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The Conceptual Change of Conscience:

Franz Wieacker and German Legal Historiography 1933 – 1968

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ACADEMIC DISSERTATION

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Abstract

This dissertation is a history of the ideas of German legal historian Franz Wieacker. The broader aim of this study is to analyze the intellectual context in which Wieacker's texts were situated, thus the German legal scientific discourse from 1933 to 1968. In this study Franz Wieacker's texts are analyzed in the light of his correspondence and the broader social historical change of the twentieth century Germany. The study concentrates on the intertwinement of his scientific works with the contemporary society, as well as on the development of his personal perception of continuity and meaning in history.

The theoretical framework of the dissertation derives from conceptual history and hermeneutics of historiography. As objects of analyze I have picked two concepts which Franz Wieacker often utilized in illuminating European legal history: *Rechtsbewusstsein* (legal consciousness) and *Rechtsgewissen* (legal conscience). These concepts were the key terms in his attempt to analyze the themes of justice and the rule of law in European history. In concrete terms, the change in the meanings of Wieacker's concepts *Rechtsgewissen* and *Rechtsbewusstsein* is being tracked in reference to paradigmatic changes in continental legal science and social historical development of Germany.

The analysis conducted in this dissertation proves Franz Wieacker's continuous and firm belief in the necessity of the distinct social position of legal scholars in society. The prestigious status of the 'juridical estate' was a premise for social justice. Furthermore, Wieacker's view on society was shaped by his unconditional trust on the values concerning learnedness and higher education. This preconception was due to his upbringing and attachment to the values of Weimar Republic *Bildungsbürgertum*, 'learned bourgeoisie'

As a result, in the later scientific production of Franz Wieacker, the themes of 'communality' as the context of legal scholarship and 'elastic creativity' as the aim of legal science were significantly important. Wieacker explained the diverse social breaches and recent crises of Germany through a vast narrative of European legal culture, which he constructed with the means of concepts. Despite the radical changes brought about the National-Socialist seizure of power of 1933 and the end of the Second World War in 1945, the core of his scholarly identity remained the same from Weimar to the Federal Republic of Germany.

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1. Introduction

This thesis is about the German legal historian Franz Wieacker¹ and the body of scientific writings² he produced during the years from 1933 to 1968. I study changes in Wieacker's ideas, and the way these are reflected in his legal historical texts. Wieacker's legal historical works constituted an influential and essential contribution

¹ Comprehensive biographies on Franz Wieacker include Okko Behrends, 'Franz Wieacker 5.8.1908 – 17.2.1994,' in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 112 (1995), XIII–LXII., Joseph Georg Wolff, 'Franz Wieacker (5. August 1908–17. Februar 1994),' in Stefan Grundmann (Hrsg.), *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler. Eine Ideengeschichte in Einzeldarstellungen. Bd. 1*. Berlin, de Gruyter 2007, 73–86., Detlef Liebs, 'Franz Wieacker (1908 bis 1994) – Leben und Werk,' in Okko Behrends & Eva Schumann (Hrsg.), *Franz Wieacker: Historiker des modernen Privatrechts*. Göttingen, Wallstein Verlag 2010, 23–48; So far the most thorough intellectual history of Wieacker is Viktor Winkler, *Der Kampf gegen die Rechtswissenschaft. Franz Wieackers "Privatrechtsgeschichte der Neuzeit" und die deutsche Rechtswissenschaft des 20. Jahrhunderts*. Hamburg, Verlag Dr. Kovac 2014. The above-mentioned *Franz Wieacker: Historiker des modernen Privatrechts* by Behrends & Schumann includes eight illuminating articles, from which the most relevant with respect to this work are Martin Avenarius, 'Verwissenschaftlichung als "sinnhafter" Kern der Rezeption: eine Konsequenz aus Wieackers rechtshistorischer Hermeneutik' (119–180), Joachim Rückert, 'Privatrechtsgeschichte der Neuzeit: Genese und Zukunft eines Faches?' (75–118), and Hans-Peter Haferkamp, 'Positivismen als Ordnungsbegriffe einer Privatrechtsgeschichte des 19. Jahrhunderts' (181–212). Articles concerning Wieacker's methodology include Joachim Rückert, 'Geschichte des Privatrechts als Apologie des Juristen – Franz Wieacker zum Gedächtnis,' in *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 24 (1995), 531–562., Martin Avenarius, 'Universelle Hermeneutik und Praxis des Rechtshistoriker und Juristen. Die Entwicklung ihres Verhältnisses im Lichte der Diskussion zwischen Gadamer und Wieacker,' in *Juristische Hermeneutik zwischen Vergangenheit und Zukunft*. Baden-Baden, Nomos Verlagsgesellschaft 2013, 59–103., and Marion Träger, 'Methode und Zivilrecht bei Franz Wieacker (1908–1994),' in Joachim Rückert & Ralf Seinecke (Hrsg.), *Methodik des Zivilrechts - von Savigny bis Teubner*, 2. Auflage 2012, 235–260.

² Among the most renowned monographs of Wieacker published during 1933–1968 are *Privatrechtsgeschichte der Neuzeit, unter besonderer Berücksichtigung der deutschen Entwicklung*. (Göttingen, Vandenhoeck & Ruprecht 1952), and its second revised edition from 1967 (Göttingen, Vandenhoeck & Ruprecht), which has been translated into English by Tony Weir: *A History of Private Law in Europe: With Particular Reference to Germany*. (Oxford, Oxford UP 1995), also *Textstufen klassischer Juristen* (Göttingen, Vandenhoeck & Ruprecht 1960). Article collections include *Vom römischen Recht. Wirklichkeit und Überlieferung* (Leipzig, Koehler & Amelang 1944) and *Gründer und Bewahrer. Rechtslehrer der neueren deutschen Privatrechtsgeschichte* (Göttingen, Vandenhoeck & Ruprecht 1959). A comprehensive collection of Wieacker's 1930s and 1940s articles are being compiled in Christian Wollschläger (Hrsg.), *Franz Wieacker. Zivilistische Schriften (1934–1942)*. Frankfurt am Main, Vittorio Klostermann 2000. Outside the above-mentioned works, the texts which will be elaborately analyzed in this thesis include: *Das römische Recht und das deutsche Rechtsbewusstsein*. Leipzig, Johann Ambrosius Barth, 1994; *Vulgarismus und Klassizismus im Recht der Spätantike*, Heidelberg, Carl Winter Universitätsverlag 1955; 'Ursprünge und Elemente des europäischen Rechtsbewusstseins,' in Martin Göhring (Hrsg.), *Europa, Erbe und Aufgabe. Internationaler Gelehrtenkongress Mainz 1955*. Wiesbaden 1956. S.105–119; 'Vom Römischen Juristen,' *Zeitschrift für die gesamte Staatswissenschaft* 99 (1939), 440–463; 'Der Standort der römischen Rechtsgeschichte in der deutschen Gegenwart,' in *Deutsches Recht* 12 (1942), 49 – 55; 'Die Stellung der römischen Rechtsgeschichte in der heutigen Rechtsausbildung,' in *Zeitschrift der Akademie für Deutsches Recht* 6 (1939), 403–406; 'Die Fortwirkung der antiken Rechtskulturen in der europäischen Welt,' in *Vom Recht*. Hannover, Niedersächsische zentrale für Politische Bildung 1963. A complete bibliography of Wieacker's works can be found in Okko Behrends, 'Bibliographie der Schriften Franz Wieackers,' in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 112 (1995), 744–769.

to contemporary knowledge of European jurisprudence in the past. Therefore, a larger task for this study, in which I utilize Wieacker's case, is to analyze the pre- and post-Second World War turmoil of German legal history – the scientific context in which Wieacker's texts were situated – and the manner in which common experiences shape historiography.

In order to scrutinize a change in the ideas of an individual scholar, I focus my study on concepts which are related to the themes of justice and the rule of law. I take these concepts more as mobile and transparent explications of ideas than practical models of jurisprudence. Thus, my starting point is the history of ideas – and following Jürgen Kocka's elaboration – I believe that scholarly thinking always appears in relation to actions and social circumstances.³ In order to study the thinking or ideas of a given scholar, one needs to concentrate on the wider systemic triangle, where the ideas are influenced by the social situation and behavior. Conversely, the ideas of a given scholar cannot be distinguished from his actions, and the actions and thoughts together have an effect on the reality he lives in.⁴ In a way, I study Franz Wieacker's texts like he himself studied legal history: I emphasize the "material" conditions of the author, and analyze how these premises shape the meaning of his text.⁵

In Central Europe, the era from 1933 to 1968 was a turbulent, politically loaded, and even disturbing time. War, violence and scarcity, and on the other hand a sense of unity and meaningful national destiny generated strong emotional experiences also among the academics of the time. National Socialism demolished the previous practices of administration and law, challenging the contemporary ideas on subjective rights, communality and justice. After the Second World War, German society was physically in ruins, but also faced with an inevitable rethinking of the ideologies and values which defined the national community. Demarcation between individuality and social pressure, common values and personal space were topics which defined public discussion and identity in one way or another, not only in Germany, but throughout Europe.⁶ Thus, common explanations of the world of human affairs became more

³ Jürgen Kocka, 'Sozialgeschichte zwischen Strukturgeschichte und Erfahrungsgeschichte,' in Wolfgang Schieder & Volker Sellin (Hrsg.), *Sozialgeschichte in Deutschland*, Bd 1, Göttingen, Vandenhoeck & Ruprecht 1986, 67–88. Or as Quentin Skinner puts it, ideas reflect the larger domains of beliefs and desires in society. Quentin Skinner, 'Motives, Intentions and Interpretations,' in James Tully, *Meaning and Context: Quentin Skinner and his Critiques*. Princeton, Princeton UP 1988, 231–258.

⁴ According to Aviezer Tucker, the history of historiography should concentrate both on published texts (the superstructure) and on the research process (the infrastructure). Aviezer Tucker, *Our Knowledge of the Past: A Philosophy of Historiography*. Cambridge, Cambridge UP 2004, 6–8.

⁵ e.g. Wieacker, *Zum System des deutschen Vermögensrechts. Erwägungen und Vorschläge*. Leipzig, Leipziger rechtswissenschaftliche Studien 126 1941, 5-13; Wieacker, *Die Fortwirkung der antiken Rechtskultur*, 81; cf. Florian Meinel, *Der Jurist in der industriellen Gesellschaft. Ernst Forsthoff und seine Zeit*. Berlin, Akademie Verlag 2012, 200-205.

⁶ About the breaches and continuities in the public levels of German society in connection to identity formation (e.g. upbringing, masculinity or communality), see e.g. Georg C. Mosse, *The Image of Man: The Creation of Modern Masculinity*. New York, Oxford UP 1996, 155–180; Ute Frevert, 'Vertrauen - eine historische Spurensuche,' in Ute Frevert (Hrsg.), *Vertrauen. Historische Annäherungen*.

fragile and possibly incompatible with the experiences individuals faced in their everyday lives. In the face of this ontological crisis, legal historiography, from its part, also had to provide answers to the questions of continuity and meaning not only in the realm of abstract history, but with respect to the essence of contemporary society. Franz Wieacker wrote some of his most influential works during this ideological turmoil and social disarray. Thus, an analysis of his academic works, which were written amidst changing norms and tumbling common assumptions, has to take this ambiguity not only into account but as a starting point.

An academic historical text is produced in a dialogue about the past between the author and his cultural meanings, where neither the culturally constructed meanings nor the identity of a scholar are rigid, permanent or emotion-free elements (let alone the entity of “the past”).⁷ Consequently, I argue that historiography, in addition to researching past sources and weighing them against a philosophy or methodology, as a representation *also* deals with the socially experienced emotions which its writer confronts in his surroundings as a member of a community. Franz Wieacker wrote not only about “the past” of the phenomena of the rule of law and justice, but concurrently conceptualized and commented on contemporary social and political events he witnessed at first hand, and which somehow affected the ideas of German rule of law and justice. In my thesis I concentrate on this intertwinement of the personal view, cultural change and scientific tradition in Wieacker’s production.

I argue that the ‘intertwinement’ inside the historical text reveals itself in the metaphors and concepts used by the historian, and focusing on them enables me to grasp this complicated level in historiography. Despite the claims of historical scholarship, historians are not exceptionally able to discern between their subject matter, outer public influence, and personal orientation in their works. Rather, and this is often the case, historical writing resembles more a semi-conscious process, where the author’s ideas of significance are weighed against what one believes to be the socially acknowledged meaning. By semi-conscious I mean that usually for historians the process appears as if it is guided by the automatic, axiomatic and unquestionable principles of a methodology or paradigmatic truth, even though this process has rarely been explicated or even given much cognitive effort. Such principles seem to be

Göttingen, Vandenhoeck & Ruprecht 2003, 7-66; and Andrew Donson, *Youth in the Fatherless Land: War Pedagogy, Nationalism, and Authority in Germany, 1914–1918*. Cambridge, Harvard UP 2010.

⁷ To say this in a slightly different way, historiography can be studied as an *aesthetic entity*. The aesthetics of historiography is a vast field which is being studied by numerous scholars. Here my theoretical approach is close to Hayden White’s theories, at least in the way that I am interested in the actual writing process of history (cf. Hayden White, ‘The Practical Past,’ in *Historiein* 10 (2010), 10–19). I have also been influenced by Frank Ankersmit’s analysis of the relation between the feeling and expression of the temporal (see Frank Ankersmit, *Meaning, Truth, and Reference in Historical Representation*. Ithaca, Cornell UP 2012, and ‘Historical Experience Beyond the Linguistic Turn,’ in Nancy Partner & Sarah Foot (ed.), *The SAGE Handbook of Historical Theory*. Los Angeles, SAGE 2013, 424–438). Nevertheless, in many cases I have found it useful to borrow from and refer to theorists of aesthetics such as Arthur C. Danto and Hans-Georg Gadamer, who, with different emphasis, illuminate the interplay of the subjective and object in cultural reproduction.

attributed with affective meaning, and they are “true” because other options are perceived as untenable. As a finished aesthetic entity, a history, a narrative of and for a community, is “correct” because there cannot be other options.

I take as my starting point a conceptual historical approach in which concepts and metaphors are perceived as flexible and contested symbols in communal meaning production.⁸ These terms and sayings manage to include the various and even contradictory opinions on the phenomenon they signify.⁹ In other words, concepts and metaphors are the mediums which deliver the experience of the writer to the receiving end. They help, on the one hand, historians to present personal and credible arguments on a contested subject to a wider audience and, on the other hand, the wider audience to understand historians’ claims at a personal level. To focus on the linguistic mediums, and perceive historical writing as a dialogue, enables the researcher to take into account the concurrent impacts of personal view, public influence and scientific tradition in the legal historiographical texts under scrutiny.

Such a stance is helpful especially when studying the continuities and discontinuities embedded in a given historiographical culture. Franz Wieacker, among many other legal scientists, wrote of matters which were anchored in concrete reality, such as ‘property’ and ‘education.’ Amidst the social and political turbulence of early twentieth-century Europe, the actual circumstances defining these entities changed rapidly, and so did the common meanings which were associated with them, as well as Wieacker’s view on those phenomena. However, this study is not about tracking developments in legal definitions, since that was not the manner in which Franz Wieacker himself understood legal historical change. For him, legal historical analysis should not focus on legal language concerning “things,” but on the mentality, perceptions and valuations related to those “things,” and their change in time. To Wieacker, “things” were always mere (though important) particles of a wider cultural understanding regarding the rule of law and justice, and, in the end, a temporal change in those entities should be the primary interest of a legal historian.¹⁰

Wieacker explicated the abstractions of justice and people’s understanding of the rule of law with the concepts of *Rechtsgewissen* and *Rechtsbewusstsein*, ‘legal conscience’

⁸ See e.g. Reinhard Koselleck, *Begriffsgeschichten. Studien zur Semantik und Pragmatik der politischen und sozialen Sprache*. Frankfurt am Main, Suhrkamp Verlag 2006; Jan Iversen, ‘About Key Concepts and How to Study Them,’ *Contributions to the History of Concepts* 6(2011):1, 65–88.

⁹ I, however, go even further than traditional *Begriffsgeschichte* in holding that concepts and metaphors are perfect and elemental cognitive tools in connecting the domains of the writer and his or her audience in the field of history. Cf. George Lakoff & Mark Johnson, *Metaphors We Live By*. London: Chicago UP 2003; Gilles Fauconnier & Mark Turner, *The Way We Think: Conceptual Blending and the Mind’s Hidden Complexities*. New York, Basic Books 2002; Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, Garden City, Anchor Books 1966.

¹⁰ See e.g. Franz Wieacker, ‘Entwicklungsstufen des römischen Eigentums,’ in Helmut Berve (Hrsg.), *Das Neue Bild der Antike*. Leipzig, Koehler & Amelang 1942. 156: “Die Art, wie eine Rechtswissenschaft das Eigentum bestimmt, kennzeichnet ihr Verhältnis zur sozialen Wirklichkeit und die Eigenart ihres Denkstils.”

and ‘legal consciousness.’¹¹ Embedded in these two concepts were the common meanings which the contemporary time gave to “things,” but moreover, they also included the accumulated knowledge of preceding scientific tradition, and the personal valuations of the scholar utilizing them. *Rechtsbewusstsein* and *Rechtsgewissen* were frequently and widely used terms in German legal science from the 1930s to the 1960s, and they played a significant part in Wieacker’s legal historical texts, but moreover, these concepts were tools with which Wieacker – and indeed many other legal scientists too – perceived his society and its change in time.

Concentrating on these two concepts and by following the lines of my theoretical framework, an intellectual historical study of a culture of writing about the past through the character of Franz Wieacker can be made. It also provides a stance in which the experience and historical view of Franz Wieacker are not unconditionally attached to the general historical development of Germany nor tied to the narrative of German legal scholarship. However, acknowledging the dialogical nature of historiography and the communal bind which concepts carry with them, necessarily places Wieacker within a certain group of scholars. His personal view of contemporary society was not a closed creed, but an evolving stance, which he and his circle of friends reflected. So, while studying the ideas in Wieacker’s texts, I argue that I can comment on the assumptions, explanations and ideologies of a group (a community) of people, rather than on the mere axioms of one particular scholar. The research interest of this study, therefore, is concerned with the continuities and discontinuities in this culture of writing about the past.¹²

This study analyses the ideas of a scholar, and concurrently his relation to politics, the ideal of social good and the morality of science. Thus, and in addition, it also contributes to an understanding of Franz Wieacker’s intellectual context. I study how a community of scholars once saw the definition of the abstractions of social justice and rule of law in the European framework as their own projects. Their definitions were transformed by the common experiences they faced, and the virtues appreciated by this material community characterized the form of the justice and rule of law they represented. In distinction to previous studies I am able to tie Franz Wieacker’s understanding of the relation between scientific knowledge and society to the

¹¹ A more detailed definition of the concepts of *Rechtbewusstsein* and *Rechtsgewissen* will be given in the methods chapter.

¹² Here I lean on scholars like Axel Honneth (*The I in We: Studies in the Theory of Recognition*. Cambridge UK, Polity Press 2014, especially 201-216) and David Carr (*Experience and History. Phenomenological Perspectives on the Historical World*. New York, Oxford UP 2014), but also on classic social psychological studies, which insist that the interaction between the public and private spheres of society can be examined through the concept of a group. A group is an intermediary tool, concept and forum between the individual and society. (See e.g. Philip E. Converse, ‘The Nature of Belief Systems in Mass Publics,’ in *Critical Review*, 18 (1964), 1-74; Henry Tajfel, *Human Groups and Social Categories*. Cambridge, Cambridge UP 1981). Similarly, “culture” according to Benedict Anderson, is not *the* body of people sharing a language or ethnic origin, but the values to which an individual is attached and can perceive in concrete terms (Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London, Verso 2006, 1–65).

worldview of this legal scientific community. Wieacker's personal understanding of morality and justice in society and the corresponding beliefs of his closest colleagues were built upon similar premises. The intertwining of this shared belief, social change, and cumulative learnedness in scientific tradition shaped Wieacker's academic texts from the 1930s to the 1970s. The continuities and discontinuities in the ideas embedded in that body of scientific writings affect even today our common understanding of European legal heritage and the ideas of justice and the rule of law in continental legal history.

1.1. Historical background for the research and research questions

Franz Wieacker was a Romanist and legal historian, and sometimes it is hard to say which came first. He did not write solely on matters concerning Roman law and its heritage in the modern German (and European) legal system, for his texts contributed to discussions about legal hermeneutics, property and work law, as well as methodological questions, both before and after the Second World War.¹³ In all these subfields of legal discipline, his writings either clarified or re-interpreted the existing body of knowledge. In his scientific texts, through those decades, the target was always the existing law, and he actively tried to have an effect on contemporary jurisprudence, judicature and even legislation. If there is a concise theme inside Wieacker's scientific works, it must be the question of justice, namely the problem of a just interpretation. "To search for the timeless idea of justice" from the history of European legal tradition is the research task that Wieacker explicitly formulated for himself in the first pages of his classic book "*Privatrechtsgeschichte der Neuzeit*" (1952).¹⁴ Wieacker's ideas on the history and practice of that justice are groundbreaking and are still influential today. He was one of the most influential legal historians of twentieth-century Germany, and analyzing his texts means scrutinizing a theory which many other scholars have taken as a starting point or comparative model in their respective works.¹⁵

In the 1930s Wieacker established his status among the leading young legal scholars in Germany. He started his academic career as a scholar of Roman law, but soon moved on to more contemporary themes, and was renowned especially for his work on property law. Wieacker's works had an effect not only in giving a sophisticated and appropriate elaboration of the phenomenon of ownership in law, but through his writings he indirectly supported the National Socialist intentions to bend jurisprudence

¹³ Marion Träger, 'Methode und Zivilrecht bei Franz Wieacker (1908–1994),' in Joachim Rückert, Ralf Seinecke *Methodik des Zivilrechts - von Savigny bis Teubner*, 2. Auflage 2012, 235.

¹⁴ Wieacker, *Privatrechtsgeschichte* 1952, 8: "[Rechtsgeschichte ist] Geschichte schlechthin, gesehen unter dem übergeschichtlichen Gesichtspunkt der Rechtsidee und der Rechts Erfahrung."

¹⁵ Winkler 2014, 1–2.

so that it echoed the fascist political ideology.¹⁶ After the war, Wieacker's influence was again dual. His texts which concerned legal interpretation, and especially his thorough *History of Private Law in Europe (Privatrechtsgeschichte der Neuzeit)*, shaped the way in which continental legal scholars perceived the study of law. However, Wieacker's input on the larger paradigmatic shift when continental legal history started to emphasize continuities and kinship between the Roman legal tradition and European, namely United European, law, was also decisive.

The time frame of my study (1933-1968) takes us from the beginning of the Third Reich to the early Berlin Wall years and the student riots of the late 1960s. This frame leaves out some significant work Franz Wieacker produced and rules out a detailed study of the development of his scientific stance as a whole. I argue for this framing on the basis of the coincidence of several important events in the personal and public spheres of the scholar under scrutiny, in both the starting and end point of my time frame. In 1933 not only did Nazis seize power in Germany, but Franz Wieacker also took the first steps in his academic career.¹⁷ In the 1960s the Berlin Wall was erected, Konrad Adenauer left his position, student riots escalated in 1968, and West Germany had to face its Nazi past in an unprecedented manner.¹⁸ In 1967 the second revised edition of Franz Wieacker's magnum opus *Privatrechtsgeschichte der Neuzeit* was published. In this volume Wieacker concluded the results of his scholarly work of the last decades, and in a much more direct manner than in the first edition of 1952 he extended his analysis to the fields of historical meaning and interpretation. For Wieacker the late 1960s was an era of rethinking, not only in the scientific sense, but also with regard to his personal history. This becomes evident in the publication of the revised version of his 1935 article *Wandlungen in Eigentumsverfassungen*.¹⁹ 1968 marked the ending of an era both to Wieacker personally and in more general terms to the Federal Republic of Germany. Since it would be impossible to cover Wieacker's whole career in this study, I consider the boundaries I have placed to be justified.

In this study I take Franz Wieacker's personal history and scholarly identity to be deeply intertwined with the more general social and scientific destinies of Germany, and argue that this connection is also evident in the ideas of his academic texts.²⁰ My purpose, however, is not to offer social historically derived causal explanations of the ideas of a single individual. Both before and after the Second World War, the view

¹⁶ See Wolf 2007, 77 and Wieacker's influence on the 1937 reform of matrimonial law.

¹⁷ Wieacker completed his *Habilitation* in 1933 and started to gain a good reputation among legal scholars towards the end of the decade. Liebs 2010, 34-35.

¹⁸ Dirk A. Moses, *German Intellectuals and the Nazi Past*. New York, Cambridge UP 2006, 8-9.

¹⁹ Both the original article 'Wandlungen der Eigentumsverfassung' [1935] and "Wandlungen der Eigentumsverfassung" revisited' [1976/77], can be found in Christian Wollschläger (Hrsg.), *Franz Wieacker. Zivilistische Schriften (1934-1942)*. Frankfurt am Main, Vittorio Klostermann 2000, 9-108; 475-491.

²⁰ Mark Bevir, 'Mind and Method in the History of Ideas,' in *History & Theory* 36 (1997):2, 167-168: "When we study the history of ideas, we look at ideas as they appear in texts and other artifacts from the past."

that Franz Wieacker had on society cannot be straightforwardly equated with any particular ideology, but it is obvious that the shifts in the material conditions and changes in the political sphere of the society were reflected in his works. Moreover, even the intellectual atmosphere, or “public opinion” if one prefers, itself is a very complex and multileveled phenomenon.

For example, National Socialism was neither a monolithic nor a completely thought out plan of actions for the German people. Rather, from the beginning it constituted two competing discourses: the harsh anti-Semitism of the NSDAP, and disguised ethnic fundamentalism directed towards “ordinary” Germans. No one had absolute mastery over this ideology. In other words, “National Socialism” was defined (one could say constructed) in interactive situations in the context of old clubs, committees, classes, gatherings, informal chats between neighbors, friends and relatives, etc., namely wherever people shared their experiences of recent social events.²¹ Nevertheless, behind the communal meaning construction of the 1930s was the National Socialist party’s ruthless greed for power. The unusual nature and success of the fascist revolution was due to its capability to persuade the old networks of the Republic to redefine themselves as National Socialist.²² The Nazi demagogues utilized common emotions or intentions like political opportunism, fear, nationalistic euphoria or the mere wish to have an effect on one’s local environment. They created an atmosphere and social possibilities where individuals motivated by those feelings could take a lead in stabilized or totally new, freshly established, networks and groups. These new champions of the “movement” were provided with the vocabulary and concepts of National Socialism, which they then interpreted in their own context and preached in their communities. The task of this standardized vocabulary and language was to disguise the harsh takeover of communal networks and present it as a strong and unified, unprecedented uprising of the *Volk*.²³

Academia and jurisprudence were by no means immune to this phenomenon. The emphasis on *Führerprinzip*, enthusiastic but irrelevant deployment of the fashionable rhetoric and outright racist remarks in academic texts, were common traits in the legal scientific works following the National Socialist *Machtergreifung* [seizure of power].²⁴ The National Socialist revolution, however, did not as such change legal historical methodology. Of course, if one wanted to obtain grants, be promoted or even

²¹ Claudia Koonz, *The Nazi Conscience*. Cambridge, Harvard UP 2003.

²² Thomas Rohrkämper, *A Single Communal Faith? The German Right from Conservatism to National Socialism*. New York, Berghahn Books 2007.

²³ Koonz’s account of Martin Heidegger as a new herald of the *idée*, gives an example how scientific language was jumbled with the new vocabulary as a nonsense, which power lied not in its verbal reasoning or deduction (which it didn’t have), but in the ruthless and overwhelming message of fundamental change. Koontz 2003, 46-56; About the lack of “legal philosophy” in National Socialistic law see Michael Stolleis, *Law under the Swastika. Studies in Legal History in Nazi Germany*. Chigago, Chigago UP 1998, 20-21, also 35, 98.

²⁴ Stolleis writes of “centralized regulation of language”. Stolleis 1998, 12, also 15, 7, 45; Bernd Rüthers, *Die Unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*, 7. Auflage. Tübingen, Mohr Siebeck 2012, 91–111.

keep one's job, the research topics, questions and results had to follow a certain pattern. But this "paradigmatic change," like every other change, left free space for scholars to express themselves as scientists.²⁵ Despite the seemingly harsh demands of the National Socialist state on academic life, and especially on those studying Roman law, the party for the most part let the learned be, possibly because the Nazis were just not very interested in human sciences.²⁶ The majority of German scholars did not feel that they were involved in a theatrical pseudo-scientific game; it was relatively easy to contribute to the introduction of the "legal renewal," at least on the level of rhetoric, and ignore the already visible and alarming signs of injustice.

The relation between scholarly ideas and both the social and scientific beliefs of the time was by no means a simple, causal or unidirectional one.²⁷ Before the Second World War, and despite the fact that many scholars found the public mentality following the fascists' accession to be empowering, it was common among academic circles to look down at, silently disdain, or fear the vulgar Nazis. The academic stance towards National Socialist politics was fused with the experience of the generational revolution, which overshadowed the social perception of young scholars.²⁸ Nevertheless, fascist rhetoric was commonly used in academic works, and scholars utilized the positive chance to see the emerging historical force as a guiding light to clarify unsolved episodes of the past.²⁹

²⁵ Karen Schönwälder shows how historians absorbed new vocabulary to old scientific models and analyzed for example foreign policy from the same ground as before, now only in a more aggressive way. Karen Schönwälder, *Historiker und Politik. Geschichtswissenschaft im Nationalsozialismus*. Frankfurt, Campus Verlag 1997; cf. Stolleis 1998, 95-105; Georg G. Iggers, *Deutsche Geschichtswissenschaft. Eine Kritik der traditionellen Geschichtsauffassung von Herder bis zu Gegenwart*. Wien, Böhlau 1997, 320-328.

²⁶ Hans-Peter Haferkamp, *Die heutige Rechtsmissbrauchslehre: Ergebnis nationalsozialistischer Rechtsdenkens?*, Baden-Baden, Nomos Verlag 1995.

²⁷ "Their [lawyers'] motivations for later affirmation were complex and diverse. The systematic conservatism of lawyers in supporting the rulers on the basis of legality does not suffice to explain the motivations behind their sometimes enthusiastic advocacy. Hope for an end to the permanent crisis of the Weimar system was coupled with relief at the demise of an unpopular republic. Often, National Socialism was misunderstood to be a conservative movement. On top of everything else, the coming generation expected it to provide career opportunities and soon filled the positions of the numerous professionals driven out by the Law to Restore the Professional Civil Service [Gesetz zur Wiederherstellung des Berufsbeamtentums]," Reinhard Mehring, 'Introduction,' in Arthur J. Jacobson & Bernhard Schlink (ed.), *Weimar. A Jurisprudence of Crisis*. Berkeley, University of California Press 2000, 314.

²⁸ E.g. Michael Wildt, *An Uncompromising Generation: The Nazi Leadership of the Reich Security Main Office*. Madison, Wisconsin UP 2009, 37-80; Mark Roseman, 'Introduction: generation conflict and German history 1770-1968,' in Mark Roseman (ed.), *Generations in Conflict: Youth Revolt and Generation Formation in Germany 1770-1968*. Cambridge, Cambridge UP, 1-40.

²⁹ Outline article about the subject, see Winfried Schulze, Gerd Helm & Thomas Ott, 'Deutsche Historiker im Nationalsozialismus: Beobachtungen und Überlegungen zu einer Debatte,' in Winfried Schulze & Otto Gerhard Oexle (Hrsg.), with the assistance of Gerd Helm & Thomas Ott, *Deutsche Historiker im Nationalsozialismus*. Frankfurt am Main, Fischer Verlag 1999; also Stolleis 1998, 55-56, 61.

Consequently, in 1945 most Germans had to face what Peter Fritzsche calls an “abyss” of emotions.³⁰ Worry, victimization, scarcity, shame and cynicism existed alongside of the need to hold on to what one had possibly achieved during the previous years. For many, Germany’s defeat came close to being a traumatic experience as it destroyed and removed symbols and structures which had previously represented emotions and ideas which were important with respect to one’s *own* narrative and life as a member of a group. Now societal change affected everyday practices with respect to nutrition, work and safety. Besides, where there was a continuum in conservative lifestyle from Weimar to the Nazi regime, the end of the Second World War in Germany also meant, to a degree, an end to a certain nationalistic ideology.³¹ Many (especially those who had foreign contacts, like scholars) faced outside pressure to explain one’s, in retrospective possibly questionable, actions during the recent decade. The moral condemnation of the winners and the revealed horrors of the Nazi regime, also comprised a serious dilemma to the individual ethic. The almost inconceivable National Socialist crime against humanity did not fit into and was not acceptable in any historical explanation.³² As a participant (or even as a silent supporter) of a social phenomenon which had committed such crimes, how could one define oneself as a moral agent following certain rules or aspiring to certain righteous goals?

Again, explanations were constructed within networks. However, in many cases there was no revolution in communal or local networks, and the people who were in charge during the wartime were able to keep their positions.³³ The allied countries were mostly interested in either exploiting the rich coal resources of Germany or worried about the relational power hierarchies within their own, slowly eroding coalition. For Germany, the ultimatum to immediately switch from a fascist nation to a country like its liberal western victors, was a mission impossible with respect to at least scientific tradition and common culture. The existing social structures, the few which still worked after the total defeat, largely concentrated on mere survival and did not prioritize distinguishing themselves from the legacy of the previous years.³⁴ Universities were among those strongholds where the former supporters of the National Socialist regime maintained their posts. Only a few scholars eventually lost

³⁰ Peter Fritzsche, *Life and Death in the Third Reich*. Cambridge, Harvard UP 2008, 13–14.

³¹ Brown et. al found that the harsher the conditions with respect to everyday routines get, the more traumatic and dominating the memory of those times will become (Norman R. Brown, Tia G.B. Hansen, Peter J. Lee, Sarah A. Vanderveen & Fredrick G. Conrad, ‘Historically Defined Autobiographical Periods: Their Origins and Implications,’ in Dorthe Berntsen & David C. Rubin, *Understanding Autobiographical Memory: Theories and Approaches*. Cambridge, Cambridge UP 2012, 160–180). On the significance of informal collectives in the German recovering process, see Thomas Kühne, *Kameradschaft. Die Soldaten des nationalsozialistischen Krieges und das 20. Jahrhundert*. Göttingen, Vandenhoeck & Ruprecht 2005, 209–252.

³² Iggers 1997, 318-319; Moses 2007, 15-36, 50-54.

³³ Kühne 2005, 214–221; cf. Wildt 2009, 377–403.

³⁴ Carolyn Eisenberg, *Drawing the Line: The American Decision to Divide Germany, 1944-1949*. Cambridge, Cambridge UP 1996.

their place within the academia due to their co-operation with the Nazis.³⁵ In academia the emotional re-categorization met with the negative challenge to rewrite history, since the fashionable concepts of the preceding decades, utilized to make sense of the past and present, had been steered towards following the fascist vision of the world.³⁶ There was an unbridgeable gap between one's experiences and the language that was used to make sense of social and legal phenomena. Yet, the immediate past had to be articulated and rationalized, *and* in a way which explained the unacceptable in one's society as well as within the self. At first glance, the explanative act was paradoxically conducted by means of the old concepts, metaphors and philosophical constructions which were used to back up a National Socialist regime.

In the field of legal science, there is hardly a decisive paradigmatic rift between the discourses of the Third Reich and those of post-War Germany. With respect to methodology, one cannot distinguish any clear change which would have occurred on account of some war-related turn in the intellectual atmosphere.³⁷ However, it is obvious, and as I intend to show, that scholars did reflect their personal past and the new situation in their networks. At first glance this reflection seems to remain outside the textual level of their works. Visible in them is only the "communicative silence" deployed with regard to the Nazi years, the emphasis on natural law and away from Germanistic explanations.³⁸ Widely acknowledged in recent elaborations, however, is the "rise" of Roman law as a source and a stable ground in reconstructing the European legal culture. According to Michael Stolleis, this was due to the more "untainted" status of Roman law, since Nazis originally, in their Party program, had announced their repulsion towards it.³⁹ After 1945 scholars like Franz Wieacker and Helmut Coing explicitly argued on behalf of the shared European legal culture built upon the foundations of the law of the Late Roman Republic. This stream of thought became dominant, was later developed by, for example, Raoul C. Caenegem and Peter Stein, and has retained its status well up to our own days.⁴⁰

An important feature of the explanations about the essence of Nazi Germany and the academia within it, as well as the concept of European legal culture built on Roman

³⁵ Schulze, Helm & Ott 1999; Steven P. Remy, *The Heidelberg Myth: The Nazification and Denazification of a German University*. Cambridge, Harvard UP 2002, 146–176; Stolleis 1998, 3.

³⁶ Stolleis 1998, 10, 25–26.

³⁷ Rütters 2012, 485–504.

³⁸ Herman Lübke, 'Der Nationalsozialismus im politischen Bewusstsein der Gegenwart,' in Martin Broszat, Ulrich Dübber & Walther Hofer (Hrsg.), *Deutschlands Weg in die Diktatur. Internationale Konferenz zur nationalsozialistischen Machtübernahme im Reichstagsgebäude zu Berlin. Referate und Diskussionen. Ein Protokoll*. Berlin, Siedler Verlag 1983, 329–49; Lena Foljanty, *Recht oder Gesetz. Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit*. Tübingen, Mohr Siebeck 2013, 343–373.

³⁹ Michael Stolleis, 'Die Rechtsgeschichte im Nationalsozialismus: Umriss eines wissenschaftsgeschichtlichen Themas,' in Michael Stolleis & Dieter Simon, *Rechtsgeschichte im Nationalsozialismus: Beiträge zur Geschichte einer Disziplin*. Tübingen, J.C.B. Mohr 1989, 5–6.

⁴⁰ Raoul C. von Caenegem, 'History of European Civil Procedure,' in *International Encyclopedia of Comparative Law* XVI, Chapter 2, 1973; Peter Stein, *Roman Law in European History*. Cambridge, Cambridge UP 1999.

law, is that not only were they reconstructed in retrospective, but also mostly by people who had to reevaluate the stance they themselves had taken during the Nazi regime. Today, few, if any, claim that German scholars managed to maintain their strictly objective handling of the subject matter both before and after the Second World War, free of outside interference, and thus produced textual presentations only about and solely on legal *science*. Rather, the opposite view, emphasizing the deep and effective relation between the scientific and the political spheres during the Third Reich, as well as the apologetic tone after the War, appears to be more like the paradigmatic truth.⁴¹ In the 1950s, while looking back to the 1930s, it was almost impossible for scholars to deploy the same methodological requirements they were supposed to use in their research in analyzing their own part in the intellectual life of the Third Reich. Such a demand for objectivity on behalf of later generations is in fact very unfair, since, as I intend to show, it would have required scholars from the 1950s to reject the very principles that keep personal and social identities together and enable historical writing, namely a trust in the congruity between the individual and communal narratives and a certainty in one's ability to interpret temporal phenomena.

The change in the premises which defined the work of a historian from the 1930s to the 1970s has been explicated by Franz Wieacker himself, when in 1976 he rewrote his old article 'Wandlungen der Eigentumsverfassung' from 1935. In the original article Wieacker wrote:

Der überpersonliche Verband, für den die Befugnisse des Bauern ausgeübt werden, ist der Blutsverband des Bauerngeschlechtes (nicht der Kleinfamilie). Das Geschlecht ist der Kreis der Volksordnung, in dem das Erbhofeigentum mit ihr zusammenhängt. Diese Ordnung gründet sich nicht auf abstrakte Rechtssubjekte, sondern auf der Verbindung konkreter Personen durch einen Blutszusammenhang.⁴²

The rhetoric and style of the texts belongs unmistakably to the National Socialist culture. Emphasizing the 'blood-bind' and the entity of the 'people' as principles defining the individual's position towards the state, were clichés in the legal science

⁴¹ At the level of public and explicit evaluations, very few paid any attention to the co-operation between academia and the National Socialists (Mehring 2000, 315). However, in the private sphere, legal scientists acknowledged that the scholarly world had played its part in strengthening and justifying the violent exclusion and destruction of an entire people, not only inside academia but with respect to public opinion (see e.g. Meinel 2012, 240). On present elaborations on the responsibility theme, see Michael Stolleis, 'Prologue: Reluctance to Glimpse in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945,' in Christian Joerges & Navraj Singh Ghaleigh, *The Darker Legacies of Law in Europe and Fascism over Europe and Its Legal Traditions*, Oxford, Hart Publishing 2000, 1–18.

⁴² Wieacker, 'Wandlungen der Eigentumsverfassung' [1935], 80–81. "The transpersonal association for which the prerogatives of the farmers were exercised, is the association by blood of the farmer family (not the nuclear family). The family is the unit of the people's order with which the family farm is associated. This order is based not on abstract legal entities, but rather on the connection of actual people by blood." (Translation by HW).

following the National Socialist *Machtergreifung*. Later Wieacker revisited the article from the perspective of democratic society. In 1976 he wrote:

Obwohl sie [the original article] kein Wort enthält, an das der junge Autor nicht glaubte [...] und obwohl ihr Inhalt ergibt, dass sie nach Absicht und Wirkung die Unterdrückungen und Rechtsbrüche des Regimes in seinem weiteren Fortgang nicht ermutigen konnte, muss der Vf. ihr heute doch die Illusion vorhalten, das neue Regime habe es damals ernstlich und verantwortlich auf eine gerechte [...] Neuordnung der Sozial- und Besitzverfassung einer modernen Industrienation abgesehen. [...] Der Stil hält sich zwar wie ich denke, von opportunistischen Phrasen frei, und meidet – übrigens in bewusster und erkennbarer Distanzierung von der parteioffiziösen Beschimpfung der Andersdenken – jegliche Herabsetzung der weltanschaulichen Gegner und Gegenrichtungen der damaligen Machthaber [...]⁴³

There is no doubt that Wieacker in 1976 saw his old article as incorrect, and in the light of succeeding historical development, unethical. Nevertheless, even if one believes – as I do – that Wieacker sincerely tried to review his earlier worldview, comparison of those two articles does not comprehensively answer questions concerning historiography's relation to the society and tradition in which it is being contextualized. Further, the dilemma of continuity continues. Wieacker's revisiting verifies that there was a change in his legal historiography – and in the premises that affected his representations – but neither Wieacker nor a contemporary reader can point out a simple factor or factors to explain the change. Wieacker insisted that the original article was not mere 'opportunism.' He did not write 'Wandlungen der Eigentumsverfassung' in order to improve his own position within the Third Reich or to make an impression on the political and scientific leaders. Rather, the article was the result of a belief in a certain social reality and development which had led to that situation.⁴⁴ How did the original 'belief' become constituted, and when and why did the 'belief' in the nature of social reality transform to what it was in 1976? Moreover, Wieacker proposes that some structures in his thinking and valuations have remained the same, although he has 'matured' and currently lives in a totally different ideological environment. What were those principles and why did they stay with him? There were continuities and discontinuities in Wieacker's historiographical culture,

⁴³ Wieacker, "'Wandlungen der Eigentumsverfassung' revisited' [1976/77], 475–477. "Although it [the original article] contains no word that the young author did not believe [...] and although its contents state that it cannot condone the oppression and breaches of law of the regime in its continued path given its intentions and effects, today the author must nevertheless reproach it for the illusion that the new regime at that time had as its goal a just [...] new order for the make-up of society and property in a modern industrial nation. [...] I believe that the phrasing avoids opportunistic expressions and any disparagement of the ideological adversaries and tendencies opposed to the rulers of that time, besides conscious and recognizable distancing from party-official complaining about those who think differently." (Translation by HW).

⁴⁴ cf. Behrends 1995, XXIII.

and although they most certainly relate to changes in the epistemological bases guiding the work of a legal historian, shifts in the political atmosphere in which he lived and in the material conditions of society, none of them alone provides an adequate explanation of the historiographical change.

In deconstructing the textual meaning which Franz Wieacker exhibited in his time and society, one needs to take into account two fundamental difficulties in the history of ideas. They are, namely, the problem of discerning individual agency and thinking from conceptual expressions, and a more general question of understanding scientific texts from another time and culture. First, it is very difficult to define the space for a subjective agency inside a historical situation and scientific discourse. In other words, how committed were German scholars in the 1930s to Nazism, and how ardently did they try to make sense of the(ir) past in the 1950s? The expressions which we nowadays categorize as fascist or belonging to some other ideological family, were once fashionable and widely used, even if individual authors who used them necessarily did not adhere to the ideology with which the concepts have later been associated. The primary sources of intellectual history, the scientific texts themselves, do not differentiate between the ideological, opportunistic, or social reasons behind the intentions and textual decisions, and the motivational force which connected the scholars to nationalism before and de-nazification after the Second World War remains ambiguous. If one is committed to a legal or intellectual historical study of the academic texts of past generations, and simultaneously acknowledges the influence of the “outer-scientific” forces in the object of one’s study, it is necessary to weigh the effects of an author’s personality, scientific discourse and the historical situation within those texts. It would be a naïve and not very solid argument to assert that the pre-war works of a given historian were thoroughly “wrong” if the author has shown some support for fascist ideas, but that orientation nevertheless comprises a dilemma when studying the later works of that very same writer.

A much deployed (self-)explanation in clarifying the changing of meanings in a historian’s texts, is to point to societal reasons, especially on social pressure or public influence. This view not only makes it impossible to discriminate *any* historical presentation, but it also simply transfers the original dilemma to a different place. If the differences between histories of a given historian are explained on the grounds of nationalism, one is entitled to ask why scholars were oversensitive to nationalism, but immune to other ideologies. After all, according to the self-proclaimed rationalism of social sciences, researchers should be able to exclude the influence of current public opinion from their methodologically attuned research machinery. Consequently, and with respect to Wieacker, this problem expresses itself as a difficulty in grasping his sincerity while deploying a certain rhetoric, and the extent to which he believed that those politically loaded terms did depict reality in a truthful way.

For example, during the 1930s and early 40s Wieacker utilized the concepts of *Weltreich* [empire] and *Konkrete Ordnung* [concrete order], confident in their ability

to represent reality, but after 1945, like every other respected legal scholar, he ceased to use them on account of their fascist connotations. He also deployed a concept like *Rechtsbewusstsein* to argue in support of the jurisprudence prevailing in the Third Reich, and in the post-Second World War society he used the same concept to highlight the innate and perennial failure of the fascist legal system.⁴⁵

It is obvious that the meanings to which these concepts referred in Wieacker's texts changed during the time he utilized them. The relations between concepts, contexts and discussions drastically altered from the 1930s to the 1970s, but to plausibly explain why, when, and how is a very complex matter. It is evident, nevertheless, that the referred meanings were not consistent; the exact connotations of a given concept in Wieacker's body of scientific writings varied in time, and to investigate the causes and bases of this variation is a task which is far from simple.

Second, how is one supposed to provide a solid analysis of a legal historical *text* from the 1930s or 1950s if the meaning of that *representation* changes according to the stance the researcher has to the circumstances which define the text under scrutiny? In another words, analyzing German legal science before and after the Second World War inevitably leads to comparisons between the values of the researcher and the objects of his study. In order to understand Franz Wieacker's ideas, one has to make an attempt to identify with his – and his closest colleagues' – worldviews, but how does one maintain a distance and avoid a concluding verdict? From our perspective, the state of German legal science in the late 1930s and some choices which Wieacker did in that context were simply morally wrong, but merely announcing that does not add any scientific value to one's study, nor does it treat the people of the past in an ethical way.⁴⁶ Although, and especially, with respect to fascism we can make moral judgments on representations, it is impossible by means of a retrospective analysis to draw a line exactly where and to what extent Wieacker 'erred' and where he 'succeeded' in his 'search for the timeless idea of justice.' We can explicitly compare his works on our current idea of justice and seek plausible differences, but that would not be a historical study of ideas. It is not possible to perfectly repeat the historical situation which the scholars faced before and after the Second World War, and then causally derive the meaning of a given text from this reenactment. Rather, a

⁴⁵ On 'Konkrete Ordnung,' see Franz Wieacker, 'Zum Wandel der Eigentumsverfassung' [1934], in Wollschläger (Hrsg.) 2000, 6. On 'Weltreich,' see Wieacker to Carl Schmitt 25.8.1942. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg. On *Rechtsbewusstsein* during the Second World War, see Wieacker, 'Das römische Recht und das deutsche Rechtsbewusstsein' 1944, and after 1945, see Wieacker, 'Privatrechtsgeschichte' 1952, 323.

