend, his main experience, after serving two years in a military hospital, had been studying and reporting on the international newspapers for the Foreign Office. This gave him his first realisation of the comparative integrity of the English reporting and general approach to the war, which was strongly reinforced by his subsequent experience as Education Officer in a prisoner of war camp for British Officers. He later told us of his surprise, after having experienced the universal hatred of the German Prussian officer type, that the British officers were "such thoroughly nice chaps." He made many friends, some of whom wrote to him in 1933 encouraging him to come to England.

Altogether, Kantorowicz spent 20 years at Freiburg University but found promotion difficult. Though he received the titular rank of a.o. *Professor (außerordentlicher)* it was not "established" (*planmäßig*) and not even paid at first. He was eventually appointed to an established a.o. Professorship in 1923 for Auxiliary Legal Sciences (*juristische Hilfswissenschaft*), still in Freiburg. That he did not receive promotion to a full professorship (*Ordinarius*), despite his outstanding ability, was this time mainly due not to anti-Semitism but to his political activities during the Weimar Republic days as a member of the DDP (German Democratic Party), and his strong Pacifist views. His first major political row and clash with the university came in 1921. He had written an article in a Swiss newspaper entitled, "*Bismarcks Schatten*" ("*Bismark's Shadow*") attacking Bismark's legacy, which he claimed impeded the democratic development of Germany.¹⁰¹ This caused a storm of protest among right wing lecturers and students, with violent demonstrations against him in his lectures, followed by a severe warning from the university authorities against further political activities. He ignored this, but it led to his isolation among his colleagues, and a failure to progress. Also, Kantorowicz had greatly upset the government with his report on the "War Guilt Question," which the Reichstag had commissioned him to investigate. Inevitably, he concluded in the report that Austria and Germany had been mainly responsible for starting the Great War.¹⁰² His report was suppressed by the Reichstag, but he managed to

¹⁰¹ See *Bismarcks Schatten. Gedanken zu Robert Riemanns "Schwarzrotgold"*, BASLER NACHRICHTEN, November 13, 1921, at 183.

¹⁰² HERMANN KANTOROWICZ, GUTACHTEN ZUR KRIEGSSCHULDFRAGE (edited with an introduction by Imanuel Geiss, 1967).

circumnavigate this setback by incorporating some of his conclusions in his famous pro-British book *Der Geist der englischen Politik*,¹⁰³ published in 1929 and later among the books ceremonially burnt by the Nazis. When Radbruch moved from Kiel to Heidelberg, the Kiel Law Faculty wanted to appoint Kantorowicz to the vacant Chair but this was not surprisingly vetoed by the Prussian Government. The Faculty, strongly supported by Radbruch, stuck to their choice and the tussle lasted an astonishing two and a half years before the Government gave way, fearing that Kantorowicz might become a “martyr.” His time at Kiel, where he became Dean of the Law Faculty in 1931, was the most satisfying of his career, but it was cut short in January 1933 when Hitler came to power. He was sacked in the first wave of dismissals, on both political and Semitic grounds. Very fortunately he was in his beloved Florence at the time on a Sabbatical year and so escaped internment or other persecution.

Kantorowicz emigrated to England, after a short period lecturing in New York, and thanks to his happy temperament enjoyed, unlike many of his fellow *émigrés*, a contented and productive few years, mainly in Cambridge. Despite being dogged by illness in the last two years of his life (due to an operation for cancer of the colon and its after effects) he remained cheerful, helping less fortunate *émigrés* and achieving an astonishing amount of work during his five and a half years in England. The most important work he published was his *Studies in the Glossators of the Roman Law*,¹⁰⁴ without which he felt his work on medieval legal history would have been incomplete and therefore formed an integral part of one of his earliest ambitions, a comprehensive history of legal science. On 27 November 1903, just 26 years old, he had written to Radbruch, “My main work, ‘The Study of Legal Science’, will also have an historical basis; only by studying the changing facets of Legal Science over the last three thousand years, shall I be able to recognise its enduring character.”¹⁰⁵ Thirty-five years later he came close to achieving this ambition when he was appointed co-editor of a proposed Oxford History of Legal Science, but the project had to be abandoned on his death. As Arthur Goodhart wrote regarding this project “Whether it can ever be revived in the future is uncertain because it is unlikely that another editor possessed of [Kantorowicz’s] encyclopedic knowledge, wide interests and unlimited energy can be found

¹⁰³ HERMANN KANTOROWICZ, *DER GEIST DER ENGLISCHEN POLITIK UND DAS GESPENST DER EINKREISUNG DEUTSCHLANDS* (1929). The book was translated into English. See HERMANN KANTOROWICZ, *THE SPIRIT OF BRITISH POLICY AND THE MYTH OF THE ENCIRCLEMENT OF GERMANY* (William Johnson trans., 1931).

¹⁰⁴ HERMANN KANTOROWICZ, *STUDIES IN THE GLOSSATORS OF THE ROMAN LAW* (with collaboration of William Warwick Buckland, 1938).