⁴⁶ Here we are, of course, talking about a fundamental philosophical problem, the topic of a multitude of scholarly works, which usually and cordially agree on the impossibility of addressing this question exhaustively. Cf. Hans-Georg Gadamer, *Truth and Method*. 2nd rev. edition. Trans. Joel Weisheimer and Donald G. Marshall. New York: Continuum 2000, 277–284. With respect to National Socialism and Holocaust, see e.g. Dominick LaCapra, *Writing History, Writing Trauma*. Baltimore, Johns Hopkins UP 2001, 1–43. Hayden White, 'Writing in the Middle Voice,' in Hayden White, *The Fiction of Narrative: Essays on History, Literature, and Theory, 1957-2007*. Baltimore, Johns Hopkins UP, 2010: 255-262.

researcher's view, including my own, on the meaning of a text under scrutiny is in many respects predetermined by his own historical situation. This said, to investigate the above-mentioned themes in different historical situations remains fundamentally important in research in the history of ideas. Embedded within these dilemmas are the principles of the scientific pursuit of truth and justice/injustice, and to seek for a presentation of them, despite their ungraspable nature, should constitute a norm for self-understanding in the human sciences.

In this study I do not aim for an over-encompassing answer to the questions of truth or justice, but I do intend to show that an adequate analysis of a representation in history, such as a legal historical work of the 1930s or 1950s needs to take into account the affective side and level in the text one tries to study. One has to consider the intertwining of the personal and public spheres in historical representations, where the personal sphere cannot be perceived as clear-cut, invariable or even primarily rational.

The questions and preconceptions which guide my work are:

1. How did Franz Wieacker perceive the political and social changes of his society, and why did he believe some of them were just and some were unacceptable?
2. What were the continuities and discontinuities in the historiography of Wieacker, and with what kind of shared worldview or culture did he situate his historical vision?
3. By what means did Wieacker explicate his belief in the "truthfulness" of some historical development as well as the continuities/discontinuities in his historiographical culture at the level of text?

1.2. Previous studies

Legal science both before and after the Second World War as well as Wieacker's personal stance within it, have been dealt with in various studies. None of these works, however, shares the research approach I have chosen in my analysis, or leans on similar source material. I have divided the existing research literature on Franz Wieacker which I have utilized in my study into two categories in order to highlight the added value of my elaboration with respect to the previous research.

The starting point for the studies on the history of legal science in Germany is usually found, in one way or the other, in the works of Michael Stolleis.⁴⁷ Stolleis's reviews on the jurisprudence of the twentieth century remain a major achievement, but do not concentrate very deeply on single cases, at least not in Franz Wieacker's case. In

⁴⁷ See e.g. Michael Stolleis, *Gemeinwohlformen im nationalsozialistischen Recht*. Berlin, J. Schweitzer Verlag 1974, and Stolleis 1989; 1998; 2000.

addition, in them, as well as in Bernd Rüthers's books, the emphasis is on the twisted legal system and its later reconstruction as a whole.⁴⁸ The authors concentrate more on the discontinuities and continuities of the structures than with identities. Since the primary focus of this thesis is on one scholar, I also need to utilize more narrowly focused works.

With respect to the individual position of Wieacker within the historical context, Detlef Liebs, Okko Behrends and Joseph Georg Wolff have provided very detailed and sophisticated biographies of Franz Wieacker.⁴⁹ They all studied under the guidance of Wieacker, and thus possess a first-hand experience of his personality and character. The biographies they have written present an invaluable aid in my attempt to scrutinize the ideas in Franz Wieacker's texts. My study is, however, in a different situation with regard to their works, since I have been able to utilize a large portion of the correspondence between Wieacker and his close friends stretching from 1930s to 1970s. Over one hundred and fifty letters from Wieacker to, for example, Gerard Dulckeit, Ernst Forsthoff, Hans-Georg Gadamer, Ernst Rudolf Huber, Karl Larenz, Erich Rothacker, Salvatore Riccobono, Carl Schmitt, Rudolf Smend, Werner Weber and Erik Wolf provide a rich body of primary sources which previous writers have not been able to use. The Franz Wieacker whom his former students knew was a middle-aged professor who had already done his work in explaining the shifting social surroundings and his own place as an individual within them. The correspondence, however, offers an insight into the evolving identity of a scholar, constructed within the transforming social surroundings. Thus, I do not have to rely on the memory of those surroundings or inductions from general historical representation. In a way, the acquaintance of Wieacker's students with their teacher starts where Wieacker's correspondence ends. I believe the information provided by the letters gives me a firm ground for bringing the "personal sphere" into the research process when investigating Franz Wieacker's academic texts.

Probably due to the scarcity of good contemporary primary sources, the explanations for the acts and motives of Franz Wieacker have more or less inclined to approach one or the other extremes; either they emphasize the consequence of overwhelming nationalism in society *or* they point to individual and opportunistic motivations.⁵⁰ I aim for an analysis which does not lean too heavily either on individualistic and

⁴⁸ Rüthers 2012.

⁴⁹ Behrends 1995; Liebs 2010; Wolff 2007.

⁵⁰ The opportunistic explanation is given by Mathias Schmoeckel, *Auf der Suche nach der verlorenen Ordnung*. Köln, Böhlau 2005, 454. According to Ralf Frassek, Wieacker was, among the young scholars of the so-called *Kieler Schule*, with "great enthusiasm" and "encouraged by the new rulers" involved in politicizing legal science. Ralf Frassek, 'Wege zur nationalsozialistischen "Rechtserneuerung" – Wissenschaft zwischen "Gleichschaltung" und Konkurrenzkampf,' in *Von den Leges Barbarorum bis zum ius barbarum des Nationalsozialismus. Festschrift für Hermann Nehlsen zum 70. Geburtstag*. Köln, Böhlau 2008. Okko Behrends refers to the "illusion" which Wieacker, according to his "'Wandlungen der Eigentumsverfassung" revisited [1976/77]', had about the social political aims of the Nazis. Behrends 1995. Both Behrends and Detlef Liebs also point to Wieacker's young age during the *Machtergreifung*. Liebs 2010, 26.

opportunistic motives or explanations which sideline the impact of subjective agency when referring to overwhelming collective ideologies. In analyzing the interpretative act and dialogue within historiography, exploring the personal voice of Franz Wieacker is a necessity. In his letters Wieacker reflects upon his position vis-à-vis contemporary political and social events, but also, and more often, in relation to philosophies and theoretical constructions concerning legal science. Thus, through these letters it is possible to deduce the actual affective relationship which Wieacker had to the social world and academic ideas in his time.

In addition, and with respect to the research interest of this study, which I briefly sketched in the Introduction, the letters reveal the fundamental significance which Wieacker gave to his in-group. From his correspondence it is easy to both track down this loose group of friends and colleagues, and consequently observe how the contemporary social and scientific events were being processed within this circle. One can contextualize Wieacker's scholarly works within a shared matrix of social meanings and preconceptions. If Wieacker is studied as a representative of the culture of a group of scholars and the focus is on his interaction with others in a network which was facing similar emotional, social and political ruptures, research has something new to offer to legal history.⁵¹ Hence, the correspondence enables me to analyze Wieacker's texts in a way that has not previously been possible. His correspondence can be systematically studied as a result of an ongoing dialogue between an author and his social surroundings, where the obvious yet indefinite influences of personal worldview, scientific tradition and public opinion in historical writing are given the attention and importance they deserve.

In his dissertation Viktor Winkler presents an analysis of the academic influences that shaped Wieacker's perception of, and claims about, history. Winkler's book is a thorough and successful research on the academic influences and theories which had an effect on Wieacker's works. Here lies also its problem, since one can criticize it on the basis of the general critique directed towards the so-called "influence model."⁵² It is very difficult to assert plausibly that the peculiar features in a scientific text are a direct consequence of an encounter with another scientific argumentation. My biggest critique, however, is that Winkler's elaboration does not explicitly answer *why* Franz Wieacker chose to assimilate and use the theories he allegedly did. The influence model does not tie the sphere of scientific ideas to the domain of social reality, let alone personal motives. Rather, it composes ideas in causal chains, without hierarchy, affective aspects, and space for interpretation or re-interpretation. My claim is that in order to reach an adequate understanding of the intentions of a writer, one needs to

⁵¹ Cf. Stolleis 1998, 40-41: "Although it is true that scholars make their decisions as individuals, from a greater distance one can also see that they show a relatively uniform behavior as a group, and this allows us to make general observations."

⁵² See e.g. Quentin Skinner, 'Meaning and Understanding in the History of Ideas,' *History & Theory* 8 (1969), 3-53.

study the systemic interaction of not only ideas but also social emotions and practices in which that given writer participated.

The second category consists of the works of Joachim Rückert and Martin Avenarius. Joachim Rückert has elaborated how Wieacker used history in order to explain phenomenon in his recent past.⁵³ Martin Avenarius has successfully analyzed the peculiar methodology of Franz Wieacker and placed it within the field of twentieth-century legal history and science.⁵⁴ In this sense, Wieacker truly was an exceptional scholar since he impressively applied methods and sources from intellectual history and *Geistesgeschichte* to legal study. My attempt is not to study Wieacker in this respect. Rather, I focus on the way he constructed and utilized the *mentalities* he saw as forces in historical development.⁵⁵ In other words, I am not studying the legal scientist Franz Wieacker as an intellectual historian, but instead Franz Wieacker, a historian of ideas, as a legal scholar.

Wieacker held that the study of ideas and patterns of thought of past people gave as valuable information about legal history as did the scrutiny of the institutions and legal statutes of the past. Ways of thinking influenced and explained human behavior. This tendency was also characteristic of his work in general, and was a feature which separated him from the majority of the field.⁵⁶ In illuminating and describing these influential mentalities he borrowed concepts from legal historians and philosophers of nineteenth-century German idealism. With the help of these concepts and abstractions he both explained past events and action, but also connected them to recent social phenomena. These concepts comprised a point of comparison from where the movement in history could be explained. To Wieacker, the words depicting different modes of legal thinking were not just analytical tools in the categorizing attempt of a scholar. They were displayed and used as affirmative depictions, organic subfields of the legal system, and moral and educational entities affecting the everyday reality of the people. This method was a truthful way to analyze the inconsistencies of legal systems and the social reality (*Wirklichkeit*).⁵⁷

It is the connection of Wieacker's works to the political and social spheres of society, including both continuities and discontinuities that I intend to study. While doing so, a comparison of scientific representations needs to be deepened to involve the

⁵³ Rückert 1995.

⁵⁴ Avenarius 2010; 2013.

⁵⁵ cf. Franz Wieacker, 'Privatrechtsgesetzgebung und politische Grundordnung im römischen Freistaat,' *Die Antike* 16 (1940), 176: "[D]ie Geschichte ist nicht die Lehrmeisterin der Politik und die Rechtsgeschichte insbesondere keine illustrierte Unterweisung für Rechtspolitik [...] Die Offenbarung der Rechtsgeschichte spricht vielmehr nur Urgestalten des menschlichen Zusammenlebens im Recht aus [...] dass nur die Jurisprudenz Leben hat, die, wie die altrömische, dem Lebensgefühl, dem Stil und den sozialen Erfahrungen der Nation Stimme gibt."

⁵⁶ Wieacker, *Privatrechtsgeschichte* 1952, 7–8; cf. Avenarius 2010, 146; Michael Stolleis, 'Methode der Rechtsgeschichte,' in *Handwörterbuch zur deutschen Rechtsgeschichte, Band 3*. Berlin, Erich Schmidt Verlag 2016, 1475-1483.

⁵⁷ Cf. Franz Wieacker, *Rudolf von Jhering*. Leipzig, Koehler & Amelang 1942, 15, 20.

practices which the historian under study has participated in and his personal experience of the social change needs to be charted. A change in the ideas of an individual scholar or a scholarly culture does not restrict itself to a mere re-transformation of representations. Thus, in order to study conceptual change, one has to track the change in the identity or identities of the scholars under scrutiny. This is even more so when one is researching the intellectual history of early twentieth-century Germany, when the scientific community, along with society as a whole, faced unprecedented material turbulence.

Thomas Duve has explained changes in European legal historiography after the Second World War, using Wieacker as an example. The changes, he argues, derive mainly from the central European (German) desire to detach itself from previous Nazi theories, the narrow borders of the discipline of legal history already at the beginning of nineteenth century, the influence of two new-found theorists (Max Weber and Arnold Toynbee), and a certain degree of political opportunism.⁵⁸ These reasons are very likely true, but only present a partial picture. In Duve's account it seems as if researchers made a mutual rational decision to change scientific paradigm to emphasize common European roots. Duve's article also leaves unanswered why precisely Weber and Toynbee were employed and how political opportunism revealed itself in historiography. Scholars are not and were not blotting paper, soaking up wandering ideas. Assimilating and accepting an idea always requires rethinking.

If the breach between National Socialist and Eurocentric legal history is seen entirely as an academic change with respect to research questions and theoretical bases, the affective and personal level of historiography is easily diminished. Many scholars felt genuinely inspired amidst the general euphoria during the Nazi seizure of power. This emotion of belonging, expressed in different ways, substantially affected scholarly texts in the 1930s. Furthermore, it is relevant to ask to what extent the post-war turn towards the heritage of Roman law in European legal culture was due to the affective need to find a replacement for that genuine experience of true communality. As much as the German legal historians of the 1950s attempted to review the meaning given to the national (and European) past, they were at the same time explaining the events they had confronted both as individuals and as a group of legal scientists. This also worked vice versa. Wieacker's and his contemporaries' scholarly works had implications in the real world. If scientific paradigms are perceived as entirely value- and emotion-free, thoroughly rational cognitive constructs, science becomes an isolated playground in which scholars do not have to care about ethics or the consequences of their thoughts and teaching.⁵⁹

⁵⁸ Thomas Duve, 'European Legal History – Concepts, Methods, Challenges,' in *Entanglements in Legal History: Conceptual Approaches, Band 1*, Frankfurt am Main, Max Planck Institute for European Legal History 2014, 44–48.

⁵⁹ This is the central theme in Dominick LaCapra's work and from this problem he derives his demand for paying attention to mechanisms of *working through* and *acting-out* in historiographical texts

Merely adopting the idea that historiography evolves consistently with historical and political changes, is not, however, as such a sufficient point of departure for a study of the history of ideas. Placing a speech by Hitler next to a contemporary legal historical text and scrutinizing their similarities and differences does not necessarily bring about scientifically valid information. One needs to take into account, for example, the particular way that academic histories are written. Furthermore, when comparing a speech by Hitler and a history – and if it is a presupposition of this study that the particular history was indeed affected by the speech – it seems almost impossible to determine to what extent the latter was influenced by the Führer’s infamous presentation. It is hard not to fall into an either/or way of thinking, where the historical text is explained either as an intellectual heir of the speech, or as being completely free of its sphere of influence. Finally, (and if one still assumes some sort of relation between the two representations), how does the speech explain the nature of the historical text? Did the author absorb the doctrines of the speech into his personal worldview and began to see the past accordingly, thus writing a biased history? Or was it that the social reality, the community where the writing was being conducted, was so defined by the speech (or vice versa) that the historian automatically had to direct his research questions and task along its lines? The similarities could also remain solely on the technical level of the text. Possibly, the contemporary language, with respect to both scientific concepts and fashionable expressions, was simply contaminated by the rhetoric of the speech, preventing the scholar from expressing his argument in any other way?

Franz Wieacker’s historical texts were not produced in a mechanical relation to the ‘political sphere’ of Germany or legal historical tradition. Political changes and scientific ideas did influence his texts, but they were always adjusted to his moral standpoints about society, his personal understanding of historical development, and his idea of the role of science in relation to the national and public good. Previous studies on Franz Wieacker’s works and his scholarly persona agree that Wieacker’s engagement with the politics of legal science was at times quite exceptional, and his ability to conceptualize the legal spheres of justice and rule of law highly unusual. Without doubt the change in his intellectual context – from a participant in a fascist research group to a prestigious figure in an “untainted” academic discipline – as well as the lasting influence which he has had on continental legal science, indicate that a straightforward categorization of his scholarly endeavours is fruitless. Thus, a study which aims at analyzing a change in his ideas has to define carefully what the intertwinement of the public and private sphere in legal science and historiography actually means, both in general and with respect to Franz Wieacker’s texts.

(LaCapra 2001, 1–43). On concrete examples of the effects of legal scientific works, see Herlinde Paul-Studer & Julian Fink (Hrsg.), *Rechtfertigung des Unrechts. Das Rechtsdenken im National-Sozialismus in Originaltexten*. Berlin, Suhrkamp 2014.

1.3. Theory and Methodology: Deconstructing the historiographical act

Academic historiography as a way of writing has its own rules and norms which separate it from fiction or pure propaganda, and it cannot be straightforwardly analyzed as a literary endeavor or a self-reflexive report about the relationship between the community and the scholar.⁶⁰ The economic and political circumstances create a framework in which the scientist works, and the traditions and scientific authorities that he leans on, mold the research questions and view.⁶¹ But even for established research the past is absent. It is gone, impossible to submit to personal inspection. The power of historiography lies in its ability to bind large-scale events – noticeable in space and time – and people’s personal narratives in an explanatory way.⁶² This makes the past’s representations such influential and moldable discourses in our society. “Absence” can become a canvas where elements (hopes, emotions, motives and rhetorical explanatory tools) from our time are projected.⁶³

When writing history, historians aim at interpreting ‘the past’ in a way that distinguishes their work from previous elaborations, but *also* and always the intention is to shape the meanings given to ‘the past’ in a way that has an actual effect on their contemporary circumstances. Thus, Franz Wieacker not only studied the past, but through writing history proactively wanted to influence his society. But, if one studies the ‘desired effect’ of a given historian, it is not necessarily accurate to equate his intentions either with any particular policy of his time or with the scientific tradition which preceded his representations. Franz Wieacker’s historical representations were more or less contiguous with the current political atmosphere and were related to the tradition of legal history, but always reflected most the principles of his scholarly identity.⁶⁴

⁶⁰ After decades of arguing the mainstream perspective is that historiography is not comparable to historical fiction, and academic historical writing is directed by its own principles. Thus, the “truth claim” it states about history must be taken to have a different value than, for example, the “truth” of a historical novel. In short, academic historiographical studies are not first and foremost narratives, but justified, dialogic presentations of the past. Historical philosophers such as Richard Evans have moved the focus from historical “accuracy” to historiography’s “validity.” Richard J. Evans, *In Defence of History*. London, Granta Books 2012. See also John H. Zammito, ‘Post-Positivist Realism: Regrounding Representation,’ in Partner & Foot (ed.) 2013.

⁶¹ John Tosh, *The Pursuit of History: Aims, Methods, and New Directions in the Study of Modern History*. New York, Longman 1991, 144-145.

⁶² Eelco Runia parallels individuals’ and societies’ need to give meaning to a ‘sublime’ event by placing it next to previous episodes. He cites Ranke: “[Historians try] to bring recent history into harmony with what happened before.” Runia 2007, 319.

⁶³ See e.g. LaCapra 2001, 22-24, 27, 52-53, 78-82, 195, 218-219; LaCapra 2009, 91-96; Tuori 2006, 71-72, 96-99, 182-184, 252-253, 256.

⁶⁴ This identity, however, was not a restricted individual fantasy, but a worldview which was shared by a group of close colleagues, and it sometimes transformed asynchronously according to public opinion and changing scientific paradigms. On ‘scholarly identity’ see Jorma Kalela, ‘Jatkomenoinen uudistaminen. Poliitiikka historiassa ja historiantutkimuksessa,’ in *Historiallinen Aikakauskirja* 103

So Franz Wieacker's texts embedded both an affective level (a desire towards an ideal kind of society) and an attempt to have an effect on his contemporary circumstances (to steer society towards that desirable end), but not in a straightforward way. To Wieacker, the core of any legal system relied on people's thoughts, thinking and mentalities.⁶⁵ In Wieacker's legal historical studies the timeless values of justice and the rule of law were described as concrete historical processes and structures. The fundamental quest for the legal historian was to understand the underlying streams of thought, give a proper reading of them, and, in representing their development and state as properly as possible, influence the essence of the contemporary forms of justice and the rule of law.⁶⁶ The past and present were connected in a living bind. The thoughts, beliefs, patterns and valuations concerning law had their own, distinctive rhythm, and the principles of this way of seeing the world had been adjusted and were adjusted to the shifting historical circumstances.⁶⁷ Franz Wieacker did not believe that the past could be replicated in the present, but maintained that studying the origins of current legal thinking could offer more ethical foundations on contemporary practices dealing with morality, justice and values.⁶⁸

Franz Wieacker's legal historical works, like modern historiography in general, can be seen as an affective practice to build a figural worldview. By means of historiography, Wieacker intended to explain his own experiences as resulting from and relating to a wider meaning, namely the narrative of German and European thinking.⁶⁹ In other words, Franz Wieacker wrote to clarify both his own experience of the world and that of his audience. When he argued that the undistinct social and political phenomena of his time had their analogical counterparts and roots in the past, he – intentionally and inadvertently – constructed the reality of his contemporary world. In a compelling scholarly work like *Privatrechtsgeschichte der Neuzeit*, his experience and explanation of the temporal became a shareable historical idea.

(2005):3, 294-297; Slavoj Žižek, *Organs without Bodies: Deleuze and Consequences*. London, Routledge 2004, ix.

⁶⁵ Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*. Göttingen, Vandenhoeck & Ruprecht 1952, 10.

⁶⁶ Wieacker 1952, 8: "Wir verstehen Privatrechtsgeschichte der Neuzeit als Geschichte des Rechtsdenkens und seiner Wirkungen auf die Wirklichkeit der modernen Gesellschaft."

⁶⁷ Franz Wieacker, *A History of Private Law in Europe*. Oxford, Oxford UP 1995, 4: "The 'developments' of doctrines are really only developments in people's consciousness, in the convictions and practices of existing legal communities, and we think that doctrine has its own history only because the communication of doctrine between past and present is continuous."

⁶⁸ Wieacker, 'A History of Private Law' 1995, 483: "[T]he legal scholar and legal historian have a task to perform, namely to preserve as if they were iron rations the invaluable stock of solutions which have been offered in the past, so that the future generations do not have to learn them from scratch. In this sense [...] there is very little in past thinking about law and justice [...] from which lessons cannot be learnt for justice in the future."

⁶⁹ The way in which Franz Wieacker used historiography to give meaning to his personal experiences as well as to uncertain contemporary perceptions of the meaning of the world of social affairs has been noticed by recent intellectual history, but it has not been systematically addressed to elaborate the structures guiding his attempt. Cf. Rückert 1995.

Obviously, historiography in general, and Franz Wieacker's texts in particular, possess other, equally important dimensions, which serve the needs of constructing a modern society.⁷⁰ Academic historiography still needs to have and still does have its reference to actual events. It is established around true depictions about the past, but as a narrative or an illustration of the past it also negotiates with motives beyond or on top of normative prescriptions about the world. Via the process of historical writing, the subject matter of the historian turns into a compelling, coherent and prestigious claim about the past. Within the practice of historiography, the historian's experience and explanation of the temporal becomes an understandable, shareable and effective historical idea. The rules and conventions guiding the writing process in academic historiography shape his representation of the past into an understandable poetic reconstruction. This historiographical form can be called and analysed as a *figura*,⁷¹ a narrative,⁷² or as a historical metaphor.⁷³

We encounter Franz Wieacker's powerful representations about the European legal history, such as *Privatrechtsgeschichte der Neuzeit*, as *figuras*, narratives or historical metaphors. As aesthetic illustrations of the past they enable reader to attune themselves to the past; a written event of the past continues to live in a reader's personal world of experiences, it is supplemented, and it reaches its fulfillment in one's narrative identity where similar experiences, memories, and schemas, are recollected to support the proposed temporal order.⁷⁴ Hence historiography becomes 'a natural truth,' which covers and evades the irrationality and detachedness of a temporal experience. Wieacker's texts were written both to clarify the experience-world of the historian, but also to fit the historical representation to the world view of the audience, and further to steer it in a desired direction. In his representation, Wieacker's endeavor was to produce an epistemologically resilient claim, but also an emotionally coherent one. Borrowing the words of Marci Shore, Wieacker works were "emotional-intellectually entangled" and enhanced "necessary contingency."⁷⁵

⁷⁰ If written history is analyzed only as normative claims, and its evaluation only considers the epistemic bases and 'rational' connections it has to its contemporary society, some constitutive parts in its essence are neglected. How could one, then, explain the feeling of the "depressing vanity of historical meaning" which seems to take place when historiography's possibility to reach an objective past becomes more and more questionable? Why in a time of crisis and blurred collective values does history "rush in"? See Alun Munslow, 'Editorial,' in *Rethinking History: The Journal of Theory and Practice* 17 (2013):4, 435–436, and Rik Peters, 'Actes de Présence: Presence in Fascist Political Culture,' in *History and Theory* 45 (2006), 362–374. See also Kalle Pihlainen, 'Rereading Narrative Constructivism,' in *Rethinking History: The Journal of Theory and Practice* 17 (2013):4, 509–527; Michael Roper, 'Psychoanalysis and the Making of History,' in Partner & Foot (ed.) 2013, 322–323.

⁷¹ Auerbach 1938.

⁷² Ankersmit 2012.

⁷³ Kövecses 2002.

⁷⁴ cf. Eelco Runia, 'Burying the Dead: Creating the Past,' in *History and Theory* 46 (2007), 319, 323.

⁷⁵ Marci Shore, 'Can We See Ideas?: On Evocation, Experience and Empathy,' in Darrin M. McMahon & Samuel Moyn, *Rethinking Modern European Intellectual History*. New York, Oxford UP 2014, 198–200.

In this historiographical study – and in order to deep interpret Franz Wieacker’s texts – I question the division between “public” and “private,” common opinion and personal view, in writing history. I assert that such a division is, if not non-existent, often at least insignificant, since not even a historian can understand historical change without comparing it to his or her personal experience. Historians construct their narrative within the framework of scientific tradition and on the bases of their subject matter, but interpret the tradition and subject matter through their personal, and learned experience. Thus, I claim that **(a)** Historians use their scholarly identity as a tool and an interpretative sphere to understand the past. This tool is usually called a vision, sense or touch (*Geschichtsauffassung*).⁷⁶ Franz Wieacker preferred (*reife*) *Erfahrung*, ‘(mature) experience.’⁷⁷ Wieacker was a historian to the core; he was always inclined

⁷⁶ Hayden White considers the *figural worldview* a preconfiguration of temporality, allowing one to build a narrative order to the past, where previous actions and intentions seem to reach their ‘fulfillment’ in the later events of history. Hayden White, ‘Auerbach’s Literary History: Figural Causation and Modernist Historicism,’ in Seth Lerer (ed.), *Literary History and the Challenge of Philology: The Legacy of Erich Auerbach*. Stanford, Stanford UP 1996, 124-139. Cf. Kasper Risbjerg Eskildsen, ‘Leopold Ranke’s Archival Turn: Location and Evidence in Modern Historiography,’ *Modern Intellectual History*, 5 (2008):3, 425–453; Torbjörn Gustafsson Chorell, ‘Desire for the Past?’ in *Rethinking History, The Journal of Theory and Practice* 19, (2015): 4, 569-582. Different conceptualizations of this mental tool express a close relationship with the affective sensations of one’s body; astonishingly many historians from different times and cultures have articulated their research attitude with words suggesting physical involvement. See e.g. Pentti Renvall, *Historiantutkimuksen työmenetelmät*. Porvoo, WSOY 1946: “In history, one sees himself in others.” This “seeing” – placing oneself in history, an endeavor to understand and feel intentions and presence of the people in the past – is a multilevel process. Cf. Emily Robinson, ‘Touching the Void: Affective History and the Impossible,’ in *Rethinking History: The Journal of Theory and Practice* 14 (2010):4, 503–520. In addition I approach this mental tool from the bases of cognitive psychology. It allows me to understand the historiographical act of Franz Wieacker from the point of view of obtaining confidence over temporal change and constructing meaning in historical time. The ‘historical vision’ or ‘mature experience’ are not merely invented conceptualizations, but applications of the human way to discern significance from the undirected flow of time. According to a substantial body of research conducted in cognitive sciences, achieving meaning in the temporal world is based on a constant act of interpretation, in which an individual in accordance with his culture and personal narrative absorbs emotions and information about his understanding of the world. See e.g. Dorthe Berntsen and David C. Rubin, ‘Understanding Autobiographical Memory: An Ecological Theory,’ in Berntsen & Rubin (ed.), *Understanding Autobiographical Memory: Theories and Approaches*. New York, Cambridge UP 2012, 334, 336–341.

⁷⁷ Franz Wieacker, ‘A History of Private Law’ 1995, 2: “This means that the legal historian needs to have a personal experience of law before he is capable of even recognizing among his data those which relate to the past experience of law.” See also Wieacker, ‘Apologie der Rechtsgeschichte,’ in *Göttingische Gelehrte Anzeigen*, 227 Jahrgang, heft ½. Göttingen, Vandenhoeck & Ruprecht 1975, 107: “Die besondere Art, in der Rechtshistoriker diese Realität ‘bearbeitet’, d.h. auswählt und interpretiert, ist durch seine eigene (und also zugleich gesamt menschliche) Erfahrung von ‘Recht’ schlechthin konstituiert – welches also selbst als dauerndes Constitutens aller menschlichen Gesellschaften erscheint (ohne diese Vorgriff könnte es freilich *Rechtsgeschichte* nicht geben).” Cf. Avenarius 2010, 122: “Ihren Grundannahmen gemäss sucht Wieacker aus seiner eigenen Erfahrung mit dem Recht auf vergangene Erfahrung mit demselben zu schliessen.” The scholarly tool of ‘experience’ grew with the identity of the researcher, it was an accumulative feature, thus some ‘experiences’ were more ‘mature’ than others. See e.g. Franz Wieacker, ‘Vielfalt und Einheit der deutschen Bodenrechtswissenschaft der Gegenwart [1942],’ in Christian Wollschläger (Hrsg.), *Zivilistische Schriften*, 457: “reife Erfahrung”. Cf. Wieacker, ‘Rudolph Von Jhering (1818–1892),’ in *Gründer und Bewahrer. Rechtslehrer der neueren deutschen Privatrechtsgeschichte*. Göttingen, Vandenhoeck & Ruprecht 1959, 202. Wieacker describes the change in Rudolph von Jhering’s “Anschauungsvermögen”: “der Reifende vom wachsenden Erfahrungsstoff meist von der inneren

to see social phenomena in their temporal context. Thus, in the following text when I write about Wieacker's scholarly identity I often use the term 'historical vision.' It underscores the fact that the affective, personal level in Wieacker's works was obtained by identifying with the past, historical world. It is also essential to mention that I do not perceive Wieacker's historical vision as a rigid dogma, personality trait nor individual fantasy. His historical vision evolved over time, and it changed due to social and ideological transitions, which were assimilated and understood as a member in a group of colleagues.

Franz Wieacker utilized his historical vision to deal confidently with temporal change and to construct meaning in historical time, but in a way that his reading audience could understand and attune themselves to his narrative. His works were not mere self-reflexion, but historiography, which inspired generations of scholars and laymen to appreciate the exceptional development, significant features and particular nature of the European past. They were epistemologically "correct" but from the point of view of the reading audience they carried along with them an understandable, persuasive historical meaning. Thus, I assert that **(b)** The extent to which Wieacker used his historical vision, as well as the actual places within the chain of argument where he utilized this vision, are revealed through concepts and metaphors. The concepts and metaphors within historiography work as cognitive tools, which connect the personal worlds and experiences of the writer and reader. They enable "a representation of the past" to be transformed into "our history." It becomes *figura*, a semantically structured cognitive means, which is used to emphasize congruence and bring confidence amidst and in time.⁷⁸

(a) The emotional-intellectual entanglement: Cognitive bases of historical vision

There is a level of personal insight as well as a reference to current, common opinions in every historical study. These traits are usually hidden in language, through generalizations, concepts, juxtapositions and other rhetorical means typical for historical writing. This domain can be called the *aesthetic* level of historical writing.⁷⁹ In historiographical work, the aesthetics is comprised of axiomatic rules, the "unwritten" part of a scholarly work, which define the reasonings and choices of a

Erfahrung zur äusseren, von der Phantasie zur Welt, vom Traum zur Tat geführt wird." On the other hand, in hindsight, Wieacker described his 1930s texts as "immature" (*unreife*), Wieacker 'Wandlungen der Eigentumsverfassung' Revisited [1976/77], in Christian Wollschläger (Hrsg), *Zivilistische Schriften*, 475.

⁷⁸ See Ville Erkkilä, 'Time, Identity, and History: On the Cognitive Psychology and Figural Practice of Historiography,' in *Rethinking History. The Journal of Theory and Practice* (19) 2015: 4, 602-620.

⁷⁹ Tracking the aesthetic in scholarly work can begin by distinguishing the descriptive and prescriptive statements of given historiographical work (Stolleis 1998, 39), but my aim is to show that such a distinction in the end is not sufficient since aesthetics (however descriptive it might seem) also takes a normative stance while illuminating the past (cf. Ankersmit 2012).

researcher's writing process.⁸⁰ They are rarely explicated and remain invisible under the surface level of the text, but nevertheless they form a foundation for the historiography of an individual historian. To put it another way, it is the level which is preconceived by the researcher's scholarly identity.

According to Arthur C. Danto, analysis of the aesthetics of a cultural product should be divided into two parts: surface analysis and deep interpretation.⁸¹ When scrutinizing the surface intentions of a text, one concentrates on the conscious references that the author of that particular text has made and connected to his or her work. Consequently, a deep interpretation means tracking those links which define the view of an author outside the articulated process that guides his or her text. For example, one can argue (and it has been argued by Franz Wieacker) that Friedrich Carl von Savigny's legal theory was at the surface level an endeavor to historicize the study of law in society, but in a more hidden way and possibly unconsciously his writings were guided by his reluctance and distrust of social change in contemporary society.⁸² This preconception shaped the meaning of Savigny's texts; it appeared and can be read on the aesthetic level of his works. Underneath the explicit references of Savigny's works lay his scholarly identity, which defined his stance and approach towards the historical subject matter and research questions. Wieacker put this mental working model into words as follows:

The legal historian's attitude to his subject matter is akin to that of the individual reflecting on his own past behavior, who asks "How did this come about?", "How did we fare in the situation?"; the historian should similarly feel that the answer is significant to him personally.⁸³

So, it is worthwhile to analyze the aesthetics of Wieacker's works, since he himself saw it as not only possible, but important to study the intertwinement of personal experience, tradition and one's subject matter in legal history. In order to make a deep interpretation of a historiographical text – to track the historical vision of its author – one has to make an attempt to understand the larger worldview of the historian and find the structures of thinking that this particular researcher does not actively reflect or question, but takes them as axiomatic rules of the social world and of human behavior. In other words, analyzing the aesthetic level of historiography means

⁸⁰ The concept is Frank Ankersmit's (Frank Ankersmit, *Sublime Historical Experience*. Stanford, Stanford UP 2005). It is a part of the research process in which the scholar is in imaginative dialogue with his public about how the concepts and chains of reasoning which he uses, adjust to public history, e.g. to the vision the public holds of history. However, these processes are largely disguised, and reasoning chains (for example, the effect of emotions on the writing process) which affect a composition are hidden from the reader's sight. See also Ankersmit 2012. On the imaginative dialogue between the scholar and his/her audience, see Jonathan Gorman, 'History as a Fiction: The Pragmatic Truth,' in Alexander Lyon Macfie (ed.), *The Fiction of History*. London, Routledge 2015, 15-16.

⁸¹ A.C. Danto, *After the End of Art: Contemporary Art and the Pale of History*. New York, Princeton UP 1997.

⁸² Wieacker, 'A History of Private Law' 1995, 304-306.

⁸³ Wieacker, 'A History of Private Law' 1995, 3.

addressing the interpretative space of a given historian, where the demands of the social context, personal valuations and the requirements of epistemological coherence in a historical representation merge. It was this space which Wieacker called 'mature experience'.⁸⁴ Scholarly identity, no matter how learned it might be and cultivated with abstract knowledge, is, nevertheless, an affective identity. The self-image of a scholar is no more rational nor immune to beliefs, emotions and presuppositions than any other self image. Rather, scholarly identities too, are worldviews where emotional and intellectual domains of human understanding intertwine, combine together, and co-operate.

Many cognitive theories hold that the concept of a human *being*, our understanding of ourselves, is based on memory and response. The self-image of a person consists of a cumulative number of memories, experiences, and learned ways of acting, which are stored and organized in that person's autobiographical memory. This accumulated data about human interaction comprises the person's social agency, the actions and thoughts of which loosely follow a certain pattern. In short, we are narrative creatures. The 'self' is a story constructed on the bases of distinguished memories and schemas, where previous experiences seem to verify one's interpretation of the present and open up new perspectives and possibilities for an individual.⁸⁵

The narrative self-image is molded in constant interaction with other people, and in a way it comes to life when it is translated into words and shared with others. Our identity is tested through joint reminiscences with other people, creating a cycle whereby one's personal experience is shaped by others and a joint understanding of such cultural phenomena lives and develops through single interpretations.⁸⁶ In order to maintain a confident and stable identity one needs to find congruence between socially appreciated values and one's autobiographical narrative.⁸⁷ It is this *congruence* between a confident self-image and socially appreciated meaning that people try to reach in social interaction. The ways to achieve compatibility between a personal narrative identity and a historical meaning (a publically held master narrative

⁸⁴ cf. fn. 77.

⁸⁵ Cf. D.L. Schacter, 'The Seven Sins of Memory: Insights from Psychology and Cognitive Neuroscience,' in *American Psychologist* 54 (1999), 182–203; Martin A. Conway, 'Memory and the Self,' in *Journal of Memory and Language* 53 (2005), 597.

⁸⁶ Louis Cozolino, *The Neuroscience of Psychotherapy: Healing the Social Brain*. New York, W. W. Norton & Company 2010, 207-208; Tillmann Habermas, 'Identity, Emotion, and the Social Matrix of Autobiographical Memory: A Psychoanalytic Narrative View,' in Berntsen & Rubin (ed.) 2012, 35-36.

⁸⁷ Thus, a cycle of identity formation is also about compatibility between one's autobiographical narrative or the internal model of emotions and language, and the cultural idea of 'significance' as it displays itself in communication within social occasions and cultural traits. H.R. Markus & S. Kitayma, 'Cultures and Selves: A Cycle of Mutual Constitution,' in *Perspectives on Psychological Science* 5 (2010), 421; S.A. White, 'Learning to Communicate,' in *Current Opinion in Neurobiology* 11 (2001), 510-520.

about the nature of the world) in order to achieve confidence concerning the bases of one's subjectivity, varies depending on culture and place.⁸⁸

To sum up, there is no stable ground for the 'I,' and it is instead created in constant interaction and revised to fit a changing environment. If surety in its continuity for some reason ceases to exist, the identity of a person is felt to dissolve, since each and every new event will appear to be a challenge to one's identity. The premise for a temporal 'I' is the *certainty* of a capability to create schemas and bind emotions to an autobiographical narrative which gives rise to the understanding, direction and meaning of the 'self' moving in time.⁸⁹ In fact, it is the certainty of both a personal life script but also its counterpart, a culturally upheld 'significance' in history, which need to be reached in order to gain individual sense of meaningfulness to one's personal narrative, to the story of 'I' among others.⁹⁰

A breach or a blow to a personal ability to create temporal order can be called a trauma. A trauma challenges the presumption of the stability and continuity of one's identity. It shatters the predictable and secure cultural norms of behavior. Thus, it paralyzes the individual skill to bind and divide things into past, present and future. One starts to see its echoes in upcoming events and in interaction, and it corrupts the new phenomena with a feeling of strangeness (*unheimlich*) or uncategorized anxiety.⁹¹ The explanation given to the world we live in might be strong, but it is built on sand. The collapsing of the order people have adopted for the events which influence their daily routines, otherwise blurred in unrestricted eternity, is a constantly hovering possibility which is evaded by reproducing and strengthening the explanations they have come up with.⁹²

The possibility of an all-shattering trauma is, however, tangible with respect to the collective life as well. The same need for an explanatory 'plan' also involves social

⁸⁸ Becoming a competent subject thus means participating in an ever-evolving network of activities and *practices*, where "sociality" is not only "comprised of normative order, rational agents, discourses, intersubjectivity or material structures" but also of evolving patterns of doings, "which carry their agents and are at the same time carried (out) by them." Andreas Reckwitz, 'Affective Spaces: A Praxeological Outlook,' in *Rethinking History: The Journal of Theory and Practice* 16 (2012):2, 248.

⁸⁹ See e.g. Cozolino 2010, 151–161.

⁹⁰ Robyn Fivush, 'Subjective Perspective and Personal Timeline in the Development of Autobiographical Memory,' in Berntsen & Rubin 2012, 239.

⁹¹ For Robert Stolorow, a trauma is a change in one's worldview or *Weltanschauung*; It turns the familiar into something strange and threatening (Robert D. Stolorow, *Trauma and Human Existence: Autobiographical, Psychoanalytic, and Philosophical Reflections*. New York, Routledge 2007, 13–16). Stolorow uses Freud's concept of *unheimlich*, as does Dominick LaCapra (LaCapra, Dominick LaCapra, *History and Its Limits: Human, Animal, Violence*. Ithaca, Cornell UP 2009, 85–89); cf. Cozolino 2010, 265–268.

⁹² "For whenever and wherever we engage with life in its details, it is undeniable that we and those close to us experience injustice on a daily basis. To be able to bear with equanimity what happens both generally and to us personally we need to have an intimation of a plan for the sake of which and in the light of whose fulfillment chaos becomes a matter of order." Erich Auerbach, 'Vico and Herder,' in James I. Porter (ed.), *Time, History, Literature: Selected Essays of Erich Auerbach*. Princeton, Princeton UP, 11.

entities, which also face the futile task of finding solid and sustainable explanations.⁹³ How should one compare and evaluate experiences if the order and hierarchy they are given, which distinguishes or merges them into other events, proves to be inaccurate? How can *we* (as a collective) make sense of temporality if everything is in constant change, and more importantly and devastatingly, when no one is outside this same tide as an observer?⁹⁴ To avoid both collective and personal trauma at all cost is a human way to enable one's basic social life. To build figural relationships between phenomena distinct in temporal dimension is our way to make the world a more comprehensible and easier space to conduct social action.⁹⁵ These relationships provide the scale and measure for personal earthly tragedies by revealing the absolute *idea* of sacrifice and sorrow. If it is to be removed, a structural ontological similarity between a personal pain and a transcendental model of sorrow vanishes, and some aspects of the cultural sense of being understood and accepted are lost. This absence of a scale with which to measure one's experiences, and consequently the horror of an undirected flow of time, is avoided by cultural means like historical writing.

Historians rarely write about their own scholarly identity – the unquestionable principles, fears, dogmatic theoretical axioms and desires in their historical works. Often, however, they comment on the identities of other (past) scholars. It is not far-fetched to claim that at the same time, in an indirect way, they explicate their own historical vision.⁹⁶ Similarly, Franz Wieacker wrote about the emotional presuppositions which guided the work of Rudolf Jhering:

[A]s he matured, he turned from intellectual fantasy to social realism. These feelings were in tune with the times. Jhering's personal experience was characteristic not just of his fellow jurists but of all his contemporaries; most original thinkers of the mid-century felt the joy or horror of waking up, of turning from dream to action. All Jhering's subsequent work must be seen in the light of this Damascus.⁹⁷

⁹³ Rik Peters (Peters 2006, 373) finds this 'horror of historicity', in Fascist Italy but also in present modern societies, which are inspired by the changeability of the world, where nothing is absolutely given: "At the same time, the belief that reality is history is the most uncanny [*unheimlich*] awareness humans can have. For how can we live in a world in which nothing is given, no principles, no truths, no fixed points, in a world in which historicity in itself is not given, but always appears as a construction of our own?"

⁹⁴ Hayden White concludes on Auerbach's thoughts: "Indeed, if, in many respects, *Mimesis* is ultimately the story of how Western literature came to grasp historicity as humanity's distinctive mode of being in the world, this mode of being in the world is represented as one in which individuals, events, institutions, and (obviously) discourses are apprehended as bearing a distinctively figural relationship to one another." White 1996, 137; cf. David Carr, *Time, Narrative and History*. Indianapolis, Indiana UP 1986.

⁹⁵ Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age*. Cambridge, Polity Press 1991, 35–69; White 1996, 133–134, 137.

⁹⁶ Such a method was emblematic e.g. to Carl Schmitt in his quest to illuminate German legal history. Mehring 2014.

⁹⁷ Wieacker, 'A History of Private Law' 1995, 356.

Jhering faced the ‘experience of waking up,’ that is, the explanation he had given to the world of social affairs was not in accordance with reality. The scale which he had used to measure experiences was no longer valid. Nevertheless, through a process of ‘maturation’ Jhering was able to overcome that ontological breach and produce textual works in which his vision of historical meaning was congruent with the needs of his time. This process was not merely a rational decision to shift one’s scientific view. Wieacker describes it through a metaphorical reference to the abrupt revelation which Apostle Paul experienced on the road to Damascus. So, to Wieacker, the mental tool which legal historians utilize in their works is not comprised solely of “epistemological rules” and “norms,” for this worldview is more close to identity. It was just as much based on an affective understanding of the world of social affairs.

(b) Historiography as an affective practice and the historical vision in action

In the previous section we saw that when a historian *writes history*, frames out the temporal experience from time, plots it, and links this historical idea to his/her culture, the writing process from the beginning is a mixture in which “objective and subjective dimensions are always already intertwined and perpetually interact with each other.”⁹⁸ In the *research* process a scholar is in a dialogue with the historical sources and cultural truth as defined by the scientific community. *Writing* on the other hand means adjusting one’s scientific questioning and priorities to the public “need” for historical results and persuading people to understand and uphold the importance of this viewpoint and research.⁹⁹ In order to make the past relevant to one’s audience, a historian needs to link the phenomena he is studying to contemporary society. He has to translate bygone events and adjust them to our perception of the world. In short, historiography is juxtaposing phenomena from one’s time to (allegedly) similar events in the past through language.¹⁰⁰

Within this process, however, a historian faces the unavoidable gap between the past historical experience and the present one. This constitutive gap in historiography has also been articulated as an incongruity between language and reality, or the distance between historical experience and writing.¹⁰¹ Where should one place “the glossators” of our culture? How should one consider such expressions as “the enthusiasm brought

⁹⁸ Benno Gammerl, ‘Emotional Styles – Concepts and Challenges,’ in *Rethinking History: The Journal of Theory and Practice* 16 (2012):2, 168, cf. Paul Ricoeur, *Time and Narrative Vol. 1*. Chicago, Chicago UP 1990, 82–87, 229; Paul Ricoeur, *Time and Narrative Vol. 2*. Chicago, Chicago UP 1990, 92–96.

⁹⁹ This distinction between *researching* and *writing* history is indeed an important feature for my study. To many scholars, writing history is more a task of adjusting, choosing and deciding about source material and putting one’s experience and vision into words. Jorma Kalela talks about *reconstruction* and *argumentation*. Jorma Kalela, *Making History: The Historian and Uses of the Past*. New York, Palgrave Macmillan 2012, 132–145; cf. Tosh 1991, 1-2, 26-27.

¹⁰⁰ Tosh 1991, 38–40; Kalela 2012, 94.

¹⁰¹ See Ankersmit 2012, 59–64.

about by the Industrial Revolution” or “the conservative worldview of the 19th-century liberalists”? The historical traces that encouraged historians to assume that such phenomena existed, have to be linked to other events and be supplied with cause and consequence in order to be understandable.¹⁰² While interpreting sources through one’s historical vision, researchers come to fulfill the incomplete presentation with “other accepted facts” from their society or personal history, thus allowing them to give a coherent representation of history.¹⁰³ In their attempt to fill this gap between the reality of a historical event and an understandable elaboration of it, historians deploy the tool of historical vision, but in such a way that the reader understands their personal interpretation of these historical events. Historical vision has to function in a way that it mediates between the experience of a historian and the experiences of the reading audience. This underlines the fact that in the realm of academic historiography, historical vision is not an individual fantasy but is connected to a scholarly identity, which in turn is tied to the vocabulary provided by tradition and by scientific paradigms.¹⁰⁴ The individual scholarly ‘experience’ or ‘vision’ is translated into concepts and expressions which are emblematic of academic historical writing, and are familiar both to the historian and to his audience.¹⁰⁵

As a result, the actual work of the historical vision – bridging the gap between the past historical experience and the present one as well as overcoming the otherness of the past – on the level of the text is performed with the help of established linguistic tools, such as narratives, metaphors or concepts.¹⁰⁶ The argument behind this thesis is that

¹⁰² Robinson 2010, 504.

¹⁰³ Paul Ricoeur, *Time and Narrative Vol. 2* 1990, 155. Or in other words, historians use the same emotional styles that they apply in their personal lives to create narratives in and about the past. Gammerl 2012.

¹⁰⁴ Jorma Kalela asserts (Kalela 2005, 294-297) that every scholar has “one’s thing” which they keep working on throughout their writings. This “thing” is a group of conditions for cognition, a collection of very personal opinions which are not necessarily associated with any scientific school or political stance of a scholar. They still nevertheless frame research and form a base for a vision that connects the scientific works of a researcher. “One’s thing” is divided into three levels. 1. *The ontological level* of defining mechanisms behind recent and distant societal changes. It holds the scholar’s answers to the questions concerning *what exists?* The answers provide an explanation to an ontological structure of the world; the future as derived from past and present; an outline understanding of historical development and its presence in the scholar’s time. 2. *The in-group level* of shared fears, desires and moral principles, in other words, the researcher’s moral standpoints about society. According to Kalela, the researcher’s intention in all of his works is to defend some statement or proposal about the moral condition of society, present or forthcoming; the distinguishing of ideal, acceptable and disapproved behavior as constructed in the networks of friends, family, and academic colleagues. 3. *The scientific level* of heretical and respected methods in history as well as the role of science in relation to the national and public good. For the scholar himself, what is the nature of his pursuit? What kind of means is he ready to employ in analyzing reality?

¹⁰⁵ Wieacker himself rejected the idea that concepts could be straightforwardly applied from one culture to another. Rather, the meaning which the concepts embedded had to be translated into terms prevailing in the receiving culture: “Perhaps the genetic model of modern biology is the most appropriate model for the historian of the effect of the ancient civilization on its daughter culture in Europe, for it sees the transmission of life from generation to generation in terms of information: living forms reproduce themselves by means of genetic information, which like a matrix engenders and builds new organisms with the same or similar form.” Wieacker, ‘A History of Private Law’ 1995, 26.

¹⁰⁶ cf. Ankersmit 2012, 76, 218–219.

historical narratives, metaphors, and concepts, ‘the bridging tools’ deployed by the practice of historiography are not only linguistic structures, but cognitive means in conceptualizing the world of experiences. In this way history is made shareable and accessible to other people in a way which mediates emotional coherence and continuity, *confidence* rather than incoherence.¹⁰⁷ Narratives, metaphors and concepts are means to express history as a meaningful and substantive part of people’s lives.¹⁰⁸

To Reinhard Koselleck, the normative vocabulary of society, that is concepts, have been constructed through time.¹⁰⁹ A single concept evolves through intertwining with social structures, and it is used in different contexts, thus it embeds layers of meanings and contains a metahistorical meaning. As a result, a concept can be utilized in different contexts, but although it might be used to explicate a restricted actual phenomenon, it also manifests meanings beyond the temporal and spatial frames of the phenomenon it explicates. Concepts utilize the abstract past in their task of signifying concrete, everyday events.¹¹⁰ Conceptual historical theories assert that concepts hold within the commending and condemning meaning of language. Concepts reflect the social reality – they are the normative vocabulary of society – but they also concurrently categorize this reality from the stance of the one who utilizes the normative vocabulary.¹¹¹ How a concept is used in a given time and context should be of prior importance in every conceptual analysis. For example, *Volksgemeinschaft* was not only a word for a certain social constellation. While it was used, it also defined a right kind of social being, as well as its opposite, and the tension between these two positions. Thus, *Volksgemeinschaft* as a word and a concept was a symbol for social change, activity and values.

It is important to emphasize that this work does not analyze *jurisprudential* concepts, but concepts utilized in historical writing. The usage and purpose of both linguistic

¹⁰⁷ cf. Raymond W. Gibbs, ‘Metaphor and Thought: The State of the Art,’ in Raymond W. Gibbs (ed.), *The Cambridge Handbook of Metaphor and Thought*. New York, Cambridge UP 2008, 3; cf. Paul Ricoeur, ‘Time and Narrative Vol 2’ 1990, 7–9, 16–30. In historiography, narratives very often emerge as a natural, organic development, and the denial or ignoring of other possibilities give them somehow a natural, rather than a (re)constructed and man-made, appearance.

¹⁰⁸ Barbara Dancygier & Eve Sweetser, *Figurative Language*. Cambridge, Cambridge UP 2014, 8: “Figurative language usages appear to be pervasive in all languages – and the reason is apparently that they reflect patterns of human cognition.”

¹⁰⁹ Koselleck distinguishes certain ground concepts (*Grundbegriffe*) from other normative vocabulary. For criticism on the elevation of concepts above ordinary language use, see Michael Stolleis, *Rechtsgeschichte schreiben. Rekonstruktion, Erzählung, Fiktion?* Baden-Baden 2008, 15.

¹¹⁰ To Koselleck, concepts bear both diachronic and synchronic meanings (Reinhard Koselleck, ‘Introduction and Prefaces to the *Geschichtliche Grundbegriffe*,’ in *Contributions to the History of Concepts* 6 (2011):1, 30-31). With ‘synchronic meanings’ he asserts that in conceptualization the past is brought on board in explicating a current, actual phenomenon. It is the “contemporaneity of the noncontemporaneous” (“Gleichzeitigkeit des Ungleichzeitigen.” Koselleck 2011, 17).

¹¹¹ Both Quentin Skinner and Reinhard Koselleck emphasize the connection between conceptual history and the study of social structures. E.g. Koselleck 2011, 18: “[C]oncepts are discussed according to their sociopolitical rather than their linguistic function.” To Skinner, significant social structures are essentially rhetorical and refer to values and norms. See e.g. Quentin Skinner, ‘Rhetoric and Conceptual Change,’ in Kari Palonen (ed.), *Finnish Yearbook of Political Thought* 1999, 60–73.

tools - jurisprudential and historical concepts – is to create analogies and gather a phenomenon under a textual device, but historical concepts embed a meaning of temporality and existence in time.¹¹² Furthermore, whereas Reinhard Koselleck was mostly interested in the way concepts were used in political language, this study focuses on the theme of how concepts are used in the legal historical texts of an individual scholar. As a result, this thesis has to take into account the distinct manner of writing scientific historiography. In other words, while analyzing the use of concepts in a given body of legal historical texts, one has to acknowledge the instructional influence of the historiography preceding the body of texts under scrutiny. Scientific historiography is always contextualized within a tradition and is related to the arguments of other scholars.

As a practice within modern society, academic historical writing, nevertheless, also serves affective purposes. Historiography encourages a trust in cultural and individual tools deployed to find and/or create analogies between phenomena distinct from each other in chronological measure, thus providing a temporal order for unrestricted and unlimited time.¹¹³ Historiography makes the ‘I’ more grounded in a world of change and in the world of others, not only by producing normative information about the world, but also allowing one to create an emotional coherence to time as a subjective experience.¹¹⁴ One could say that historiography, among other affective practices deployed to come to terms with temporality, is a means to find certainty or confidence in experienced time, to overcome the otherness of the past.¹¹⁵ It is both written to give meaning to unattached temporal events, but also used as a proof of a correct interaction between people and their culture. Thus my approach to the concept within historiographical texts departs from that of Koselleck’s and Skinner’s with respect to

¹¹² Wieacker explicitly rejected the priority of jurisprudential concepts, and a continuous fight against *Begriffjurisprudenz* is a foundational theme in his works stretching from the 1930s to the late 1960s (see Wieacker, ‘Wandlungen der Eigentumsverfassung revisited,’ [1976/77] 476). Nevertheless, he did conceptualize history, but called his terms “types” of European history (see Wieacker, ‘A History of Private Law’ 1995, 6 fn. 9). Accordingly, *Rechtsbewusstsein* and *Rechtsgewissen* were not jurisprudential concepts, but were terms used in elaborating the relationship between norms and attitudes or experience (cf. Wieacker, ‘A History of Private Law’ 1995, 2).

¹¹³ Academic historiography possesses the means, or at least has a reputation for possessing the means, to mold historical representation in an epistemologically positive direction. See Chris Lorenz & Berber Bevernage, *Breaking up Time: Negotiating the Borders between Present, Past and Future*. Göttingen, Vandenhoeck & Ruprecht 2013. On modern communalism and historiography, see Anthony D. Smith, *Chosen Peoples: Sacred Sources of National Identity*. Oxford, Oxford UP 2003, 166–179.

¹¹⁴ Runia (2007, 319, 323) elaborates how a “sublime historical event,” either experienced or committed, produces hindsight, a need to make a new standpoint habitable or understandable. It can later turn into an ‘ontological homesickness,’ “a desire to get into contact with the numinosity of history.” See also LaCapra 2001, 48-52; cf. Habermas 2012, 46-49.

¹¹⁵ Emily Robinson (2010, 504) vividly expresses how the re-enactment and physical presence of historical material produces an ambiguous sensation of ‘pastness.’ On the other hand it produces an ‘unavoidable awareness of its absence,’ and on the other ‘a feeling of genuineness.’ The latter emotion has also been described as ‘credibility,’ ‘firmness’ and ‘emotional knowing.’ It seems that it is this feeling about ‘real historical knowledge’ which historians still pursue, although the task of writing a totally objective historical representation is widely considered to be impossible.

the metaphorical and interpretative latitude I give to concepts.¹¹⁶ In its attempt to bind past, present and future to a coherent whole, metaphorical means are essential for historical writing.¹¹⁷

In his 1963 article ‘Die Fortwirkung der antiken Rechtskulturen in der europäischen Welt,’ Franz Wieacker attempted to represent the multifaceted phenomenon of the diffusion and reception of Roman law to the later legal cultures of Europe. To explicate the complicated phenomenon in a short and textual form was difficult,¹¹⁸ so he used metaphors to illuminate the process: “Wie die Abkömmlinge die Erbfaktoren der Eltern übernahmen, so erbt die ‘Tochterkultur’ Eigenschaften der ‘Mutterkultur.’”¹¹⁹ In another context, he described the mentality which had prevailed in German culture towards the idea of Rome by referring the historical juxtaposition to a parable in Dostoyevsky’s *The Brothers Karamazov*, asserting that the idea of Rome has been perceived as “the Grand Inquisitor.”¹²⁰ Furthermore, he pictures the increasing awareness of ancient culture in medieval Europe as the growing up of a child: “[I]n the same way as individuals come to understand their parents better as they themselves mature.”¹²¹ Wieacker frequently used metaphors like these in his texts.

In this, of course, Wieacker was not alone. Historiography does not juxtapose ‘true’ phenomena in a loose way, but instead emphasizes the genuine bond and similar essence between ‘real’ objects. The figural relations between events, the claim that phenomena distinct in chronological time can be labelled under a historical meaning or that a later event can somehow be defined by a former, is backed by metaphorical language. A very common metaphorical claim of the 1930s that “fascist Italy is like ancient Rome” is a temporal, historical argument. It puts two social, complex entities in a correlative relation, where the entities of both fascist Italy and ancient Rome

¹¹⁶ Despite the fact that Koselleck here and there explicitly labels concepts as metaphors, and acknowledged the translational and interpretative performance they involve, he never took his analysis further in that direction. Mostly this decision seemed to be due to a lack of time and resources. See Koselleck 2011, 33-34; also Timo Pankakoski, ‘Carl Schmitt Versus the ‘Intermediate State’: International and Domestic Variants,’ in *History of European Ideas* 39 (2013):2, 241-266.

¹¹⁷ Ankersmit (2012), Blumenberg (Hans Blumenberg, *Paradigms for a Metaphorology*. Ithaca, Cornell UP 2010) and Ricoeur (Paul Ricoeur, *The Rule of Metaphor: The Creation of Meaning in Language*. Psychology Press 2003) are all interested in the role metaphors play in text and especially in historical presentations.

¹¹⁸ Franz Wieacker, ‘Die Fortwirkung der antiken Rechtskulturen in der europäischen Welt,’ in *Vom Recht*. Hannover, Niedersächsische zentrale für Politische Bildung 1963, 82: “Zur Erfassung einer rechtsgeschichtlichen Periode müssen wir also ausser den eigentlichen Rechtsquellen auch erforschen und verstehen: die Rechtsmetaphysik und die allgemeinen soziaethischen Wertvorstellungen einer Epoche, ihre soziale und politische Verfassung; die herkunft und die soziale Stellung ihrer Justizfunktionäre sowie die äusseren Formen und die Denkformen des Rechtsunterrichts und der Rechtswissenschaft. Nur so erfasst die rechtsgeschichtliche Forschung wirklich das gesamte Gefüge der Wertvorstellungen, sozialen Verhaltensnormen und –gewohnheiten, der Machttechniken und der intellektuellen Techniken, die erst in ihrer Gesamtheit eine geschichtliche Rechtskultur ausmachen.”

¹¹⁹ *Ibid.* 80.

¹²⁰ Franz Wieacker, *Vom römischen Staat als Rechtsordnung*. Freiburg i. Br, Zähringer 1949, 6: “Rom hat für Europa allezeit jenes ursprüngliche Wollen ausgedrückt, von dem Dostojewskis Grossinquisitor spricht.”

¹²¹ Wieacker, ‘A History of Private Law’ 1995, 18.

define and explain each other, and more importantly, fascist Italy is seen as the later fulfillment of ancient Rome, in history and in essence.¹²² But a metaphorical connection involves an affective sphere. In a metaphorical frame, temporally distinct phenomena – which in the case of historiography have been reconstructed from textual traces and as such are without emotional content – receive an affective dimension. In other words, in its task to bridge the gap between language and reality, historiography also uses emotional means when it gives us the feeling of continuity amidst infinitude.¹²³ Consequently, acknowledging the metaphorical aspect enables the researcher of past historiography to take into account the affective, personal dimension of figurative language and of historical writing.¹²⁴ Accordingly, Joanne Bourke argues that metaphors within history and in historical texts need to be studied in terms of the domains of language, culture and affections.¹²⁵

For example, when Carl Schmitt asserted that in German history “Jews are like parasites,”¹²⁶ his offending metaphor referred implicitly and explicitly to the preceding anti-Semitic representations already existing in German culture.¹²⁷

¹²² Cf. Denis Mack Smith, *Mussolini's Roman Empire*. Madison, Longman 1976, 47–48, 93–94.

¹²³ Cf. Emmanuel LeRoy Ladurie, *Montaillou: Cathars and Catholics in a French Village 1294–1324*. Bungay, Richard Clay 1984, 338–339: “Today Catharism is no more than a dead star, whose cold but fascinating light reaches us now after an eclipse of more than a half a millennium. But Montaillou itself is much more than a courageous but fleeting deviation. It is the factual history of ordinary people. It is Pierre and Béatrice and their love; it is Pierre Maury and his flock; it is the breath of life restored through a repressive Latin register that is a monument of Occitanian literature. Montaillou is the physical warmth of the ostal, together with the ever-recurring promise of a peasant heaven.” In these metaphors, LeRoy Ladurie places within the text elusive feelings of warmth, love and communality which seem to emerge from the ‘factual’ history of this Occitanian village. LeRoy Ladurie suggests that in the text of *Montaillou* human emotions are translated into action and they emerge as ‘naturally’ placed in this written history within their correct premises and conclusions. The presupposition is that when one reads *Montaillou* one can share and embody these emotions by observing the actions of past people.

¹²⁴ The semantic analysis of metaphors is a rapidly growing discipline, which has benefitted substantially from the results and approaches of cognitive sciences. See e.g. Zoltán Kövecses, *Metaphor and Emotion: Language, Culture, and Body in Human Feeling*. New York: Cambridge UP 2000; Lakoff & Johnson 2003; Gibbs 2008; Dancygier & Sweetser 2014.

¹²⁵ Joanna Bourke, ‘Pain: Metaphor, Body, and Culture in Anglo-American Societies between the Eighteenth and Twentieth Centuries,’ in *Rethinking History: The Journal of Theory and Practice* 18 (2014):4, 475–498.

¹²⁶ See Carl Schmitt’s 1936 talk in the ‘Conference for University Legal Teachers,’ where he explains the “necessary changes” in scholarly practices concerning citations, research tasks and bibliographies (which banning anything related to Jews) by means of this metaphor. Carl Schmitt, ‘Schlusswort des Reichsgruppenwalters,’ in *Das Judentum in der Rechtswissenschaft. Ansprachen, Vorträge und Ergebnisse der Tagung der Reichsgruppe Hochschullehrer des NSRB am 3. und 4. Oktober 1936. 1. Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist*. Berlin, Deutscher Rechtsverlag 1936, especially 32.

¹²⁷ Of course, Schmitt referred first and foremost to Hitler’s rhetoric (see e.g. Adolf Hitler, *Mein Kampf*: “The Jews’ life as a parasite in the body of other nations and states...”; “[H]is existence as a parasite on other people...”) quoted in Benjamin C. Sax & Dieter Kuntz, *Inside Hitler's Germany: A Documentary History of Life in the Third Reich*. Lexington, D.C. Heath & Co. 1992, 200). Nevertheless, Hitler was not the first to use this offensive metaphor (cf. Eva Holmberg, *Jews in the Early Modern English Imagination: A Scattered Nation*. Burlington, Ashgate 2011, 147). The underlying and very common anti-Semitism of early twentieth-century Europe is a widely acknowledged fact (see e.g. Hans-Ulrich Wehler, *Deutsche Gesellschaftsgeschichte. 3. Band: Von der “Deutschen Doppelrevolution” bis zum Beginn des Ersten Weltkrieges 1849–1914*. München, C.H.Beck 1995, 924–34, 1063–66). The

Furthermore, the parasite-metaphor exploited the common and current assumptions in capitalist society, where individuals whose behavior (especially with respect to work) diverged from the communal average were accused of sucking at the fruits of other's work as well as at the vitality of respectable folk.¹²⁸ Thus, Schmitt's metaphor was bound to and referred to the domains of common language (what we would currently call free-riders in society) and cultural meanings (anti-Semitism). In addition, the metaphor also mediated the affective meanings from the author to the receiving audience. Parasites can be felt. This metaphor produced a bodily sensation at the receiving end. By the means of a metaphor, Schmitt was able to communicate his emotional experience of hatred and scorn of Jews to contemporary readers, who might not share his antisemitism, but nevertheless understood his emotions, since the dread of parasites was and is a basic and common emotion.

A semantic analysis of the strategically placed metaphors within the historical argumentation, such as the above-mentioned example by Schmitt, nevertheless does not quite reach the wider affective practice of historiography, which seeks to bring confidence to otherwise irrational or unorganized temporal experience. In post-War Germany, scholars often in their correspondence struggled to articulate their overflowing emotion of unattachedness. The time seemed to lack meaning, and any actions felt futile. The extent to which historiography was used to bring meaning into everyday life was evident and at the same time puzzling.¹²⁹ Historiography was utilized in order to evoke an affectively-colored notion of continuity and confidence, not only in the abstract historical world, but in the experience world of its audience. To address this phenomenon, one needs to analyze the figural use of history and the historical metaphors it is constituted of.

Frank Ankersmit (2012) argues that a historical representation as a whole is like a metaphor in its three-step reference to the past. What differentiates the *historical* metaphor from other rhetorical concepts is that a historian's representation not only constructs a narrow analogy of a text and reality, but a metaphorical connection in history envelops the whole reality surrounding the sources and subject matter deployed by the historian.¹³⁰ In historical metaphors, emotions are not only used as

parasite metaphor was widely used when abstract prejudices or negative emotions were channeled into discriminating and violent social acts.

¹²⁸ Vladimir I. Lenin, *Imperialism, the Highest Stage of Capitalism* [1920]. Sydney, Resistance Books 1999. See especially chapter VIII, 'Parasitism and Decay of Capitalism,' 100-108.

¹²⁹ An example of this kind of usage of history is the common phenomenon of "academias" established in POW camps after the Second World War. Franz Wieacker, Helmut Coing, Fernand Braudel, among others, lectured about history in these camps. The purpose was to bring confidence and comfort to prisoners, whose previous idea of the social world was being demolished in the war. Cf. Liebs 2011, 28-29.

¹³⁰ Ankersmit 2012, 68-69, 103; Ankersmit's historical metaphor comes quite close to the notion of *conceptual metaphor* as defined by Zoltan Kövecses (2010), where an abstract conceptual domain (for example 'real life') is understood through another more coherent, concrete, organization of experience. A conceptual metaphor (such as 'life is a journey') is distinguished from other, smaller linguistic metaphors ('He is without direction in life') which map and make use of this more comprehensive

fundamental building blocks in constructing the represented connection within time, they are also the factors that make the argumentative claim personally recognizable to the audience.¹³¹ The coherence which a metaphorical connection embeds enables one to emotionally attune to the past; a historical account can be assimilated into one's narrative identity and utilized as evidence of a correct interaction between people and their culture.¹³² The representation can arouse an experience in the reader: 'Think about those people, so distant in time but still so recognizable in their being!' The life in the abstract past was like our life. This verbalization of the reader's undefined senses is something that Paul Ricoeur calls 'the pleasure of recognition.'¹³³ A recognition of similarity, of a congruence between emotional narratives of the historiographical text and the autobiographical identity of the reader, not just between detached emotions or cause-effect sequences, will occur as 'emotional knowledge.'¹³⁴

Erich Auerbach calls this comprehensive, temporal metaphor established in the realm of history a *figura*.¹³⁵ *Figura* as a linguistic (and emotional) tool has a temporal dimension, which produces an affective perspective on history, enabling one to evade 'the horror of historicity' and deal with past events like they were personal experiences. Figural interpretation withholds the idea of reading a script, of seeing the continuity and connection in time and achieving truth. Although figural relationships reveal only a partial truth about the world, they are found and constructed in the hope of uncovering a general ontological truth about the world people live in.¹³⁶ To explain history as figurally fulfilling for the interpreter conducting it, contained an idea of his

discourse in language. Zoltan Kövecses, *Metaphor: A Practical Introduction*. New York, Oxford UP 2010, 4–8.

¹³¹ Kövecses argues that in language (as well as in historiographical texts) 'emotions are forces' (Kövecses 2000, 61–62).

¹³² See fn. 127: metaphorical language enables the reader to perceive a historiographical argument as a historical metaphor. Thus, *Montaillou* by LeRoy Ladurie is a representation of life in a distant Occitanian village, although 'life' is crafted from partial textual sources and grafted onto the text. It is such emotions, connected and interpreted as a part of larger cause-effect entity, that link us to the metaphor of Ladurie's book; cf. Erich Auerbach, *Mimesis. Dargestellte Wirklichkeit in der Abendländischen Literatur*, 2. Auflage. Bern, Francke Verlag 1959.

¹³³ See Ricoeur, 'Time and Narrative. Vol. 1' 1990, 42, 51, 70–71. In 'the pleasure of recognition' the 'purged emotions' of the reader and the context of a textual narrative (including its affective dimension) are in congruence and can create a mimetic reproduction of a cultural material.

¹³⁴ Like Tillman, Habermas (Habermas 2012, 37) states, "[S]ubjectivity and meaning in a temporal world, which seemingly lacks any direction, are constituted through 'motive-consequence links' that give a *sense* of agency and direction to a life and help bridge change and development in the individual" (emphasis mine).

¹³⁵ Auerbach 1938.

¹³⁶ Through figural interpretation one could see the general ontological order (*veritas*) in a particular truth (*certum*). The figural interpretation of the connection between two events was at first a spiritual act, linked to God's meaning, and later a mode of close reading, with confidence about the "true nature" of the fulfillment [Erfüllung]. Auerbach 1938, 72–74. Similarly, Eelco Runia (2007) treats historiography as a "metonym": as a metaphorical depiction of a partial representative of the whole.

or her ‘fixed point’ outside the stream of time, from which the world could be commented on ‘seriously’ or with ‘high style.’¹³⁷

In *Die Fortwirkung der antiken Rechtskulturen in der europäischen Welt*, Wieacker analyzed the problematics of historical continuity. He presented how cultural and legal historiography has depicted the idea of a historical heritage and ‘rebirth’ of an era in the succeeding times by means of such concepts as ‘continuity,’ ‘reception,’ and ‘renaissance.’¹³⁸ He concluded that in order to explicate the historical meaning of continuity from the world of Antiquity to medieval Europe the researcher had to use ‘mediating concepts’ which translate the ‘indefiniteness’ of the historical reality into a truthful ‘presentation’: “Without such concepts [Here Wieacker uses the word *Bild* (“picture”, image” or “figure”)] but refers to the above-mentioned concepts and metaphors] the historian of culture and legal order cannot subsume and make visible the immense diversity of the interaction of effects.”¹³⁹ The most important feature however in Wieacker’s text is the way in which the truthfulness of a given ‘presentation’ is measured:

Ein solches Bild [which again refers either to a metaphor or concept] wird der Historiker der Kulturen noch am ehesten im Einklang finden mit seiner wissenschaftlichen Erfahrung von den Wirkungen einer älteren Kultur auf ihre Tochterkultur.¹⁴⁰

Wieacker acknowledges the metaphorical dimension of the ‘mediating’ concepts by seeing no distinction between them and metaphors. The problem is not whether the researcher’s ‘presentation’ mediates affections to the audience, after all the ‘continuity’ of ancient legal cultures is very much a continuity of “moral and intellectual judgements”,¹⁴¹ but whether the given ‘presentation’ is congruent with the researcher’s ‘scientific experience,’ that is, his historical vision or scholarly identity. In order to mediate the idea of continuity from Antiquity to the modern world, which for Wieacker was not only obvious but also a foundational feature in European legal history, he relied on ‘concepts’ which were personally recognizable to the audience. These concepts had been used before in historiography, they were understandable in the light of the common culture in which Wieacker wrote, but they also evoked a

¹³⁷ Auerbach 1959, 547; In the words of Fernand Braudel (Braudel 1982, 23): “To describe, analyze, compare and explain usually means standing aside from historical narrative: it means ignoring or willfully chopping up the continuous flow of history.”

¹³⁸ Wieacker, ‘Die Fortwirkung der antiken Rechtskulturen’ 1963, 79.

¹³⁹ *Ibid.*, 79, 80: “Vermittlungsbegriffen,” “Unbestimmtheit”; 79: “Ohne solche Bilder kann der Historiker der Kulturen und Rechtsordnungen die unübersehbare Vielfalt der Wirkungszusammenhänge vielleicht nicht zusammenfassen und anschaulich machen.”; also 80: “[D]er Historiker, der Wirkungszusammenhänge zwischen Kulturen nicht zu erforschen, sondern auch *darstellen* soll, kann auf solche Formeln der Veranschaulichung wohl kaum verzichten,” emphasis original.

¹⁴⁰ *Ibid.* 80. ” The cultural historian will most likely find such a picture [Bild: which again refers either to a metaphor or concept] in line with his or her expert knowledge of the effects of an older culture on its following culture.” (Translation by HW).

¹⁴¹ *Ibid.* 81, “moralischen und intellektuellen Grundwertungen.”

personal affection for continuity and a confidence in the reader. In other words, the linguistic devices Wieacker utilized in expressing the idea of continuity and confidence were constructed concurrently comprising the domains of language, culture and affections.

Such was the case also with the concepts Wieacker used when he described the ideas of the common understanding of the rule of law and justice within history. These entities he represented using the terms *Rechtsbewusstsein* and *Rechtsgewissen*.

For reasons of succinctness and readability, I have in this thesis often used the translations ‘legal consciousness’ and ‘legal conscience.’ These concepts were key terms in Wieacker’s attempt to analyze and have an effect on legal culture.¹⁴² Semantically, both words are constituted by connecting the German word ‘law’ with a term that describes a mental or spiritual action. Thus already in their semantics they bridged the social sphere of norms and individual perception. The concepts were established expressions in the tradition of German legal science. Not only Wieacker, but also other scholars applied and sometimes redefined them, within a similar or slightly different context. In Wieacker’s texts these words were not mere meta-level tools. To him, they had an empirical equivalence both in the minds of European individuals as well as in the German legal system and in correct application of the law. Naturally, Wieacker was not dogmatic in using these concepts through his long career, but they did nevertheless always express a dual ontology. They illuminated the juridical havoc of modern society as well as the persistent mentality inside a European mind. The concepts formed a bridge between distinct historical phenomena. Juridical developments inside the European continent, separated by time and national cultures, could all be related to these ways of thinking.¹⁴³ Using *Rechtsbewusstsein* and *Rechtsgewissen* as uniting abstractions, he represented the past as an entity which sustained a meaning and direction and was significant to people on a personal level.

A preliminary reading of his scientific writings revealed four thematic domains, which not only regularly appeared in connection to the common understanding of the rule of law and justice, but remained as significant entities within his texts throughout his career, from the 1930s to the 1970s. I have labeled these themes *Stand*, *Bildung*, *Schöpfung* and *Kameradschaft*. It is argued that these themes relate to the concepts of *Rechtsbewusstsein* and *Rechtsgewissen* as sub-concepts. With their help, through the affective and evaluative tension they withheld, a scientific concept, nominally emotion- and value-free tool, was further filled with social meanings. Whereas the themes of ‘Perfection through education’ (*Bildung*), and ‘An estate based on abilities’ (*Stand*) are related to the concept of *Rechtsbewusstsein*,¹⁴⁴ *Rechtsgewissen* was partly

¹⁴² On *Rechtsgewissen* see Liebs 2010; on *Rechtsbewusstsein* see Avenarius 2010.

¹⁴³ e.g. Wieacker, ‘Privatrechtsgeschichte’ 1952, 260.

¹⁴⁴ I will further elaborate the sub-concepts of *Bildung* and *Stand* in chapter 2. For now, on the relation of *Bildung* to *Rechtsbewusstsein*, see e.g. Wieacker, ‘Vulgarismus und Klassizismus’ 1955, 55: “allgemein Bildungshöhe” explained the (temporal) success of Eastern Roman “legal culture,” on the

defined with the help of ‘Scientific creativity’ (*Schöpfung*) and the ‘In-group of alike’ (*Kameradschaft*).¹⁴⁵

In order to find answers to my research questions, I will focus on the conceptual change in the terms *Rechtsgewissen* and *Rechtsbewusstsein*. My attempt is not to study these concepts *per se*, but instead the way Wieacker used them. I argue that in scrutinizing what these concepts exactly signified in Wieacker’s texts and how those meanings changed in time, I am able to clarify Wieacker’s view of society – his historical vision – as well as the continuities and discontinuities in his historiography. Along the lines of the above-elaborated theoretical stance, I take Wieacker’s *Rechtsgewissen* and *Rechtsbewusstsein* to comprise the domains of language, culture and affections. In other words, these notions were related to the previous scientific tradition (language). The overall social and political changes in Germany had an effect on their meaning (culture), *but* these changes were always perceived through Franz Wieacker’s historical vision. In other words, the domain of culture was always being referred to and compared with his scholarly identity, the worldview which he shared with his close colleagues (affections), and as a consequence it shaped the meanings of his texts.

1.4 Structure and Methods

The previous biographies of Franz Wieacker enable me to construct a chronological timeline of the events he encountered in 1933-1968. I will complete the picture with respect to the network of friends and phases that have not previously been sufficiently

one hand, 46: the “juristischen Bildung” explained the continuity from Rome to the middle ages in the Western part of the empire; also Wieacker, ‘Rudolph Von Jhering’ 1959, 200: while overviewing Rudolf von Jhering’s production, Wieacker stated on the interplay between Jhering’s personal “vision,” the “social streams of the time” and “legal scientific orientation”: “Jherings Bildung zeigt schon etwas von der Rückbildung des Weltbürgertums der deutschen klassischen Zeit zum Bourgeois”. On *Stand*, see e.g. Wieacker, ‘Privatrechtsgeschichte’ 1952, 92: “Gelehrtenstand [in sixteenth-century Germany]”, and 78: “gelehrten Juristenstand”; Wieacker, ‘Friedrich Carl Von Savigny’ 1960, 41: “Professorenstand [of nineteenth-century Germany].”

¹⁴⁵ *Schöpfung* and *Kameradschaft* will be dealt with in depth in chapter 4. For now, on *Schöpfung*, see e.g. Wieacker, ‘Privatrechtsgeschichte’ 1952, 17: [The European understanding of law as] “einer fachlich-geistigen, d.h. im weitesten Sinne wissenschaftlichen Schöpfung”, and 18: [Roman law as] “Fachschopfung”; Wieacker, ‘Der Standort der römischen Rechtsgeschichte’ 1942, 55: “[the tradition of Roman law as an exemplary] Rechtsschopfung”. On *Kameradschaft*: Wieacker uses the term *Kameradschaft* rarely (see Franz Wieacker, ‘Das Kitzberger Lager junger Rechtslehrer [1936],’ in Wollschläger (Hrsg.) 2000, 163: “Kameradschaftliche Beziehung”), but Wieacker consistently and explicitly writes on the importance of “community” in scientific work. I have chosen the term *Kameradschaft* to represent the emphasis on “communality,” because this enables me to better depict the interaction between Wieacker’s ideas and social change. Thus, with *Kameradschaft* I represent the phenomenon which Wieacker also called “Gemeinwesen,” “Kreis,” “Genossenschaft” and, most often, “Zunft.” See e.g. Wieacker, ‘Friedrich Carl von Savigny’ 1960, 42: “der Juristenzunft [of nineteenth-century Germany]”; Wieacker, ‘Vom römischen Juristen’ 1939, 447: “Gemeinwesen [of Roman Jurists]” and 446: “freie Zunft [of Roman lawyers]”; Wieacker, ‘Das römische Recht und das deutsche Rechtsbewusstsein’ 1944, 24: “fachlichen Berufsgemeinschaft.”

elaborated, with the information found from his correspondence. So in chapter two. “Biography, networks and social reality,” my attempt is to show the social position of Franz Wieacker in the fields of his contemporary legal science, higher education and German citizenship.

While analyzing Wieacker’s correspondence I will, indeed I must, follow a hermeneutical process as described by Hans-Georg Gadamer and Paul Ricoeur. Wieacker was, probably even to a larger extent than his friends, a legal scientist. He saw the world as a legal entity. He was also a highly learned scholar. Wieacker enjoyed expressing himself with the vocabulary provided by German literature and humanistic culture. Throughout his career, he searched and experimented with different ways to address social reality as perfectly as possible.¹⁴⁶ Thus it is often very difficult for me to examine the meanings and messages in his letters. His arguments are frequently so intertwined and cross-referenced to contemporary legal theories, poetry or classical texts that a straightforward thematic reading proves futile. In order to understand Wieacker’s *ideas*, it is necessary to read his letters in a hermeneutical circle: the references and claims found in certain letters are compared to secondary research literature or to other works to which they refer. The knowledge achieved in this way will be adjusted again to the text of the letters in order to further illuminate Wieacker’s ideas, and so on. The aim is not to give a final, coherent and single truth about the sayings and claims of Wieacker. Rather, I attempt to understand the world he inhabited, to see as far as possible the horizon which defined his representations.

In chapters 3 and 4 I scrutinize the concepts Franz Wieacker used in his works. As items for analysis, I have chosen the concepts of *Rechtsbewusstsein* [legal consciousness] and *Rechtsgewissen* [legal conscience]. Although these concepts are key terms in Wieacker’s argumentation, he rarely uses them in his correspondence. The themes which these concepts signify, however, consistently circulate in his letters to colleagues. The values, historical ideas and structures as well as interpretations of these entities dominate the discussion in his correspondence, and comprise the domains of his writing for decades. So in order to deconstruct the scientific meanings they connote, one needs to study Wieacker’s letters and his scientific works side by side.

The metaphorical emphasis determines the structure of my conceptual analysis in chapters 3 and 4 as follows: (a) I take metaphorical language and concepts to be constituted in and mediated between the domains of *language, affections and culture*. Thus concepts need to be studied as consistently and concurrently bearing these spheres.¹⁴⁷ (b) *Rechtsbewusstsein* and *Rechtsgewissen* envelope an affective dimension which is a prerequisite for their metaphorical function. In short, these terms can be felt, both by the writer applying them and the individual reading his text.¹⁴⁸ (c)

¹⁴⁶ Liebs 2010, 29–30.

¹⁴⁷ cf. Bourke 2014.

¹⁴⁸ cf. Gibbs 2008.

I consider *Rechtbewusstsein* and *Rechtsgewissen* to be comprised of smaller normative terms. These assisting, more socially grounded, concepts within a concept mapped the two basic concepts, which were contextualized more often within the domain of scientific language.¹⁴⁹

It is clear that historiography is not just a self-reflexive activity. Historians need to adapt their stance to the frame of a scientific way of writing. The restrictions imposed by the tradition, methods and relevant terms have to be addressed if one is to write legal history. In the “language” chapter of both concepts, I analyze the vocabulary Wieacker had at his disposal when expressing the experience of the society of his time. *Rechtbewusstsein* and *Rechtsgewissen* were common concepts whose meanings were not decided solely by Wieacker. So when scrutinizing the meanings that Wieacker applied to history through those concepts, one has to take into account (as Wieacker did) the scientific meanings which were previously and diachronically stratified in them. In this section I will briefly analyze the usage of the above-mentioned core concepts by looking at a number of renowned classics of legal science and certain legal historians. I assume that the vocabulary and argumentation related to *Rechtbewusstsein* and *Rechtsgewissen* in their texts plausibly presents the scientific horizon which also defined Wieacker’s works. I will also utilize previous historiographical analyses which address the academic and jurisprudential diachronic meanings of these concepts. These chapters enable me to sketch the scientific requisites and borders which affected Franz Wieacker’s aesthetics in his legal historical production.

In the analysis of the ‘culture’ domain regarding the concepts of *Rechtbewusstsein* and *Rechtsgewissen*, I elaborate the political and social factors affecting society during the emergence of both concepts in Wieacker’s text. With respect to the general mental landscape of Germany between 1933 and 1968, I trust to the comprehensive and multifaceted picture provided by secondary research literature on social and mental history. I have categorized the vast body of historical studies with the help of four thematic entities – *Bildung* [education], *Stand* [estate], *Kameradschaft* [comradeship] and *Schöpfung* [creation] – notions I have found in Wieacker’s texts. Consequently, from the research literature on early twentieth-century German culture, I have picked the works which somehow concentrate on these four themes. Reading them has allowed me to further elucidate the social reality of the concepts used by Franz Wieacker. Furthermore, in discussing the secondary research literature, I have given extra weight to those historical works which concentrate on contexts which were most familiar to Wieacker: academia, formal education, and science politics. Reading research literature will, I hope, reveal the diachronic changes within German society: the layered meanings in social reality and tensions inside and between fashionable slogans and legal historical concepts.

¹⁴⁹ cf. Kövecses 2000.

The distinguishing feature of my thesis, both concerning the conceptual-historical tradition as well as previous legal historical studies on the same subject, is the claim that I am able to reconstruct the interpretative sphere of Franz Wieacker's scholarly identity by analyzing the language of his academic works and the social reality of early twentieth-century Germany. I intend to track the historical vision which he used to evaluate historical subject matter. This is done with respect to both central concepts (*Rechtsbewusstsein* and *Rechtsgewissen*) in the sections devoted to the affective domain ("Affections"). In concrete terms this means that I take the conceptualized social meanings I tracked in the preceding "culture" chapter and compare them to the letters and conversations between Wieacker and his colleagues. The aim is to approach an understanding of the mentality of his in-group. I analyze how those contemporary phenomena, which somehow affected the themes of *Bildung*, *Stand*, *Schöpfung* and *Kameradschaft*, were handled in their discussions. I attempt to show that within this group, events were not taken as factors which demanded a reaction or explanation as such, but they were interpreted and fitted to a worldview which defined the group's relation to the social reality. Later this collective world view, an interpretative sphere, guided Wieacker's historical studies and appeared in the aesthetics of his works.

I will conclude the conceptual analysis of both *Rechtsgewissen* and *Rechtsbewusstsein* in chapters where I elaborate how these concepts were used in practice in Wieacker's legal historical texts. I will scrutinize his works between the 1930s and the late 1960s, and study whether there was a conceptual change, and if so, what kind of change this was. Thus, in discussing *Rechtsbewusstsein* and *Rechtsgewissen*, the sections "language," "culture," and "affections" focus on the process in which Wieacker connected his scholarly identity to the social meanings of his time, and in doing so created a *historical vision* of human affairs. This process enabled him to understand fragmented historical sources as a part, a metonymy, of the larger field of human activity.¹⁵⁰ I attempt to show how concepts which were constructed on the basis of a scholar's experiences of contemporary society, were utilized to make sense of the past. Not only did historical vision act as an analytical tool, the analytical process itself was also the object of one's study. Franz Wieacker used the concepts of *Rechtsgewissen* and *Rechtsbewusstsein* to study the same phenomena these concepts signified in Europe's legal past. Consequently, the aesthetic dimension in his historiography (largely built up with the help of presuppositions, axioms and unconscious references), reflected the contemporary time and social surroundings but also became exceptionally personal and evident.

¹⁵⁰ cf. Runia 2007.

2. The biographical background of Franz Wieacker in the collapsing bourgeois society before 1934

Franz Wieacker was born on 5 August 1908 in Stargard. His father – also called Franz Wieacker – worked in courts around Northern Germany, so during his early years Franz junior lived in the cities of Stade and Celle before moving at the age of 17 to Tübingen to study law.¹⁵¹ Wieacker’s social background and upbringing were much like those of his later network of close colleagues.¹⁵² He studied in Stade in a *Gymnasium*, a humanist-oriented and exclusive form of secondary schooling whose students aimed at higher academic education. Wieacker’s family was firmly situated in the upper-middle class of German society and was (nominally) Protestant. Wieacker remembered the early years with his family as being happy, and he was brought up in the middle class traditions of his time. He was familiar with classical languages and texts, and was especially fond of Roman law.¹⁵³ In Tübingen, Wieacker joined the Corps Rhenania, just like his brother and many relatives before him.¹⁵⁴ Although the Corps Rhenania was not a *Burschenschaft* and did not explicitly adhere to militant and nationalistic worldview, it was a traditional all-male organization for the sons of bourgeois families. At the time it upheld the idea of the nobility of German – which meant conservative middle class – values. It is fair to say that Wieacker grew up in a bourgeois environment and was effectively initiated into its world views from an early age.

This background is not without importance with respect to Wieacker’s identity as a scholar and the aesthetics of his scientific works. Quite the contrary; throughout his career Wieacker emphasized the underlining morality of law, and its nature as an embodiment of social values.¹⁵⁵ The virtues of responsibility, piety, and dignity, which he associated with law and legal scholarship can be traced to the world view of the early twentieth-century German middle class, or, to be more precise, the ideal type of social upheld by the German *Bildungsbürgertum* [educated middle class].¹⁵⁶ While

¹⁵¹ Liebs 2010, 23.

¹⁵² cf. Meinel 2012, 15–16; Alexander Hollerbach, ‘Zu Leben und Werk Erik Wolfs,’ in Erik Wolf, *Studien zur Geschichte des Rechtsdenkens. Ausgewählte Schriften, Band 3*. Frankfurt am Main, Vittorio Klostermann 1982, 235–250.

¹⁵³ Behrends 1995, XVI.

¹⁵⁴ Liebs 2010, 23.

¹⁵⁵ Wolff 2007, 78: Wieacker understood legal history: “Als Geschichte des verantwortlich handelnden Juristen und seiner Anleitung durch die Rechtswissenschaft.”; cf. Wieacker, *A History of Private Law* 1995, 194: Wieacker explains his stance on the “old question, ever new, of the purpose of the state and the relation between the citizen and his society and the state respectively” by referring to the legal history of Germany, where different phases are “attempts to revivify in the citizen a sense of personal *responsibility* for his law. Those who have eyes to see will realize that Germany still has some way to go before such a sense of *responsibility* is revitalized.” Emphasis mine.

¹⁵⁶ On *Bildungsbürgertum* See e.g. Jürgen Kocka, ‘Bürgertum und Bürgerlichkeit als Probleme der deutschen Geschichte vom späten 18. zum frühen 20. Jahrhundert,’ In Jürgen Kocka (Hrsg.), *Bürger und Bürgerlichkeit im 19. Jahrhundert*. Göttingen 1987, 21-63; cf. Franz Wieacker, *Rudolf Von Jhering. Eine Erinnerung zu Seinem 50. Todestage*. Leipzig, Koehler & A. Melang 1942, 12–13: Wieacker obviously held in high value the “alten Daseinsform des deutschen Weltbürgertums”. Alike Rudolf Von

one studies the intellectual history of early twentieth-century Germany, it is almost a rule that its scholars originated from a middle class environment. Thus, one should not overemphasize the fact that Wieacker and all of his associates came from bourgeois families. Nevertheless, since Franz Wieacker wrote of justice constructed on the idea of personal property, freedom and European virtues, it is vital to acknowledge that these ideas emerged from the intellectual atmosphere of the twentieth-century German *Bildungsbürgertum*. Franz Wieacker and his colleagues had been acculturated and socialized to this worldview since childhood. This connection is especially important with respect to the notions of *Bildung* and *Stand*, which Wieacker frequently utilized in his texts, and which constructed his idea of *Rechtsbewusstsein*, the legal consciousness of the people. Thus, I will next elaborate the meanings which *Bildung* and *Stand* were associated with in early twentieth-century Germany.

2.1. *Bildung* and *Stand* in the early twentieth century Germany

In the German bourgeois ethos, a certain kind of education, *Bildung*, was both a tool and purpose for a successful life, and an individual's destiny was tied to the greater cause of the nation through it.¹⁵⁷ Since the state was the provider of academic education and by far the most important employer of the academically educated, these two nineteenth-century innovations, university training and the nation state, were connected in the mentality of *Bildungsbürgertum*.¹⁵⁸ In the rhetorical sphere, German *Bildungsbürgertum* was created, upheld and defined against other social groups with the help of *Bildung*.

The "learned bourgeoisie," *Bildungsbürgertum*, distinguished itself from the workers and craftsmen in emphasizing social mobility and need for higher education, but also from the nobility and officers, whom the *Bildungsbürgertum* saw as backward, self-righteous, and tyrannical. In general, the values, beliefs and self-understanding

Jhering (according to Wieacker), in the beginning was in touch with the "Bildungsgefüges," which was "ein breiter, 'künstlerischer' Lebenszuschnitt die echte, frugale und klare Bildung der klassischen Zeit."

¹⁵⁷ The German bourgeoisie differed a great deal from its British counterpart. German class divisions were less defined and often economic reality or social distinctions did not follow the boundaries of class division. This however did not mean that they were less influential than their Anglo-Saxon counterpart (Jürgen Kocka, 'Einleitung,' in Werner Conze & Jürgen Kocka (Hg.), *Bildungsbürgertum im 19. Jahrhundert, Teil I: Bildungssystem und Professionalisierung in internationalen Vergleichen*. Stuttgart 1985, 9-26; David Blackbourn, 'The German Bourgeoisie: An Introduction,' in David Blackbourn & Richard J. Evans, *The German Bourgeoisie: Essays on the Social History of the German Middle Class from the Late Eighteenth to the Early Twentieth Century*. London, Routledge 1991, 1). The middle class's work, writings, clubs, and participation shaped a people's mentality or public discussion. *Öffentlichkeit* was a bourgeois invention which they very much wanted to keep their own (Jürgen Habermas, *Theorie des kommunikativen Handelns*. Bd. 1: Handlungs-rationalität und gesellschaftliche Rationalisierung. Frankfurt am Main 1981). The great dispute over the German *Sonderweg*, was mostly a debate about the conditions and opinions of the German middle class, or *Bürgertum* (Wehler 1995, 482-484).