¹⁰⁵ See *supra* note 9.

again.”¹⁰⁶ All that remains of this intended three volume opus is part of Kantorowicz’s Introduction which was published in book form as *The Definition of Law* in 1958.¹⁰⁷ Kantorowicz finished his final essay, “Bractonian Problems,”¹⁰⁸ only days before he died. Remarkably, this sparks memories of his very first youthful publication, “*Goblers Karolinen-Kommentar*.”¹⁰⁹ In each of these essays Kantorowicz was intent on establishing the high reputation of a scholar, who he felt, had been misunderstood and underrated.

In the last months of his life he was saddened by the outbreak of the war, which he, like Winston Churchill and very few others, had so clearly foreseen. In this context some of his letters to his daughter Hilde, a nurse in New York, are worth quoting. “The danger of war, at least for England,” he concluded, “has temporarily receded, because England will always give way, but that alone is sufficient to dishearten me.”¹¹⁰ Later, one month before Neville Chamberlain’s disastrous visit to Adolf Hitler in Munich, he wrote: “The Government have missed one moment for action after the other, and now they are [merely] postponing a likely, long, destructive war with their resistance. Let us hope for a hellish duel Hitler - Stalin; there is no other hope!”¹¹¹ Again, like Churchill, he was concerned that America was delaying intervention but remained confident of final victory. Three weeks after the outbreak of war, he wrote, “You [American] people don’t realise that there is only one way of keeping out of the war, namely to see that it does not break out, and nobody would dare to go to war if he were sure to have to fight America. The boys [my brother Tom and I] will of course stay here; England is *not* a sinking ship and anyhow we are no rats!”¹¹² Later still, he wrote: “everybody knows that the Nazis must lose in the long run, but nobody knows what will happen after the victory. Lots of people

¹⁰⁶ KANTOROWICZ, *supra* note 4, at p. xii.

¹⁰⁷ See *supra* note 4. The book was also translated into German, Italian and Spanish

¹⁰⁸ *Bractonian Problems*, being the ninth Lecture on the David Murray Foundation in the University of Glasgow, prepared but not delivered by H. Kantorowicz, M.A., with a short memoir of the Author by Doris M. Stenton, 1941.

¹⁰⁹ HERMANN U. KANTOROWICZ, *GOBLERS KAROLINENKOMMENTAR UND SEINE NACHFOLGER, GESCHICHTE EINES BUCHES* (1904).

¹¹⁰ Letter in German from Hermann Kantorowicz to his daughter Hilde (14 August 1937) (on file with the Author).

¹¹¹ Letter in German from Hermann Kantorowicz to his daughter Hilde (3 September 1938) (on file with the Author).

¹¹² Letter in English from Hermann Kantorowicz to his daughter Hilde (23 September 1939) (on file with the Author). Many English families, especially in the academic world, were sending their children to North America for safety.

are pleading for a 'generous' peace, the fools have not learned anything from what happened after the last peace."¹¹³

Kantorowicz wrote his last letter to his daughter less than three weeks before his death on 12 February at the comparatively young age of 62. "Well, I must draw the line here, and go to bed. But I don't sleep much as the work which I am now doing is so exciting that it keeps me awake. At least it will be read. [And it was: "Bractonian Problems," was published posthumously in 1941¹¹⁴) Would it not be swell if we were all together once more? But I suppose I shall remain here 'for good' or evil."¹¹⁵

¹¹³ Letter in English from Hermann Kantorowicz to his daughter Hilde (10 December 1939) (on file with the Author).

¹¹⁴ See *supra* note 108.

¹¹⁵ Letter in English from Hermann Kantorowicz to his daughter Hilde (24 January 1940) (on file with the Author).

APPENDIX

The Press Notices

1. As proposed by Kantorowicz; 2. As rewritten by Radbruch; 3. Translation of Radbruch's rewrite into English.

1. Kantorowicz's letter to Radbruch of 28 February, 1906:

Der *Waschzettel* anbei. Sie können ihn, wenn Sie wollen, ändern.