¹⁵⁸ Kocka 1985; Rainer M. Lepsius, 'Kritik als Beruf. Zur soziologie der Intellektuellen,' In Rainer M. Lepsius (Hg.), *Interessen, Ideen und Institutionen*. Opladen 1990, 270-285.

associated with *Bildungsbürgertum* were strengthened and reconstructed in its own ethos, but also in public discussion, since newspapers, publishing houses and learned societies were very much owned, guided and occupied by middle class agents.¹⁵⁹ The concept of *Bildungsbürgertum*, as well as its synonyms, such as *Gebildet*, learned ones, did not solely mean people who had studied a lot or were disposed towards seeing society built upon education, but a group of people with a particular social background, standard of living, employment and common perception of both socially appreciated behavior as well as degrading deeds.¹⁶⁰

It is not, however, entirely accurate to analyze *Bildungsbürgertum* as a monolithic whole. There were differences between professions, regional variations, asynchronous lines of development, and divergent attitudes with respect to social change within the German bourgeoisie. But in general terms, one can attach relative exclusiveness in education and professions, an ambiguous relation both to the state and to modernization, and a heritage of values and communality to the world view of *Bildungsbürgertum*.¹⁶¹ The professions provided by public administration, the church and (higher) education tended to work as reproducers of class division, since often – due to a relative social stagnation – sons followed in the footsteps of their fathers workwise, and in any case the education required for these professions was within reach and was desirable for the children of bourgeois families. The modernization process offered both possibilities but also evident threats to the lifestyle of *Bildungsbürgertum*. Concerning threats, most had to do with the (bourgeois) division between “*Kulturnation*” [cultural nation] and “*Machtstaat*” [power state], where the cultural world of *Bildungsbürgertum* was in perennial (albeit often reconcilable) contradiction with the administrative attempts of the state.¹⁶² With respect to actual social changes brought about by modernization, mass society and economic development, *Bildungsbürgertum* insisted that the modern challenges should be solved by means of bourgeois values. In its ethos “responsibility” and “communality” were virtues, which preceded administrative alterations, not the other way around.

As a concept, *Bildung* was more like an academic subfield, holding many interpretations and views. Although *Bildung* stood for a state of learnedness, it also signified a process where an individual through studying allegedly started to see the world in a critical, truthful manner, and emancipated himself [sic] to work on behalf

¹⁵⁹ Habermas 1990.

¹⁶⁰ This bourgeois mentality did not remain a dead letter or an abstraction. In early twentieth-century public discourse it was undisputed that middle class values promoted middle class action; these values were emblematic to people from middle class origins. Even today, in established historical studies, some deeds in the past are interpreted as being caused by the mentality of the *Bildungsbürgertum*. Cf. Moses 2006, 74-75; Mehring 2014, 92-93.

¹⁶¹ Rüdiger Vom Bruch, *Bürgerlichkeit, Staat und Kultur im Kaiserreich*. Stuttgart, Franz Steiner 2005, 75-78.

¹⁶² cf. Klaus Scholder, ‘Vorwort,’ in Klaus Scholder (Hrsg.), *Die Mittwochs-Gesellschaft. Protokolle aus dem geistigen Deutschland 1932-1944*. Berlin 1982, 9-47. Scholder’s text also offers a first-class example of the distinguished *academic* application of the worldview of *Bildungsbürgertum*.

of the greater social cause. Naturally, this kind of learning often, but not necessarily always, was supposed to take place in universities. It meant more than mere training or acquiring some skills in order to manage and find one's place in society, but instead it stood for personal perfection and constant reflection between I and the other. It signified becoming aware of one's capabilities and fulfilling a personal quest of growing into a thoroughly conscious subject.¹⁶³ The idea of "becoming" what one should be presupposes a lack of something essential or a state of incompleteness. In the words of H.-G. Gadamer:

Man is characterized by the break with the immediate and the natural that the intellectual, rational side of his nature demands of him. "In this sphere he is not, by nature, what he should be"—and hence he needs *Bildung*.¹⁶⁴

Bildung was localized in the ever-recurring movement of the spirit. It meant distancing oneself from the immediacy of natural life and the mind's control over sensations and irrational stimulus. In short, it meant recognizing oneself in the other, and then critically evaluating one's previous position. Since the Romantic Movement, from which the idea of *Bildung* emerged, also emphasized an awareness of and an emphasis on the historicity of things, the common understanding was that 'elevation' was best achieved in learning about the past. Especially important were the high cultures of antiquity, which seemed to carry within them the virtues and values relevant for modern society. In them the noble and universal purpose of the human soul was visible – distant yet learnable. Studying the theoretical knowledge of antiquity (its language, art, culture and law) was a process of moving towards or becoming what humankind was supposed to be.

Nevertheless, the concept of *Bildung* could not float above the social meanings of its present society; contemporary social meanings were placed upon it in arguments and discussions, and in expressing goals, emotions and opinions. Like other concepts of German idealism, it was read and interpreted as intertwined with contemporary social structures.¹⁶⁵ Consequently, the original idea of *Bildung* became fused with bourgeois ideas concerning education, personal property and social status. It was utilized in discussions concerning the fate and direction of the nation state as well as being a value in itself while creating social rankings and distinctions.

¹⁶³ cf. Wilhelm von Humboldt, 'Theorie der Bildung des Menschen,' in Andreas Flitner & Klaus Giel (Hrsg.), *Wilhelm Von Humboldt. Werke in fünf Bänden. Bd.1: Schriften zur Anthropologie und Geschichte*. Stuttgart, J.G.Cottasche Buchhandlung 1960, 234–240.

¹⁶⁴ Gadamer 2000, 11.

¹⁶⁵ Kettel and Loader assert that already to Wilhelm von Humboldt: "'Bildung' embodied the notion that a conjunction of individual self-cultivation, collective cultural achievement, and a public order both prosperous and ethical belonged to the natural course of social development." David Kettler & Colin Loader, 'Weimar Sociology,' in P.E. Gordon & J.P. McCormick, *Weimar Thought: A Contested Legacy*. Princeton, Princeton UP 2013, 18.

Lawyers were an important and active group inside the *Bildungsbürgertum*. Due to the impossibility of drawing sharp class-based divisions both in relation to other social groups, as well as inside the educated middle classes themselves, the task of self definition needed to be conducted with new concepts. The studies and terminology of British and French society could not be straightforwardly applied to German society. Hence, lawyers repeatedly and persistently demanded acknowledgment as a *Stand*, an estate.¹⁶⁶ In the writings of nineteenth-century German lawyers there is a constant need for acknowledgement of the particular challenges this profession faced in the young state and industrializing society. In juridical self-perception lawyers were an intermediate group between state bureaucracy and the people. Michael John writes:

[L]awyers came to see themselves as ‘organs of the administration of justice’, as a *Stand* whose existence and claims to status were justified in terms of an abstract notion of public service. In this there were many parallels with the bureaucracy’s self-image as a ‘universal estate’.¹⁶⁷

Lawyers’ working conditions and horizon were bound to the state. By far, most of those who were legally trained found a job within the public sector. Thus the professional appreciations and commonly upheld virtues were related to this vocational status as “a legal civil servant of the people.”¹⁶⁸ The profession was unique in its simultaneous universality and exclusiveness both in terms of international comparison and among other German middle class professions. Contrary to, for example, the British legal class, the work of a lawyer or a judge in Germany was officially regulated in a manner that necessitated a state-provided, special education.¹⁶⁹ The lawyer ‘estate’ was by no means a closed profession. Anyone, despite their origin or fortune, could apply. However, one part of this universally available education was a relatively long and unpaid practice, which a candidate had to conduct in an organization that dealt with legal matters.¹⁷⁰ Usually it meant a commission in an organ of state bureaucracy, where a jurist could continue to work, this time with salary, after his graduation. Throughout the nineteenth and twentieth centuries there was a regular over-supply of the legally trained in comparison to the

¹⁶⁶ Michael John, ‘Between Estate and Profession: Lawyers and the Development of the Legal Profession in Nineteenth-Century Germany,’ in Blackbourn & Evans 1991, 163, 170.

¹⁶⁷ John 1991, 175.

¹⁶⁸ John 1991, 184.

¹⁶⁹ Wilhelm Bleek, *Von der Kameralausbildung zum Juristenprivileg. Studium, Prüfung und Ausbildung der höheren Beamten des allgemeinen Verwaltungsdienstes in Deutschland im 18. und 19. Jahrhundert*. Berlin, Colloquium Verlag 1972, 50–54. The education of lawyers was strongly attached to the Humboldtian tradition, which guaranteed a certain freedom of teaching, and a strong link with philosophical (and later psychological) discourses. F. Ranieri, ‘Juristen für Europa: Wahre und falsche Probleme in der derzeitigen Reformdiskussion zur deutschen Juristenausbildung,’ in *JZ* 52 (1997), 801, 804–805, 807–808.

¹⁷⁰ Rüdiger Vom Bruch, *Gelehrtenpolitik, Sozialwissenschaften und akademische Diskurse in Deutschland im 19. und 20. Jahrhundert*. Stuttgart, Franz Steiner 2006, 377–378; John 1991, 166.

posts available.¹⁷¹ Thus, the education itself posed an obstacle for a wide and socially equal entrance to the lawyer *Stand*. Not many could afford the apprenticeship, especially if the income after graduation was insecure, and, in any case, not very generous.

These particular conditions created a culture which strongly upheld and appreciated self-imposed service over economic gain. The financial conditions of the legally trained were of course an important and often referred to matter in the publications of jurists, but complaints and expressions of discontent were directed to the state, which remained the main source of lawyers' income. Also, the arguments on behalf of more reasonable compensation to the 'estate' were based on its common *neglect* of economic profit. Contempt for personal economic gain became a virtue, which elevated the jurist *Stand* above other groups. This same criteria was similarly applied in making inner group distinctions. The *Winkeladvokaten* [hedge advocates] were legal advocates who took small cases, which lacked any significance in the perspective of the general public or the state, but were at least moderately well paid.¹⁷² Thus in the jurist self-definition of the nineteenth (and early twentieth) century the *Stand* was distinguished from society, and also from other professions in *Bildungsbürgertum* by the virtue of its *inner morals*, a visible symptom being the disdain shown to money by its members.

2.2. The 'war generation': Franz Wieacker and the social history of German legal scholarship

Equipped with the ideological premises elaborated above, Wieacker followed in his father's footsteps and chose a career in law. After Tübingen, Wieacker moved to the University of Göttingen, and in 1930 to the Albert-Ludwigs-Universität in Freiburg.¹⁷³ During these years Wieacker became acquainted with numerous people whose friendship he valued throughout his life. First of all, in Göttingen he met Fritz Pringsheim, who as a supervisor and mentor represented an academic father figure par excellence to the young Wieacker. In Freiburg Wieacker established life-long friendships with Erik Wolf and Ernst Forsthoff, and it was also in Freiburg, via Forsthoff's political activity, that he got in touch with national academic celebrities like Carl Schmitt and Ernst Jünger. As the youngest member of Forsthoff "circle" Wieacker participated in seminars where the leading young conservative revolutionaries analyzed the state of the nation and experimented with new ideas.¹⁷⁴

¹⁷¹ Hannes Siegrist, 'Bürgerliche Berufe. Die Professionen und das Bürgertum,' in Hannes Siegrist (Hg.), *Bürgerliche Berufe: Zur Sozialgeschichte der freien und akademischen Berufe im internationalen Vergleich*. Göttingen, Vandenhoeck & Ruprecht 1988, 31-32.

¹⁷² John 1991, 183.

¹⁷³ Liebs 2010, 24.

¹⁷⁴ Meinel 2012, 42.

In 1932 Wieacker completed his Habilitation with a monograph *Lex commissoria. Erfüllungszwang und Widerruf im römischen Kaufrecht* and, in October 1933, followed Forsthoff to the University of Frankfurt.¹⁷⁵ During that year National Socialist seized power in Germany and started to transform Germany into a totalitarian nation.

In order to have an insightful picture of Franz Wieacker's thoughts and actions following the political "revolution" of 1933, and also to understand the later developments in his academic production, one aspect has to be taken into account. Franz Wieacker represented the "war generation," a generation of Germans born between 1902 and 1908. Thus to Wieacker, in addition to the ideological premises elaborated in the preceding pages, the generational experience of the First World War and its consequences became a basic factor behind his perception of society during the interwar years.¹⁷⁶ The European nation states had already standardized upbringing, education and the media when they engaged themselves in a new kind of total war in 1914. The war generation, which was just old enough to understand but too young to participate, experienced the events of the First World War from the "*Heimatfront*" [home front]. From this safe distance, and innocently unaware of the true horrors of the battlefield, they nevertheless with the help of mass-media gained a strong experience of nationalism and were aware of the outrageous death-toll. This cohort, protected from the horrors of the front, but very open to war propaganda, gained a personal experience of the Great War that was often patriotic, dominated by national feeling, and directed against outside dangers.

Ernst Forsthoff, Werner Weber, Erik Wolf, Gerhard Dulceit, Karl Larenz, Friedrich Schaffstein, Hans Welzel, Ernst Rudolf Huber, Wolfgang Siebert, Karl Michaelis, Georg Dahm, Martin Busse, Hans Thieme and Franz Wieacker were all born between 1902 and 1908, Wieacker being the youngest of this group. Not only was the First World War a decisive key experience in their life history, they also witnessed at first hand the struggles of the Weimar Republic and the empty liberal promises it failed to deliver. They felt the consequences in their own everyday reality, in their families and personally as young students.

¹⁷⁵ Franz Wieacker, *Lex commissoria. Erfüllungszwang und Widerruf im römischen Kaufrecht*. Berlin 1932; On the move to Frankfurt, see Behrends 1995.

¹⁷⁶ Ulrich Herbert uses the concepts "Kriegsjugendgeneration" or "Generation der Sachlichkeit". See Ulrich Herbert, "'Generation der Sachlichkeit". Die völkische Studentenbewegung der frühen zwanziger Jahre in Deutschland,' in Frank Bajohr, Werner Johe & Uwe Lohalm (Hrsg.), *Zivilisation und Barbarei, Die widersprüchlichen Potentiale der Moderne*. Hamburg, Hans Christians Verlag 1991, 115–143; cf. Roseman 1995, 27; Donson 2010; Meinel 2012, 24–27. Even if one rejects the Mannheimian idea of key moments which form the ideologies of an entire cohort, it is obvious that this group confronted drastic phenomena, which were homogenized in an unprecedented way. Cf. Karl Mannheim, 'Das Problem der Generationen,' in *Kölner Vierteljahrszeitschrift für Soziologie* 7 (1928), 157–185, 309–330.

There were concrete and indisputable reasons for the feelings of disintegration and for suspicions about one's personal and collective future. Germany had lost the war and, it was felt, had been maltreated by the victors and neighboring countries. The shadow of Bolshevism was a constant reminder of how civic society as they knew it could be threatened.¹⁷⁷ The social contract between classes, groups and parties had lost its legitimacy after the Revolution and Civil War of 1918-19. The *Reichstag* was inefficient and made democracy seem powerless. Violence in the streets was more a rule than an exception. Hyperinflation and the Great Depression had ruined the possibilities for improved living conditions for millions of people.¹⁷⁸

Values which for decades had unified the middle classes even on the level of manners and gestures, and which had defined the mental status quo of the *Heimat*, ceased to have the same significance in the chaotic years immediately after the First World War. The bourgeoisie now felt that the norms controlling society were artificial, unrelated to the actual needs and goals of the people.¹⁷⁹ In short, many felt that society, both in everyday practices and with respect to future expectations, was undergoing a disastrous change and individuals could no longer achieve the standards which were previously valued as comprising a good life.¹⁸⁰ This sense of loss was accompanied by feelings of envy and injustice. As the structures of the German way of life collapsed or were dismantled, some individuals seized the moment for personal gain, tearing up the cultural guidelines for what had previously been regarded as accepted and decent.

¹⁷⁷ On the threat of Bolshevism, see Max Weber, 'Politik als Beruf [1919],' in Johannes Winckelmann (Hrsg.), *Max Weber: Gesammelte politische Schriften*. Tübingen, J.C.B. Mohr 1988. Weber's text was originally a talk given at the University of München in 1918, when the tension, which later surfaced in the Civil War, already existed and was felt personally by the students to whom Weber addressed his speech. On the more undefined fear of Bolshevism among the *Bildungsbürgertum*, see Carl Schmitt, 'Diktatur,' in Carl Schmitt, *Staat, Grossraum, Nomos. Arbeiten aus den Jahren 1916-1969*. Berlin, Duncker & Humblot 1995, 36-37.

¹⁷⁸ Martin H. Geyer, *Verkehrte Welt: Revolution, Inflation und Moderne, München 1914-1924*. Göttingen, Vandenhoeck & Ruprecht 1998, 379-405.

¹⁷⁹ Geyer 1998, 379-382. This was clearly how Franz Wieacker thought, both in private and in his publications. The latter part of *Privatrechtsgeschichte der Neuzeit*, roughly from the French Revolution onwards, is a critical and pessimistic presentation of the development in the European legal system and consciousness. Wieacker was not alone in his cultural pessimism. Cf. Oswald Spengler, *Der Untergang des Abendlandes: Welthistorische Perspektiven*. Beck 1923; Carl Schmitt, *The Concept of the Political: The Age of Neutralizations and Depoliticizations*. [1929]. Chicago, University of Chicago Press 1996.). About the degeneration of bourgeois virtues, see Moses 2006, 79.

¹⁸⁰ This was not, however, the whole picture. The end of the Wilhelminian Empire and its estate system meant the possibility of social upgrading for a large number of the younger members of the lower middle class. (Hans Mommsen, 'Generationskonflikt und Jugendrevolte in der Weimarer Republik,' in Thomas Koebner, Rolf-Peter Janz & Frank Trommler (Hrsg.), *"Mit uns zieht die neue Zeit."* *Der Mythos Jugend*. Frankfurt am Main, 1985, 50-67.) It is probable that the deep cultural pessimism, expressed especially in academia, was a symptom of a *relational* degradation. Whereas insecure future prospects and unclear economic situation of the early twentieth century were nothing new for the tenants and workers, to the bourgeois generation it seems as the infinite structures of the society were shaking. With respect to economic possibilities and secured career options, the bourgeoisie found itself on the same level with the lower social classes. For the previous elite in estate-based Germany, the 1920s and 1930s represented a disaster of a similar kind.

In sociological terms, the German middle class faced both a generational and a class crisis.

That was especially noticeable with respect to personal property and income. The hyperinflation of 1923 cast some into immediate and unexpected poverty, while some, widely resented, made a fortune by speculation. Nevertheless, this new wealth tended to disappear as quickly as it came.¹⁸¹ The end result, however, was a widespread notion that personal property was no longer the anchor it had once been. While pursuing the good life, one could not place trust in the personal property or wealth of one's family, nor even the security of a stable income. Instead, those who seemed to benefit most from the situation were immoral opportunists who ignored traditional values. The winners were those who detached themselves from the cultural frame and aimed for their own selfish good, while at the same time preventing others from their rightful share. The word *egoism* often occurred in public discussions and in texts.¹⁸² It came to mean an attitude and acts which despised the common good and instead ruthlessly pursued individual gain. To cultural conservatives *egoism* was a plague of Weimar society, which, notwithstanding that it could be linked with socialism or particular persons, lacked an elaborated definition and was often used as a universal curse word.

Thus, the economic turmoil of the 1920s and 30s for the German middle class meant an ontological crisis. The bourgeois values of the middle class were bound to their personal property, work, accommodation and a secure future.¹⁸³ The recession and inflation devalued virtues and collectively esteemed symbols of a good, respectable life. A common explanation for this crisis in values, whose *visible symptom* was the surrounding economic turmoil, was to blame either socialists or liberals, or both. Bolshevism as an ideology seemed to challenge everything the middle classes believed in. It emphasized the importance of economics as a predetermining historical force. It was allegedly based on the same 'force' that in modern capitalism had stripped the middle classes of all the things that they perceived to be most significant: the social status accrued in service of the state, the dignity provided by personal possessions, and formal education as a superior force shaping the destiny of the nation.¹⁸⁴ According to the conservative bourgeoisie, socialism was a misunderstanding of a

¹⁸¹ Wildt 2009, 32–36.

¹⁸² Kühne 2005, 55; cf. Hitler's speeches and the use of the concept of "egoism" in Sax & Kuntz 1992, 195, 199.

¹⁸³ Max Weber, *The Protestant Ethic and the Spirit of Capitalism*. Mineola, Dover Publications 2003, 47–78.

¹⁸⁴ Thus, Carl Schmitt in his early work *Roman Catholicism and Political Form* (1923) writes of two kinds of barbarism which threatened European bourgeois values: liberal democracy, and the dual threat of Russian barbarism combined with Marxism. The latter was an anathema "to West European tradition and education [*Bildung*]." The class-conscious proletariat and the Russian "masses" were both "barbarians": "Where they have a sense of their own power, they proudly call themselves barbarians." Schmitt, *Roman Catholicism and Political Form* [1923]. Westport, Greenwood Publishing Group 1996, 38; Cf. Roger Woods, *The Conservative Revolution in the Weimar Republic*. London, Macmillan Press 1996; Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War*. Princeton: Princeton University Press 2014.

perennial kind. Bolshevism was an obvious enemy, but since it could not be associated with any concrete social group or visible, common symbol, it remained a primitive, undefined threat that needed to be stemmed.¹⁸⁵

The educated middle classes had a patronizing attitude on the lower classes, which they combined with the demise of nationalist ideology. The nationalism of the nineteenth century and the first decade of the twentieth century had presented the nation as an organic whole.¹⁸⁶ The insurmountable cohesive corporation of the people was placed on a pedestal labelled the nation. Furthermore, the bright future of the nation was defined by its cultural essence, the *Geist*, which was in the possession of, and was formed by, the educated classes. The nation was perceived in relation to and as opposed to other ethnic units.¹⁸⁷ This background constituted the nationalistic double-bind of the conservative bourgeoisie.¹⁸⁸ On the one hand, the nation, the unity of the German people, had proved to be a clear misconception. Not all German-speaking people respected the national (cultural conservative) values, which the cultural elite perceived as foundational. Nor were all Germans willing to live under the same social norms or prioritize similar material or cultural matters that the educated did. On the other hand, the implicit theme in German idealism was that truly meaningful artistic and scholarly work could only be created in association with the *Geist*, the national spirit or tradition. The necessity of a culturally unified whole was countered by the impossibility of gathering all Germans within the same community.

The relational plight to which the post-war years drove the bourgeoisie did not mean to them merely economic recession; it meant that social dignity and personal prospects faced a chaotic future.¹⁸⁹ Hyperinflation and recession ate away at the certainty of continuity for upper-middle class children; a fixed economic status vanished when a salary ceased to be anything more than a provider of subsistence living standards. Universities in Germany were multiplying and growing bigger, and the total number of graduates was increasing every year. In addition, the new academic fields of economics and the social sciences produced professionals who were ready to compete for the jobs which had traditionally been the domain of jurists. Education no longer

¹⁸⁵ Naturally, the political parties SPD and KPD were associated with Bolshevism, but it was somewhat difficult to accuse the socialists of the destruction of the national and personal bases for property. In the end, it was the workers who suffered the most from hyperinflation and the recession of the early 1930s. Also the conservative and reconciliatory discourse after the Civil War was concerned with the souls of the lower classes. If the workers were isolated and overly punished for their engagement in socialist movements, they would only be further radicalized, which would lead to the accelerating division and weakening of the nation. cf. Mosse 1991, 121–132.

¹⁸⁶ Anthony D. Smith, *Chosen Peoples: Sacred Sources of National Identity*. Oxford, Oxford UP 2003, 195–199.

¹⁸⁷ Anderson 2006, 4–8; The First World War was widely welcomed as the initiation rite of this unified organic unit (Mosse 1991, 155–162). However, the Civil War and the unstable social reality of the Weimar Republic smashed this ideal to pieces. Obviously, some parts of the population had not shared the romantic ideals that the learned had carefully constructed during the fin-de-siècle.

¹⁸⁸ Kühne 2005, 51.

¹⁸⁹ See fn. 35.

had the distinctive meaning that it had previously possessed.¹⁹⁰ The socially acknowledged status which lawyers as the ‘organs of the administration of justice’ had had, existed no more.

Whereas Hitler’s succession has traditionally been explained by the frustration of the lower middle classes, I agree with scholars who hold that this view is too simplistic. Having said that, this does not eradicate the fact that serious frustration, disappointment and bitterness existed amongst the bourgeoisie, and on some levels the behavior and ideas which those emotions generated, supported the rise of the Third Reich. My argument is that Franz Wieacker, along with other scholars in his circles, experienced firsthand the change in bourgeois ideals which were brought about by the social and political developments. Wieacker studied the preceding tradition from the perspective of Weimar, as well as reflected on the explanations other scholars had given about the contemporary world, but far from merely repeating these discourses in his writings, he used that material as a conceptual resource in expressing his historical vision. This becomes evident in his ideas on the rule of law and justice as expressed by the concepts *Rechtsbewusstsein* and *Rechtsgewissen*.

¹⁹⁰ Wildt 2009, 40–41; cf. Christian Jansen, *Vom Gelehrten zum Beamten. Karriereverläufe und soziale Lage der Heidelberger Hochschullehrer 1914–1933*. Heidelberg, Verlag Das Wunderhorn 1992, 10–15.

3. *Rechtsbewusstsein*: The cruel reality and human awareness

In this chapter I scrutinize the ways in which the concept of *Rechtsbewusstsein*, legal consciousness, appeared in Franz Wieacker's scholarly texts. I analyze the ways he defined the concept in congruence with his personal experience of the surrounding society, as well as how he used it to explain social phenomena in the past. To Franz Wieacker, *Rechtsbewusstsein* signified a wider mentality prevailing in a given society or constellation, and its study presented a starting point for a researcher in his quest for commenting on the rule of law and legal historical development. It was a common mental perception of the legal system of his time, and as such it was a temporal understanding of the relations between the state, its people, and the law. In other words, legal consciousness was the people's opinion on the rule of law.

This understanding, of course, had to do with the concrete institutions of law and jurisprudence. Nevertheless, Wieacker always regarded legal consciousness as welling from – and thus it had to be understood in relation to – the social structure, its distinguishing cultural values and virtues, and the status of an ideal kind of education prevailing in society. In his works he emphasized the mental sphere of legal systems. Hence, the historiographical concept of *Rechtsbewusstsein* was also comprised of the narrower entities of *Stand* and *Bildung*. The treatment and value which a given time and society gave to *Stand* and *Bildung*, were reflected in that society's legal consciousness. On the other hand, in his own circumstances, Wieacker believed that German legal consciousness evolved according to the changes he experienced as a member of the *Juristen-Stand* and as a learned scholar who was devoted to the task of studying the high spiritual achievements of past thinkers, and aware of the value this past knowledge enshrined.

In analyzing the meaning of the concept of *Rechtsbewusstsein* in Franz Wieacker's texts, one cannot treat it solely as a legal tool, a fashionable slogan, or a personally constructed idea. Rather, the meaning as it emerges in Wieacker's texts, was based on his learnedness in previous legal theories, the prerequisites of the current political and social situation, as well as his individual interpretation and experience of those two domains – the scholarly tradition and changing social circumstances in Germany.. Thus I intend to study Wieacker's idea of *Rechtsbewusstsein* –along with the terms which he also used to depict that abstraction – as a result of the intertwining of personal experience, historical development, and scientific discourse. My claim is that although Wieacker studied the legal consciousness of the past and derived from them his comments on present society, in reality his research process was more like a circle. Through his experience of the contemporary legal consciousness (the current situation regarding *Stand* and *Bildung*) he perceived the historical events and texts, and then via that construction made a claim about the nature of his contemporary society and what it should become in the future.

Since I study Wieacker's concepts as metaphorical linguistic tools, I have divided the forthcoming analysis into three spheres. The term *Rechtsbewusstsein* was not Wieacker's own invention. It had been used by earlier legal theorists and was an established concept in the legal scientific discourse of twentieth-century German jurisprudential vocabulary. Thus, in the forthcoming section on language I briefly elaborate the meanings that the concept had, and explore the vocabulary which Wieacker had at his disposal when writing about the past. It also illuminates the means by which other scholars studied the past phenomena which Wieacker was interested in.

In the section on culture I analyze the social and political changes which took place during the time frame of my study, and which affected the ideas of *Stand* and *Bildung*. This general historical development overshadowed Wieacker's understanding of legal consciousness, but by no means predetermined his thoughts and writings. Thus following the section on culture, I present how Wieacker personally conceived the society of his time, and scrutinize how the political and social changes were perceived through the shared world view of a group of scholars (see 3.3 on affections). I show that a scholarly culture of understanding the contemporary world existed. The focus of this scholarship related to national development, but it also distinguished distinct virtues and valuations. This section on the relation between the national and scholarly cultures is mainly concerned with analyzing Franz Wieacker's correspondence with his friends as well as elaborating the meanings that other scholars in his close group of colleagues gave to contemporary phenomena. Finally, I compare my results to Wieacker's scholarly texts and clarify how the meanings in the concept of *Rechtsbewusstsein* changed in the course of his career.

The section on language provides the overall historiographical usage of the term *Rechtsbewusstsein* in the discourse of German legal science, and covers the period from 1933 to 1968. In order to avoid repetition, and to highlight the conceptual changes in Wieacker's texts, I have split the timeline into two periods. I analyze the general political and social change, the cultural view upheld by Wieacker and his peers, and the change of meanings in Wieacker's scientific texts (in this order) first from 1933 to 1945, and then scrutinize the post-war situation from 1945 to 1968. In line with the research questions posed at the beginning of this thesis, the following analysis will focus on these questions: What did *Rechtsbewusstsein* actually signify to Franz Wieacker? In which ways was it related to the general social and political change of twentieth-century Germany? What part did the notions of *Stand* and *Bildung* play within the concept? And how did the use of the concept in Wieacker's legal change over time?

3.1. Language in *Rechtsbewusstsein*: The scientific horizon and the previous tradition of the concept

Bewusstsein has been translated as “consciousness” or “awareness.” These words however fall short of the meanings which the German concept connotes. *Bewusstsein* (as well as *Gewissen* and *Schöpfung*) carry along with them whole intellectual weight of historicism, i.e. the attempt to redefine tradition in the fields of social interaction and scholarship. Thus the romantic counter-effect, especially in Germany, was to defend the holistic idea of man, society and history. To Hegel (as well as Hume, Kant, and Husserl) science and the cultivated mind were to be understood as the co-work of the senses and experience, where experience meant accumulated and categorized information.¹⁹¹

The concept of *Rechtsbewusstsein* needs to be analyzed against the idealist background as it appeared in Carl Friedrich von Savigny’s texts.¹⁹² Savigny as a legal theorist belonged to the Romantic counter-movement which questioned the enlightened and utilitarian formulations of jurisprudence and justice. The legal tradition emerging from the French Revolution, Napoleonic codification, and, for example, Jeremy Bentham’s radical philosophy, treated law as an unattached system that was legitimate and functional regardless of time and place.

Savigny emphasized the cultural background and history of a legal system. Far from being disconnected rational constructions, legal systems were an organic part of the culture and the people whom it served. According to Savigny, laws needed to have reference to the sense of justice of a people. This sense, *Rechtsbewusstsein*, emerged from the collective experience of the people. Thus, it was created over time, it had features which distinguished it from the awareness of other ethnicities, and it could not be reduced to “mere” reason.¹⁹³ As such, it also represented all the sides we attribute to human behavior, not only the rational, easily understandable, goal-directed and clearly articulated visible action, but also affect-based, unconscious and malevolent actions. To successfully utilize and study law, one had to have an understanding of the social context in which it operated, which also meant that a society and its legal consciousness, *Rechtsbewusstsein*, were in continuous development and the law as well as scholarly presentation about it had to adapt to this process.¹⁹⁴ This feature was not only a decisive factor in Savigny’s formulation of the concept, but was closely contingent with his view on the world of science in more general terms. To Savigny, the political level of society moved fast and often in an opposite direction to the most “natural” and beneficiary one from the point of view of

¹⁹¹ Carr 2014, 8–30.

¹⁹² Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge, Cambridge UP 2004, 42-46.

¹⁹³ Friedrich Carl von Savigny, *System des heutigen römischen Rechts. Vol 1*. [1840]. Aalen Scientia 1981, 14–16.

¹⁹⁴ *Ibid.*, 45.

people's consciousness of law. In his own time this was concretized in the social reforms of the estate system, in education and the economy, and in making administrative rearrangements to actions that were not ethical or just.

The problematic was picked up and further developed by the German free law movement, the *Freirechtsschule*, among whom could be counted Herman Kantorowicz and Eugen Ehrlich. Whereas Savigny was content to describe the division and incompatibility between politics and law, between norms and social reality, *Freirechtsschule* wished to challenge the whole education and understanding of legal matters in order to have an effect on the political reality. To Kantorowicz and Ehrlich, law had distanced itself from the social reality (*Wirklichkeit*). Codified and parliamentary legislation could not keep up with the social changes which people faced in their everyday world. Neither were the traditional theories of, for example, the Historical School flexible enough to describe society. Thus, legal science's contribution to society had become insufficient to provide solutions to the perennial problems of freedom, justice, and authority.¹⁹⁵ To Ehrlich, law was a social psychological phenomenon, and the state's legislation and norms should not be perceived as the only or most important form of law. In order to study the law one had to acknowledge the *opinio necessitatis*, i.e. the belief that an action is carried out as a legal and social obligation.¹⁹⁶ Kantorowicz concentrated on the sociological bases of the law within society and tried to historicize its practices. He stressed the significance of a lawyer class and praised the values it upheld or should uphold.¹⁹⁷

Legal positivism and the jurisprudence of interests acknowledged the same dilemma as Savigny and the *Freirechtsschule*, but took a totally different point of departure. In the influential texts of Hans Kelsen, law was firmly separated from the realm of commonly appreciated values.¹⁹⁸ To legal positivists, law was an isolated construction of norms which created a system of its own, and it could only be studied and analyzed as such. Furthermore, and according to especially Kelsen, legal interpretation had to be conducted from within the hierarchical system of law. The meaning of a given norm could only be understood through its relation to another, more general and higher norm. The task to understand the original intentions of the lawgiver was irrelevant in applying the law, nor was it fruitful to scrutinize the variations of a given norm in

¹⁹⁵ E. Ehrlich, 'Freie Rechtsfindung und freie Rechtswissenschaft [1903]' reprint as 'Judicial Freedom of Decision: Its Principles and Objects,' in Bruncken & Register (ed.), *Science of Legal Method*. Boston, Boston Book co 1917.

¹⁹⁶ To Ehrlich, *opinio iuris ac necessitatis* was a feeling, awareness or hunch that one needs to yield to a behavior dictated by a social norm (e.g. queuing). *Usus*, the behavior dictated by this social norm, is constantly reproduced by the social norm itself. Marc Hertogh, *Living Law: Reconsidering Eugen Ehrlich*. Portland, Hart 2009.

¹⁹⁷ Hermann Kantorowicz, 'Was ist uns Savigny? [1911],' in Hermann Kantorowicz, *Rechtshistorische Schriften*. Karlsruhe, C. F. Müller 1970, 397-417.

¹⁹⁸ Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* [1934]. Tübingen, Mohr Siebeck 2008; Rudolf Stammler, *Die Lehre von dem richtigen Rechte. Wissenschaftliche Buchgesellschaft* [1902], Darmstadt, Wissenschaftliche Buchgesellschaft 1964.

different circumstances and times.¹⁹⁹ In later times ‘legal positivism’ became a curseword among legal scholars, since it seemed to allow the fragmentation of a previously coherent legal system and consequently led to the legal disarray emblematic of the late Weimar Republic.²⁰⁰ During that time the rapidly changing social situation was handled – or at least that seemed to be the plan – by giving detailed and incoherent laws and in order to extend the government regulation to all possible aspects of social interaction. Such a situation was being lambasted by Carl Schmitt as “motorized” legalization.²⁰¹

In the 1930s the aversion to legal positivism among legal scholars was widespread. Not only Carl Schmitt, the conservative revolutionaries and the new generation of National Socialist lawyers, but also other conservative scientists like Paul Koschaker attacked the “immoral” theories of legal positivism and the jurisprudence of interests.²⁰² The combination of failed Weimar legislation and legal positivism was one thing, the removal of scholarly interpretation in legal decisions, to which it in practice led, was another. Not only was legal positivism perceived as a low point in the long line of legal development where theoretical frames and constructions of legal systems subordinated the value of individual juridical consideration,²⁰³ but also the codification and systemization of law eradicated the status of legal interpretation, which had traditionally been in the possession of the class of lawyers.²⁰⁴ When the focus in preserving the legality of the nation moved from the judgments and contracts of the legally trained to the actions of the lawgiver, the parliamentary state, it had consequences for the relative social status of the lawyers and judges, but undoubtedly it also awakened many serious difficulties considering the applicability of the laws in varying situations. Both Weimar and the *Freirechtsschule* had announced that the law and reality were still (and possibly even more than ever) too separated from each other.

Thus *the* task which the legal scholars of the war generation, Franz Wieacker included, took over, was to redefine old and invent new conceptual legal tools in explicating the common mental space between legislation and the changing social reality to which it referred. This task necessitated an understanding of what society really was, and the kind of pursuits, standards and competing organizations it was comprised of. Since legislation and legal interpretation were supposed to be grounded on a national awareness of justice, which elements in society were the most important, noble and

¹⁹⁹ Kelsen 2008.

²⁰⁰ cf. Schmitt 1996.

²⁰¹ Carl Schmitt, ‘Die Lage der europäischen Rechtswissenschaft [1943/44],’ In *Verfassungrechtliche Aufsätze aus den Jahren 1924–1954*. Berlin, Duncker & Humblot 1958. Franz Wieacker quoted this metaphor in his ‘Privatrechtsgeschichte,’ but insisted that it first came from Werner Weber. Wieacker, ‘Privatrechtsgeschichte’ 1952, 330 fn. 4.

²⁰² See Paul Koschaker, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*. München, Beck 1938.

²⁰³ Wieacker, ‘Privatrechtsgeschichte’ 1952, 332–339.

²⁰⁴ John Bell, ‘Continental European Jurisprudence 1850–2000,’ in Michael Lobban & Julia Moses, *The Impact of Ideas on Legal Development*. Cambridge, Cambridge UP 2012, 110.

decisive ones with respect to the national mentality concerning law and legitimacy? And furthermore, since the national legal consciousness was a developing and evolving entity, what particles and principles regulated this change, from where did it come and where was it headed? The concept which was supposed to answer and involve the explanations to the above questions was named *Rechtsbewusstsein*.

One cannot gather all the legal scientific streams, schools and thoughts of 1930s Germany under one banner. The influence of Carl Schmitt's concrete order-thinking was eminent, as was the conviction that something totally "new" was being done in the field of jurisprudence.²⁰⁵ Many scholars of the war generation, however, were dealing in one way or another with the problem of *Rechtsbewusstsein*. One reason was the state of legal science, which had to answer the misgivings of the previous, positivistic theories, but a more concrete and timely inducement was the *Machtergreifung*, the seizure of power, of the National Socialist party. The NSDAP announced that it embodied the will of the people, and that will should become the guiding principle in all areas of society, including law. Thus, young conservative lawyers competed in conceptualizing this will and spirit of the people, and tried to define how it should direct jurisprudence, where it had emerged and how it could be studied, of what parts it was comprised, and in which situations it should be utilized and in what ways. Erik Wolf wrote that legal sources and ideals should follow the unity of the "new *Rechtsbewusstsein*."²⁰⁶ Karl Larenz underlined the inevitable unity of norms and "the living order" in the "general consciousness" of the people.²⁰⁷

Although political theorists like Ernst Forsthoff or Carl Schmitt did not use *Rechtsbewusstsein* as a conceptual tool in describing their theories of legal reasoning until their war-time writings, the endeavor to redefine legal thinking in opposition to the claims of legal positivism and according to the new political climate prevailed.²⁰⁸ The *Rechtsbewusstsein* utilized in the writings of 1930s concerning 'legal renewal' had similarities with the renewal Savigny had formulated in the nineteenth century. Law had to be addressed as an inseparable part of the "people," although the *volk* of which Savigny and scholars of the 'legal renewal' wrote about was a different matter.²⁰⁹ For the legal scientist of the 1930s, the correct kind of legal thinking that

²⁰⁵ The *Kieler Schule* called their contributions "Neue Rechtswissenschaft." Cf. Ernst Döhring, 'Geschichte der Juristischen Fakultät 1665-1965,' in Karl Jordan & Erich Hofmann (Hg.), *Geschichte der Christian-Albrechts-Universität Kiel 1665-1965*. Bd 3. Neumünster 1969, 209-211.

²⁰⁶ Quoted in Rüthers 1992, 21.

²⁰⁷ "Die Grundgedanken dieser Gesetze [...] sind aber keineswegs vom Gesetzgeber frei erfunden oder willkürlich gesetzt, sondern von ihm als notwendige Folgerungen aus dem Wesen echter Volksgemeinschaft oder dem immanenten Sinngehalt dieser Lebensverhältnisse erschaut, ausgesprochen und in das *allgemeine Bewusstsein* gehoben worden." Karl Larenz, 'Sittlichkeit und Recht [1943],' in Herlinde Pauer-Studer & Julian Fink (Hrsg.), *Rechtfertigungen des Unrechts. Das Rechtsdenken im Nationalsozialismus in Originaltexten*. Berlin, Suhrkamp 2014, 208. Emphasis mine.

²⁰⁸ Forsthoff preferred the more multifaceted and sophisticated concept of *Daseinvorsorge* (Meinel 2012, 153-180).

²⁰⁹ Cf. Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung: Methodentwicklungen in der Weimarer Republik und ihre Verhältnis zur Ideologisierung der Rechtswissenschaft im Nationalsozialismus*. München, C. H. Beck 1994, 14ff.

aimed at a just result had to draw its premises from actual life, from the values of the people. However, their understanding of what “actual life” consisted was heavily influenced by the ongoing political situation and was not in accordance with empirical social reality in general nor with Savigny’s ideas on topic.

Although it might be possible to analyze the ‘New legal science’, as upheld, for example, by the *Kieler Schule* as a continuation of the older theories of the nineteenth century,²¹⁰ the war generation itself was certain of the radically novel nature of its work.²¹¹ Especially important was to redefine legal concepts so that they reflected the ‘völkisch revolution’ and detached the spheres of jurisprudence from the false thinking of the previous generations.²¹² To the conservative young lawyers of the ‘New legal science’ the liberal ideas of individual rights and a sociality based on compromise were detached from actual reality. Consequently, the whole enlightened idea of the liberal state as the provider of just social norms had to be rejected, and the relation between people and society had to be understood from the point of view of institutional legal thinking, or *concrete order*, meaning that the tradition and habits of a given group of people were superior to any outer interventions of a lawgiver, which referred especially to the parliamentary procedure of the Weimar Republic.²¹³ Thus, a legal system for the future needed to be developed and maintained to conform to the actual legal reality of the people to whom it related. From these two preceding points emerged the inevitable conclusion that an individual could have and should have an inner notion of justice, since he was the one who observed and experienced the reality of the ‘concrete order,’ which was in itself comprised by him and his peers. The juridical position of an individual was being defined through a “moral bind” he or she felt towards the national community.²¹⁴ In constructing a legal system and analyzing it, it was necessary to take into account this bond between an individual, his community, and social justice, and furthermore, such a dynamic starting point should be embodied in the legal tools and concepts which the ‘New legal science’ used.²¹⁵

²¹⁰ Okko Behrends, ‘Von der Freirechtsschule zum konkreten Ordnungs- und Gestaltungsdenken,’ in Ralf Dreier & Wolfgang Sellert (Hrsg.), *Recht und Justiz im “Dritten Reich,”* Frankfurt am Main 1989, 34-79. On Ernst Forsthoff’s work on natural law, see Meinel 2012, 247–253.

²¹¹ Jörn Eckert, ‘Was war die Kieler Schule?’ in Franz Jürgen Säcker (Hrsg.), *Recht und Rechtslehre im Nationalsozialismus.* Baden-Baden, Nomos 1992, 56–57.

²¹² Herlinde Pauer-Studer, ‘Einleitung: Rechtfertigungen des Unrechts. Das Rechtsdenken im Nationalsozialismus,’ in Herlinde Pauer-Studer & Julian Fink (Hrsg.), *Rechtfertigungen des Unrechts. Das Rechtsdenken im Nationalsozialismus in Originaltexten.* Berlin, Suhrkamp 2014, 23; Rüthers 1992, 26.

²¹³ Schmitt 1934. On the diffusion of Schmitt’s concrete-order thinking in jurisprudence, see Rüthers 1992, 24-30.

²¹⁴ Herlinde Pauer-Studer, ‘“Jenseits vom Chaos und von Interessenkonflikten.” Aspekte der Rechtsentwicklung im NS-System der 1930er Jahre,’ in Fritz Bauer Institut Werner Konitzer (Hg.), *Moralisierung des Rechts. Kontinuitäten und Diskontinuitäten nationalsozialistischer Normativität. Jahrbuch 2014 zur Geschichte und Wirkung des Holocaust.* Frankfurt am Main, Campus Verlag 2014, 19–30.

²¹⁵ Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung. Methodentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft im Nationalsozialismus.* München, J.C. Beck 1994.

Unlike many other concepts which surfaced during the ‘legal renewal’ of the 1930s, *Rechtsbewusstsein* remained rather uncontaminated. In the end it was a classic legal sociological expression and could be used in the post-Second World War German legal scientific vocabulary. Many concepts, such as *Konkrete Ordnung*, *Erbhof*, and *Berufstand*, had to be silently buried, although the legal questions they were used to depict might still exist. The significance of the fundamental dilemma of the distance between reality and norm, was after the Second World War more relevant than ever before. The havoc of the German legal system in the face of the National Socialist challenge called for healthy and sound explanations. Thus, many scholars continued their work on the subject, and some stuck to *Rechtsbewusstsein* as a conceptual vessel in approaching the problem.²¹⁶ One of the scholars who adopted *Rechtsbewusstsein* as a permanent term in his scholarly vocabulary was Franz Wieacker. In his post-war works on European legal history, the idea of legal consciousness was of fundamental importance, although the meaning of the concept had changed from its original usage. I will return to this point in the following chapters.

It has been noted that the conceptual core or methodology of German legal science altered surprisingly little after the point zero of 1945.²¹⁷ Thus *Rechtsbewusstsein* could be used by the same scholars who had used it to back up ‘legal renewal’ in order to find a new theoretical framework for a just legal system in the Federal Republic, but characteristic to the concept in its post-1945 usage was that it now contained religious or metaphysical connotations.²¹⁸ Since “heartless” and “cold” legal theories were perceived to be a prior reason for the failure of jurisprudence, the legal vocabulary of the 1950s and early 1960s leaned heavily on mystical or religious grounds.²¹⁹ *Rechtsbewusstsein* fitted well to the natural law theories so fashionable in 1950s Germany, since the prior objective was to find a new way between strict normativism without falling for the caveat of an over-rigid theoretical construction, and to maintain some sort of contact with the theoretical work carried out during the preceding decades.

This paradigmatic development defined the scientific prerequisites in the meaning of the concept of *Rechtsbewusstsein*. Merely situating Wieacker’s text in this framework

²¹⁶ See e.g. Hans Welzel, *An den Grenzen des Rechts: Die Frage nach der Rechtsgeltung*. Wiebaden, Springer 1966, 19: “Es ist ein verhängnisvoller Irrweg gewesen – den zu wiederholen nach den Erfahrungen, die wir gemacht haben, unentschuldbar wäre –, dass man die soziologische Grundlage der generellen Anerkennung, also die gemeinsame Rechtsüberzeugung, das *allgemeine Rechtsbewusstsein* u. dgl., zu etwas Normativ-Richtigem, etwas Objektiv Gültigem oder Wertvollem, zum ‘objektiven Geist’ emporgesteigert hat” (emphasis mine). Forsthoff did not use the concept but continued his work on legal hermeneutics, circling around the concept after the Second World War. Meinel 2012, 98.

²¹⁷ Rütters 2012, 314–317.

²¹⁸ See e.g., Walther Schönfeld, *Das Rechtsbewusstsein der Langobarden auf Grund ihres Edikts. Entwurf einer deutschen Rechtslehre*. Weimar 1934, and *Grundlegung der Rechtswissenschaft*. Stuttgart und Köln, Keip 1951; cf Avenarius 2010, 130–131.

²¹⁹ Cf. Lena Foljanty, *Recht oder Gesetz. Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit*. Tübingen, Mohr Siebeck 2013, especially 23–24.

would not, however, reveal anything from the point of view of his historical vision. In order to track the conceptual change in his production and study the ideas within them, beside the legal scientific discourse, one needs to attach the concurrent political and social development, and scrutinize how Wieacker and his group of friends understood it. Hence, in the following chapters I concentrate on the social reality of early twentieth-century Germany in general, and especially analyze how the domains of *Stand* and *Bildung* altered. I also review Franz Wieacker's personal experience on the changing circumstances through his correspondence.

3.2. Culture in *Rechtsbewusstsein* 1933–1945: The breakdown of the Weimar Republic and National Socialism in academia and legal science

To Hitler and the Nazi elite the place of academics and universities was clear from the beginning. It has been disputed whether the Nazis had any strategy or educational policy,²²⁰ but it is clear that they considered higher education in general to be degenerate and unmasculine. To National Socialists all training and education should proceed from physical attributes and be designed for warfare.²²¹ The administrative actions of the Third Reich were often confused, overlapping and insignificant, but they were carried out in order to fulfill Hitler's vision of education.²²² The ultimate purpose for National Socialists policy was to synchronize, *Gleichschaltung*, all aspects of society with the Nazi worldview. A holistic stance on education was not (and is not) a National Socialist principle. German fascists wanted to seize universities, not to decide on the direction of higher education, but in order to silence critical voices, suppress the autonomy of the universities, and shape German youth to triumph in the inevitable war for survival.²²³

To the Nazi elite the only important form of learned knowledge, or academic culture, was the code of the military and of war. In their texts "education" [*Bildung*] was a synonym for arrogant ignorance. The position of the educated man was unassailable;

²²⁰ Aharon F. Kleinberger, 'Gab es eine nationalsozialistische Hochschulpolitik?' in Manfred Heinemann (Hrsg.), *Erziehung und Schulung im Dritten Reich. Teil 2: Hochschule, Erwachsenenbildung*. Stuttgart, Klett-Cotta 1980, 9–30.

²²¹ *Ibid.*, 29; Sax & Kuntz 1992, 309.

²²² "[T]he folkish state must not adjust its entire educational work primarily to the inoculation of mere knowledge, but to the breeding of absolutely healthy bodies. The training of mental abilities is only secondary. And here again, first place must be taken by the development of character, especially the promotion of will-power and determination, combined with the training of joy in responsibility, and only in last place comes scientific schooling.... A people of scholars, if they are physically degenerate, weak-willed and cowardly pacifist, will not storm the heavens, indeed they will not even be able to safeguard their existence on this earth. In the hard struggle of destiny the man who knows least seldom succumbs, but always he who from his knowledge draws the weakest consequences and is most lamentable in transforming them into action." Adolf Hitler, *Mein Kampf*, 407–12, quoted in Sax & Kuntz 1992, 309.

²²³ Kleinberger 1980, 90; Koontz 2003, 46–48.

he represented a social system that defined culture exclusively in terms of relations between men. His education found expression in inter-male attitudes: “respect,” “reverence,” “courage,” “discipline,” “distance,” “obedience,” “integrity,” and above all, “loyalty.”²²⁴ Culture and education, in this twisted fascist meaning, were significant since they marked the essential gap between the masses and the distinguished individual. The latter was worthy, the former not. Surprisingly for many commentators, since the idea of education upheld by Hitler and the SA could have not been further from the original meaning of *Bildung*, the capture of German academia was an easy one. There really was no serious resistance. Fascists like Bernhard Rust, Ernst Kriek and Hans Frank quickly took their place as leading officials with respect to national education, and figures like Martin Heidegger, Carl Schmitt and Gerhard Kittel loyally echoed them and the National Socialist message.²²⁵ To translate this into contemporary slogans, “thinking with the blood” became curiously synonymous with the “concrete order.”²²⁶

Since academia did not form a resistant bulwark against the National Socialist attempts, the Nazis were able to adjust their ideas on training and learning in universities rather early. The first restrictions on higher education were placed in April 1933, in order to banish all “foreign” elements, including personnel and ideas, from the academic realm. Though the first laws reserved some exceptions for war veterans, their implementation meant that the vast majority of teachers and students of Jewish descent were dismissed and excluded from the universities.²²⁷ At the University of Freiburg the purge was conducted by the newly-appointed rector Martin Heidegger. Kiel University received a dynamic dean in K.A.Eckhardt who, in close cooperation with the SA wing of the Nazi party, devoted himself to transforming the Kiel faculty of law into a ‘stormtrooper law school’ of the Third Reich and its ideologies. In Frankfurt, Ernst Kriek was elected the principal of Johann Wolfgang Goethe-Universität in the spring of 1933. Kriek was the first university rector to come straight from the ranks of the Nazi party, and he immediately started to lecture in support of the “revolution in education” and to rearrange the university to meet the standards of the new regime.²²⁸ On an ideological and racial level the national *Gleichschaltung* in universities was completed between 1933 and 1935, when the Nuremberg laws finally cemented the racist doctrines of the NSDAP to the social reality.

²²⁴ Klaus Theweleit, *Male Fantasies. Volume 2. Male Bodies: Psychoanalyzing the White Terror*. Minneapolis, University of Minnesota Press 1989, 46-47.

²²⁵ See Fritzsche 2008, 25–37. Cf. Martin Heidegger, ‘Bekanntnis der Professoren’ [1933]: “We see the goal of philosophy in servitude. The Führer has awakened this will in the whole nation and has fused it into one single will. No one can be absent on the day when he displays his will.” Quoted in Koontz 2003, 46.

²²⁶ On the importance of “concrete-order” thinking, see Stolleis 2003; Rüthers 2012, 277–301.

²²⁷ Saul Friedländer, *Nazi Germany and the Jews: The Years of Persecution: 1933-1939*. London, Phoenix 1998, 17–73; Sax & Kuntz 1992, 140.

²²⁸ Rüdiger Safranski, *Martin Heidegger. Between Good and Evil*. London, Harvard UP 2002; Eckert 1992, 46–55; Grothe 2005, 168–172; Gerhard Muller, *Ernst Kriek und die nationalsozialistische Wissenschaftsreform: Motive u. Tendenzen e. Wissenschaftslehre u. Hochschulreform im Dritten Reich Bildungsgeschichte*. Weinheim, Beltz 1978.

Gleichschaltung was a process which was conducted in the early years of the Nazi coup, and Hitler was at this point cautious not to reveal the true destructive anti-Semitism of his worldview.²²⁹ The very visible grassroots anti-Semitism of the NSDAP, mainly evident in the SA and student organizations, did not seem to meet with a similar zeal on the administrative and political level.²³⁰ This frustrated hard-core Nazis and members of fascist student organizations, who practically seized the power in many universities, boycotting the lectures of unwanted staff, and threatening, demonstrating against and disrupting the teaching whenever it did not conform to their idea of the regime's official line.²³¹ As a result, in 1933-1935 there were many people working and studying in the universities, who did not fulfill the definition of an "Aryan man," and who became the target of a vigorous bullying campaign by National Socialist organizations. The confusion between the public statements of the Party, their implementation by the administration, and the collective meaning given to fascism, were all part of the messy picture of German higher education in the 1930s.²³² After the manic and concrete actions of 1933, with the purging of libraries and burning of books, the *Gleichschaltung* of schools and universities seemed to grind to a halt in a state of administrative and ideological quarreling.²³³ This feature might also explain why some "mistook National Socialism as a conservative movement."²³⁴ The precise aim, ideology and policy of the new regime was foggy. Rather, it seemed to be constituted of visible individuals whose actions might or might not resemble the 'true' goals of the new political elite.

²²⁹ Koontz 2003, 17–45.

²³⁰ First of all there were those Jews to whom the April laws of 1933 did not extend, namely war veterans, *Frontkämpfer*, and their families. Additionally, the definition of the "Jude" had not yet been implemented (Friedländer 1998, 145–177). There were some active teachers who were of distant Jewish origin, who themselves might have thought that this heritage was unimportant. Also some parts of the teaching staff lectured, wrote about and supported theories which were hostile to the National Socialist worldview. See Wolfgang Ernst, "Fritz Schulz" and Tony Honoré, "Fritz Pringsheim" in Jack Beatson and Reinhard Zimmermann (ed.), *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain*. Oxford, Oxford UP, 2004, 105–232.

²³¹ Wildt 2003, 43–55. For the University of Kiel, see Grothe 2005, 170; also Eckert 1992, 41–43.

²³² This is a feature of Nazi Germany (and any other totalitarian regime). One important factor in the successful seizure of power by the National Socialists was the disorganized administration, where overlapping offices and power-hungry officials fought against each other. This state of affairs was maintained by Hitler himself. Views on the intentionality of this chaotic administration are divided. (Reinhard Bollmus, 'Zum Projekt einer nationalsozialistischen Alternativ-Universität: Alfred Rosenbergs "Hohe Schule",' in Manfred Heinemann (Hrsg.), *Erziehung und Schulung im Dritten Reich. Teil 2: Hochschule, Erwachsenenbildung*. Stuttgart, Klett-Cotta 1980, 127 fn. 3). Nevertheless, Hitler's incongruous briefing of subordinates and reality-detached rhetoric, enabled him to stay above practical business (Sax & Kuntz 1992, 165–170). The accusations and criticisms of the previous practices of the fascist elite were the product of an environment in which the "Nazi ideology" and its implementation was on many levels created by middle-level functionaries who competed for the favor of the Führer or the upper members of the party hierarchy (Koonz 2003, 140). The case of Carl Schmitt is illustrative. For many academics he was the personification of the new order in academia, and his favor was eagerly pursued by many. From his own point of view, he was stuck in an endless and bitter battle for power, and in the end he never reached the place beside Hitler which he so desperately sought (Reinhard Mehring, *Carl Schmitt: A Biography*, translated by Daniel Steuer. Cambridge, Polity Press 2014.).

²³³ Koonz 2003, 140.

²³⁴ Mehring 2000, 314.

The National Socialist bureaucrats responsible for national education attempted to bring the substance of higher education in line with the party ideology. The Nazi *Machtergreifung* and reformulation of German legal studies occurred at the same time, but in the beginning they were unrelated. The new curricula for teaching law at the universities (*Studienordnung*) was inaugurated in 1935.²³⁵ The groundwork for the renewal of legal studies and the training of judges had been a long process, and the reasons for rearranging the content and focus of the studies were based on incompatibility between the education provided and the demands of the jurist's profession. The widespread general opinion in the discipline on the necessity of cultivating an awareness of the historical foundations of law and its relation to 'social reality,' was translated by Nazi-oriented officials into associating legal education with the National Socialist *Weltanschauung* on the nature of social reality.²³⁶ As a result, to fascist-minded professors the new *Studieordnung* was an attempt to incorporate National Socialist ideology into practical legal training.²³⁷ National Socialist officials in education took care that the new curricula were in keeping with fascist ideas of the superiority of unity and power over learnedness. These curricula emphasized the "Neuzeit," modern world, at the expense of the previous focus on German and Roman traditions and varying aspects of the national legal system. In brief, the *Studieordnung* of 1935 concentrated on the unity of the law, its transformation into a modern phenomenon, and on the divide between public and private law.²³⁸ One could interpret this change as a strong attack on Roman law education and tradition in Germany.

This claim is in a sense true, given the outspoken resentment which the Nazis felt towards Roman law. The Party program of the NSDAP, which contained overall 25 key points, stated in paragraph 19: "We demand that the Roman law, which serves the materialistic world order, shall be replaced by a legal system for all Germany."²³⁹ This demand was amplified by many Germanistic scholars, who either sincerely perceived Romanist influence as "foreign," or were ready to champion their own field of study at the expense of research on Roman law.²⁴⁰ Many contemporary scholars, however, saw the "replacement" as merely a rhetorical obstacle. The new curricula stressed the importance of assimilating legal studies with a personal understanding of the meaning of law. To many scholars of Roman law, that had been the true essence of ancient jurisprudence.²⁴¹ So in a way, and according to new *Studienordnung*, law was again

²³⁵ Ralf Frassek, 'Weltanschaulich begründete Reformbestrebungen für das juristische Studium in den 30er und 40er Jahren,' in *ZRG GA* 111 (1994), 564-591.

²³⁶ Grothe 2005, 191-194.

²³⁷ K.A. Eckhardt, 'Das Studium der Rechtswissenschaft,' in Carl Schmitt (Hrsg.), *Der Deutsche Staat der Gegenwart*. Hamburg, Hanseatische Verlagsanstalt 1935; cf. Frassek 1994.

²³⁸ Rückert 2010, 77-80.

²³⁹ Sax & Kuntz 1992, 72-75.

²⁴⁰ See e.g. Helmut Nicolai, "Rasse und Recht." Vortrag gehalten auf dem Deutschen Juristentage des Bundes nationalsozialistischer deutscher Juristen am 2. Oktober 1933 in Leipzig: "Indem wir den 'totalen' Staatsgedanken durchführen, tun wir damit nichts anderes, als sowohl den liberalen als auch den römischen Rechtsgedanken zu besteitigen und ihn wieder zu ersetzen durch den deutsch-rechtlichen Gedanken [...]" quoted in Pauer-Studer & Fink 2014, 47; cf. Pauer-Studer 2014, 18 fn. 22.

²⁴¹ See e.g. Ernst Schönbauer, 'Vom Bodenrecht zum Bergrecht. Studien zur Geschichte des Bergbaurechtes,' In *SZ RA* 55 (1935), 183; cf. Winkler 2014 162-172; Franz Wieacker himself interpreted §19 of the NSDAP party program to be targeted against the twisted Roman law *tradition*,

taught as emerging from within society, and when legal history managed to retain its place in the curricula, many researchers of ancient legal history felt relieved. The initial grand announcement of wiping out Roman law was forgotten along with the many other disputes and empty denunciations of the Nazi administration. The actual judiciary in the Third Reich, a primary concern of the NSDAP, was synchronized with the fascist principles with more robust actions and arrangements. The disfavor of Roman law, however, continued to play a part in academic power struggles. The persecution of Roman law was an experience felt especially among the Romanists, and after the Second World War, the narrative of the untainted core of jurisprudence could be built upon that memory.²⁴²

In 1933, however, it was clear that the new order was hostile to Jews, willing to dismantle the traditional sovereignty of the universities, and, at least on the rhetorical level, against Roman law. Accordingly, on 26 October 1933 Carl Schmitt gave a talk to the German-European Cultural Association about the harmful influence of Roman law and the “outsider-race” which cultivated this foreign heritage in German society.²⁴³ One month later, on 30 November 1933, Fritz Pringsheim issued an open letter to Schmitt where he asserted:

Da diese bereits mehrfach vorgebrachte These hier zum ersten Male von einem deutschen Rechtslehrer aufgenommen wird, darf ich mir als Lehrer des Römischen Rechtes die sehr ergebene Anfrage erlauben: (1) an welche Zeit ist dabei gedacht? (2) welche fremde Rasse ist gemeint? (3) können vielleicht Namen von Persönlichkeiten genannt werden, die einen solchen Einfluss ausgeübt haben? Sie werden verstehen, dass es für jeden Lehrer des Römischen Rechtes wichtig sein muss, sich entweder überzeugen zu lassen oder der These entgegenzutreten. Das kann aber nur nach einer Prüfung geschehen, die erst nach Beantwortung meiner Fragen erfolgen kann.²⁴⁴

In his blunt response, Schmitt merely advised Pringsheim to read his (Schmitt’s) works. To Pringsheim, the tradition of Roman law stood above any political turbulence or Party Programs. Roman law was German, and moreover, to know Roman law was to be ‘learned’ (*Gebildet*); under its banner lay a civilizing legacy thousands of years

which had taken place since the Reception of Roman Law in Germany. Wieacker, ‘Der Standort’ 1939, 55.

²⁴² Winkler 2014, 163; cf. Paul Koschaker, *Europa und das römische Recht*. München, C.H.Beck 1966, IX–XII.

²⁴³ Mehring 2014, 305.

²⁴⁴ Reprinted in Fritz Pringsheim, ‘Die Haltung der Freiburger Studenten in den Jahren 1933–1935,’ in *Die Sammlung* 15 (1960), 532–538. “As this theme that has already been voiced several times is being received here for the first time from a German legal lecturer, I may allow myself as a lecturer of Roman law these very humble questions: (1) which time period is considered? (2) which outsider-race is meant? (3) could perhaps personages be named, who would have exercised such influence? You understand, it must be important for every lecturer of Roman law to either let himself be convinced by this thesis or to oppose it. That can, however, happen only after an examination, which can only occur after my questions have been answered.” (Translation by HW).

old.²⁴⁵ He understood clearly that the biggest threat to this tradition, which he held to be characteristically German, was the new political elite and the scholars who were willing to follow its ideological guidelines and implement the fascist doctrines inside academia. The public talks of the leading academics, such as Schmitt, and the government's intervention into education was not "just politics," but resembled a greater struggle for the fate of German *Bildung*.

If one takes Fritz Pringsheim as the representative of the values descending from imperial Germany and as a defender of the tradition of legal science, Carl Schmitt might be seen as the other extreme in the field of legal science. After a short period of hesitation following the National Socialist coup, Schmitt became the most distinguished scholar to provide academic support for Hitler's regime. Schmitt had been a central figure in the conservative revolutionary movement, but participated in what seems to be wholehearted engagement in public discussion, rationalizing the crimes of the Nazis.²⁴⁶ On closer scrutiny, many of the scientific texts written by the younger generation of scholars were built on and dealt with the concepts and doctrines Schmitt had developed for years, and which he now bent to justify Nazi totalitarianism.²⁴⁷ It was also primarily Schmitt who steered this anti-formal, legal-sociological discourse to confirm to the racist, exclusive worldview.

Whereas the war generation of young legal scholars, including for example Ernst Forsthoff and Erik Wolf, but also more established figures like Rudolf Smend and Julius Binder, all found their scientific nemesis in Hans Kelsen's "pure legal theory," it was Schmitt who manifest

ed this theory as "Jewish" in essence.²⁴⁸ Yet, after a few celebrated years as the highest scientific authority of the Third Reich (Schmitt was referred to as *Staatsrat* or crown jurist), Schmitt was replaced by a group of more politically and racially passionate lawyers, such as Otto Kollreuter, Theodor Maunz and Reinhard Höhn, who were also more successful than Schmitt in the power struggles within the Nazi party.²⁴⁹ To the majority of academics, however, the division lines within this redefinition of *Heimat* and *Bildung*, national education, were not that clear. Nevertheless, and especially the war generation of young scholars, found the suddenly fashionable discourse of revolution in legal science intriguing. Karl Larenz, Ernst Forsthoff and Ernst Rudolf Huber among others contributed to the heated discussion following the Nazi coup of power, preaching a renewal of the understanding of the basis of the legal system, and the relation between the people and law.²⁵⁰

²⁴⁵ Ibid.: "Selbst ein neues Parteiprogramm hält den Einfluss dieser geistigen Macht nicht auf[...]Täte man das erste, so würde man die Deutschen zu den Ungebildetsten der Welt machen, aber nicht ändern können, dass das Römische Recht durch die Macht der Geschichte in unser deutsches Recht eingegangen ist."

²⁴⁶ Mehring 2014, 275-290.

²⁴⁷ e.g. Grothe 2005, 172; Rütters 2012, 277-278; Meinel 2012, 36-38.

²⁴⁸ Volker Neumann, 'Carl Schmitt, Introduction,' in Arthur Jacobson & Bernhard Schlink, *Weimar: A Jurisprudence of Crisis*. Berkeley, University of California Press 2000, 280-283.

²⁴⁹ Mehring 2014, 342-343, 346-348.

²⁵⁰ Stolleis 2003, 9.

The “New legal science” (*Neue Rechtswissenschaft*) was the vague definition which the young, conservative scholars of the war generation gave to their own orientation.²⁵¹ The constellation to which the name referred was not unanimous or theoretically coherent, but the most important common denominator was that the ‘New legal science’ was comprised of young scholars who represented the war generation.²⁵² They were also united in their battle against legal positivism, legal language inherited from the enlightened tradition, the liberal idea of the relation between a citizen and the state, and the form of academic practices and education that had appeared during the late years of the Weimar Republic. In their scientific perspectives these young scholars leaned mostly on neo-Hegelianism, Carl Schmitt’s theory of concrete order, or outright racist ideology. In the ‘New legal science’ the people were primarily connected to their society through value-based ties like “responsibility,” “communality,” and “honor,” and this institutional and communal foundation should also guide the perception of future jurisprudence, as well as shape legal education and regulate the textual and linguistic tools which German lawyers used. The academic endeavors of the new generation of scholars found congruence with the National Socialist view of society and the political purposes of fascist administration.

Legal scientific texts were used to support a racially based, oppressive policy.²⁵³ Just as young scholars sought to reverse the liberal concepts of law, to Goebbels, for example, ‘enlightenment’ and ‘capitalism’ were plots against the German people.²⁵⁴ When Ernst Forsthoff, Karl Larenz and many others wrote in support of an institutional, concrete understanding of the law, National Socialists demanded the priority of racially pure *Volksgemeinschaft*, the people’s community, which should be

²⁵¹ Cf. Karl Larenz & Georg Dahm (Hrsg.): *Grundfragen der neuen Rechtswissenschaft*. Berlin 1935.

²⁵² The ‘New legal science’ was not, of course, a closed establishment. It was a term which Wieacker himself used in attempting to give shape to a movement of young scholars to which he himself contributed (Franz Wieacker, ‘Das Kitzberger Lager junger Rechtslehrer [1936],’ in Wollschläger (Hrsg.) 2000, 163–176). One impartial way to map the participants of the ‘New legal science’ is to follow Wieacker’s elaboration. Nevertheless, when Franz Wieacker later wrote of the contributions made by the ‘New legal science’ he referred to his acquaintances and friends from the universities of Frankfurt, Kiel and Freiburg. Basically, this meant the scholars of the *Kieler Schule*, Ernst Forsthoff, Werner Weber and Erik Wolf. cf. Wieacker, ‘Die Stellung der römischen Rechtsgeschichte’ 1939; Wieacker, ‘Vielfalt und Einheit der deutschen Bodenrechtswissenschaft der Gegenwart. Über die Umgestaltung des Grundstückrechts durch die heutige Bodenpolitik,’ in Wollschläger (Hrsg.) 2000, 431–462.

²⁵³ To what extent the legal scientific texts actually had an effect on the practical work conducted in courts is debatable. Rüthers posits legal theory before practical implementations, thus shifting the responsibility for the immoral judicature of the Third Reich onto the ‘New legal science’ (Rüthers 2012). It seems that at least in criminal law new positions taken by a younger generation of legal scholars did have a real influence (Pauer-Studer & Fink 2014, 532–542). The National Socialist regime, however, did invest a lot in modifying legal science to back up its ideological purposes (Grothe 2005, 190) and the evident ambiguity of the concretization of the ‘new legal concepts’ and the ‘new reading’ of law in practical judicature did not prevent the ‘New legal science’ from trying to influence matters.

²⁵⁴ Matthew Lange, *Antisemitic Elements in the Critique of Capitalism in German Culture, 1850-1933*. Oxford, Peter Lang 2007, 289–296.

the starting point and a point of reference for all common activity.²⁵⁵ And finally, whereas the *Kieler schule* upheld the idea of the morality of law, and its personal significance and binding nature for individual awareness, the totalitarianism of Hitler demanded absolute submission of all citizens.²⁵⁶ In pointing to the, to a degree coincidental, parallels in the legal scientific discourse and Nazi rhetoric, I do not wish to diminish the responsibility of the academics at that time. In the end, it was they themselves who redefined their theories and paradigms so that they became loyal and submissive to National Socialist ideology. Likewise in legal science, the process of “coming together” with the Nazi ideology was more of a process of *Selbstgleichschaltung* (self-synchronization) than outer *Gleichschaltung*.²⁵⁷ Furthermore, when the legal scientific culture was transformed to reflect the fascist worldview, the committed heralds and apostles of this science of the Third Reich were found amongst the scholar class.

Some kind of a high-point in fawning of the new political elite of NSDAP in legal science was reached at the 1935 meeting of the National Legal Teachers Association (*Reichsgruppe Hochschullehrer*).²⁵⁸ There Carl Schmitt laid out the new racial norms that forthcoming scientific works should follow. Scientific writings should not refer to the works of Jewish scholars; no Jewish scholars should be mentioned by name; no mention could be made of Jewish accomplishments, or if necessary their deeds could be noted as an unnamed and abstract influence. Most importantly, the future generations of scholars should see Jews as degenerate parasites, merely a momentary setback for German culture.²⁵⁹ The network around Wieacker, scholars who had not yet established themselves as authorities in the field of legal sciences, to a degree followed Schmitt’s example, but were more hesitant and cryptic in their writings. For example, in his *Totale Staat*, Ernst Forsthoff labelled the degenerate force threatening the social order of Germany as “Jewish,” and Erik Wolf defined the false interpreters of domestic legal culture as “foreign and non-Aryans.”²⁶⁰ This use of racist rhetoric in the works of ‘New legal science’ scholars is evident, but it remained at such an ambiguous level that these scholars were later able to argue that their texts merely

²⁵⁵ Oliver Lepsius, ‘The Problem of Perceptions of National Socialist Law or: Was There a Constitutional Theory of National Socialism?’, in Christian Joerges & Navraj Singh Ghaleigh 2003, 23–24.

²⁵⁶ Sax & Kuntz 1992, 255–262.

²⁵⁷ cf. Thomas Finkenauer & Andres Herrmann, ‘Die romanistische Abteilung der Savigny-Zeitschrift im Nationalsozialismus,’ in ZSS 134 (2017).

²⁵⁸ Meinel 2012, 229. Cf. section 1.3: ‘Historiography as an affective practice and the historical vision in action.’

²⁵⁹ Carl Schmitt, ‘Schlusswort des reichsgruppenwalters,’ in *Das Judentum in der Rechtswissenschaft. Ansprachen, Vorträge und Ergebnisse der Tagung der Reichsgruppe Hochschullehrer des NSRB am 3. und 4. Oktober 1936. 1. Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist*. Berlin, Deutscher Rechts-Verlag 1936, 28-34.

²⁶⁰ Ernst Forsthoff, *Der totale Staat* [1933]: “Darum wurde der Jude, ohne Rücksicht auf guten oder schlechten Glauben und wohlmeinende oder böswillige Gesinnung, zum Feind und musste als solcher unschädlich gemacht werden,” quoted in Pauer-Studer & Fink 2014, 274; Erik Wolf, *Richtiges Recht im nationalsozialistischen Staat*. Freiburg I Br., Wagner 1934, 15.

reflected the pressure coming from political leaders and administrative policymakers rather than expressing their true beliefs.²⁶¹

After 1936, perspectives became clearer. The “renewal” of the society and higher education started to take the totalitarian shape which the NSDAP had aimed for. The ideological struggle and confusion about the virtues and values of the “new national culture” was over.²⁶² Concurrently, the injustices committed by the fascist administration could no longer be bypassed as merely the unintentional side effects of administrative rearrangement. Everyone had a friend, relative or acquaintance who had suffered on account of the applied racist doctrines. Hitler ordered political murders which were carried out openly, such as when the Nazi party was “purged” during the so-called “Night of the Long Knives.” The persecution and exclusion of Jews was evident in the everyday reality of jobs, public spaces and the media. Saul Friedländer asserts that at least after the “Crystal Night” of 1938, the major part of the German middle classes felt anxiety about the unleashed violence which the new government exercised publicly.²⁶³ This social reality of the nation state constituted, or at least should have constituted, an impossible dead-end for legal scientists in their attempts to interpret the fascist actions in good faith and scientifically approve the compatibility between the German *Geist* and National Socialist ideas.²⁶⁴

In universities the emigration of Jewish scholars to the United Kingdom, the US and Switzerland reached vast dimensions. Within legal history and Roman law Fritz Schulz, Ernst Levy and Fritz Pringsheim were lucky enough to escape; Otto Lenel died bitter, unable to understand why his *Heimat* had turned against him and his family.²⁶⁵ Arnold Ehrhardt, a good friend of Wieacker and Ernst Forsthoff, found refuge in England after having been bullied and mistreated by both the administration and university students. Like Lenel, Ehrhardt was both patriotic and conservative in character and had even in 1924 volunteered for the *Freikorps* to fight against the Bolsheviks in Latvia. His service in these proto-SA troops, was not however sufficient reason to be given decent treatment.²⁶⁶ Many “Aryan” scholars who had previously advocated the “revolution” and hailed the destruction of the Weimar Republic were disappointed, and tried to withdraw from public collaboration with the new administration. Martin Heidegger stepped down from his post as Rector of Freiburg University. Erik Wolf made a similar decision earlier. Ernst Jünger, who had never

²⁶¹ Another excuse, but also a peculiar fact, was that most of these young scholars had good friends of Jewish descent. Arnold Ehrhardt and Ernst Forsthoff, for example, had a very close friendship; Erik Wolf’s and Fritz Pringsheim’s connection continued up until Pringsheim’s death in 1967.

²⁶² Stolleis 2003, 9.

²⁶³ Friedländer 1998, 4.

²⁶⁴ Of course, everyday reality in the late 1930s was a complex affair. After the War when scholars and the officials of the occupation administration attempted to distinguish between “active” and “passive” Nazis, it proved difficult to define when the exact “revelation” of the criminal nature of the National Socialist regime might have reached the individual. Remy 2002, 151–155.

²⁶⁵ Pringsheim, ‘Die Haltung der Freiburger Studenten in den Jahren 1933–1935,’ 535–537.

²⁶⁶ Leonie Breunung, & Manfred Walther, *Die Emigration deutschsprachiger Rechtswissenschaftler ab 1933*. Berlin/Boston 2012, 576; Meinel 2012, 53.

agreed to co-operate with the National Socialists, isolated himself and started to write his satirical book *On the Marble Cliffs*.²⁶⁷

The young scholars of ‘New legal science,’ among them Franz Wieacker, continued to pursue their place in first-class scholarship. The dismissal of Jewish professors left many chairs in different universities open, and competition for these vacancies was fierce. Young scholars continued to publish their works, but now they had no choice but to toe the Third Reich line. The arguments in the ‘New legal science’ had to be compatible with the demands of the political ideology of National Socialism, and the worldview upheld by the fascist administration. In order to address the questions why this alliance took place, how established legal scientific concepts like *Rechtbewusstsein* intertwined with National Socialist ideology, and why Franz Wieacker among other scholars of the ‘New legal science’ adopted, utilized and further developed the legal language to meet the ‘revolution,’ one must study the intertwinement of the personal and public spheres of society. That is, one must analyze the individual perception of social development, and the meaning which the respected individual gives it in discussions with his in-group. As I have already partially shown, and as I intend to argue in what follows, the reasons are found in the common understandings and meanings attached to the concepts of *Bildung* and *Stand*.

3.3. Affections in *Rechtbewusstsein* 1933–1945: Personal redefinition of *Bildung* and *Stand*

In 1935 new national instructions for legal studies (*Studienordnung*) in Germany were given. The doctrine was prepared under the surveillance of K.A. Eckhardt, a committed National Socialist and the professor of legal history at the University of Kiel.²⁶⁸ In his official announcement on the new curricula, Bernhard Rust, the Third Reich Minister responsible for higher education, commented on the historicizing and politicizing of the legal sciences, at which the instructions aimed: “The German legal sciences must be made National Socialist.”²⁶⁹ Three decades later, in the second edition of his *Privatrechtsgeschichte der Neuzeit* (1967), Franz Wieacker commented on the reform and especially the way it emphasized some parts of the BGB: “In this sense, it [the *Studienordnung*] was not politically motivated.”²⁷⁰

The state of German legal science in the early years of the Nazi regime concentrated on this, at first glance, impossible contradiction. To Minister Rust *Studienordnung* was

²⁶⁷ Koonz 2003, 217; Safranski 2002; Christoph M. Scheuren-Brandes, *Der Weg von nationalsozialistischen Rechtslehren zur Radbruchschen Formel*. Paderborn, Ferdinand Schöningh Verlag 2006; Elliot Y. Neaman, *A Dubious Past: Ernst Jünger and the Politics of Literature after Nazism*. Berkeley, University of California Press 1999, 45–46.

²⁶⁸ Grothe 2005, 196.

²⁶⁹ Grothe 2005, 199.

²⁷⁰ Wieacker, *A History of Private Law* 1995, 440.

an achievement and embodiment of Hitler's 'thinking with the blood'. It was a plan to bend higher education to make it serve the needs of a fascist state; to raise soldiers who valued the physical over the intellectual and found their strength in physical dexterity rather than from the mind. K.A.Eckhardt and Reinhard Höhn saw it as a vital extension of the National Socialist 'revolution' to the field of legal science.²⁷¹ The content of university curricula was formally decided in a "Conference for university teachers" held in Berlin on 20-21 December 1934. The participants were summoned by Carl Schmitt and K.A.Eckhardt, and the speakers included Hans Frank and Adolf Rosenberg, Rosenberg's talk being "The Worldview, Law and the Paragraph." Only two weeks later the curricula were published.²⁷² On Christmas Day 1934 after returning from the conference, Wieacker wrote to Erik Wolf about the reform:

Die Referate über die Neugestaltung des Vorlesungsplans hielten sich alle auf gewisser Höhe, und die entgeltigen Entschlüsse scheinen mir bis auf den experimentellen Zug, den jede gründliche Neuordnung enthält, doch ganz wohl gelungen.²⁷³

The main thing for Wieacker was that the compulsory lectures on legal history had not been wiped out from the curriculum.²⁷⁴ To Wieacker (and, among others, to Ernst Rudolf Huber and Karl Larenz) *Studienordnung* was first and foremost a manifestation of the new kind of jurisprudential stance to legal theory and history. It was a generational achievement targeted against the stiff and dogmatic majority of the academia.²⁷⁵ Its content celebrated the intertwining of practice and knowledge. The point of departure for 'New legal science,' and accordingly for the new *Studienordnung*, was anti-positivism. The sweeping opinion in the legal academia was that the politically corrupted nature of the legal language of previous decades had to be renewed. German jurisprudence needed to be purified from foreign and unhealthy features. The intention was "again" to connect positive norms with the spheres of morality and justice.

The other side of the coin was the thorough renewal of national legal science to coincide with social change and the National Socialist 'revolution.' The 'New legal science' attempted to redefine legal language, thinking and practices just as the National Socialists were (allegedly) renewing the fundamental structures of society. Even if one leaves aside racial exclusion, the themes which young scholars called for, namely experience and *awareness*, in some respect corresponded with those called for by National Socialists like minister Rust. From the perspective of our own times, it is

²⁷¹ K.A. Eckhardt, *Das studium der Rechtswissenschaft*. Hamburg, Hansseatische Verlagsantalt 1935; Reinhard Höhn, 'Die neue studieordnung für Rechtswissenschaft im Rahmen der Universitätsreform,' in *Deutsches Recht* (1935), 51–53.

²⁷² Winkler 2014, 140-143.

²⁷³ Wieacker to Erik Wolf in 25.12.1934. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. "In the redesign of their lectures, the academic departments all held themselves to a certain standard, and it appears to me that the final resolutions have probably succeeded after all, apart from the experimental phase, which incorporates each thorough restructuring." (Translation by HW).

²⁷⁴ *Ibid.*

²⁷⁵ Eckert 1992, 56; See also Wieacker *A History of Private Law* 1995, 409.

difficult not to perceive the 1935 *Studienordnung* as politically motivated. Its groundwork had started well before 1933 but it was the Nazi party who sought to benefit from it by using it for racist goals.²⁷⁶

Wieacker participated in ‘legal renewal’ with a notable contribution, and published regularly in journals whose ideological stance was unmistakably National Socialist.²⁷⁷ He often concentrated in his texts in the 1930s and 40s on the way in which the new political order could be assimilated into the substance of legal science. In addition he joined in National Socialist associations, most notably the NSKK, and in the end, enlisted in the National Socialist party (NSDAP) on 1 May 1937.²⁷⁸ Naturally, Wieacker was no exception in the field of legal science. Since the research task of this thesis is to study *conceptual change*, one cannot simply derive conclusions on the nature of Wieacker’s perception on law, the people and culture from the common culture of German academia in the 1930s. A more detailed view is necessary, including acknowledging the existence of mixed intentions in (most of) the legal scientific works during the ‘legal renewal.’ An example of the mixed intentions in scholarly works following the Nazi coup are the texts of Erik Wolf. Wolf was promoted as a vice-dean by Martin Heidegger in 1933, and for a short while Wolf’s writings loyally echoed the wishes of the new order, and the scientific elite to which he had now been upgraded. In his *Richtiges Recht im nationalsozialistischen Staate* (1934) Wolf wrote: “Zu den nichtarischen Volksgästen, denen keine Rechtsstandschaft zukommt, gehören rassisch Fremdstämmige und Ausländer.”²⁷⁹

The text as whole was for the most part a blunt reproduction of nationalistic slogans.²⁸⁰ In January 1934 Wolf sent the manuscript to Wieacker, who responded:

Das gute Wort vom Richtigem Recht empfängt mir einen reineren Sinn, als bei seiner missbräuchlichen Inanspruchnahme durch Stammler. Ihre Ausführungen S. 6 ff waren für mich bei der Fixierung von Gedanken über Ziele der Rechtsgeschichte – zum privaten Gebrauch – ein starker Halt. Der gesamte Aufsatz ist eine Unterstützung bei dem Bemühen, Sachenrecht und Familienrecht so zu lesen, daß unter den zertrümmerten ideengeschichtlichen Strukturen des 19. Jhdts. die Konturen des neuen Aufbaus und der neuen Zuständigkeitszuordnung sichtbar werden. Ich habe Ihnen auch hierfür sehr zu danken.²⁸¹

²⁷⁶ Grothe 193–205; cf. Frassek 1994.

²⁷⁷ Winkler 2014, 458–459.

²⁷⁸ Liebs 2010, 24.

²⁷⁹ Wolf 1934, 15. “Foreigners and those who are racially of a foreign origin count among the non-Aryan peoples, who hold no civil status“ (Translation by HW).

²⁸⁰ Wolf did not continue on this path, and later in 1934 he resigned from administrative responsibilities and distanced himself from Nazi ideologues and ideologists. This was not the case in early 1934, however, nor in his argument in *Richtiges Recht*. Cf. Scheuren-Brandes 2005.

²⁸¹ Wieacker to Erik Wolf 25.1.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “In my eyes the good word from Richtiges Recht receives [in your treatise] a purer meaning than its abusive utilization by Stammler. Your explanations from page 6 et seqq. were a strong support

Wieacker did not take part in or bathe in the racist rhetoric of the Third Reich. In the letters I have succeeded in collecting, there is not a single racist remark nor any signs of willingness to propagate fascist ideology. He was, however, willing to work with scholars who devalued the rule of law, echoed the racist rhetoric of the Third Reich, and openly supported the totalitarian regime. Of course, the National Socialist attack on the rule of law was camouflaged as a counter-reaction to legal positivism. Wieacker found it easy to participate in this ‘fight,’ since for him legal positivism represented the greatest imaginable threat to the legal sphere of society in degrading the authority of law. Wieacker saw the time as a great challenge to legal science, legal consciousness and German society. This challenge was raised by legal positivism and scholars who “utilized abusively” the law,²⁸² stripped it of its authority and thus endangered the historical and juridical basis of German society. The twisted use of history and the *meaning of law* was personified by Rudolf Stammler, who represented the positivistic stance on legal science, and to Wieacker, was equivalent to Hans Kelsen and his *Reine Rechtslehre*.²⁸³ What connects Franz Wieacker’s pre-war texts is the idea of the new generation of jurists, some of which National Socialistically oriented, who resembled the “new structure and new jurisdiction” in the society, and primarily fought against old twisted legal theories.²⁸⁴

As mentioned in chapter 2, Wieacker moved from Freiburg to the University of Frankfurt in 1933. From Frankfurt he steadily reported the events and tones, which he either witnessed or personally experienced, to his Freiburg mentor and friend Erik Wolf. At the time Wieacker was invited to the university, it seemed a dynamic and ambitious faculty where a young scholar could make a career, despite or because of the newly-elected, Nazi-minded administration.²⁸⁵ It is obvious that in moving to Frankfurt, Wieacker believed he would soon receive a permanent position there.²⁸⁶ The structure of legal education in Frankfurt was planned by Ernst Forsthoff with the help of Franz Beyerle. In practice this meant a “concrete order” view of jurisprudence and a nationalistic treatment of German law and legal history, thus implementing the principles that the ‘New legal science’ emphasized and the war generation appreciated.

for me in specifying concepts, for private use, about the goals of legal history. The entire treatise assists in the efforts to read property and family law, so that the contours of the new developments and jurisdictions become discernible under the fabric of the shattered history of ideas of the 19th century. I am very grateful to you for this.” (Translation by HW).

²⁸² Cf. above.

²⁸³ In 1967 Wieacker describes the works of Stammler (and Kelsen) as bearing a “distinctive uncompromising [black-and-white, *uneigestandene*] ethos.” Wieacker, *A History of Private Law* 1995, 589.

²⁸⁴ cf. Franz Wieacker, ‘Der Stand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts [1937],’ In Wollschläger (Hrsg.) 2000, 241: “Während für den Antipositivismus der neuen Forschung und Gesetzgebung die Überwindung des alten Gesetzes durch neues Recht die eigentliche Aufgabe ist, erschien unserm Richter das Gesetz, ob alt oder neu, von je als der Kern der Rechtweisung.”

²⁸⁵ Forsthoff seemed to believe that Frankfurt was a progressive university because of its declarative National Socialism. Meinel 2012, 52.

²⁸⁶ In the early days of 1934 Wieacker reported to Erik Wolf about the sudden uncertainty plaguing the University in Frankfurt, which left many important decisions open. “Wie sich meine Beziehungen zur hiesigen juristischen Fakultät gestalten werden, [...] ist ungewiss.” Wieacker to Erik Wolf 25.1.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

Wieacker was enthusiastic about the Frankfurt legal curriculum.²⁸⁷ The break with the “old ways” was evident, and, unlike before, universities again seemed to cultivate true *Bildung*. Law education now proposed creating jurists who had assimilated a body of legal historical knowledge, and could adjust it to various contexts. This new generation would be in direction communication with both reality and with the values of their community.²⁸⁸

On another level, the Johann Wolfgang Goethe-Universität of Frankfurt was in the eye of the storm in 1933 and 1934. During the spring of 1934 fascist student organizations demanded changes to the education and the dismissal of staff members who were either Jewish or not supportive enough of National Socialist ideas.²⁸⁹ One of the victims was Wieacker’s friend Arnold Ehrhardt, who was no longer able to teach due to resistance from student organizations as well as from some university officials. Although the April law restrictions did not extend to Ehrhardt, who had a *Frontkämpfer* status and was considered *Halb-jude*, in practice he was not allowed to work.²⁹⁰ Wieacker refers only indirectly to these tensions in his letters to Erik Wolf.²⁹¹ Mostly Wieacker was worried about the fate of the faculty of law in Frankfurt. He reports about the uncertainty plaguing the university during the 1934 spring term. There were rumors that Ernst Krieck was about to leave the Johann Wolfgang Goethe-Universität, which according to Wieacker “causes serious anxiety around here.”²⁹²

In May 1934 Krieck did indeed leave for Heidelberg and at the beginning of April it seemed that the faculty of law would be subject to serious cuts and reductions. Wieacker’s hope for a permanent professorship seemed to be in ruins.²⁹³ However, after a few weeks, the original announcement of a major reduction of the faculty was ameliorated to a plan in which the faculty of law would be combined with philosophy department. Wieacker, along with his colleagues, was not sure what to think. In addition, three professors from other universities were forced to move to Frankfurt,

²⁸⁷ Wieacker to Erik Wolf 19.11.1933, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

²⁸⁸ Ibid; cf. Meinel 2012, 51–53.

²⁸⁹ Dorothee Mussnug, Reinhard Mussnug & Angela Reinthal (Hrsg.), Briefwechsel Ernst Forsthoff Carl Schmitt (1926–1974). Berlin, Akademie Verlag 2007, 8: “schwierige Lage” and “Unruhe der Studentenschaft”; cf. Windt 2009, 53–55.

²⁹⁰ Leonie Breunung & Manfred Walther, *Die Emigration deutschsprachiger Rechtswissenschaftler ab 1933*. Berlin/Boston 2012, 576.

²⁹¹ In fact, Wieacker only mentions Ehrhardt in his letters after the latter had fled to Switzerland: “Ehrhardt ist in Lausanne ausserlich ganz zufriede; doch lässt sich nicht voraussehen, was am Ende daraus wird.” Wieacker to Erik Wolf 25.12.1934. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. Wolf nevertheless knew Ehrhardt (possibly through Pringsheim, possibly because Ehrhardt had worked at the University of Freiburg), and was aware of his situation.

²⁹² Wieacker to Erik Wolf 25.1.1933: “Kriecks Ruf nach Heidelberg, der sehr beunruhigt ist.” Cf. Wieacker to Wolf 2.4.1934: The worst-case scenario was that the faculty of law would have been downsized and other disciplines, namely economics, expanded unprecedentedly, leaving “juristischen Restbeständen wird zurückbleiben.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

²⁹³ Wieacker to Erik Wolf 2.4.1934 “Das bedeutet für mich, daß [my plan] gänzlich zusammenbricht.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

among them the prestigious Roman law professor Fritz Schulz.²⁹⁴ This relocation was a result of Nazi legislation since the newcomers were of Jewish descent, and the decision on both the transfer of “unwanted” scholars as well as the downsizing of the faculty of law at Frankfurt was carried out at the Ministry for National Education (*Reichserziehungsministerium*).²⁹⁵ Wieacker described this as a “collapse.”²⁹⁶ To Wieacker, the fault for the catastrophic situation lay with the bureaucratic tendency to reduce the role of legal science and jurisprudence, and the contemporary urge to move all the institutions of higher education to technical training facilities, thus ignoring the historical and cultural values that legal education should stand for.

Man sieht hier keineswegs mit großer Heiterkeit in die Zukunft. Immerhin hat man, was man der juristischen (und philosophischen) Fakultät nahm der medizinisch-naturwissenschaftlichen wieder gegeben. Dort scheint man wirklich an einen Ausbau zu denken, sodass sich das Programm der verschiedenen Universitätstypen mit Ausbau je der geisteswissenschaftlichen oder naturwissenschaftlichen Seite immer deutlicher abzeichnet.²⁹⁷

The situation was especially dispiriting for Wieacker, who had an emotional bond with Frankfurt University. He often wrote of his affection for the natural environment and cultural surroundings of the region. They generated within him genuine feelings of belonging and beauty; the region and the University was *Heimat* and everything it represented. Thus, although many of his friends left the University, he felt obliged to stay.²⁹⁸ With respect to his career, Wieacker’s personal prospects for the future appeared challenging. The plan he had produced and followed had failed and other options, such as returning to Freiburg, were uncertain. The disappointment took concrete form as Wieacker found himself penniless, and in order to carry on his academic vocation he had to ask for Wolf’s help.²⁹⁹ This to Wieacker was the nadir in

²⁹⁴ “Die Angelegenheiten in der Frankfurter Juristenfakultät beginnen sich immer neuartiger und origineller zu gestalten. Die Wegberufungen sind durch niemand anderes als die Herren James Goldschmidt, Hoeniger, G. Hussler und Fritz Schulz ersetzt worden. Der Studentenschaft gegenüber bedeutet dies eine große Erschwerung der Sachlage, und auch wenn man sich, wie immerhin möglich, im gemeinsamen Interesse mit ihr auf ruhigen Ausgleich einigt, dürfte das Semester gelegentlich bizarre Formen annehmen.” Wieacker to Erik Wolf 18.4.1934. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau; cf. Hammerstein, Johann Wolfgang Goethe-Universität Bd.1, 299-301.