Einliegend: Wie einst Gnaeus Flavius der Schreiber des alten Cato, die Axt an die Pontificaljurisprudenz der Römer legte, indem er die bisher geheim gehaltenen Formeln des Gerichtswesen den Laien bekannt machte, so unternimmt der Verfasser der vorliegenden Streitschrift die Sondermethoden der Juristerei in ihrer Unzulänglichkeit darzustellen. Im Sinne der neuen freirechtlichen Bewegung und im Anschluss an deren Hauptvertreter Bülow, Stammler, Ehrlich u.a. bespricht er in drei Teilen die neue Auffassung vom Recht, von der Rechtswissenschaft und von der Rechtsprechung. Im ersten Teil weist er die Existenz von nichtstaatlichem 'freien' Rechte nach und nähert sich insofern dem alten Naturrecht, trennt sich aber von diesem unter anderm dadurch, dass er die Möglichkeit bestreitet, jeden Rechtsfall rechtlich zu entscheiden. Diesem, jeder Dogmatik abholden, Standpunkt gemäß, zerpfückt er im zweitem Teile die herrschenden juristischen Methoden, wobei er jedoch betont, sich mehr gegen die Theorie zu wenden als gegen die Praxis, die schon bisher meist instinctiv das Richtige getroffen habe. Besonders bemerkenswert ist der Nachweis, dass in der Rechtsprechung der Wille eine weit größere Rolle spiele als der Verstand, und die schlagende Parallele der bekämpften Methoden mit denen der orthodoxen Theologie. Endlich fordert der Verfasser, der nach dem guten Vorbilde anderer Reformjuristen sich noch nicht nennt, für die Rechtsprechung Anerkennung ihrer freier schöpferischen Stellung dem notwendig lückenhaften und schnell veraltenden Gesetze gegenüber. Hierdurch erhofft er die Beseitigung der unglücklichen Entfremdung zwischen Recht und Volk, Jurisprudenz und Leben. Die in gemeinverständlicher Sprache und mit feuriger Beredsamkeit verfaßte Schrift wird jeden interessieren, der den Befreiungskampf der Rechtswissenschaft sympatisch begrüßt als den Versuch, die Mittelalterliche Scholastik aus ihrem letzten Bollwerk zu vertreiben.

2. A loose sheet found by the Author with his mother's notes on Radbruch's letters:

Waschzettel in der endgültigen Form:

Gnaeus Flavius, *Der Kampf um die Rechtswissenschaft* (Heidelberg, Carl Winter Gr.8. Geheftet 1 Mark).

Der Verfasser der vorliegenden Streitschrift, der sich nach dem guten Vorbilde anderer juristischen Methodenreformer (Jhering, Bülow) nicht nennt, verbirgt sich bezeichnender Weise hinter dem Namen des Gnaeus Flavius, der die bisher geheimgehaltenen Klagformeln der römischen Pontifices der Öffentlichkeit preisgab and damit die Axt an die unpopuläre Pontifikaljurisprudenz legte. Auch er will eine populäre Rechtswissenschaft und Rechtsprechung. Er sucht aber die Wurzeln der vielberufenen Entfremdung von Recht and Volk in grösserer Tiefe als andere vor ihm: in der juristischen Methodenlehre.

Der herrschenden Theorie, nach welcher Rechtswissenschaft und Rechtsprechung das vorhandene lücken- und widerspruchlose Recht durch blosse (sic) Verstandesthätigkeit ermitteln, stellt er die von der guten Praxis instinctiv schon heute befolgte Ansicht gegenüber. Nach welcher sie das unvermeidlich unvollkommene Recht durch schöpferische Willensentscheidungen ergänzen und fortbilden.

Die richterliche Rechtsschöpfung entnimmt aber ihren Stoff einem nichtstaatlichen "freien Recht," in welchem das Naturrecht in freilich erheblich verjüngter Gestalt wiederaufersteht.

Der Verfasser steht mit diesen seinen Ausführungen nicht allein, er bezweckt vielmehr gerade die zahlreichen von einander unabhängigen Äusserungen Gleichgesinnter zu einer einheitlichen "freirechtlichen Bewegung" zusammen zu schliessen und zugleich weiteren Kreisen von dieser für jeden Rechtsgenossen wichtigen Erscheinung zu geben."

Die Schrift sucht deshalb mit der teilweisen Neuheit ihres wissenschaftlichen Gedankenganges eine allgemeinverständliche Darstellung zu verbinden."

3. Press Notice in its final form for Gnaeus Flavius, *Der Kampf um die Rechtswissenschaft* (Heidelberg, Carl Winter, Octavo, bound. 1 Mark).

The author of the manifesto presented here, who following the good example of other reformers of legal methodology (Jhering, Bülow) does not identify himself, significantly hides himself under the name of Gnaeus Flavius, who made public the litigation formulae of the Roman Pontiffs, hitherto kept secret, and in this way laid his axe to the unpopular pontifical jurisprudence. He, also, wants to have popular jurisprudence and legal decision-making. However, he looks in greater depth than others have before him into the roots of the frequently proclaimed estrangement between Law and People, namely in legal methodology.

In antithesis to the prevailing theory, according to which legal science and the legal decision-making process can, purely with thought processes, establish the current Law, which they consider gap-free and incontrovertible, he puts forward the view, which good practice instinctively follows already, that they can, through creative, purposeful decisions, develop and complete the unavoidably incomplete Law.

Law created by judges, however, draws its material from non-statutory 'Free Law', in which Natural Law is resurrected but in a cogent new form

The author is not alone in these expositions; he aims at bonding the numerous assertions of like-minded scholars acting independently of each other into a unified 'Free Law Movement' and at the same time to bring about wider circles of such scholars, which will be of importance to every legal colleague.

This work therefore seeks, with its partly original scientific thought process, to consolidate a rendition which can be understood universally."