²⁹⁵ Dorothee Mussgnug, Reinhard Mussgnug & Angela Reinthal (Hrsg.), *Briefwechsel Ernst Forsthoff Carl Schmitt (1926–1974)*. Berlin, Akademie Verlag 2007, 8.

²⁹⁶ “Zusammenbruch” Wieacker to Erik Wolf in 2.4.1934. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

²⁹⁷ Wieacker to Erik Wolf 18.4.1934. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “By no means does one look into the future with great cheerfulness regarding this matter. At least one has given what was taken from the law (and philosophy) departments to the medical and natural science departments. There it really seems that one is thinking about an expansion, so that the program of having various types of universities becomes more apparent with the expansion of the humanities or the sciences.” (Translation by HW).

²⁹⁸ “Es [leaving] wäre dann nur ein Provisorium, das gegenüber der Heimatsuniversität im ganzen nicht gerechtfertigt wäre.” Wieacker to Erik Wolf 14.4.34. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

²⁹⁹ Wieacker to Erik Wolf 2.4.1935: “Ich habe noch eine Bitte. Ich habe hier finanziell nicht sehr gut gestanden und würde mich freuen, wenn mein Privardozentenstipendium wieder einsetzte. Ich weiß

his relation to the state. Although in 1934 Germany was already a National Socialist nation, and the new administration could have been blamed (with good reason) for the ‘collapse’ of Frankfurt University, Wieacker saw things differently. The root of the misfortunes was the ‘modernization’ process, of which the Weimar Republic had been a symbol.

Prospects changed however in 1935 when Wieacker received a position from the University of Kiel to work as a private docent. During this time, either by coincidence or not, his encounters with Carl Schmitt intensified, Schmitt showing interest in Wieacker’s work.³⁰⁰ In Kiel Wieacker joined the circle of colleagues who comprised the *Kieler Schule*,³⁰¹ Karl Larenz, Ernst Rudolph Huber, Georg Dahm, Karl Michaelis, Wolfgang Siebert, Friedrich Schaffstein, Martin Busse, and Franz Wieacker comprising the core of the *Schule*.³⁰² Gerard Dulckeit was later assigned to fill in for Wieacker, who left for Leipzig. Walther Schoenborn and Julius Binder were scholars who managed to keep their chairs in the purge preceding the establishment of the *Schule*, and are sometimes included.³⁰³ In 1935 the *Schule* experienced its period of greatest florescence. K.A.Eckhardt, Ernst Rudolf Huber, Georg Dahm and Friedrich Schaffstein had contributed to the creation of the new curriculum for legal studies.³⁰⁴ The newly-started legal journal *Deutsche Rechtswissenschaft* devoted its first issue of 1936 to the writings of the Kielians.³⁰⁵

The *Schule* was established as, and it seemed to represent, the vanguard of the ‘New legal science’ against the old theories and practices of the “old ways.”³⁰⁶ In many ways, the members of the *Schule* represented a typical sampling of the conservative revolutionary and nationalistic circles of early 1930s Germany. They were all young, Protestant, and confident in their world-historical task at a critical moment in Western civilization. The idea of a “new elite” and its nationalistic and speculative theologies

nicht, ob es wieder von selbst in Lauf kommt, oder ob es noch eines Antrages bedarf [...] Ich freue mich sehr, ab Anfang Mai den großen Dank, den ich Ihnen für die gütige Beratung und Wahrnehmung meiner Angelegenheiten während meiner Ansenz schulde, durch den Versuch einer fördernden und einsatzbereiten Mitarbeit erstatten zu dürfen.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

³⁰⁰ Schmitt had a reputation for being able to arrange teaching positions for his students (Mehring 2014). Later Schmitt was ready to bring Wieacker to Berlin. See Wieacker to Carl Schmitt 11.7.1944. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

³⁰¹ Wieacker did not have the position of *Ordinarius* at Kiel, but worked there as *Privatdozent*, which has generated a debate whether he belonged to the actual *Kieler Schule* or not. See e.g. Winkler 2014, 261, 264; Liebs 2010, 25–26; Frassek 2008, 358.

³⁰² The *Kieler Schule* was not tied to a specific faculty, and to the participants the most decisive feature of the school was the personal ties they had with one another. To contemporary scholars it appeared as a group to be mostly united by its methodological stance and its relation to the University in Kiel (cf. Heinrich Lange, *Die Entwicklung der Wissenschaft vom Bürgerlichen Recht. Eine Privatrechtsgeschichte der neuesten Zeit*. Tübingen, Mohr 1941, 11). With these points in mind, I consider the *Kieler Schule* to be comprised of the above-mentioned scholars. This is also Wieacker’s own opinion, see Wieacker, ‘Kitzeberger lager’ [1936], 163.

³⁰³ See e.g. Grothe 2005, 172. Yet, as I argue in the following pages, there was a decisive difference whether one was among the eight war generation scientists or whether one represented an older generation, no matter what opinions one had of the “political revolution.”

³⁰⁴ Grothe 2005, 195 fn. 138.

³⁰⁵ *Deutsche Rechtswissenschaft I* (1936).

³⁰⁶ Concerning the significant input of the *Kieler Schule* in ‘legal renewal,’ see Eckert 1992, 65–68.

of history was promoted by the far-right press, but it also had its supporters in academia. Carl Schmitt in particular legitimized his attack on “neutral” legal science with his conviction that the “last days” of the old world order were at hand.³⁰⁷ He actively sought to have an effect on the wider opinion or consciousness of the German people, in which his circle of disciples – including from the *Kieler Schule* Ernst Rudolf Huber and Franz Wieacker – played an essential role.³⁰⁸ Thus, the self-legitimation of the *Kieler Schule* as the young elite of German legal science was confirmed not only by the new fascist administration, but also by the “public (nationalistic and to a degree learned) opinion” and their academic mentors.

This loose group of colleagues bonded and created a working environment which the participants recollected with nostalgia even decades later.³⁰⁹ Although the inner climate of the group was informal, supportive and warm, the visible habitus of the young legal scholars adjusted to their suddenly achieved status as the forerunners of legal studies in Germany. There was a good degree of arrogance in the public appearance of the *Schule*, as Wieacker later recollected.³¹⁰ The self-understanding of the young scholars as the most dynamic, informed, and aware legal scientist elite was unshakable. Their advocacy of the ‘New legal science’ was sincere.

It is very difficult to draw a decisive distinction between the ‘stance’ of the *Kieler Schule* and other discourses in legal scientific debates.³¹¹ On the level of scientific discourse, the *Kieler Schule*’s orientation diverged from the more party-oriented theorists. Accordingly, Walkenhaus draws a distinction between the groups of “Ordo-theoretischen Hegelianern vs. anarchotheoretischen Sympathisanten von SA, SS and SD” in the field of ‘New legal science,’ and more general in the Third Reich’s

³⁰⁷ Mehring 2014, 241, 242, 245-248.

³⁰⁸ *Ibid.*, 240, 335.

³⁰⁹ On the inner atmosphere of the *Schule*, see Winkler 2014, 470–476. Cf. Wieacker to Ernst Rudolf Huber 2.7.1961, when Wieacker and Huber were again able to work together in the same University at Göttingen: “[...] da die mir sich eröffnende Möglichkeit, mit Dir zusammen wieder an der gleichen Hochschule sein zu können, mich so sehr erfreut, dass für mich hinter diesem Prae alles andere, weil technisch, mittelbar und ungewiss, vollkommen zurücktritt. [...] In der Tat wäre Dein Hinzutritt zu unserer, richtiger der dann sich bildenden Juristischen Fakultät der beste Gewinn, den die Fakultät seit vielen Jahren gemacht hätte. Wie sehr schön es gewesen wäre, wenn dieses Resultat vor Jahren ohne Umschweife und Umwege über die Nordseeküste hätte erreicht werden können, ist klar; dennoch kann ich mich noch immer über das Resultat freuen und möchte wünschen, dass sich ein wenig von dieser Empfindung auf Dich übertrüge. Unsere regelmässigen Ferienunterhaltungen gehören für mich zu den Angenehmsten, das Freiburg bietet; aber wieviel wichtiger wäre es, sich hier in täglicher Zusammenarbeit zu besprechen.” Cf. Wieacker To Ernst Rudolf Huber 20.11.1957: “Lieber E. R. H, zugleich im Namen von Schaffstein und Michaelis möchte ich erfragen, ob Du Lust hast, uns zum nächsten Wochenende 30/11 / 1/12 (1. Advent) zu besuchen. Schaffstein schlägt vor, bei ihm zu wohnen. Ich schlage vor, gegen Sonnabend früh abzufahren und gegen Mittag hier anzutreffen. Abends würden wir zusammen in einem netten Waldgasthaus eine Ente verzehren; Sonntag uns unterhalten. Montag werden wir vermutlich alle wieder im Geschirr sein müssen.” NL Ernst Rudolf Huber Bestand 1529, Bundesarchiv Koblenz; Ernst Rudolf Huber to Wieacker 25.11.1957: “Lieber Wieacker, schönsten Dank für die freundschaftlichen Einladung, der ich, wie ich Michaelis schon heute morgen am Telefon sagte, gerne Folge leiste [...] Grüsse an Schaffstein (mit Dank für die Einladung zum Nächtigen), an Michaelis (mit Dank für den Anruf) und besondere an Dich.” NL Ernst Rudolf Huber Bestand 1505, Bundesarchiv Koblenz.

³¹⁰ Wieacker, *A History of Private Law* 1995, 410 fn. 2; cf. Eckert 1992, 55.

³¹¹ Grothe 2005, 215-216.

legal discussions concerning the relation between state and law.³¹² Whereas the members of the *Schule* all upheld, albeit to varying degrees, some kind of connection to the Hegelian or institutional theories on society, the ‘party sympathetic’ side was represented by, for example, Reinhard Höhn.³¹³ To many, the *Kieler Schule* distinguished itself in its view of legal education, and thus the vehement opponents of the *Kieler Schule* were mostly against the stance it was seen to represent in the field of legal pedagogics.³¹⁴ Nevertheless, to conclude that these disputes made the *Kieler Schule* somehow “less National Socialist” would be incorrect, although that was how Ernst Rudolf Huber saw things in 1945.³¹⁵

The most decisive feature of the *Schule* for its members, which later retained its importance in reconstructing the ‘Kielian narrative’ of the Nazi era, was the fighting stance it took against the old practices of the higher education and older staff, which represented the ‘degenerating bourgeois spirit’. In the spring of 1939, devoted *Kieler schuler* and the professor of legal philosophy at the University of Kiel, Karl Larenz, wrote to Gerard Dulckeit:

Der zweite Punkt [of the letter] betrifft natürlich unser Schmerzenkind, Julius [Binder]... Zu meinem Entsetzen schreibt er mir nun, er wolle seiner Wissenschaftslehre eine eine "allgemeine Erörterung über Wissenschaft überhaupt, reine und zweckbestimmende Wissenschaft, Objektivität und dergl. mehr" vorausschicken. Was das wird, ist ja klar: eine verschlimmerte Auflage des Vorworts aus der Grundlegung, eine einzige verbitterte Polemik gegen die "neue" deutsche Wissenschaft, so wie sie sich in Julii Augen malt, und ein mehr oder weniger versteckter Angriff gegen die Weltanschauung, eine nationalsozialistische Rechtswissenschaft, usw. Sie müssen das verhindern! Wie, das überlasse ich Ihrer bewährten Klugheit und Geschicklichkeit!³¹⁶

³¹² Ralf Walkenhaus, ‘Totalität als Anpassungskategorie. Eine Momentaufnahme der Denkentwicklung von Carl Schmitt und Ernst Rudolf Huber,’ in Ralf Walkenhaus, Alfons Söllner & Karin Wieland (Hrsg.), *Totalitarismus, Eine Ideengeschichte des 20. Jahrhunderts*. Berlin, Akademia Verlag 1997, 95.

³¹³ To Ernst Rudolf Huber (and to e.g. Wieceker) the relation of law and state presupposed an existence of some kind of *Stand*, a political body of people, whereas Höhn held ‘the people’ and *Volksgemeinschaft* to be identical concepts (Grothe 219-220). The breach between these two streams also originated very probably from their relation to Carl Schmitt. Höhn, also a party informer inside academia, appeared to Schmitt to be a participant in the group which caused his dethronement during the late 1930s. As such, to “Schmittians” Höhn was a despicable person; cf. Mehring 2014, 337-338.

³¹⁴ Cf. Lange 1941.

³¹⁵ Grothe 2005, 218.

³¹⁶ Karl Larenz to Gerhard Dulckeit 4.4.1939, NL Gerhard Dulckeit, Nachlass Cod. Ms. Dulckeit 5, Niedersächsische Staats- und Universitätsbibliothek, Göttingen. Emphasis original. “The second point [of the letter] is naturally about our problem child, Julius [Binder]. To my appall, he now writes me that he wants from his scientific lecturers a “general detailed discussion of science, pure and single-minded science, objectivity and the like” delivered in advance. What that will lead to is clear: a worsened condition of the introduction from the foundation, a single embittered polemic against the “new” German science, as it is reflected in Julius’s eyes, and a more or less hidden attack against the worldview, a National Socialistic jurisprudence, etc. You must stop this! How? I leave that to your cleverness and skill.” (Translation by HW).

This letter is no exception in the correspondence between Larenz and Dulckeit. Many of Larenz's letters from 1936 to 1939 concentrate on mocking Julius Binder, the other professor of legal philosophy in Kiel during that time, and Larenz's doctor father. According to Larenz, Binder was miserably outdated in his theories. The bibliography and books Binder wished to include in the faculty's curriculum were simply dull. Nor was his teaching much better; Binder failed to bond with his audience and did not understand the essence of lecturing, namely the education of young minds. Overall, to Larenz his senior college was simply unaware of the contemporary reality in which legal science should also evolve.³¹⁷ The distinction which Larenz draws between himself (together with Dulckeit) and Binder is, however, revealing with respect to the basic attitude of the *Kieler Schule* in general. Binder was by no means a legal positivist or "Kelsenian." He had established himself as a tireless critic of the Neo-Kantian, for example, Rudolf Stammler's legal doctrines.³¹⁸ Michael Stolleis shows how Binder in his strongly adjusted Hegelianism draws the legal discipline closer to nationalistic and anti-democratic discourses. In other words, Binder can undoubtedly be labeled a conservative revolutionary.³¹⁹ Binder, however, was not a youngster, and unlike the war generation of the conservative legal scientist, he could not understand, support or accept the way National Socialists were shaping higher education. Inevitably, that stance placed him at odds with the Kiel scholars of the war generation, since their determined aim was to distinguish their 'school' from the old hierarchies and academic practices.

In the first part of the 4 April 1939 letter to Dulckeit given above, Larenz deals with the state of the law faculty at the University of Kiel. His main point circles around the question of whom the faculty should hire after Karl Michaelis had left the University and accepted a professorship at Leipzig. The newcomer should be a scholar whose personality, ideological stance and scholarly interests would fit the overall frame of the 'stormtrooper faculty.' The first choice would have been Wieacker, whom Larenz had already consulted earlier, but who "after long oscillation" between Leipzig and Kiel decided to stay in Leipzig,³²⁰ and thus Dulckeit and Larenz were forced to rethink their options. The subsequent part of the letter suggests some points around which the faculty teaching should concentrate. Here Larenz exhibits the distinguishing grounds which both separated the 'war generation' from the older conservative revolutionaries, and made the young scholars such a politically ambiguous group. While pondering ways to coordinate the next semester, Larenz praises the contemporary rector Paul

³¹⁷ Karl Larenz's letters to Gerhard Dulckeit, Nachlass Cod. Ms. Dulckeit 5, Niedersächsische Staats- und Universitätsbibliothek, Göttingen.

³¹⁸ cf. Ralf Dreier, 'Julius Binder (1870–1939). Ein Rechtsphilosoph zwischen Kaiserreich und Nationalsozialismus,' in Fritz Loos (Hrsg.), *Rechtswissenschaft in Göttingen*, Göttingen 1987.

³¹⁹ Michael Stolleis, *A History of Public Law in Germany, 1914–45*. Oxford, Oxford UP 2004, 167.

³²⁰ The fact that Wieacker moved to Leipzig does not mean that he was no longer part of the *Kieler Schule*. The *Schule* was a group, not a faculty (Cf. fn. 302). Furthermore, the Central administration had plans to turn the law school at Leipzig into a similar 'stormtrooper faculty' like the one in Kiel (Grothe 2005, 172). In the light of these plans it is understandable that Wieacker was not alone in moving to Leipzig. Huber, Dahm, Michaelis and Schaffstein also continued their work in Leipzig. Another National Socialist model school was later (1941) established in Strasbourg, where Huber, Schaffstein and Dahm found professorships. Finally, after the war, the members of the original *Schule* continued to foster their *Kameradschaft* at the University of Göttingen. Winkler 2014, 473–474.

Ritterbusch who, according to him, had succeeded in putting his ideas into action and had achieved impressive results. Larenz concludes the positive results:

So mit seinen Universitätswochen, mit der Dozentenakademie und jetzt eben mit der Tagung seines Instituts, die aus dem In- und Ausland ausgezeichnet besucht war und sehr interessant verlief. Die Beziehung mit Partei, Stadt und Marine sind, wie gerade diese Tagung zeigte, sehr günstig. Die Dozentenakademie veranstaltet ausser monatlichen Vorträgen auch bestimmte Arbeitsgemeinschaften.³²¹

Larenz suggested that the faculty should deepen its cooperation with Ritterbusch and with the institutions he represented. The intertwining of politics, social change and university teaching was natural, and even desirable, since the means were less important than the end, namely to educate and “engage in fruitful scientific work.”³²² The war generation was not hesitant to co-work with the Nazi party and adjusted its teaching to meet the new ideology. It is also here where one can see a decisive shift towards National Socialist legal science *on the level of practice*. Later during the war Paul Ritterbusch was given the task of gathering together German scientists and shaping a “weapon of war” from their texts and thoughts, hence the *Aktion Ritterbusch* project. Participants demonstrated the value of the humanities, social sciences and law in the “intellectual prosecution of the war” and in the planning of a new Europe under German leadership.³²³ Activities included organizing conferences and publishing collective works. The project might be regarded as one of the saddest symbols of the alliance between the fascist government and German social sciences. From the original *Kieler Schule* at least Larenz, Huber, Michaelis, Dahm and Wieacker participated in *Aktion Ritterbusch*, and Wieacker’s small part was to convince readers of the similarity between the mentality and base values of German and Roman cultures.³²⁴

³²¹ Karl Larenz to Gerhard Dulckeit 4.4.1939, NL Gerhard Dulckeit, Nachlass Cod. Ms. Dulckeit 5, Niedersächsische Staats- und Universitätsbibliothek, Göttingen. “It was so with his university weeks, with the lecturer academy and now even with the session of his institute which has had an excellent number of both foreign and domestic visitors and proceeded in a very interesting way. The relationship with party, state and navy is, as this meeting just showed, very favorable. The lecturer academy organizes certain collaborative research groups as well as monthly presentations.” (Translation by HW).

³²² Ibid.

³²³ Frank R. Hausmann, »*Deutsche Geisteswissenschaft*« im Zweiten Weltkrieg. Die »*Aktion Ritterbusch*« (1940–1945). Heidelberg, Synchron 2007; Schönwälder 1992, 208-216; cf. Karl Larenz To Gerhard Dulckeit 31.1.1940: “Ferner hat Ritterbusch von Ministerium einen Auftrag u. Mittel zwecks “Einsatzes der Geisteswissenschaften im Kriege” erhalten: ich habe ihm bereits einen Plan für die Rechtsphilosophischen unterbreitet u. hoffe nun auf Ihre Mitwirkung. Bei der Zusammenkunft mit Wieacker an der auch Glockner teilnehmen wird, können wir auch über die ZDK sprechen.” NL Gerhard Dulckeit, Nachlass Cod. Ms. Dulckeit 5, Niedersächsische Staats- und Universitätsbibliothek, Göttingen.

³²⁴ Ibid. Wieacker’s “Entwicklungsstufen des römischen Eigentums” (1942) was an article published in the collection *Das neue Bild der Antike* (Helmut Berve hrsg.), Leipzig 1942, edited by Helmut Berve. It was part of the program “Kriegeinsatz der Altertumswissenschaft” directed by Berve, which itself was part of the “Kriegseinsatz der Geisteswissenschaft” led by Paul Ritterbusch. Like many other contributions in “Aktion Ritterbusch,” *Entwicklungsstufen des römischen Eigentums* could be seen as either ‘normal science’ or propaganda. Frank R. Hausmann, »*Deutsche Geisteswissenschaft*« im Zweiten Weltkrieg. Die »*Aktion Ritterbusch*« (1940–1945). Heidelberg, Synchron 2007.

Larenz was clearly more aggressive in tone and style than Wieacker, but I would argue that in some respects his message can be generalized to describe the culture and mentality of the whole *Kieler Schule*, including Wieacker. The ‘New legal science’ was not only considered to be the correct way to see law and society, but the paradigmatic change from the “old” was an inescapable temporal necessity if one wanted to shape contemporary German society. There were traits of patricide and fascinated “motion-blindness” in the existence of the *Kieler Schule* and its young scholars. Abandonment of the frustrating old codes, a sense of the dazzling possibilities which the new national uprising seemed to offer for bright young minds, and if not support for racial exclusion, at least selective ignorance towards the concrete results to which the racist slurs were taking people, are obvious characteristics of the culture of the *Kieler Schule*.³²⁵ A radical breach with respect to the scholarly tradition also occurred in the sphere of practices. The cooperation in the form of camps, direct interaction with society in networking with the party and military, and changes in the University hierarchy as well as in the style of teaching brought about by the new *Studienordnung*, were all aspects that marked an enormous rift in comparison to the way the war generation had started their own studies in the 1920s.³²⁶ The practices brought a sense of togetherness and aroused emotions which distinguished Wieacker’s circle from the traditional way to do legal science.

There are only three letters written by Wieacker in the archives of Erik Wolf and Carl Schmitt sent during his *Privatdozent* times in Kiel.³²⁷ There is, however, an abundance of correspondence where Wieacker recollects those times and compares his present and future situation to the nostalgic memory of the *kameradschaftliche* experience.³²⁸ I will deal with this theme in more detail in chapter 4. For now, it is suffice to note that the time in Kiel, especially the experience of belonging to a group of like-minded friends, was a decisive feature in Wieacker’s personal life history, according to which he arranged and interpreted the later events and phenomena in his life. The network which formed in Kiel also continued to support its members long after the war, in such universities as Freiburg or Göttingen.³²⁹

Wieacker did not find it a problem to be linked with National Socialist-minded scholars in their mission against “foreign and capitalist” traits in German culture, because these notions roughly resembled his own underlying ideas in attempting to conceptualize justice. To Rust, Rosenberg, Frank and Hitler the priority was to purify Germany from anything Jewish-related, to exterminate the Jews. In order to be comprehensive they extended their mission to eradicate ‘racial corruption’ in culture and science.³³⁰ To Wieacker, however, the ‘racial element’ was irrelevant to science

³²⁵ Eckert 1992, 55, 56, 60.

³²⁶ Gerhard Müller: *Ernst Kriek und die National-Sozialistische Wissenschaftsreform. Motive und Tendenzen einer Wissenschaftslehre und Hochschulreform im Dritten Reich*. Berlin 1978, 389; Grothe 2005, 197–200.

³²⁷ Wieacker to Erik Wolf 12.7.1935, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau; Wieacker to Carl Schmitt 13.7.1935 and 2.9.1935. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

³²⁸ Cf. fn 310.

³²⁹ Winkler 2014, 470-476.

³³⁰ Cf. Schönwalder 1992, 32-33.

There was instead a wrong and dangerous kind of weak argumentation by disrespectful people, whose work needed to be set aside for the greater cause of the fatherland and German culture.³³¹ Because of this ‘merging of intentions’ Wieacker, like many other young scholars, worked with the National Socialists, and ignored the reality of Nazi injustices. Here lies one reason for the success of the fascist coup in German academia. The National Socialists managed to convince their contemporaries that they were responding to the basic needs of the people, that they were aware of amorphous social changes, and were able to fight against the grievances brought about by modernization. Many scholars advocated ‘legal renewal,’ and like Wieacker celebrated the “improved structuring of studies” which “brought them closer to real life,”³³² but there was a difference between the older scientists and the war generation with regard to attitudes concerning education and practical engagement in National Socialist programs.³³³ Wieacker was concerned with *Bildung* and *Stand*. They presented the ethical foundation of the everyday life (*Wirklichkeit*) of German society and represented the principles of social justice. He was, nevertheless, intrigued by the possibilities which the changed political atmosphere had brought about from the perspective of educational reform. Thus, in distinction to many older legal scholars, he participated in projects and programs which drew him close to National Socialist *Gleichschaltung*.

The late 1930s and war as *Erlebnis*

During the war Franz Wieacker found his distinguishing style in studying and describing legal historical phenomena. The understanding that legal concepts should reflect the material bond between the people and normative order remained, as it did for the rest of his career. So too did the claim that law embodied humankind’s triumph over degeneration and superstition – law was the sum of people’s cultural achievements – although Wieacker’s argument took a more sophisticated and versatile form. In his letters the quest to combine law and the reality as perfectly as possibly took a metaphysical turn, and his interest started to turn from contemporary and current legal problematics to historical themes. Scientifically, he was very active. His scholarly work was interrupted when Germany invaded Poland in September 1939, and Wieacker was drafted, but he was able to return to his academic duties fairly quickly and he was not called up again until the summer of 1944.³³⁴ Whereas the terms *Rechtsbewusstsein* and *Gewissen* started to appear in his scientific texts, in private Wieacker struggled to give a precise definition to these concepts. What exact features and meanings did these words signify? What was the distinction between them? Who

³³¹ Wieacker to Erik Wolf 25.1.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

³³² Wolfgang Künkel & Hans Würdinger, ‘Vorschlag einer Neuregelung des juristischen Studiengangs’ [1934]. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg; cf. Winkler 2014, 144, 158, 161.

³³³ Cf. Schönwälder 1992, 31: although the older generation welcomed the political change in society, they were more reluctant to accept its effects on higher education.

³³⁴ Liebs 2010, 28; Winkler 2014, 456 fn. 3.

expressed them and in what circumstances? What were the limits of these concepts in defining social change from a history perspective?

Wieacker's ambiguous stance towards the National Socialist regime is evident in the secondary sources from the war years. Party informers produced a report on Wieacker's political reliability (as they did for most scholars), which stated:

[Wieacker] ist in politischer Hinsicht vollkommen zuverlässig. [...] Pg. Wieacker ist erfüllt von der Idee des neuen Staates und arbeitet mit äusserstem Fleiss and ihrer Verwirklichung mit. [...] Opferbereitschaft ist vorhanden, Leumund ist gut. Auch sonst ist nichts Nachteiliges bekannt.³³⁵

Judging by his correspondence, Wieacker was by no means an eager supporter of the regime, and there are no signs of a fascination with war in his letters to his friends. In general with regard to the war, the picture which previous studies on Wieacker creates is similar to most of the retrospective analyses of the inner worlds of people living under Nazi rule. The war was a necessary evil, which individuals often wanted to set aside like bad weather and concentrate on routines or matters of spiritual life instead and as fully as possible.³³⁶ On the surface, Wieacker's correspondence repeats the same narrative. If there had been a place for nationalistic zeal in his *Weltanschauung* before the 1940s, war-weariness certainly removed any beliefs in the sustainability of the political nationalism of Nazi Germany. In his letter to Erich Rothacker, Wieacker expressed his irritation towards the war. It constantly interrupted his scholarly work and prevented him from carrying out the meaningful work of studying and writing about law:

Zudem kann die Kriegsentwicklung jeden Tag meiner wissenschaftlichen Arbeit auf unbestimmte Zeit ein Ziel setzen. Praktisch würde dies heissen, dass die Herausgeber vor 2,5 Jahren nicht mit der Ablieferung meines Manuskripts ruhen dürfen, ausser den zusätzlichen Kriegsfällen, mit denen ihre Unternehmung ohnedies belastet ist.³³⁷

³³⁵ "Beurteilung" der NSDAP-Kreisleitung Leipzig, 19.10.1938, quoted in Winkler 2014, 463. "[Wieacker] is completely dependable in the political sense. [...] Private scholar Wieacker is filled with the idea of the new state and participates with the utmost diligence to make it come true. [...] The willingness to make sacrifices is present, [his] reputation is good. At least, nothing detrimental is known." (Translation by HW).

³³⁶ "In Leipzig hat das Trimester mit vielen ersten Semestern begonen; es erschöpft einen ziemlich, wenn man daneben noch arbeiten will. Ich habe mich bei Ihnen noch sehr zu entschuldigen, da ich Ihnen etwas so Gutes wie die »Rechtsdenken« durch die Vorspiegelung entlockte, ich würde auch mein Bodenrecht schenken; ich hatte es über den Krieg vergessen und erschrak heute sehr, als es mir einfiel." Wieacker to Erik Wolf 25.9.1940. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

³³⁷ Wieacker To Erich Rothacker 8.8.1944. NL Erich Rothacker, Bonn Landesbibliothek. "Furthermore, the development of the war can delay a goal for an indeterminate amount of time every

Viktor Winkler sees Wieacker's war years as a time when he consolidated previous influences. The identity and vision of Wieacker as a researcher had already been formed earlier; his permanent position at the University of Leipzig enabled Wieacker to put this vision into practice. Winkler correctly shows that during the war, Wieacker wrote many of his key texts which were later brought together in an essay collection, *Vom Römischen Recht* (1944). It is also obvious that the first drafts of *Das Privatrechtsgeschichte der Neuzeit* (1952) had already been written in the early 40s, determining the content of biographical articles Wieacker wrote during the war, and which constituted an important part of the book.³³⁸ Wieacker's correspondence confirms this picture. In his letters Wieacker reported that he had started a new project in late 1941, namely a study on "the scientific consequences of Roman law on the Occident" as well as "the history of German private law in modernity."³³⁹ These themes, with different topics and developments, comprised the two major branches of Wieacker's scholarly works throughout the following decades.

The turn towards historical meaning, the result of both disappointment and new scientific influences, is evident. In his letter to Erik Wolf, Wieacker, both frustrated and curious, discusses how poetry succeeds in capturing the essence of law better than philosophy ever will. Following Wolf's encouragement Wieacker interpreted Hölderlin's *Rhein*, and saluted the poem's ability to display the *Geist* of binding norms:

Ich finde den schwierigen Gedanken, aus dem Dichter über die Existenz des Rechtes zu erfahren, behutsam und fruchtbar durchgeführt, wenn ich urteilen darf. Sehr eigentümlich, wie einpolig und undialektisch seine Bestimmung des Rechts ist. Wie streng er die positiven Bestimmungen des Rechts aus seiner Idee ausschließt. Vom Recht handelt er nebenher auch terminologisch bedeutsam, im »Rhein«: "denn eher müsse die Wohnung vergehn und die Satzung und zum Unbild werden, der Tag der Menschen, ehe vergessen ein solcher dürfte den Ursprung und die reine Stimme der Jugend."³⁴⁰

day of my scientific work. Practically, this can mean that the publisher cannot count on the delivery of my manuscript for two and a half years, apart from the additional war events burdening their operation." (Translation by HW).

³³⁸ Winkler 2014, 172–173.

³³⁹ "So ist im Erscheinen begriffen eine Sammlung von Versuchen über das römische Recht, von denen der letzte, fast 100 Seiten lange, die Geschichte des römischen Rechts im Abendland, d.n. praktisch einen Ueberblick über die Geschichte der abendländischen Rechtswissenschaft zum Gegenstande hat. Schlimmer ist es noch/dass ich ein Buch über "Deutsche Privatrechtsgeschichte der Neuzeit" vorarbeite, das ziemlich weit gefördert ist und voraussichtlich einen Umfang von Schätzungsweise 20 Bogen erreichen dürfte." Wieacker to Eric Rothacker 8.8.1944. NL Erich Rothacker, Bonn Landesbibliothek.

³⁴⁰ Wieacker to Erik Wolf 25.9.1940. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. "If I may judge, I find the difficult concept that one can learn from the poet about the existence of law, carefully and productively composed. Very strange, how unipolar and undialectical his definition of law is. How strictly he excludes the positive definitions of the law from his own ideal. He also deals further in a terminologically meaningful way with the law in Rhein: "because the dwelling

His suspicion of rational philosophy (Hölderlin is characteristically a poet who rejected philosophical reasoning) as a tool to draft laws, understand legal matters and sustain social justice in everyday reality is a visible feature of Wieacker's war time writings.³⁴¹ Within this theme Wieacker found an appreciative and well-informed counterpart in Carl Schmitt.

Both Reinhardt Mehring and Florian Meinel notice a serious drift between Carl Schmitt and his disciples from 1936 to the late years of the decade.³⁴² They interpret this as a "moment of soberness" on Ernst Forsthoff's and Ernst Rudolf Huber's behalf, resulting in Schmitt's attempt to whitewash the murderous purge of the NSDAP during the Night of the Long Knives and his escalating anti-Semitism. On the other hand, Schmitt himself was "dethroned" by SS-minded opposition, which suspected (correctly) that Schmitt's engagement with the regime was not sincere and wholehearted. After the blurry chaos of the early years of *Gleichaltung*, the National Socialist policy had become distinctively racist and vulgar. So it is not far-fetched to allege such "soberness" in the case of Wieacker's orientation as well. Detlef Liebs suggests that around the time of the outbreak of the war, Wieacker was already well aware of the true nature of the Third Reich. Especially the ousting and exiling of Fritz Pringsheim had opened his eyes to Nazi betrayal.³⁴³

Nevertheless, after a few years of silence between Wieacker and Schmitt, their cooperation deepened considerably during the war years from chance encounters to collegial acquaintance. After the surrender of France, the Germans established a 'model university' at Strasbourg. It employed many of Wieacker's friends, including Ernst Rudolf Huber, and Wieacker himself visited there.³⁴⁴ On these trips, which sometimes included a visit to the German Institute of Science in Paris, Carl Schmitt accompanied Wieacker. The two also travelled together on a conference to occupied Hungary. Wieacker invited Schmitt to Leipzig for guest lectures, commented on his articles, and inquired into Schmitt's opinion on some of his ideas.³⁴⁵ Wieacker

must rather pass away and the statute, and the days of men return to nothingness, ere such one should forget the origin and the pure voice of youth"³⁴⁶. (Translation by HW).

³⁴¹ Wieacker did not like abstract, theoretical philosophy. See e.g. Wieacker to Dulceit 25.12. 1948: "Meine Unzuständigkeitserklärung in philosophicis ist kein versteckter Hochmut." NL Gerhard Dulceit, Nachlass Cod. Ms. Dulceit 5, Niedersächsische Staats- und Universitätsbibliothek, Göttingen.

³⁴² Mehring 2014, 336-337; Meinel 2012, 228-229.

³⁴³ Liebs 2010, 28.

³⁴⁴ Winkler 2014, 473-474; Wieacker to Carl Schmitt 30.11.1941. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

³⁴⁵ Wieacker to Carl Schmitt 7.11.1941: "Das Leipziger politisch-historische Colloquium, das von je einem Mitglied der Philosophischen und der Juristenfakultät veranstaltet wird und etwa alle Woche oder zwei Wochen eingeführte Kenner über ihnen besonders vertraute Abschnitte eines losen Generalthemas sprechen lässt, hat bereits im Sommer 1939 die Freude gehabt, Sie mit einem Vortrage über den französischen Juristen bei sich zu Gaste zu sehen. Als stellvertretender juristischer Leiter dieses Colloquiums (seit Hubers Fortgang bis zum Eintreffen seines Nachfolgers) darf ich anfragen, ob Sie, sehr verehrter Herr Staatsrat, uns die Ehre und Freude machen würde, im Lauf des Wintersemesters über Toqueville oder einen anderen französischen Sozial- und Staatsdenker des gleichen Zeitraums im weitesten Sinne (nach Ihrer Wahl) zu sprechen." And Wieacker to Carl Schmitt 30.11.1941: „Ich freue mich sehr, daß Sie zu uns über Tocqueville sprechen werden, [...] [Ich bin] unter dem frischen Eindruck Pariser Erfahrungen, die für uns auch persönliche Spannung auf Ihr Urteil und Ihre Einschätzung des

obviously admired Schmitt's intelligence and writing skills. The relation might have given Wieacker some practical advantage with respect to work positions and publishing, but undoubtedly Wieacker also benefitted scientifically from their interaction.³⁴⁶ After the war, cooperation with Schmitt was in general disapproved, and the correspondence between the two ended immediately. But like in the cases of so many other scholars, Schmitt's influence was decisive, and it showed also in Wieacker's post-war production.

In 1941 Schmitt held a lecture in Leipzig on French jurisprudence and later sent Wieacker a copy of his article 'Die Formung des französischen Geistes durch den Legisten.'³⁴⁷ The war-time correspondence between Schmitt and Wieacker followed the same themes which they had discussed earlier in 1935. Then Schmitt had asked Wieacker's opinion on Johan Stroux's article on Greek influences in Roman legal culture, which gave Wieacker a perfect opportunity to exhibit his expertise on Roman law, but also to defend his vision of the distinct nature and meaning of Roman legal scholarship.³⁴⁸ In his 1935 letter to Schmitt, Wieacker wrote of Roman law and lawyers:

[The Greek systematization] bringt einmal eine für das klassische römische Recht ziemlich untergebliebene Rechtstheorie griechischen Musters über das Verhältnis von natürlichem und bürgerlichem Recht hervor. Sie führt auf der anderen Seite zu einer rationaleren und logisch durchgegliederten Erfassung überlieferter Rechtsvorstellungen, wie sie dem hellenistisch gebildeten Römer selbstverständlich ist, und lokert dadurch den etwas zopfigen zünftlerischen Denkstil der vorklassischen Juristen (vergleichbar etwa dem englischen Inns) stark auf. Dagegen glaube ich, dass das innere Gefüge der klassischen Jurisprudenz sich diesen Einwirkungen fast gänzlich versagte und den altrömischen Stil bis zu Julians Ediktredaktionen wahrte.³⁴⁹

alten-neuen Frankreich begründen." See also Wieacker to Carl Schmitt 11.7.1944: "Später denke ich doch daran, den Grundriss der "Privatrechtsgeschichte der Neuzeit" abzuschließen; das ininteressanteste, was man sich denken kann. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.; On the trip to Hungary, See Wieacker To Reichsminister für Wissenschaft, Erziehung und Volksbildung 2.9.1944. Personal Akten SG 0457 Wieacker, Universität Archiv Leipzig.

³⁴⁶ Schmitt offered Wieacker a position in the University of Berlin in 1944, but Wieacker refused, Wieacker to Carl Schmitt 11.7.1944. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

³⁴⁷ See Wieacker to Schmitt 25.8.1942. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

³⁴⁸ Johannes Stroux: "Griechische Einflüsse auf die Entwicklung der römischen Rechtswissenschaft gegen Ende der republikanischen Zeit," *Atti del CIDR*, 1, 111-132.

³⁴⁹ Wieacker to Carl Schmitt 13.7.1935. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg. "[The Greek systematization] produces a legal theory from a Greek model for the relationship of natural and civil law that is rather subordinate to classical Roman law. It leads on the other hand to a rationally and logically arranged survey of legal concepts that have been handed down, as they are self-evident to the Greek-educated Roman, and thereby make the somewhat archaic guild-like thinking style of the pre-classical lawyers (comparable to the English Inns of Court) much more interesting. In comparison, I think that the inner structure of the classic jurisprudence almost completely

In his 1935 letter Wieacker defended his Romanistic views to a distinguished scholar who infamously had blamed Roman law for the ‘scientification’ of German legal culture.³⁵⁰ Being aware of both Schmitt’s earlier announcements as well as his scientific rhetoric and interests, Wieacker – in a very traditional manner – accuses Greek theories of corrupting the pure ‘pre-classic jurisprudence,’ and, curiously, defends true Roman law as being like the ‘English courts of Inns’: ‘guild-like’ and ‘infused by masculine expressions’. In other words, Wieacker defended Roman legal scholarship as a distinct ‘concrete order.’³⁵¹ Wieacker’s response was not mere lip-service to the *Staatrat* Schmitt. As becomes evident in his 1930s writings, he truly believed in Schmitt’s methodology of analyzing legal entities from the institutional point of view,³⁵² and later held on to his view of Late Republican jurisprudence as a distinguished community guided by its own traditions and norms. This becomes evident when, on the basis of his 1935 response to Schmitt, Wieacker wrote an article which he sent first to Salvatore Riccobono and later published as his first article in English.³⁵³ It cannot be constructed from his letters to what extent Wieacker shared Schmitt’s anti-parliamentarism, but his doubt concerning the functionality of a legal system built solely on the virtues of the French Revolution and the Enlightenment is obvious.³⁵⁴

Wieacker rejected the idea that some people because of their origins, national or linguistic, would have a “birthright” to a more comprehensive understanding of justice. Furthermore, mere knowledge did not equate with wisdom in legal matters. Nevertheless, some people seemed to succeed better than others, and this more beneficial position intrigued Wieacker. He agreed with Schmitt’s assertion that it was the institutional premises which cultivated the perspective to understand and the ability to apply justice in society. Different people seemed to possess different ways of understanding law and jurisprudence, and this was due to national virtues as well as to institutes of legal praxis and education. In other words, national legal cultures were related to the mentality of their people:

Freilich fragt man sich, ob in jenem deutschen systematisch-philosophischen Typ die Durchdringung des Richteramts mit der

refused to give itself to these influences, and it maintained the ancient Roman style up to Julian’s former revision of the Roman edicts.” (Translation by HW).

³⁵⁰ Cf. Chapter 3.2. ‘The Culture in Rechtsbewusstsein 1933–1945: The actualization of the Weimar breakdown and National Socialism in academia and legal science.’

³⁵¹ To Schmitt the English courts were foremost examples of ‘concrete orders.’ See Carl Schmitt, ‘On Three Types of Juristic Thought’ [1934], trans. Joseph W. Bendersky. Westport, Praeger 2004.

³⁵² On Schmitt references in Wieacker’s 1930s works, see Winkler 2014, 268, 277.

³⁵³ Franz Wieacker to Salvatore Riccobono 2.2.1940. The personal collection of Professor Mario Varvaro, Università degli Studi di Palermo – Dipartimento di Storia del Diritto, Palermo-Università degli Studi, Palermo. The letters are a concession of Salvatore Riccobono’s family. Professor Professor Varvaro himself discovered the documents in Riccobono’s house. Therefore, they are not stored in an official archive.

³⁵⁴ In his 25.8.1942 letter to Schmitt, Wieacker provocatively asks: “Wird es uns möglich sein, ein Weltreich aufzurichten, ohne aufzuhören, Philosophen zu sein, was ja zu unserem Volkscharakter indelebiler gehört?” NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

Funktion, welche die politische Grundordnung dem Juristen zuweist, nicht bisher misslungen ist, und zwar eben wegen jener gelehrtsystematischen Betrachtung. Zuzugeben ist, dass die systematisch-normative Betrachtung des Lebens im Guten wie im Bösen auch für das Leben und Handeln, auch das politische Handeln der Deutschen bezeichnend ist; jene Richtung der deutschen Rechtswissenschaft, wie sie etwa Windscheid ausprägt, ist nebenbei wirklich sehr deutsch.³⁵⁵

To Wieacker as a Romanist, the absolute point of reference between different legal cultures was the one prevailing in the Late Roman Republic.³⁵⁶ I will return to the questions of what kind of legal culture the Romans had, what virtues it comprised, and what was its lasting significance from the point of view of modern society later in chapter 4, but for now the focus is the way in which Wieacker saw the relation between the distinguished legal skill of the Romans and the mentality of the common people. Wieacker presumed that the ‘guild’ of Roman lawyers cultivated its own inner mentality and derived its legal decision from this shared culture, thus it was represented as an ideal ‘concrete order’ which – during the golden age of Roman jurisprudence – defined the essence of Roman law and in more general terms constituted the lawyers estate, *Stand*, inside the Roman culture.³⁵⁷ In 1943, on Schmitt’s request, Wieacker reviewed Valentin-Al. Georgescu’s book *Études de philologie juridique et de droit romain*.³⁵⁸ In his response to Schmitt, Wieacker laid down some of the fundamental principles of his ideas on legal history and Roman law. He wrote to Schmitt:

[W]as ich im “Römischen Juristen” über die eigentümliche Rechtsontologie der Römer sage, nicht hinaus gehen, also keineswegs zugeben, dass die autonome, lebensheilige Geltung der überlieferten und fachlich fortgebildeten Rechtsform in Altrom in die Bewusstseins-Kategorien des Magischen, Numinösen, des Tabu, Orenda und ähnlicher ethnologischer Hilfsvorstellungen fällt.³⁵⁹

³⁵⁵ Wieacker to Carl Schmitt 25.8.1942. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg. “However one wonders, if in each German systematic-philosophical structure, the pervasiveness of magistrates with the role, which the basic political order assigns to lawyers, has not failed until now, due in fact to each systematic teaching approach. It is conceded that the systematic-normative approach of life is, for better or worse, characteristic of the Germans in their lives and deeds, as well as for government policy. Each trend of German jurisprudence, as it influences Windscheid, is incidentally very German.” (Translation by HW).

³⁵⁶ Ibid.: “Ich halte auch den römischen Juristen nicht für den einzigen denkbaren Typus ”der” juristischen Begabung, freilich für einen, der einem etwa denkbaren phänomenalen Typs ”des” Juristen am nächsten kommt.”

³⁵⁷ Wieacker to Carl Schmitt 13.7.1935. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

³⁵⁸ Valentin-Al. Georgescu: *Études de philologie juridique et de droit romain. I. Les rapports de la philologie classique et du droit romain*. Paris, Les Belles lettres 1940.

³⁵⁹ Wieacker to Carl Schmitt 16.5.1943. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg. “Not to exaggerate, and by no means to concede, but what I say in ”Roman

In this excerpt, Wieacker concentrates on the idea of his masterly article ‘Vom Römischen Juristen,’ in one sentence.³⁶⁰ At this point, Wieacker’s elaboration is dually revealing. First, he presents the essence of Roman jurisprudence as a group of ‘highly educated experts’ as opposed to the common awareness of tribal societies, which was characterized by superstition and primitive forms of thinking. Second, the feature which lifted the original Roman law above any other ‘legal form,’ was that the ‘expert-culture’ with its ‘style of thinking’ overcame the primitive ‘ontological’ explanations of common ‘awareness.’ In other words, the success and prestige of Roman law was due to the authoritative status which the lawyer *Stand* had retained in Roman society. Furthermore, such status was associated with a particular form of education.

This education, which cultivated legal wisdom and further uplifted a group of people to a distinguished position within society, continued to serve as the backbone of the legal order and civilized culture. The meaning of legal education, which needed to take the form of providing students with a general knowledge of the history of ideas and thinking (*Bildung*), led to a *Stand*, a faculty of mind capable of fostering the legal consciousness of society. These requirements were true of legal education in ancient Rome and were equally valid in modern Germany. On 11 July 1944, Wieacker reported about the state of higher education at the University of Leipzig in his letter to Schmitt:

Der Fortgang des Universitätsbetriebes hat sich im Sommer besser gemacht, als man unter dem Eindruck jener traurigen und monumentalen Nacht geglaubt hätte, als in wenigen Stunden eigentlich alle sachlichen Grundlagen der geisteswissenschaftlichen Fakultäten in Scheite und Asche sanken; nicht einmal die Frequenz der Hörer hat nachgelassen, und der Fleiss der jungen Leute ist rührend; der natürliche Verstand gut, die Ausbildung der geistigen Fähigkeiten dagegen etwa auf der Stand von Untersekunda.³⁶¹

The purpose of higher legal education, and concurrently the responsibility of the teacher, was to bring up an ‘estate’, *Stand*, of legal experts who had assimilated the

Jurists" about the characteristic legal ontology of the Romans is that, the autonomous, life-essential worth of the traditional and professionally trained legal entities in ancient Rome fall in the consciousness-categories of the magical, the supernatural, the taboo, Orenda and similar ethnological models." (Translation by HW).

³⁶⁰ See section 4.4. “Vom römischen Juristen’ (1939): The historical paragon of community and creativity.’

³⁶¹ Wieacker to Carl Schmitt 11.7.1944. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg. “The continuity of university life went better in summer, as if one had believed to be under the impression of that sorrowful and monumental night, when all objective foundations of the humanities departments collapsed to splinters and ash in a couple of hours. Not once did the frequency of attendance slacken, and the industriousness of the young people is touching. The natural mind is good in contrast to the intellectual abilities which are those of 10th graders.” (Translation by HW).

virtues and traditional knowledge emblematic of the profession, and further would be able to fulfill their duty of guarding and guiding the legal consciousness of the people. This trope or ontological premise was a principle which not only sustained the core of Wieacker's legal historical writings over the decades, but also provided a key to understanding his vision of the intertwinement between society, legal science and people's way of thinking. The relation between this 'historical trope' and Wieacker's contemporary society was not unidirectional. He did not merely explain the twentieth-century German society from the perspective of the Roman ideal, nor did he straightforwardly consider that the gestalt of present-day society mirrored that of Ancient Rome. Rather, his legal scientific research task took the form of a circle: from the bases and evaluations of twentieth-century German society he sought to understand the Roman world (as it appeared in textual sources), and from that representation he commented on present-day phenomena, which were then again compared to the ideal reference point of antiquity, and so on. In coping with his contemporary society and the challenges which the academic world in particular faced, Wieacker maintained a historical picture of Roman jurisprudence and a vision of the ideal contemporary society. These two spheres explained one another and helped to understand the social change in which Wieacker was personally situated.

The idea of the relation between a *Stand* of legal experts and the people as a mirror of the justness of a given society was further sharpened by his experiences in the war. The experience which separated, and continues to separate, Wieacker from many historians was his service as a front-line soldier. Wieacker was called up for military service twice, and though he never publicly reflected on these events, nor apparently was he subject to any severe traumas, that experience was a horizon which on the one hand connected him to some scholars, and on the other opened an irreversible breach between him and the younger generation of scientists. Service in the army, fighting for one's country, was a duty, a natural and correct thing to do. The idea of 'the inevitability of war' is a theme and an axiom, which seems to connect the scholars of the early twentieth century around the world despite cultural differences.³⁶² In Wieacker's letters from the frontline, his frustration and tiredness with fascist propaganda is obvious. There are two countries on whose behalf Wieacker is fighting. On one hand, there is the law-based obligation of a citizen to defend the nation which he inhabits, and on the other the affectionate need to protect one's *Heimat*. Wieacker talks of his service as a "duty" (*Dienst*), but he also combines and conjugates the word in a way which conveys a tone of the distinct "reality of duty."³⁶³

In his letters from northern Italy in the spring of 1945, Wieacker expressed his thoughts and feelings in an indirect way by referring to prose classics or well-known

³⁶² Consequently, after the war, European legal historians found a common ground in building a Cold War worldview from the experience of war. Ville Erkkilä & Jacob Giltaj, Interview with Tony Honoré, in *Forum Historiae Iuris* 26/02/2015. <http://www.forhistiur.de/2015-01-erkkila-giltaj>.

³⁶³ Wieacker to Ernst Rudolf Huber 6.1.1944[1945]. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

characters in German literature. This might have been a means to avoid military censorship, but a more plausible reason was that he typically perceived chaotic and stressful social reality through metaphors and narratives provided by the Western cultural tradition. Thus, while writing from the frontline, Wieacker compared himself to Corporal Gottlieb Köpke from Willibald Alexis's *Isegrimm*, and described the war and his surroundings with the help of Ernst Jünger's *In Stahlgewittern*, Shakespeare's *Macbeth*, and Boccaccio's *Decamerone*.³⁶⁴ These sources all bespeak the impossibility of an individual exhaustively categorizing the distorting reality of war and totalitarianism. But it also suggests Wieacker's fundamental trust in textual learnedness, *Bildung*, and the significance which the heritage of high culture had in his personal way of perceiving the world. Rather than accepting ready explanations on human beings, Wieacker searched for points of connection from cultural examples which were familiar to him due to his upbringing and the *Bildungsbürgertum* worldview. Likewise, after the Second World War when Wieacker tried retrospectively to make sense of his actions and attitudes towards the National Socialist regime, the explanation was made by referring to the texts of Goethe and Schiller.³⁶⁵

In his letter to Hans Georg Gadamer in March 1945, Wieacker explains that he will adopt in the letter the role of a "scientific travelling novelist" while reporting the things he sees, and in order to understand things he will make some comparisons.³⁶⁶ To both Gadamer and Wieacker, the tradition of ironic essays based on journeys was familiar. From Jonathan Swift to Montesquieu the meaning of such reports has not been so much to describe the landscape the author had supposedly inhabited, but to comment on the culture where his audience resides and he himself lived before the trip. Thus, in his letter Wieacker in an indirect way expressed his thoughts and feelings about Germany. He refers to Italy (and/or Germany) as an actor in a play.³⁶⁷ Later in his letter he makes a remark about a Shakespearean tragedy which he had seen in an Italian city some time ago:

Sehr merkwürdig, war für diese Zusammenhänge eine
Macbethaufführung im Schauspielhaus der weitaus grössten Stadt dieses

³⁶⁴ Wieacker to Ernst Rudolf Huber 6.1.[1944]1945 and 23.2.1945. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz; Wieacker to Hans-Georg Gadamer 14.3.1945. NL Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar.

³⁶⁵ Wieacker, *A History of Private Law* 1995, 410, fn. 2; Wieacker to Paolo Grossi 27.9.1974, quoted in Christian Wollschläger (Hrsg.) 2000, 473.

³⁶⁶ "Ich schweife in Reflexionen ab, anstatt zu erzählen. Ich schrieb schon, an reinem Erzählstoff fehlte es nicht; aber teils ist es nicht möglich, teils so leicht, vergnügt und unverbindlich dass einem die Feder stockt, angesichts der allgemeinen Lage und der Not des hier so doppelt vermissten und entbehrten Vaterlandes [...]" Wieacker to Hans-Georg Gadamer 14.3.1945. NL Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar. A closer example of an indirect commentary on one's homeland would be Ernst Jünger's "On the Marblecliffs," to which Wieacker referred in his letter to Ernst Rudolf Huber on 23.2.1945. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

³⁶⁷ Wieacker to Hans-Georg Gadamer 14.3.1945: "Es ist eigentlich als Filmschauspieler auf dem abendländischen, gegenwärtigen Kultur." NL Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar.

Landes, in der ich fast dauernd bin. Sie war ganz gut, aber eine fortwährende Selbstverleugnung der Spieler.³⁶⁸

To Gadamer, Shakespeare's plays represented a fundamental cultural value.³⁶⁹ Thus, Wieacker's reference was most certainly understood. Indeed, Wieacker's metaphor would be evident even to a reader who does not inhabit the time and space shared by Gadamer and Wieacker. *Macbeth* is foremost a play on political ambition, on yearning for power for its own sake, and the destructive effects of such obsession.³⁷⁰ In the spring of 1945, a character in a play who unwittingly and in stubborn denial fulfills a political tragedy was quite an accurate symbolic description of the Fascist regimes and the 'official' public opinion prevailing in them.

Yet the saddening political atmosphere and destruction brought about by the war did not prevent Wieacker from making observations on the time from the point of view of a legal historian. To researchers studying Wieacker's production, the war seemed to sharpen some of the ideas Wieacker had presented earlier and slightly shifted the emphasis of his overall research orientation.³⁷¹ It is clear that after the war in his scientific texts Wieacker mostly concentrated on the European legal heritage, the fundamental role of language in legal culture, and the systematic intertwining of people, cultural transition and the word of law in history. In other words, the mentalities, interpretations and thoughts on law took prior position in his quest to describe the essence of European legal history. A distinct research agenda was well on its way as an idea during the late war years, but one can see the wider research stance in progress when Wieacker wrote to Gadamer on 14 March 1945.

Was für uns gross und unauswechselbar ist an diesem Land, das Altertum, das Trecento, die hesperischen Himmel, das hatte ja mit der gegenwärtigen politischen Form nichts zu tun, und am wenigsten mit der grossen, noch ganz mitteleuropäischen Ebene im Norden. Aber es gibt doch noch etwas Klassisches gegenwärtig, und das ist der Mensch dieses Landes an sich; und von dem Menschen an sich bleibt nur ja hinter allem Kollektiven und Determinierten, noch ein so grosses Stück über.[...]Und doch was für ein erquickendes Wunder ist jede neue Sprache und was für eine Gelegenheit, die Beziehungen zwischen dem

³⁶⁸ Wieacker to Hans-Georg Gadamer 14.3.1945. NL Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar. "Something very remarkable in this context is a performance of *Macbeth* in the theater of the largest city of this land, where I am almost constantly. It was quite good, but there was a constant self-denial of the characters." (Translation by HW).

³⁶⁹ Gadamer recalled later in an interview that it was those texts which for him worked as an antidote to the Prussian war-mongering of his youth. The world of Shakespeare's dramas and comedies provided a sphere where a true cultivation of one's spiritual abilities was possible without combining this personal *Bildung* with the political and ideological necessities of the *Zeitgeist*. Richard Wilson, *Free Will: Art and Power on Shakespeare's Stage*. Manchester, Manchester UP 2014, 299.

³⁷⁰ Glynne Wickham, *Shakespeare's Dramatic Heritage: Collected Studies in Mediaeval, Tudor and Shakespearean Drama*. London, Routledge 1969.

³⁷¹ Avenarius 2010, 151–152.

There were points of connection and comparison in the mentalities of European people which had emerged over centuries of cultural exchange. What the war and twisted political intentions could not wipe away was the essence and history of diverse cultures and the people living in them. Wieacker once again realized the intriguing phenomenon of the interplay between language and cultural products, and the people who expressed these abstract entities. To a historian, studying the origins of such phenomenon was not only satisfying, it was also important with regard to understanding diverse cultures and societies. Such a strong conviction in his thought was evident in such post-war works of Wieacker as *Vulgarismus und Klassizismus* and especially *Privatrechtsgeschichte der Neuzeit*, but the seed of such a stance could already be found in *Das römische Recht und das deutsche Rechtsbewusstsein*, which was more or less the groundwork on which Wieacker built the later representations of European legal culture.³⁷³ In those texts Wieacker put an increasingly marked emphasis on the mentalities of the common people in a given time and culture.

Wieacker continued to be interested in the ‘people’ from the point of view of a conservative jurist and a historian of ideas brought up in the early decades of twentieth-century Germany. Thus, the research slogan ‘back to the people’ did not produce a shift towards an ethnographic interest in the everyday acts of the common people. Rather, his earlier utterance on the necessity of ‘legal anthropology’ in studying the long line of European legal history became even more firm.³⁷⁴ However, the inevitable distance between Franz Wieacker the legal historian and the ‘people’ he studied remained. Wieacker was confident that he, as a representative of a distinguished tradition of thinking and analyzing, was able to interpret the ‘reality’ of the people in a more truthful and accurate way than the people who inhabited that ‘reality.’ Whereas the ‘people’ clung to superstitious beliefs and religion, Wieacker’s own scientific knowledge and ‘conscience’ would lead to an understanding of the human realm. The ‘strange’ displacement of military service allowed him to study the community in an unusual way.³⁷⁵ Wieacker’s war service on the frontline enabled him to observe human conduct in its rawest, most primitive form. Or at least that was how

³⁷² Wieacker to Hans-Georg Gadamer 14.3.1945. NL Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar. “What is fully unavoidable for us regarding this land is the antiquity, the Trecento, the hesperis plants, which had of course nothing to do with the current political conventions and the least to do with the vast, completely middle European plain in the north. But there is yet something classical now, and that is the person of this land himself, and from that person remains only a large specimen behind all collectives and determinatives. [...] And even so, what a refreshing wonder each new language is, and what an opportunity it is to interpret the relationships between people and things from their origin.” (Translation by HW).

³⁷³ Liebs 2010, 38–39.

³⁷⁴ Cf. Wieacker, ‘Zum System des deutsche Vermögensrechts’ 1941, 10.

³⁷⁵ Wieacker to Ernst Rudolf Huber 23.2.1945. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

he saw the situation. In his letter to Ernst Rudolf Huber from 23 February 1945 Wieacker writes thus:

Aber für den Historiker ist auch der Nebenschauplatz ein Arsenal von Entdeckerfreuden. Die Psychologie des Einzelnen wie der Massen und Heere, die Chemie oder soll ich sagen Alchemie der Zeit und unserer in Todes- oder Geburtswehen kreissenden Kultur, die Bedingungen von Kultur, Sprache und Volksheim bereiten dem Auge, diesem furchtlosen Organ, das an dem Grauen und der Erschütterung der anderen geistigen Organe und des Gewissens nicht teilnimmt, unerhörte, sublimen Freuden. Die Fahrt durch ein Bandengebiet, die (passive) Teilnahme an einer Jagdbomberaktion in der Sch[...] am Rande des Krieges befriedigen den Sinn für die Existenz an sich in einer Masse, das uns durch die wirkliche Teilnahme am Kampf überboten werden könnte; wenn nur jeder Teilnehmer überhaupt das Auge hätte für die in den Erscheinungen und Zuständen spielende Gottheit, wenn ich mich so seltsam ausdrücken darf. Ich kenne als Beispiel allein eine grosse, unmittelbar hinter der Front liegende Stadt, die im Gegensatz zu den alten Städten unserer Heimat in ihrem Kern unberührt, ungefähr die Erscheinungen bietet, die Boccaccio anlässlich der Pest in Florenz erzählt: heftige Schlemmerei am Tag und nachts das Chaos des bellum omnium contra omnes. – Es handelt sich um die in der Geschichte meiner engeren Fachwissenschaft so ruhmreiche alma mater.³⁷⁶

The war allowed Wieacker to take a look at the origins and deep spheres of law. He articulated the war experience as a perennial algorithm, which enabled an observer to read the essence of human existence. War was partly a cold and rational distinguisher, but it also had its ‘alchemical,’ mystical side. It was ‘sublime,’ terrifying but nonetheless a ‘friend.’ In fact, it was the only friend the observer had within his proximity. The fact that Wieacker defined war using Jüngerian rhetoric points not only to his sophisticated learnedness, but to the deep effect that a conservative and

³⁷⁶ Ibid. The city which Wieacker refers to as the ‘alma mater of my scientific knowledge,’ was of course Bologna. In February of 1945 the battles in Italy concentrated very close to the city. “But the side stage is also an arsenal of enjoyable discoveries for the historian. The psychology of constituents like the masses and armies, the chemistry, or should I say alchemy, of the times and our circulating culture in its death throes and labor pains, the conditions of culture, language and homeland all give sublime joy to the eye, this fearless organ that does not take part in the graying and destabilization of the other organs of mental function and conscience. A trip through the occupied territories, the (passive) participation in a fighter-bomber mission in the Sch[...] at the edge of the war satisfy one’s need for a meaning of existence to such an extent which could outdo us in a real participation in the war. If only each participant had at all the eye for the divinity that plays in the events and circumstances, if I may express myself so strangely. I myself know, as an example, a large city lying immediately behind the front that, contrary to the untouched old cities in the heart of our homeland, approximately presents the phenomena that Boccaccio recounted on the occasion of the Black Death in Florence: intense feasting by day and the chaos of the war of all against all by night. This relates to my alma mater, which is so glorious in the history of my narrow technical discipline.” (Translation by HW).

ultimately pessimistic perception of the world of human affairs had on his mind.³⁷⁷ In the excerpt above, Wieacker articulated his worldview and ontological premises in an unusually pronounced way. It contains features which were typical of his historical vision, and whose roots go deep into the cultural atmosphere of Weimar Germany.

With respect to the Wieacker's concept of *Rechtsbewusstsein* this quote is revealing in two ways. First the 'divinity' which 'played' constantly in human affairs, was disguised to most. The oblivion where the absolute majority of the people remained, was not a moral dilemma; it was a sustaining element and a constituent way of the world. The expressions 'master and mass' or 'combat' should not be taken as references to National Socialist language, rather they indicate that in his letter Wieacker described a raw experience of reality, without the distracting structures of the 'modern.' Clearly Wieacker thought he witnessed a Hobbesian, original state of being ("*bellum omnium contra omnes*"),³⁷⁸ and the cultural illusion through which this chaos was being regulated. This was the reality (*Wirklichkeit*) from which modern jurisprudence had been alienated, and that reality was cruel.³⁷⁹ Such a view of society is very Schmittian, but can hardly be interpreted as an export of scholarly ideas from some other influential thinker. Nevertheless, it is an orientation which can explain Wieacker's attachment to certain theories and theorists, and his views on historical development.

Second, to become aware of 'divinity' was to know the culture. The masses did not have an understanding of the terrors and conscience in the world. They lacked the 'eye' to observe the reality provided by the cultural building blocks. This possession of knowledge was what separated the 'Master' from unnamed people. To understand 'divinity' was terrifying, but elevating, and it seemed to be the ones who were destined to remain within the mass who did not have the courage to engage themselves in 'combat' in order to reveal the truth about human societies ("*am Rande des Krieges befriedigen den Seiten für die Existenz an sich in einem Masse, das uns durch die wirkliche Teilnahme am Kampf überboten werden könnte*"). Earlier in his correspondence Wieacker had adopted the role of cynical witness with respect to the war, but now the air raids were destroying German cities, and this had a special meaning to him personally. Hamburg, Bremen and Hannover represented *Heimat*, now turned to ashes, as was the main building of Leipzig University.³⁸⁰ The culture, knowledge and values to which he was attached, seemed to suffer most from the war. At the same time he and the scholars of the 'New legal science' shared a conviction that the people in their irresponsible and irrational war mongering were basically to

³⁷⁷ See Ernst Jünger, *In Stahlgewittern*. Stuttgart, Klett-Cotta 2014.

³⁷⁸ Cf. Thomas Hobbes, *Leviathan*. Glasgow, Fount Paperbacks 1983, 141-145.

³⁷⁹ Cf. Chapter 3.1. 'Language in *Rechtsbewusstsein*: The scientific horizon and the previous tradition of the concept.'

³⁸⁰ "Hätte ich nicht so an Würde und Flor der Leipziger Universität gegangen, würde mir alles viel leichter sein." Wieacker to Erik Wolf 23.1.1944. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

blame for the consequences, but at the same time the masses lacked the understanding of what had happened and what was going on.³⁸¹

It is notable that Wieacker sees this blind struggle of the people as belonging to the “psychology of the individual as well as the masses and Master.” Wieacker rejected the view that *Rechtsbewusstsein* and the transmission of cultural awareness within European legal history was essentially a group-psychological phenomenon.³⁸² This argument was obviously a statement against *Freirechtsschule* and Eugen Ehrlich’s formulations of law as primarily a psychological phenomenon.³⁸³ But, and as the above quoted letter clearly expresses, *underneath* the law there clearly affected psychological, irrational forces. However, if one understood this feature, emblematic to all human civilizations, it ceased to be group-psychological or irrational. The distinction between ‘The Master and the masses’ was irreversibly transmitted to the concept of *Rechtsbewusstsein*. While the ‘divine play’ of war and destruction repeated itself over and over again in history, there were always people who understood, explained and controlled it. So *Rechtsbewusstsein* signified the blind (“without an ‘eye’”) and infinite participation of the masses in the battle between cultures, and at the same time the existence of a *Stand* of people who were *aware* of the rules and magic of this battle. The ability of the *Stand* to read the historical meaning, ‘existence,’ of social reality was due to its knowledge of culture, hence *Bildung*. People were easy to deceive and believed in myths, but it was the scholar’s responsibility to bring awareness of the circumstances dictating the social reality, the ‘divinity which played in the phenomena,’ and thus to take care that social justice was realized in one’s society.

In the following section I analyze the way Franz Wieacker utilized the concept of *Rechtsbewusstsein* in his scientific works. My aim is not to construct the legal reference-world of Wieacker’s argument, nor weigh the jurisprudential sharpness of his texts. Instead I attempt to study how he used the concept of *Rechtsbewusstsein* (and the terms and vocabulary surrounding it, signifying the same ontological meaning) in his texts as a heuristic tool in understanding society, and as depicting the relation between the law, people and the community. The concept was a tool to connect the past and the present, attaching their connections with meanings which were then transmitted to the reading audience.

³⁸¹ Cf. Wieacker to Ernst Rudolf Huber 29.3.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

³⁸² Wieacker, *A History of Private Law* 1995, 26; Wieacker, ‘Privatrechtsgeschichte’ 1952, 17.

³⁸³ Cf. Chapter 3.1. ‘Language in *Rechtsbewusstsein*: The scientific horizon and the previous tradition of the concept.’

3.4. The concept of property

A scientific theme which Wieacker elevated to the first rank of importance in the 1930s was the question of 'property' (*Eigentum*). Wieacker sought to redefine the concept to better match the social reality and changing temporalities of the post-Weimar Germany. It was high time for a reconceptualization both in light of the longer legal development and jurisprudential discussion concerning the theme as well as regarding the National Socialist attempt to redefine the relations between subjective rights and the state's rule over its people. From a legal dogmatic point of view the concept of 'property' certainly needed rethinking. The legislation in the German Civil Code (BGB) and the Weimar constitution fell short and dragged behind the new forms of merchandise and ownership which the rapid economic and technological development produced.³⁸⁴ The social norms and laws concerning property in many respects belonged to the time of the nineteenth century.

The First World War meant a drastic and violent deployment of ideas on the state's entitlement to common and even private property within its sphere of influence. This 'War-socialism' did not come out of the blue (as Franz Wieacker later showed),³⁸⁵ but it was a turning point which changed the perception and regulation of ownership and the individual rights related to it for good. In Weimar the commanding power of the state was handed over to the Parliament. In practice, this meant that the norms regulating the administration/individual relation on property, were decided by parties and groups whose ideological divergences on the meaning, form and essence of wealth and ownership were perennial.³⁸⁶ Moreover, the dominant stream in the parliamentary quarreling over the changing idea of property seemed to stem from socialists and laissez-faire liberalists, both of whose views were understandable in light of the massive economic dilemmas facing the Weimar Republic as well as the dissolution of the estate-state following the Revolution of 1919.

Whereas the fundamental structures of society vis-à-vis the idea of individual property had overgone a total transformation, the bourgeois values of the educated elite changed more slowly. In the Wilhelmine Empire the personal property of the middle classes had been guaranteed by a solid judicature, which derived its authority from the monarchy and the privileges of the estates.³⁸⁷ Within this field the separation of social reality (the bourgeois acknowledgment of things) and the legislation (meaning the 'sad' performance of legal positivism) appeared even more concrete than usual. It was thus no surprise that the 'New legal science' emphasized the importance of the theme,

³⁸⁴ A lively debate on the subject had already surfaced during the Weimar Republic. See e.g. Martin Wolff, 'Reichsverfassung und Eigentum,' in *Festgabe der Berliner Juristischen Fakultät für Wilhelm Kahl. Teil IV*, Tübingen 1923; cf. Meinel 2012, 196–200.

³⁸⁵ Wieacker, *A History of Private Law* 1995, 545.

³⁸⁶ Cf. Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien*. Duncker & Humblot 1996.

³⁸⁷ Meinel 2012, 197.

and took ‘property’ to be one of the key terms in its task of redefining the legal concepts of the “late-liberal state.”³⁸⁸ It would be incorrect to assert that the interest the young and conservative legal scholars showed in the question was solely motivated by the National Socialist seizure of power. To the Nazi party the question was naturally fundamental given its aim to build a totalitarian nation and demolish subjective, state-provided rights, but obviously in 1935 the concept was at the center of political endeavors and of immediate concern.³⁸⁹ In retrospect, the 1930s discussion concerning the concept of ‘property’ reflects the wider picture of the rise of National Socialism in Germany. Whereas some attempts at social change were motivated by the need to exclude and oppress, some interpreted these attempts as acts to revive the ‘good old’ core of society and confining every harmful aspects of the ‘modern.’ When in 1935 Wieacker wrote many of his texts on the concept of ‘property,’ the context and discussion in which the concept was used contained many views and intentions. These ranged from fascist and conservative ideologies to ideas about generational clash and the struggle between academic cliques, and often these influences were intertwined.

To Wieacker the conceptual change in the notion of ‘property’ during the early twentieth century appeared to reflect the larger historical development of European legal culture, and throughout his career he maintained that the problematic it embedded reflected the “degradation-history of law.”³⁹⁰ The accumulating tendency of the state to intervene in the sphere of legal affairs, eventually leading to the “crisis of justice,” became actualized in the early twentieth-century German “social-state,” which upset the balance between the people, the state and law.³⁹¹ Within this larger context, Wieacker’s conceptual study was an exploration of the changed idea of individual freedom and existence within the temporal framework of administrative power. Whereas in his later works the theme of ‘property’ represented a case study in a broader historical development, the 1934–1936 contributions were mostly arguments situated within a debate on how should one study and understand the concept, and suggestions on which bases legislation relating to it should be arranged.

The starting point for Wieacker’s argumentation was the evident failure of the Weimar Republic. The failure was not only about inoperative legislation. To Wieacker, Germany in the early 1930s had experienced an unprecedented ethical dilemma

³⁸⁸ Meinel 2012, 201; or redefined them from the point of view of “institutional legal thinking.” Rüthers 1992, 24.

³⁸⁹ See Reinhard Höhn, *Rechtsgemeinschaft und Volksgemeinschaft*. Hamburg, Hanseatische Verlagsanstalt 1935, 65; ‘Ernst Forsthoff, Kriegswirtschaft und Sozialverfassung,’ in Konrad Hesse (Hrsg.), *Kriegswirtschaftliche Jahresberichte*. Hamburg 1936. However, the National Socialist battle against liberal subjective rights simplified the multifaceted concept of ‘property’ and the academic tradition which sought to define it. Mostly formulations concentrated either on how the regime could confiscate as fully as possible, or connected the concept to a dull “farmer mythology,” Meinel 2012, 201.

³⁹⁰ Cf. Winkler 2014, 53.

³⁹¹ Wieacker, *A History of Private Law* 1995, 482; Meinel 2012, 197.

considering the authority of individual subjective rights and legitimacy of state's ruling, and as consequence, the former were ignored and latter constructed falsely. He argued that when the "liberalist state" tried to regulate and define the changing world of ownership, work and trade, the end result at its worst looked much like the judicature of the Weimar "late-individualistic" Republic.³⁹² The origins of that failure were, however, in place over a hundred years before. Societal and legal development after the French Revolution had created a "political tension" within the jurisprudential perception of 'property.' The administrative practices of the state, carried out in all post-Enlightenment societies, were characterized by this same tension between the ruler and the ruled, shifting the "unsolvable antithesis" to legal language and modern theories on society.³⁹³ The high point in this distinction between the language of the law and legal reality, in which the 'property' was actually being constituted, was to be found in positivist theories on law. Positivism comprised a legal doctrine which announced "everyone for oneself" and accepted that "the legal freedom of one could harm the legal freedom of another," and hence it ignored and violated the "pre-judicial German life-order on which 'property' was based."³⁹⁴

To Wieacker, German jurisprudence, along with positivism and the liberalist view on law, had lost its connection to the real world and the reality and tradition of the people. Legislation had shrunk the broad legal world of property to individual rights and the ownership of "things" (*Sach*). Such legal language forgot and ignored the fundamental link between the concepts and the reality.³⁹⁵ The source of the law as justice was not a matter of regulation and law-giving, but of legitimacy, which was achieved in the congruence of positive law with the common perception of the rule of law. The law-giving had to follow the "absolute", un-written, constitution of the people. The people, for their part, were comprised of different groups and traditions, whose life conditions could never fully be grasped by merely positive norms.³⁹⁶ Seen within this context, in legal *reality*, the individual was not just a package of rights and obligations wrapped together as a legal subject, but a "systematic position" (*Ordnungslage*) which carried within itself intertwined meanings and duties:³⁹⁷

Es [the legal subject] ist vielmehr eine im Aufbau der Volksordnung begründete rechtliche Ordnungslage [...], die aus sich selbst das Mass

³⁹² Franz Wieacker, 'Eigentum und Enteignung. Ein Versuch zur Neufassung der Grundfragen' [1935], in Wollschläger (Hrsg.) 2000, 135.

³⁹³ Wieacker, 'Eigentum und Enteignung' [1935], 127.

³⁹⁴ Franz Wieacker, 'Wandlungen der Eigentumsverfassung' [1935], in Wollschläger (Hrsg.) 2000, 30; cf. Wieacker, 'Eigentum und Enteignung [1935]', 129.

³⁹⁵ Wieacker, 'Zum Wandel der Eigentumsverfassung' [1935], 4: "Denn damit ist dar Reich verlassen, in dem juristische Begriffsbildung wirksam ist: die Wirklichkeit der Rechtsgemeinschaft. Hinter dem Sachbegriff verbergen sich Rechtswirklichkeiten, die eine gerechte Lebensordnung veschieden ordnen und werten muss."

³⁹⁶ Wieacker, 'Eigentum und Eigen' [1935], In Wollschläger (Hrsg.) 2000, 110.

³⁹⁷ Wieacker, 'Eigentum und Eigen [1935]', 111; also Wieacker, 'Eigentum und Enteignung [1935]', 145: "Das Eigen ist nicht subjektives recht oder eine Summe objektiver Rechte, beschränkt durch gesetzliche normierung und gesetzmässige Eingriffs möglichkeiten."

und den Inhalt von Berechtigung und Pflichtbindung ständig erneut hervorbringt, ohne dass sich überhaupt gesondert Rechtsmacht und Rechtspflicht gegenüber treten.³⁹⁸

As a result, the concept of ‘property’ in Wieacker’s texts in 1934-1936 was defined (i) through its relation to the cultural entity of people and (ii) in reference to the varying value systems of professions with their own distinctive norms within the nation. In other words, norms and rules concerning German ‘property’ could only be correctly analysed if understood as being part of ‘concrete orders’:

Nicht mehr die formale Geltung des wenigen, da noch für alle Sachen gemeinsam ausgesagt werden kann, sondern die *Konkrete ordnungen* des Rechtes für devisen, erhöhöfe, Schrebergärten, schlachtvieh bestimmen für uns den materiellen Gehalt unserer Eigentumsverfassung.³⁹⁹

The legal order structuring the allocation of goods within the community should bear in mind the innate bond between an individual and his community. Since ‘property’ was inevitably bound to the actual life of the community, Wieacker stressed and even prioritized the values the concept contained. The community was not a mere heterogeneous compilation of people, but a group held together by a deep spiritual togetherness.⁴⁰⁰ In describing this community Wieacker used examples and terms relating to the body, the home and the family.⁴⁰¹ By this he was able to exhibit the “beyond-legal” values and emotions which should guide the legal system.⁴⁰² The values of ‘responsibility’ and ‘honor’ could not be distinguished from the ‘property,’ thus they should be acknowledged while studying the concept, and more importantly,

³⁹⁸ Wieacker, ‘Eigentum und Enteignung’ [1935], 146. ”It [the legal subject] is rather a legal systematic position substantiated in the structure of the people’s order [...], that constantly yields the measure and content of authority and mandate without separately confronting legal authority and obligations at all.” (Translation by HW).

³⁹⁹ Franz Wieacker, ‘Zum Wandel der Eigentumsverfassung’ [1934], in Wollschläger (Hrsg.) 2000, 6. Emphasis mine ”No longer the formal prestige of the few, as can still be commonly affirmed for all things, but rather the concrete orders of the law for currencies, inherited lands, allotments and livestock determine the material meaning of our legal conditions of property.” (Translation by HW).; cf. Wieacker, ‘Wandlungen der Eigentumsverfassung’ [1935], 102: “[D]en innerhalb der rechtlichen Regelung konkreter Institutionen, wie sie die Forderungen nach einem konkreten Ordnungsdenken verwirklichen will, ist die Systematik des relative und absoluten Privaterchts, die ja nur am isolierten subjektiven Recht abgelesen werden kann, fruchtlos.”

⁴⁰⁰ See e.g. Wieacker, ‘Eigentum und Enteignung’ [1935], 134.

⁴⁰¹ Wieacker emphasized the meaning of “Erbhof.” He also defined different communities as “limbs” in the “body” of society. See e.g. Wieacker, ‘Wandlungen der Eigentumsverfassung’ [1935], 31.

⁴⁰² Cf. Wieacker, ‘Zum System des deutschen Vermögensrechts’ 1941, 10; “übergesetzlichen Prinzipien”; also Franz Wieacker, ‘Bauernrecht und bürgerliches Liegenschaftsrecht’ [1936], in Wollschläger (Hrsg.) 2000, 191: “Im ganzen gesehen wird aber das bäuerliche Ständesrecht sich auch in seiner sachenrechtlichen Gestaltung, die nur eine Ausstrahlung de Urpersönlichen Verfassung des Bauerstandes ist, vom bürgerlichen Recht weit entfernen: nicht nur als bäuerliches Sonderrecht, sondern auch als Einbruchsstelle allgemeinverbindlicher Grundsätze des neuen Rechtsdenkens.”

while making laws concerning it.⁴⁰³ According to Wieacker, those values had previously (in the liberalist and modern legal theories) remained outside the jurisprudential “concept-creation.” Moreover, the previous legal theories had in their twisted inner politicization, their idea of autonomous will, and their emphasis on subjective rights equated ‘honor’ and ‘responsibility’ with money.⁴⁰⁴ A law which disregarded the immaterial values embedded in different properties, different histories and purposes for ownership was not only bad, it was unjust: “Jede Bodenrechtsordnung bezieht sich unmittelbar auf überpersonliche Volkswerte.”⁴⁰⁵

Nevertheless, in the new National Socialist regime, these values were to be assimilated in the language of law, hence the new definition of ‘property.’⁴⁰⁶ Acknowledging the values which the *communality* brought about was not only vital for making just and usable laws, but would strengthen the moral atmosphere of the national community.⁴⁰⁷ While prioritizing the cultural entity of people or the natural constellation of the community – in line with National Socialist legal theories – Wieacker was hesitant to use the concept ‘people’s community’ (*Volksgemeinschaft*), and preferred the term ‘people’s order’ (*Volksordnung*). On a semantic level this distinguishes him from scholars like Reinhard Höhn, and signifies a theoretical difference between them, although whether one used the term ‘*Volksgemeinschaft*’ or ‘*Volksordnung*’ in the legal scientific discourse of the 1930s had, with regard to the reading audience, little relevance. In practice, Wieacker’s ‘*Volksordnung*’ was defined with roughly similar attributes as the later more notorious ‘*Volksgemeinschaft*’:

Da es jedem das Seine gibt, beruft es zu verantwortlichen Verwaltung zunächst den bisherigen Eigentümer, sodann seine Nächsten, die durch gleiche Abstammung Verbundenen. Der überpersonliche Verband, für den die Befugnisse des Bauern ausgeübt worden, ist der Blutsverband des Bauerngeschlechtes (nicht der Kleinfamilie). Das Geschlecht ist der Kreis der Volksordnung, in dem das Erbhofeigentum mit ihr zusammenhängt. Diese *Ordnung* gründet sich nicht auf abstrakte

⁴⁰³ Wieacker, ‘Eigentum und Enteignung’ [1935], 142: “Ohne diese Zuweisung gäbe es keine Verantwortlichkeit der Glieder, keine durch Verantwortlichkeit gebundene Volksordnung und keine Familie oder Sippe”; see also Wieacker, ‘Eigentum und Enteignung’ [1935], 31. On *honor* as a virtuous glue of society, see Wieacker, ‘Wandlungen der Eigentumsverfassung’ [1935], 81; Wieacker, ‘Eigentum und Enteignung’ [1935], 145: “Pflichtsbindung.”

⁴⁰⁴ Wieacker, ‘Wandlungen der Eigentumsverfassung’ [1935], 81; also Wieacker, ‘Eigentum und Enteignung’ [1935], 134: “Die Enteignung mit voller Geldentschädigung ist im eigentlichen Sinne keine Enteignung mehr; sie ist mehr die Verpflichtung, den Bodenwert in einen Kapitalwert einzutauschen.”

⁴⁰⁵ Wieacker, ‘Wandlungen der Eigentumsverfassung’ [1935], 59. “Every land use law refers directly to transpersonal values of the people.” (Translation by HW).

⁴⁰⁶ The chapter in ‘Wandlungen der Eigentumsverfassung’ [1935] is titled “Voraussetzung des personalen Lebensordnung: Die Ehre des Rechtsgenossen” (81–82).

⁴⁰⁷ Wieacker, ‘Eigentum und Enteignung’ [1935], 142, fn. 1.

Rechtssubjekte, sondern auf der Verbindung konkreter Personen durch einen Blutszusammenhang.⁴⁰⁸

The new legal space for an individual derived on one hand from belongingness to the natural community of people (*Volksordnung*), in practice the German nation,⁴⁰⁹ but on the other hand to a distinguished group of people united by their vocation and profession (*Stand*). The “vocation estates” (*Berufsstand*), acquired their inner values, binding social norms and sense of communality from a unifying orientation to a particular task within the larger community of the *Volksordnung*.⁴¹⁰ The idea of a national community (*Volksordnung*) based on a corporative organic society, was very traditionally conservative and not new at all. In Wieacker’s legal sociological descriptions, the estates or corporates, *Stand*, were connected to a larger whole like limbs connected to the body, and likewise conducted a necessary task in relation to and on behalf of the larger collective. Such a view was not revolutionary or originally National Socialist. In the long line of German social conservatism, it was an undisputed principle that individual freedom could only be achieved by merging the alienated and the isolated ‘self’ to the organic idea of the state. The argument was that since the ideal was perceived as more truthful than its concrete historic variations, it was necessary for individual citizens to subordinate themselves to the greater cause of the fulfillment of the national cause. In order for the material and ideal to coincide on the national level, everyone and everything had to have their natural place and task within the community.⁴¹¹ The structures of the ‘people’s order’ and ‘vocation estate’ were innate and original formations of communality which predated any legal theory.

The older conservative ideal was nevertheless made fascist and emptied out of any constructive meaning in the National Socialist rhetoric. Also, the division of ‘the people’s community’ to the particles of *Stand*, was a cliché in the Third Reich and in National Socialistic legal science.⁴¹² The old vocabulary was used to camouflage the political coup and make it seem like a legal and social reform. Likewise, Wieacker’s

⁴⁰⁸ Wieacker, ‘Wandlungen der Eigentumsverfassung’ [1935], 80-81. Emphasis mine. ” The concept of “to each what he deserves” first assigns accountable stewardship to those who were property owners up to now, then to those who are related by ancestry. The transpersonal association for which the prerogatives of the farmers were exercised, is the association by blood of the farmer family (not the nuclear family). The family is the unit of the people’s order with which the family farm is associated. This order is based not on abstract legal entities, but rather on the connection of actual people by blood.” (Translation by HW).

⁴⁰⁹ Wieacker, ‘Eigentum und Enteignung’ [1935], 149: “Eigen ist verstanden worden als mit der Gemeinschaft mitgegebene natürliche Einordnung des Gliedes in engere völkische Lebenskreise und personbestimmte Vermögenskreise [.]”

⁴¹⁰ Wieacker, ‘Eigentum und Enteignung’ [1935], 144: “Der Sinngehalt des Eigens wird am deutlichsten sichtbar, wenn wir gegenständliche Einzelordnungen aufsuchen, in denen der Angehörige eines Berufsstandes mit einer Vermögenseinheit umgeht, die einer engeren berufsständischen Aufgabe bestimmt ist.”

⁴¹¹ Cf. Dilcher 2016

⁴¹² See e.g. Ernst Forsthoff, *Deutsche Geschichte seit 1918 in Dokumenten*, Stuttgart: Alfred Kröner 1938, 269; cf. Paul Nolte. *Die Ordnung der deutschen Gesellschaft. Selbstentwurf und Selbstbeschreibung im 20. Jahrhundert*. München, C. H. Beck Verlag, 2000, 159-186.

texts repeated the message of the exceptional nature of the ‘legal renewal’ in relation to previous tradition; the strength and revolutionary essence of the new (National Socialist) legislation concerning ‘property’ relied on its way of defining individuality as well as the individual’s relation to ownership, trade and inheritance on the basis of the communal order.⁴¹³ Nevertheless, and paradoxically, to the young conservative legal scholars, the justification of ‘legal renewal’ came exactly from its alleged ability to rise above ‘empty words’ and implement the ideas – which had grown out of real and material conditions of the people – to the contemporary legal reality.

It is noteworthy, though, that the necessary homogeneity of ‘vocation-estates’ and even ‘the people’s community’, is not in Wieacker’s texts based on racial distinctions. Rather, the idea of *Berufstand* for Wieacker enabled a renewed view of society. Acknowledging their essential meaning, and their significance for the national community allowed the scholar to bring forth values and emotions as vital communal factors, and further helped lawgivers to define laws which would take into account those values and emotions. While understanding the nature of the individual’s *existence* concretely, the ‘New legal science’ was able to introduce a more just definition of the connection between the personal and the community.

Indem die Gemeinschaft den Genossen als zugehörig anerkennt, erkennt sie ihn als verantwortliches, einer Existenz und einer Aufgabe fähiges und bedürftiges Glied an. [...] der wahre Sinngehalt des Eigens und des Eigenschutzes aber um so fester in das Gefüge des Volksordnung selbst gestützt und aus ihren Notwendigkeiten begründet.⁴¹⁴

Wieacker’s conceptualization of ‘property’ gained appreciation for its highly contemporary theoretization – utilization of fashionable neo-Hegelian and Schmittian ideas – but also for the author’s ‘material’ and historical orientation. Wieacker’s 1930s texts on ‘property’ indeed followed the dull rhetoric of the National Socialist ideology, and referred to fascist principles concerning the apparently unproblematic (in)division of political power and the abolishment of subjective rights. In elaborating the historical background and the political circumstances of the law concerning property, Wieacker relied heavily on Carl Schmitt. The view on law in relation to ‘concrete orders,’ the ideas of the political tension within legal concepts and the ‘neutral state,’ and the conviction on positivism’s inability to overcome the breach between the social justice and norms, are not only themes which Schmitt brought into the scientific discussion,

⁴¹³ Wieacker, ‘Eigentum und Enteignung’ [1935], 148.

⁴¹⁴ Wieacker, ‘Eigentum und Enteignung’ [1935], 142. Cf. 138: in Weimar, under the formal legal order, an individual “was threatened in his existence.” “While the community recognizes the individual member as a part of it, it recognizes him as a capable and needy member responsible for an existence and a task. [...] the true meaning of possession and the self-protection, however is all the more based in the fabric of the people’s order and justified by its necessities. (Translation by HW).”

and on which Wieacker built, but Wieacker also explicitly refers to Schmitt's works while elaborating these themes in his own works.⁴¹⁵

Wieacker's stance has also been categorized as neo-Hegelian by Bernd Rüthers.⁴¹⁶ The implicit connections and explicit references to the Hegelians of the *Kieler Schule* can easily be traced.⁴¹⁷ This is not surprising given Wieacker's firm position in the intellectual context of the *Kieler Schule*. The unproblematic use of the value-based connection between the individual and the whole might also be considered neo-Hegelian. Whereas in Wieacker's later texts the variations between and within different emotional communities became the benchmark of his history of legal mentalities, in the 1930s formulations on 'property' and the link between the personal and the communal was straightforward. In this respect Wieacker's works were in congruence with those of, for example, Ernst Rudolf Huber. Wieacker, too, adapted Carl Schmitt's vaguely constructed concepts, and sought to reinterpret the legal tradition by contrasting it with Schmitt's powerful slogans charged with 'material' substance and (occasionally) a Hegelian orientation. In the case of both Wieacker and Huber it is clear that they admirably succeeded in addressing the inconsistencies of the German constitution, but also offered tools for the politicization of the rule of law.⁴¹⁸

On the semantic level, Wieacker did not use the concept of *Rechtsbewusstsein* in his articles about 'property.' The meaning of that term was yet 'un-conceptualized' and unformulated in the text. Nevertheless, in these works one can already see the embryos of scholarly thinking which he carried through to the times of the Federal Republic, and which were later conceptualized under the term *Rechtsbewusstsein*. To Wieacker, the legal definition of ownership, i.e. the concept of 'property,' reflected the abstractions of freedom and justice, and legislation concerning 'property' mirrored the

⁴¹⁵ Wieacker, 'Wandlungen der Eigentumsverfassung' [1935], 30 fn. 27 (a reference to Carl Schmitt's *Der Begriff des Politischen*) and 102 fn. 110 (a reference to Carl Schmitt's *Über die drei Arten des rechtswissenschaftlichen Denkens*); Wieacker, 'Eigentum und Enteignung' [1935], 127, fn. 1 (a reference to Carl Schmitt's Epilogue in Heft 17 of *Der deutsche Staat der Gegenwart*) and 136-137 (a reference to Carl Schmitt's *Die Auflösung des Enteignungsbegriffs*, [JW 1929]).

⁴¹⁶ Rüthers 2012, 354-356; cf. Meinel 2012, 204: "[Wieacker's] Dialektik, die die überkommene Antinomie von subjektiver Gerechtigung und objektiven Schranken auf der höheren Ebene des Eigens zusammenführte [...]"

⁴¹⁷ See e.g. references to Wolfgang Siebert in 'Wandlungen der Eigentumsverfassung' [1935], 50; to Ernst Rudolf Huber 'Wandlungen der Eigentumsverfassung' [1935], 25 and 'Eigentum und Enteignung' [1935], 139; to Karl Larenz 'Wandlungen der Eigentumsverfassung' [1935], 24, 117 and 'Eigentum und Enteignung' [1935], 141, 142; to Georg Dahm 'Eigentum und Enteignung' [1935], 147; to Martin Busse in Franz Wieacker, 'Familiengut und Erbengemeinschaft' [1936] in Vollschläger (Hrsg.) 2000, 191.

⁴¹⁸ Cf. Mehring 2014, 239. Wieacker's and Huber's contemporaries did, however, distinguish their work from that of, for example, Reinhard Höhn. Höhn was closer to the structures of the NSDAP, and more often echoed the exact 'will' of the party – which the former members of the *Kieler Schule* were quick to point out after the war. For Wieacker's criticism against Reinhard Höhn, see e.g. Wieacker, 'Eigentum und Eigen' [1935], 110, 112. In retrospect, the difference between these two views remained on the academic level, and it mostly derived from a disagreement on what weight should be given to, and how should one use, the idea of 'concrete order.'

value which each time and place succeeded in giving to those fundamentally European ideals. Wieacker's elaboration was both 'existential' and 'material.'⁴¹⁹ The economic, ideological, juridical and political justifications which a given society provided for the allocation of goods and the protection of privacy varied. However, these arguments could be used against each other and they were not universally valid. What was essential was how a legal culture managed to link its legal tools and concepts to the material – concrete and everyday – life of its people.⁴²⁰

Wieacker's approach to the case of Germany, and the way in which he provides proof for his elaboration, is, however, carried out via historical review, where he argues for the necessity of structuring and perceiving the society in corporates, *Stand*. In these 'estates' the ideal spiritual and virtuous form of German society exists; it exists as an atemporal order, but it is reachable through legal historical comparison. This starting point, originally Hegelian and social conservative, was a leitmotif on which he based his further analysis on German and European legal history. Wieacker asserted that the positive norms did not constitute the realm of social justice. The sense and understanding of the law came from the everyday practices of the people. It was the task of legal science to acknowledge this *value-binding* as the result of the material life of a particular group of people. In a correctly formulated legislation and legal judgments, norms should echo the valuations of the community which they seek to regulate. The principle of basing positive law on the communal mentalities which emerged from the material life of the people, dominated Wieacker's historical vision as early as 1935:

Dass begriff [of 'property'] sich primär durch bindung der deutschen Menschen, nicht durch bindung des Eigentums geändert haben. Es ist richtig dass die Voraussetzungen für die neue Eigentumsverfassung durch personliche, insbesondere durch berufsständische oder bäuerliche Verfassungsmassnahmen hervorgebracht worden ist.⁴²¹

Embedded in Wieacker's thesis, however, is the experience of the failure of the liberal Weimar state. In its judicature the Weimar Republic (and along with it the legal scholars who advocated the values on which the Republic had been built) had conducted policy which was at odds with the conservative ideals of the *Bildungsbürgertum*. As presented in chapter 2, to the 'lawyer *Stand*' personal property was tied with the notions of social dignity and status. Money was excluded from the ideal of ownership as individual freedom; rather, fiscal matters were disdained as a

⁴¹⁹ Meinel 2012, 204; Behrends 1995.

⁴²⁰ Wieacker, 'Eigentum und Enteignung' [1935], 148: "die Art der Einwirkung auf die gliedschaftliche Einordnung des Volks- und Berufsgenossen, in der Seine Existenz und der Sinn seiner Sachgüter erst begründet sind."

⁴²¹ Wieacker, 'Wandlungen der Eigentumsverfassung' [1935], 112 fn. 5. "The notion [of 'property'] has been primarily changed by the binding of the German people, not by the binding of their property. It is correct that the requirements for new legal conditions of property are produced through personal, especially through professional or farm constitutional measures." (Translation by HW).

corrupting force and perceiving things through their monetary value was seen as a symptom of the lack of inner morals. The point of comparison was to be found from the ‘golden ages’ of history, either from the national past or, in Wieacker’s case, from ancient Rome.⁴²² Allegedly, during these epochs, abstract values such as honor, discipline, freedom and willpower were the yardsticks for evaluating ‘property.’ On the other hand, the recollection of the concrete and personal experience of the war generation represented the dissolution of the bourgeois ideal after the First World War. The ‘property’ which was supposed to guarantee one’s social status and bright future was being devalued in the political and economic turmoil of the Weimar Republic. Since the legislation regarding ownership, trade and heritage was now increasingly a result of a parliamentary process, the phenomena and opinions which eroded and nullified the *Bildungsbürgertum*’s idea of ‘property’ became associated with the natural social ‘other,’ the communists and liberal leftist politicians.⁴²³

3.5. *Das römische Recht und das deutsche Rechtsbewusstsein* (1944): The historicization of the relation between mentality and law

If the concept of *Rechtsbewusstsein* is still indefinite in Franz Wieacker’s texts on ‘property,’ the situation had changed in his 1944 article *Das römische Recht und das deutsche Rechtsbewusstsein*, which was originally presented as a lecture in Leipzig in the preceding year.⁴²⁴ The text constitutes a key argument in Wieacker’s later attempts to describe the long line of European legal history, and it was included in the collection *Vom Römischen Recht* (1944). In the 1944 article *Rechtsbewusstsein* appears both as a means to understand the past, but also a phenomenon which should be the target of legal historical study. To analyze law in different times and cultures (inside the European tradition, descending from Roman law) was to understand the attitudes, emotions and perceptions (the mentality) of the people in relation to the legal institutions and norms of a given time and place. Thus the neo-Hegelian idea of the value-based relation between an individual and the whole, was further enriched by a concept whose development and different forms could be subjected to a historical study. This concept was no longer a vague principle and necessity, but a temporal

⁴²² See e.g. Wieacker, ‘Familiengut und Erbengemeinschaft’ [1936], 195: “[I]n dieser Gestalt wurde die Erbrechtsordnung in Deutschland rezipiert. Entsprechend sie im antiken Recht eigentümlichen und konkreten Aufbaubedingungen der römischen Bürgerverfassung, so wurde sie der Begegnung mit der deutschen Lebensordnung des ausgehenden Mittelalters zum Werkzeug weiterer Zersetzung der geschlossene Erbfolge in Sondergüter.” See also the comparison between the “liberal components from 1789” and “the law of antiquity [based on values]” in Wieacker, ‘Wandlungen der Eigentumsverfassung’ [1935], 17–18.

⁴²³ Meinel 2012, 199.

⁴²⁴ Liebs 2010, 38–39.

structure. Yet consistently, Wieacker held that this conceptual phenomenon could only be understood with respect to the material, concrete reality of those who expressed it.

On one hand, Wieacker posits the text in the contemporary discussion where legal science attempted to determine the place of German law within the European context. After 1941 the Nazi regime tried to present the German law and legal development as essentially European. The concrete measures in this ‘cultural war’ were such projects as *Aktion Ritterbusch* as well as the conference journeys the German scholars made in the occupied countries.⁴²⁵ The purpose was not only to persuade foreign cultural elites to adopt a more conciliatory stance towards German occupation, but to inveigle the Europeans to unite against the Eastern threat of Soviet Union and advancing Red Army.⁴²⁶ On the other hand in his article Wieacker was able to explicitly present the vision he had held since the times of his apprenticeship with Fritz Pringsheim; the superior essence and aesthetics of Roman law.

As elaborated in section 3.2, National Socialist legal science was not supportive towards Roman law. Moreover, the contemporary jurisprudential paradigm was that Roman law with its emphasis on the individual and ownership had corrupted the national legal tradition, which was mostly the reason for the legal turmoil of the late-liberal state. The violent intrusion of Roman law was embedded in the prevailing legal historical narrative of the reception of Roman law, which stressed the rational administrative tendency which the application of Roman law brought to the German culture. Because of the Reception, the dominant narrative argued, the people and the state had been separated for good.⁴²⁷ This was the prejudice which Wieacker sought to alter by means of his article. Detlef Liebs asserts that Wieacker’s research task was a courageous act, since it could have brought him unwanted and dangerous censure from fundamentalist legal scholars backed by the SS.⁴²⁸ Here, however, I do not attempt to study Wieacker’s contribution in that respect. I will instead investigate how Wieacker conceptualized the relation between common national values and law with the help of the abstraction *Rechtsbewusstsein*, scrutinize what kind of meanings the concept contained, and further analyze how his stance might possibly have changed from the 1930s.

In weighing the positive law’s changing relation to social reality, Wieacker in *Das römische Recht und das deutsche Rechtsbewusstsein* elaborated three viewpoints concerning the phenomenon, which commented and challenged the existing

⁴²⁵ See section 3.3 Affections in *Rechtsbewusstsein* 1933–1945: Personal redefinition of *Bildung* and *Stand*.

⁴²⁶ Conrad 1999, 352-353.

⁴²⁷ See e.g. Carl Schmitt, ‘Aufgabe und Notwendigkeit des deutschen Rechtsstandes,’ in *Deutsches Recht* 6 (1936), 181-185. Cf. Peter Landau, ‘Römisches Recht und deutsches Gemeinrecht: Zur rechtspolitischen Zielsetzung im nationalsozialistischen Parteiprogramm,’ in Michael Stolleis & Dieter Simon (Hrsg.), *Rechtsgeschichte im Nationalsozialismus: Beiträge zur Geschichte einer Disziplin*. Tübingen, J.C.B Mohr 1989, 11–24.

⁴²⁸ Liebs 2010, 38.

understanding of German legal history. These viewpoints can be categorized as (i) the phenomenology of the wrong turn taken by the legal culture, (ii) juridical humanism and scientification (*Verwissenschaftlichung*), and (iii) the estate-based essence of the new class of lawyers. Wieacker starts his argument by briefly presenting the prevailing prejudice of the harmful nature of Roman law and its role as the defining factor in the tragic division between the state and the material reality of the people. This actual breach had been exhibited as the distinction between the self-feeling of the bourgeoisie and the rational, administrative language of the legal rhetoric.⁴²⁹ Wieacker rejected any attempts to turn back the wheel of time and return to the times when the law was made and interpreted by laymen, a time when there (allegedly) was ongoing contact with the national, common understanding of justice. Wieacker argued that the rational essence of the law in the modern state was a fact one needed to acknowledge, and the efforts to “purify” law from “foreign” particles would not “seal the gap”:⁴³⁰

So wären den die Verwissenschaftlichung unseres Rechts nichts als sein schlimmer Irrweg von der Gemeinschaft fort zu der anmassenden Herrschaft des Verstandes über das Leben? Nein. Mit einem solchen Urteil mussten wir auch den Staat der Neuzeit selbst verwerfen.⁴³¹

According to Wieacker, whereas the scientification of the law was a matter of fact, a better understanding of the structures, development and attitudes involved in that process would benefit contemporary legal science in its quest to make and interpret laws in congruence with the people’s reality. To Wieacker the Reception was a historical event guided by larger social and intellectual historical forces of economic change and rationalization. During the Reception the living conditions of the people and the ruling elite rapidly developed, resulting in dramatic alterations in the mentalities of both individuals and the community.⁴³²

Wieacker stated – in congruence with contemporary estimations of the medieval world – that in the world of the late middle ages jurisdiction was firmly built on the personal prestige of the elite which ran the courts. The replacement of the natural economy with the monetary system, and the differentiation of society deriving from specialization in the labor market, produced more complex administrative challenges, of which the laymen or the sheriffs were no longer able to handle by means of their personal,

⁴²⁹ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 4, the “Selbstgefühl” versus “Rechtssprechungsmonopol.”

⁴³⁰ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 5, 44.

⁴³¹ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 44. “So would not the scientification of our law be an even worse track farther away from the community to the presumed mastery of reason over life? No. With such a decision we would also have to accuse the current government itself.” (Translation by HW).

⁴³² Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 24: “[D]er zunehmenden wirtschaftlichen und sozialen Differenzierung des Spätmittelalters die einzelnen Lebenskreise nicht mehr zu überblicken und ihre besondere Rechtsanschauung von den Schöffen nicht mehr zu erleben. In diesem Augenblick wurde ihr Rechtsgewissen unsicher.”

practical knowledge.⁴³³ In other words, the material, historical development brought about an unbalance in the foundations to which the authority of the law was anchored. The ideal of the pre-Reception judiciary was noble, but alas, shifting circumstances separated “status-based legal knowledge” and the individual “sense of law” of the laymen from the actual needs of the community.⁴³⁴ The language of the law (as expressed by laymen) was no longer in accordance with legal reality. In the long run, the changed legal environment resulted in a distinction between the general communal awareness of justice (*Rechtsbewusstsein*) and the functioning of the courts.⁴³⁵

Here *Rechtsbewusstsein*, a consciousness of law and legality among the people, is irreversibly bound to the material conditions concerning work, social hierarchy, appreciated skills, and future prospects prevailing within an actual community, very much like in Wieacker’s 1930s texts on contemporary legal concepts. Nevertheless, *Rechtsbewusstsein* in the 1944 context also signified the erring nature and false expectations of the people. The idea of justice, to which a given *Rechtsbewusstsein* – since there were many different *Rechtsbewusstsein*⁴³⁶ – was inclining, did not understand the meaning and variation which the general historical development added to the requirements of the working legal practice. The communal awareness or consciousness of law was founded on the *authority* of its judiciary. In a comparative manner, from the viewpoint of legal historical scholarship, that authority was functional (brought justice) if it applied an interpretative model in giving laws and verdicts, which again reflected the material needs and valuations of those who were being ruled. To put this in the language of Wieacker’s concepts: the *Rechtsgewissen* or the *Rechtsgefühl* of the judges was the spiritual skill behind their verdicts. If a legal system was functional, that skill cultivated judgments which matched the *Rechtsbewusstsein*, the values of the people; the language of the law and the social reality were compatible. This enabled the judiciary (or the judges) to enjoy the trust of the community, and be counted as authoritative.

People’s consciousness of law was a feature which guaranteed the continuity in the legal system. Some axioms could not be switched with every new scientific theory or policy. The material law was “reality-entangled,” and it carried along with it older perceptions and cultural traits.⁴³⁷ *Rechtsbewusstsein* changed like an organism. It grew, became more mature, and was transmitted from one generation to another like

⁴³³ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 23, 24.

⁴³⁴ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 24.

⁴³⁵ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 25: “[S]eine überlieferte Spruchpraxis nicht mehr als zureichende Leistung galt, und seine durch geistiges Gesetz und verstandesmäßige Schlüsse nicht fassbare Entscheidung auch nicht mehr der Ausdruck eines starken Rechtsgewissens war,” also 40–41. It is important that the relation between Wieacker’s concepts of *Rechtsgewissen* and *Rechtsbewusstsein* is not yet clear. The legal perception of the sheriffs, thus laymen, could (in 1944) be elaborated as *Rechtsgewissen*, legal conscience.

⁴³⁶ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 28: “Dem tiefer Eindringenden aber trat noch in den gleichsam ausgeglühten Juristentexten des Corpus iuris die klare Geistigkeit eines klassisch gewordenen Rechtsbewusstseins entgegen.”

⁴³⁷ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 38.

an accumulating knowledge of life.⁴³⁸ The peculiar feature of the legal consciousness of the German middle ages was, however, its primitivism with respect to the legal language. To Wieacker, the *authority* of pre-Reception German law was inevitably temporal, since the language this judicature used to describe and categorize legal phenomena was neither transmittable nor rational.⁴³⁹ Here by rationality in an appreciating sense (since ‘rationality’ often bore a negative significance as an expression of ‘scientification’),⁴⁴⁰ Wieacker meant a combination of linguistic capability, the acknowledgment of previous legal achievements (i.e. tradition), and skillfulness (*kündig*) in understanding life more broadly.⁴⁴¹ The Reception, or to be more precise, the historical development it included, separated the German legal consciousness and the administration of the state for hundreds of years, and the German legal consciousness has remained in this state of irrationality ever since. The ‘experience-bility’ of the law was lost.⁴⁴²

With respect to Wieacker’s historical vision, the meaning he gives to humanism within his narrative of German (and European) legal history is important. That entity encapsulated the problem of ‘scientification,’ which in the contemporary German social, legal and humanistic studies were perceived as the root of all evil. Scientification introduced a division between the state and the people, a division which the Nazis and more broadly even scholars, intended to overcome in order to find the true essence of German society. Previously, Germanistic scholars had blamed Roman law for the rationalistic tendencies in German culture, which had allegedly originated from the Reception.⁴⁴³ Wieacker attacked these arguments asserting that it was not the *law* which was rationalistic, but the *power* which utilized the law.⁴⁴⁴ The humanist revolution of the late middle ages had “unsealed the spiritual eyes” of the people, who now yearned for more advanced techniques in administration, commerce and governing. There was a strong need for universality in the German culture of Reception, stemming from the “feeling of life” and “spiritual experience.”⁴⁴⁵ These streams, however, carried along with them the seeds of future anomalies. Humanism

⁴³⁸ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 11.

⁴³⁹ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 23: “Das Recht ist unter dieser Betrachtungsweise nicht sowohl Norm als Sinngehalt des beurteilten Lebensverhalts, daher nur in sehr beschränktem Umfang lehrbar und begrifflich zu legitimieren.”

⁴⁴⁰ Cf. Wieacker, ‘Vom römischen Juristen’ 1939, 449.

⁴⁴¹ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 17.

⁴⁴² Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 43: “Das Ergebnis war, gleichviel, mit dem Aufhören der Anschauligkeit und *Erlebbarkeit* des Rechts Verlust der unmittelbaren Teilhabe des Volkes am Recht. In Zukunft trat dem *Rechtsgewissen* des Einzelnen wie des Volkes das rationale und intellektuell erfasste Staatliche Recht als sein Fremdes entgegen, dem er sich auf Treu und Glauben oder in äusserem Zwang unterwarf.” (emphasis mine) and “Seitdem ist ein grundsätzlicher Widerspruch zwischen dem *Rechtsgefühl* des Einzelnen wie des Volkes und der staatlichen Gesetzgebung und Rechtsprechung möglich geworden” (emphasis mine). See also 46: “irrationalen Rechtsgewissen des Volkes”; also 22. Here Wieacker joined the ranks of German scholars who grieved over the insoluble breach between the mentality of the people and the rational state.

⁴⁴³ Landau 1989, 17–24.

⁴⁴⁴ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 45.

⁴⁴⁵ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 28, 29.

appreciated above all the “higher spiritual meaning of Form,” which later resulted in the formalistic and material theories of law and society.⁴⁴⁶ Roman law as a superior technique addressed these demands and offered a “spiritual force to control life itself.”⁴⁴⁷

The evolution of Wieacker’s thoughts with respect to his previous arguments on the legal sphere is most evident in the way he conceptualizes the *Stand* of jurists in the text of *Das römische Recht und das deutsche rechtsbewusstsein*. In 1941 Wieacker had contributed to the contemporary discussion on the need to define a new *system* for German law.⁴⁴⁸ Following the political discourse, the new system had to be freed from the corrupting tendencies of liberal and economic necessities and stress the togetherness of the German people. To Wieacker, such a task should be started from an elaboration of the material conditions leading to the contemporary situation, as well as the need to scrutinize the flaws and virtues of previous theories. In ‘Zum System des deutschen Vermögenrechts’ (1941) Wieacker had argued that a functional system of law had to be independent of the formalistic construction of natural law-based theories and instead rely on a communal understanding of principles, acts and ideas.⁴⁴⁹ He expanded his previous argument on a society built on “vocation estates,” and asserted that the most sustainable statements on and creations of law, could be obtained within an estate which material task was to deal with the law. Such a constellation would be that of a “juridical estate.”⁴⁵⁰ An insurmountable historical example of such a *Stand* was the guild of jurists in the Late Roman Republic.⁴⁵¹ At the same time, Wieacker gave credit to the natural law scholars like Pufendorf and Grotius who, despite their many disadvantages, understood “juridical anthropology,” meaning that the ideas of the lawyers were also historically situated, they were “the material ideas of law.”⁴⁵² It is important to acknowledge that the existence of the “juridical-estate” and “the material ideas of law” was not to challenge any belief in metahistorical or timeless legal principles. On the contrary, utilizing these starting points would bring forth an understanding of “beyond-legal” axioms within the law, and in this way a legal system would be more related to legal reality.⁴⁵³

⁴⁴⁶ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 28.

⁴⁴⁷ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 15.

⁴⁴⁸ Cf. Werner Schubert, ‘Volksgesetzbuch. Teilentwürfe, Arbeitsberichte und sonstige Materialien,’ in Werner Schubert (Hrsg.), *Akademie für Deutsches Recht. 1933-1945. Protokolle der Ausschüsse Bd. III, I*. Berlin, Walter de Gruyter 1988.

⁴⁴⁹ Wieacker, ‘Zum System des deutschen Vermögenrechts’ 1941, 7: “In ständiger Abschleifung an dem älterer vorüberziehenden Material reift ein Schatz von Regeln, Maximen und Vorstellungsweisen, die kraft des Ansehens des Rechtskundigen in der Gemeinschaft zur objektiven Autorität, zu Recht, werden.”

⁴⁵⁰ Wieacker, ‘Zum System des deutschen Vermögenrechts’ 1941, 7: “juristische Stand.”

⁴⁵¹ Here (in ‘Zum System des deutschen Vermögenrechts’ 1941, 7) Wieacker refers to his own article ‘Vom römischen Juristen’ 1939.

⁴⁵² Wieacker, ‘Zum System des deutschen Vermögenrechts’ 1941, 10 “juristische Anthropologie,” “materialen Rechtsidee.”

⁴⁵³ Wieacker, ‘Zum System des deutschen Vermögenrechts’ 1941, 10.

Consequently, Wieacker's representation of the German Reception was a narrative of how such a *Stand* of lawyers had arisen in the German legal history. The point of departure was the conditions which brought about social change, which in turn created a need for new kinds of professionals: "[T]he new kind of administration [state], with its neutral ruling and decision techniques needed skilled men who were familiar with such techniques."⁴⁵⁴ The rapid development of the administrative sphere, reaching all fields of society, could no longer be managed by means of individual capabilities, nor could such a machinery rest on the personal prestige of the elite. It was vital to accommodate a "community of skilled and committed officials who enjoyed the respect of the regime," and who were able to guide and uphold the state.⁴⁵⁵ The feature which distinguished this new generation of lawyers from the preceding officials was their learnedness in Roman law (since according to Wieacker, the new generation was actually the offspring of the social elite, who had served as sheriffs or laymen in the courts).⁴⁵⁶

Seine Entscheidungsgrundlagen aber sind die Autorität des Corpus iuris, in der Gutachten, Präjudizien und gelehrtem Schrifttum angesammelten überlieferten Lehre oder das vom Landesherrn erlassene Landrecht: seine Rechtsanwendung war durch logische Subsumtion des Einzelfalls unter die Norm bestimmt, diese Unterlagen aber den ungelehrten, d.h. allen nicht rechtswissenschaftlich ausgebildeten Deutschen, grundsätzlich unzugänglich.⁴⁵⁷

Applying his conviction of the material bases of legal ideas, Wieacker argued that the emergence of a new generation of lawyers and the new legal instrument in the service of the state, was ultimately a social historical event. For example, sending one's offspring to South Europe in order to be educated in Roman law was an attempt by the bourgeoisie to raise the social status of one's family.⁴⁵⁸ He turns to practical sociology to distinguish three different groups within the new generation. First there were the "ethical ones" who exhibit the highest virtues both in their studies and in following a career. The second group was comprised of advocates; they were the semi-educated, who were helpful in carrying out small practical tasks for the "ethical" group. Thirdly, Wieacker posits the "juridical proletariat," who were only concerned with money. The last group came into existence because in the beginning the borders

⁴⁵⁴ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 29.

⁴⁵⁵ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 24: "fachlichen Berufsgemeinschaft."

⁴⁵⁶ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 28, 32.

⁴⁵⁷ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 41. "His basis for decision-making is, however, the authority of the Corpus Iuris Civilis, in which experts, precedents and scholarly literature of collected traditional lessons or land law that has been issued from the sovereign: his application of law was determined by the logical subsumption of each isolated case covered by the norm. These documents are, however, completely inaccessible to the unlettered (i.e. the German not educated in jurisprudence)." (Translation by HW).

⁴⁵⁸ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 43.

defining the *Stand* were not strict enough. The bad name which some historical sources give to lawyers is on account of this last group.⁴⁵⁹ It is curious that Wieacker also applied a similar categorization for the guild of Roman lawyers.⁴⁶⁰ No doubt this was a convenient way to uphold the idea of the spiritual superiority of the lawyer-estate and deal with the historical subject matter. The historical sources which spoke of the immorality of the lawyers, could be treated as stories about encountering the lesser material of the “estate,” not with the true virtuous “core.”⁴⁶¹

The new generation of lawyers (during the Reception), however, possesses all the virtues Wieacker perceived as fundamental with respect to the modern legal system. The newly-erected *Stand* of jurists comprised a system of correct ‘attitudes’ towards jurisprudence. Their ‘legal thinking’ was virtuous since it was, for the first time, connected to the superior legal tradition and *Bildung* in the form of knowledge about ancient sources.⁴⁶² Their science was not modern for it started the process of ‘scientification,’ but in a way their praxis was more just than the modern counterparts, since it was built on an actual bond with ancient wisdom: “Denn nicht Begriff und System, sondern die Autorität des Wortes und der überlieferten Lehre beherrschten das Rechtsleben damals.”⁴⁶³

The *Stand* possessed and utilized their own distinguished *Rechtsgewissen*; a “spiritual technique” which enabled them to become “the true master [Herr] of the written and learned processes.”⁴⁶⁴ Here the *Stand* mirrored the greatness of the Glossators of Northern Italy. After all, to Wieacker, knowledge of the *Stand* came directly from the institutions which the Glossators had reinstated. Thus the ‘spirit’ which the *Stand* manifested, although advanced, was not modern in a negative sense. Rather than being subordinated to social forces, it offered a tool to control the society. It was ancient wisdom usable through different times and spaces:

[It was] eine spirituelle Macht, die über das Leben Gewalt forderte und nicht umgekehrt dem “Leben” dienen wollte, ein grosses Denkmal für die Schöpferkraft ging; ja, dass die Wiedergeburt so uneigentlich ist wie die des Anherrn in dem Enkel.⁴⁶⁵

⁴⁵⁹ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 31.

⁴⁶⁰ Wieacker, ‘Vom römischen Juristen’ 1939, 446–447.

⁴⁶¹ Wieacker, ‘Vom römischen Juristen’ 1939, 447: “Kern des Standes.”

⁴⁶² Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 35.

⁴⁶³ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 35. “Because at that time it was not the concept and system, but rather the authority of the word and the traditional lessons, that controlled legal life.” (Translation by HW).

⁴⁶⁴ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 42: “geistige Technik,” “Geistige Macht der Wissenschaft”; also 41: “Trotzdem ist er früh der eigentliche Herr des schriftlichen und gelehrten Prozesses geworden.”

⁴⁶⁵ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 15-16. “It was a spiritual power that called for violence over life rather than wanting to serve it. A large monument to the creative powers went: yes, the reincarnation is so improper like that of the descendant from the ancestor.” (Translation by HW).

In his 1944 article Wieacker for the first time with utmost explicitness connects the sub-concepts of *Stand* and *Bildung* to the scientific concept of *Rechtsbewusstsein*. The national consciousness of law is formed in relation to the themes of ‘Perfection through education and studying’ (*Bildung*), and to an ‘estate based on legal abilities’ (*Stand*). If one was to study the history of legal consciousness those sub-concepts would have to be involved. Also, he argues for the principle that the modern state cannot be understood without, and is built by, the official, academic and therefore learned jurist-estate.⁴⁶⁶ I will return to the phenomenology of the concept of *Rechtsgewissen* later in chapter 4, but the 1944 article is foundational also in the manner which Wieacker uses Savigny’s concepts in the arguments of which he had already given, but not yet with such clarity. However, in this text the concepts of *Rechtsbewusstsein*, *Rechtsgefühl* and *Rechtsgewissen* are still used in a somewhat inexact manner. In Wieacker’s text the concepts often overlap and the hierarchy between them is not always clear.

It may seem surprising that Wieacker decided to introduce Savigny’s concepts as late as 1944, and his idea of the materiality of legal science did not necessitate such concepts, as he had proved in his previous articles on ‘property.’ From the publishing of *Das römische Recht und das deutsche Rechtsbewusstsein* on, he nevertheless used the concept of *Rechtsbewusstsein* in his task to trace the unchanging historical and legal principles from the past. The concept offered him a heuristic tool to understand history, but also the cognitive means through which he was able to communicate his findings to his reading audience.

There are many possible reasons which might have led Wieacker to pick the concept of *Rechtsbewusstsein* at that particular moment and in that particular text. The more opportunistic explanations point to the fact that Carl Schmitt had decided to use the concept earlier in his *Die Lage der europäischen Rechtswissenschaft* (1943).⁴⁶⁷ During that time the acquaintance between Schmitt and Wieacker was at its most intense phase, Wieacker spending his time with the Schmitt, attending his lectures and commenting on the texts which he sent him. Clearly, he was impressed by Schmitt’s endeavors to depict and capture the essence of the European legal heritage. Also, the larger search to describe and analyze the basis of a common European legal thought relates to the explicit policy conducted by the National Socialist administration, whose aim was to unite Europe under German rule against Soviet Russia. Introducing a

⁴⁶⁶ Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein* 1944, 5: “beamteten, fachlichen und daher auch gelehrten Juristenstand.”

⁴⁶⁷ Carl Schmitt, ‘Die Lage der europäischen Rechtswissenschaft [1943/44],’ in *Verfassungrechtliche Aufsätze aus den Jahren 1924–1954*. Berlin, Duncker & Humblot 1958, 386. Cf. Meinel 2012, 252. Schmitt spoke on the topic at Leipzig University and in a conference in Budapest, which Wieacker also attended (Mehring 2014, 401). Both Schmitt’s and Wieacker’s “turn towards legal consciousness” was nevertheless preceded by Ernst Rudolf Huber’s study on the ambiguous essence of German nationalism in his Strassbourg works, especially in 1942 in *Reich, Volk und Staat in der Reichsrechtswissenschaft des 17. und 18. Jahrhunderts* (*Zeitschrift für die gesamte Staatswissenschaft* 102, 593-627).

concept which enabled the comparison and evaluation of different legal systems in time and space made this task much easier.⁴⁶⁸

The above reasons alone, however, produce only a one-sided picture of the methodological shift in Wieacker's scientific works. Even to Schmitt, the study of the "Asylum for the European legal consciousness," as expressed in *Die Lage der europäischen Rechtswissenschaft*, was a camouflaged representation of his disappointment with the results of the 'legal renewal' of the 1930s. During the 'legal renewal,' *Rechtsbewusstsein* had been equated with the unsurmountable and ahistorical consciousness of the German people, which the Führer had revealed and harnessed. During the war, at the latest, the conservative legal scholars understood the hollowness, cynicism, and unscientific nature of the construction.⁴⁶⁹ Thus writing about 'legal consciousness' was an attempt to proceed from the low point of legal science of the 1930s. Although in a very indirect and fumbling way scholars started to challenge and question the prevailing dogmatic truth of the relation between a people and its law. In practice this turn was evidenced by studying past time, reviewing natural law theories or concentrating on very abstract, particular and detailed legal phenomena.⁴⁷⁰ The wrong turn which academia had started to take in 1933 was not of course as such addressed. One had to wait for roughly twenty years for the first honestly reflective legal scientific works, where scholars considered their collective and personal engagement with the regime. Nevertheless, their disappointment during the early 1940s on the 'legal renewal' promised by National Socialism was genuine.

As elaborated in the section 3.3, Affections in *Rechtsbewusstsein* 1933–1945, Franz Wieacker had also processed the idea of legal thinking and the dilemma of how some sophisticated styles seemed to reproduce themselves throughout history. His conclusion started to lean more towards the direction that the base of a legal system could not be formed from a mere idea of common national values. The *Rechtbewusstsein*, legal consciousness, of the people was (a) erring, and (b) consisted of different layers. Some forms of thinking were more vulnerable to short-sightedness and more unaware of larger social and historical forces than others. The contexts where Wieacker first presented his lectures and articles are also not without importance. *Das römische Recht und das deutsche Rechtsbewusstsein* was originally a speech given in Leipzig to commemorate and honor the destroyed main library. To Wieacker, that distinct incident, unsurprisingly, was a metaphor for the meaningless devastation of the war. Thus, his speech was more of a wishful assurance that, despite the prevailing harsh situation, the balance between the people's idea of justice and material conditions could be obtained.

⁴⁶⁸ Benjamin G. Martin, *The Nazi-Fascist New Order for European Culture*, Harvard UP 2016, 180-262.

⁴⁶⁹ Meinel 2012, 241–246; Mehring 2014, 401.

⁴⁷⁰ Stolleis 1998.

3.6. Culture in *Rechtsbewusstsein* 1945–1968: Explaining ‘Point Zero,’ the defensive battle of the German academia

In many ways one can call the year 1945 in Germany ‘point zero,’ at least in the material sense. Detlev Poekert wrote:

Am ende de Dritten Reiches und des von ihm inszenierten Weltkrieges stand keineswegs die erträumte ‘Volksgemeinschaft’. Statt dessen lag eine Gesellschaft in Trümmern, nicht nur in ihrer zerbombten materiellen Substanz (die wie sich in der Nachkriegszeit herausstellte, sogar überraschend gut gehalten hatte), sondern auch psychisch und moralisch und hinsichtlich ihrer sozialen Bedingungen.⁴⁷¹

Hunger, unemployment and homelessness had an inevitable effect on the way people perceived the meaning of their everyday life and that of the future. The visible ruins of the material living conditions were joined with a feeling of “loss of tradition” and suddenly non-existent “standards of social relations.”⁴⁷² The reconstruction process seemed to necessitate radically different values than those of the preceding years. Since the economic and material conditions were of highest priority, ‘the modern’ rushed in with an aggressive manner. The relocation of millions of inner-state refugees, rebuilding the infrastructure, redirecting the economy to follow the rules of the free liberal economy and securing the democratic constitution in binding citizens to support the administration by means of a social security system, all this demanded a shift in the relation between the state and the people.⁴⁷³ In practice, Germany had no choice but to rapidly transform itself into a “social state” in which the public administration upheld, maintained and regulated the social structures, but on the bases of a strict, almost dogmatic, constitutionalism and parliamentarianism. With respect to the preceding years, extending also beyond the totalitarian era, this meant a novel and abrupt categorization of citizenship and community. To many conservative writers, Germany’s transformation meant an irreversible degradation in the spiritual essence of the national style of living and an unforeseen burden for the people, not only in public regulations, but in the type of social expectations they faced.⁴⁷⁴

⁴⁷¹ Detlev Peukert, *Volksgenossen und Gemeinschaftsfremde. Anpassung, Ausmerze und Aufbegehren unter dem Nationalsozialismus*. Köln, Pfeiffer 1982, 286. “The dreamed “people’s community” stood by no means at the end of the Third Reich and the World War that it staged. Instead a society lay in ruin, not only in its bombed-out material substance (which, as became apparent after the war, had proved ven surprisingly solid), but also mentally and morally and with respect to its social conditions.” (Translation by HW).

⁴⁷² Michael Wildt, ‘Konsum und Modernisierung in den fünfziger Jahren,’ in Frank Bajohr, Werner Johe & Uwe Lohalm (Hrsg.), *Zivilisation und Barbarei. Die widersprüchlichen Potentiale der Moderne*. Hamburg, Hans Christians Verlag 1991, 321–325.

⁴⁷³ Ralf Dahrendorf, ‘Demokratie und Sozialstruktur in Deutschland,’ in Ralf Dahrendorf, *Gesellschaft und Freiheit. Zur soziologischen Analyse der Gegenwart*, München, R. Piper & Co Verlag 1961, 260–299.

⁴⁷⁴ See e.g. Helmut Schelsky, *Der mensch in der wissenschaftlichen zivilisation*. Köln, Westdeutscher Verlag 1961.

One part of the wider picture was of course academia. The question of the re-opening of German universities became an urgent matter in the fall of 1945. In the Potsdam conference the Allied forces had agreed on a decisive re-orientation of German education, punishment for those responsible for distorting the system and worldview within this field, and the deployment of Germans themselves in this task in order to retrain the people in democracy.⁴⁷⁵ The project was called the denazification or *Entnazifizierung* of education. With respect to universities, the direction of this goal was after a short while left mainly to the Germans, since the occupation administration lacked manpower, knowledge and even interest in the arrangement of higher education. The staff in the newly-opened universities had to answer special questionnaires (*Fragebogen*) and sometimes go through an interrogation, based on which the university board in cooperation with the occupational officials decided on the ‘suitability’ of each candidate.⁴⁷⁶ The cases of more suspicious figures were handled in *Spruchkammeries*, local civilian denazification tribunals, where the crimes of the defendants were decided according to a four-level scale.⁴⁷⁷

Ernst Forsthoff’s racist rhetoric of the 1930s was for many reason enough to distance him from academia. Forsthoff underwent a *Spruchkammer* process where he was declared a *Mitläufer*, “fellow traveller” with respect to the National Socialist actions of transforming Germany into a totalitarian nation. Thus, he had to wait for a considerable time before receiving an official teaching position at the University of Heidelberg.⁴⁷⁸ Of the members of the *Kieler Schule* Georg Dahm and Friedrich Schaffstein faced serious accusations of cooperating with the Nazi regime. Georg Dahm had as the Rector of the University of Kiel (from 1935 to 1937) ensured the exclusion of scholars and students of Jewish descent from the university.⁴⁷⁹ Schaffstein had had a visible role in turning criminal law into “political criminal law,” where the offences of an individual were interpreted as crimes against one’s duty to the community. This train of thought provided the intellectual bases for National

⁴⁷⁵ Remy 2002, 126.

⁴⁷⁶ Remy 2002, 117–122, 147–156.

⁴⁷⁷ Clemens Vollnhalls, *Entnazifizierung: Politische Säuberung und Rehabilitierung in den vier Besatzungszonen 1945–1949*. Munich, DTV 1991, 259–338. Based on the information gathered by a questionnaire and by occupational officials, the tribunals charged individuals according to these categories: (1) major offenders (*Hauptschuldige*), (2) activists, militarists, and profiteers (*Belastet*), (3) those with probational status (*Minderbelastet*), (4) followers or fellow travelers (*Mitläufer*), and (5) those exonerated (*Entlastet*). In all of West Germany by 1950, 3,660,638 cases had been tried, and of those, 1,005,874 resulted in *Mitläufer* verdicts. 2,579,622 cases had resulted in either exoneration or amnesty on other grounds. In 1,167 cases the defendant had been judged as *Hauptschuldige*. Remy 2002, 178.

⁴⁷⁸ Forsthoff, however, had indisputably had quarrels with the Nazi administration and the SS press. He also had a distinguished supporter in Gustav Radbruch, who publicly spoke for Forsthoff’s rehabilitation. Meinel 2012, 304–306; Remy 2002, 158–159.

⁴⁷⁹ Gerhard Paul, Miriam Gillis-Carlebach (Hrsg.), *Menora und Hakenkreuz: zur Geschichte der Juden in und aus Schleswig-Holstein, Lübeck und Altona (1918–1998)*. Neumünster, Wacholtz 1998, 241.

Socialist judges to sentence people for crimes against the Nazi ideology.⁴⁸⁰ Both were allowed to return to any university only in the 1950s.

Among the legal scholars (if one excludes Carl Schmitt) Ernst Rudolf Huber's case caused the most heated dispute. Huber appeared to be an archetype of a jurist who had sold his talents to the service of the Third Reich. Huber's 1930s texts were indisputably fascist, and contained attacks against *Judentum* in science and politics. Huber had been a visible figure in the National Socialist regime, one of the most notable in jurisprudence, and his editorship of fascist journals, his active contribution to constitutional discussion and his collegueship with Carl Schmitt connected him irreversibly to the National Socialists.⁴⁸¹ In private, Huber did go through an era of self-examination. Retrospectively, he did see a congruence between the National Socialist reasoning of a totalitarian nation and his own studies in the 1930s on the state of the disintegrating modern mechanisms, although he could not see himself as having advanced the National Socialist cause. He gradually cut connections with his "doctor-father" (supervising professor) and colleague Carl Schmitt, but was still not allowed to return to the teaching profession for years, which struck him as a major injustice.⁴⁸²

All modes of inquiry were insufficient and too rigid in their attempts to make sense of the multi-faceted and complicated reality of the preceding twelve years.⁴⁸³ It proved to be very difficult to conduct the denazification of universities in such a way that all education would be given by formally competent anti-Nazis. Neither were there enough such people available, nor sufficient time for reliably inspect of who were truly "anti-Nazis" and who were indisputedly in the category of "primary perpetrators" (*Hauptschuldige*). It was almost impossible to find a common understanding of what "anti-Nazi" meant, or even a more modest common concept of what a "non-follower" signified. Who had been an "active" Nazi? What did it mean to be a passive one? Providing a juridical definition of to what extent a given individual had assimilated and supported the crimes of the Third Reich proved to be a matter of interpretation.⁴⁸⁴ In time, the pressing practical necessities obliged officials to hurry the process. Due to the catastrophic death-toll of the war, the four occupation zones lacked enough skilled and educated Germans to maintain a working society. It was also obvious that young people needed somewhere to spend their days productively. In addition to the practical impossibility of an exhaustive denazification of the universities, the academics themselves were hesitant to accuse other academics of the injustices of

⁴⁸⁰ Pauline Studer 2014, 80–83.

⁴⁸¹ Bernd Rüthers calls Huber a "crown jurist" of the Third Reich. Bernd Rüthers, *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich*. München, C.H.Beck 1988, 102.

⁴⁸² Grothe 2005, 317–321.

⁴⁸³ Franz Neumann, 'Die Umerziehung der Deutschen und das Dilemma des Wiederaufbaus [1947],' in Franz Neumann, *Wirtschaft, Staat, Demokratie. Aufsätze 1930-1954*. Frankfurt am Main 1978.

⁴⁸⁴ Sentencing university professors was very difficult, partly because of the largely prevailing "Mandarin culture." The majority of Germans supported denazification in principle, but felt that too many ordinary people were persecuted, whereas the truly guilty ones were able to conduct their business as usual. See Remy 2002, 151; Moses 2007, 65; Grothe 2005, 312-317.

the Nazi era.⁴⁸⁵ Finally, the foreign political situation of the Federal Republic assured leading politicians that the biggest threat to the nation did not come from within but from the east. Thus, the resources of the nation had to be utilized to counter communism, not on aggressive litigation of past behavior. This led to a sweeping amnesty for civil servants, academics and writers from the Nazi period by the Konrad Adenauer government.⁴⁸⁶

The need to come to terms with the past in post-war Germany appeared in all discussions involving the present and future of the society. Fitting the irrational National Socialistic crimes to a temporal frame, and providing the totalitarianism of the Third Reich with a cause and purpose was a necessity in reconstructing the German community. The varying explanations and opinions comprised a debate over the policy towards the past (*Vergangenheitspolitik* or *Vergangenheitsbewältigung*).⁴⁸⁷ The fields of science and higher education likewise were engaged in a dispute over the meaning and heritage of the preceding years as well as their effect on academia. Since the breach between “what had been” and “what was” in itself was hard to confront with concrete measures, the public discussion on the national tradition and orientation conducted among scholars focused mainly on *Bildung*.⁴⁸⁸ In this debate all of the above- mentioned views merged.

Was *Bildung* part of a process in which society turned against itself, namely against the helpless ones who in the modern political ethos it should have protected? How should one safeguard the heritage and virtuous core of German universities and German scholarship? From whom should it be rescued or which discourses should be excluded from the academic sphere? Was the root of all evil in the administrative endeavors of the politicians, the over-equalizations of the socialists, or the false conclusions of corrupted scholars? Some officials of the occupational administration and a substantial group of German intellectuals believed that indeed the university system was partly responsible for the successful Nazi *Machtergreifung*. The conservative atmosphere embedded in the structures of higher education had exposed the academic culture to outer political intentions, and contributed to its inability to resist the National Socialist *Gleichschaltung*. The British occupational administration produced a “Blue Report” in which they suggested a structural rearrangement of German universities in order to link it more directly to the public sphere and to more open decision-making.⁴⁸⁹ Although the practical implications of the report were minor, the direction of the development regarding the purpose and status of universities as institutes within the field of national education was set. In the forthcoming years the universities transformed from being providers of educational

⁴⁸⁵ Remy 2002, 130, 149.

⁴⁸⁶ Norbert Frei, *Vergangenheitspolitik: die Anfänge der Bundesrepublik und die NS-Vergangenheit*. München, C.H. Beck 1996, 29–54.

⁴⁸⁷ Conrad 1999, 11–22; Grothe 2005, 311.

⁴⁸⁸ Moses 2007, 131–159.

⁴⁸⁹ Moses 2007, 132–133.

facilities for the social elite to ‘mass universities.’ The ideological framework supporting the latter emphasized equal opportunities in achieving higher education, the significance of university training from the point of view of social cohesion, and its relation to other sectors of society. Such a view did not in many cases concur with the idea of *Bildung* which the conservative scholars of the war generation (not to mention their teachers) still appreciated.⁴⁹⁰

For conservative scholars the universities represented the essence of German culture. Not only did they educate the citizens and passed on the knowledge of previous generations, in scholarly work the characteristics of a living, healthy culture became apparent. Academics worked with and utilized the national spirit (*Geist*), and as a group contributed creativity to cultural rebuilding. The autonomy of universities against any outside interventions was essential in preserving German culture as well as the ‘Occidental’ (*abendländische*) tradition to which it adhered.⁴⁹¹ The peculiar status of German universities derived from their original definition as autonomous establishments outside the political sphere of society, but nevertheless as embodiments of the nationally significant values, and as concrete institutes which fostered the emergence and impact of these values in the social reality of the nation.⁴⁹² Rightfully, the Humboldtian university system was perceived as an important European invention, but opinions on who or what exactly embodied the idea of the university in the Federal Republic or for what reasons it had originally been constructed, clashed. In other words, despite the fact that Humboldtian universities were supposed to live separately from national politics, the major political crises of the twentieth century had always extended and continued to extend inside the realm of university education. Consequently, university education suffered from repeated “crises,” “uncertain core ideas,” and seemed to be in the need of “inevitable reform”.⁴⁹³ When crises in higher education occurred, the subsequent explanations and coping strategies with respect to the actual crisis were constructed by relating the current situation to preceding crises in order to find out the “true core” of *Bildung*. This “untainted” ideal would then serve as the foundation for the succeeding academic culture.⁴⁹⁴ However, the explanations tended to be more on the side of conservation, the ‘Humboldtian ideal’ being used to redefine the meaning given to the institutes and idea of education, but also to make

⁴⁹⁰ Sylvia Paetschek, ‘Die deutsche Universität im und nach dem Krieg. Die Wiederentdeckung des Abendlandes,’ in Bernd Martin (Hrsg.): *Der Zweite Weltkrieg und seine Folgen: Ereignisse - Auswirkungen - Reflexionen*. Berlin, Rombach 2006, 242–248; Moses 2007, 136.

⁴⁹¹ Axel Schildt, *Zwischen Abendland und Amerika: Studien zur westdeutschen Ideenlandschaft der 50er Jahre*, München; Oldenbourg 1999, 21–23, 39.

⁴⁹² The values concerning education were nationally significant since they were universal, a notion not foreign to the Romantic worldview. Cf. Karl Jaspers, *Die Idee der Universität*. Berlin, Springer-Verlag 1946, 9–13.

⁴⁹³ Jürgen John, ‘“Not deutscher Wissenschaft?” Hochschulwandel, Universitätsidee und akademischer Krisendiskurs in der Weimarer Republik’, in Grüttner et al., *Gebrochene Wissenskulturen: Universität und Politik im 20. Jahrhundert*. Göttingen, Vandenhoeck & Ruprecht 2010, 107–142.

⁴⁹⁴ John 2010, 112–115.

sense of the relation which the educators, the professors, had with respect to the national past, the present and the future.

Gerd Tellenbach, a friend of Franz Wieacker and a colleague of Fritz Pringsheim,⁴⁹⁵ narrated the crisis of higher education following the end of the Second World War in 1946.⁴⁹⁶ In his narrative, which dealt with the essence and ideal of higher education, he reflected on the emotions and experiences of the conservative educational elite during and after the Nazi reign. Tellenbach saw the 1930s and 1940s as an era in which a brutal attack had been made on the scientific and cultural heritage of German universities. “[T]he state had raped the universities,” intervening in their centuries-long administrative authority. Thus, German universities were the victims of the politicizing actions of the fascist administration. The relative guilt that the universities (and their staff) bore lay in their lack of belief in the virtues and values of *Bildung*, and the lack of devotion in cultivating that ideal in practice. Tellenbach saw that particular feature as a factor which explained the success of the Nazi attack on education.⁴⁹⁷ Furthermore, the post-War task of the universities (and their staff) was to find again the “Occidental tradition,” which had shaped the virtuous core of German and European culture long before the traits of the industrial revolution and modern political selfishness had perverted the social and communal reality of the Western world.⁴⁹⁸

Tellenbach’s explanation was by no means an exception in its emphasis on the “idea of the spiritual nobility,”⁴⁹⁹ but what gave it its particular explanatory power was the comparison between the conditions prevailing in the Weimar Republic and the ‘point zero’ of 1946 Germany. In Weimar, the “modernization process,” the redefinition of the meaning given to the universities and higher education within society, had been explained as the degeneration of the essence of national cultural.⁵⁰⁰ It had threatened to destroy the world of the Weimarian *Bildungsbürgertum*, and that threat seemed similar to (or at least it was interpreted as the same thing as) the phenomena which were appearing in the post-Second World War social reality. Again, the harsh

⁴⁹⁵ See, Korrespondenz mit Franz Wieacker, Bestand C0157, Signatur 431, Universitätsarchiv der Albert-Ludwigs-Universität Freiburg i Br. See also Nachlass Gerd Tellenbach, Tod von Fritz Pringsheim, Bestand C0157, Signatur 447, Universitätsarchiv der Albert-Ludwigs-Universität Freiburg i Br.

⁴⁹⁶ Gerd Tellenbach, ‘Zur Selbstorientierung der deutschen Universität,’ in *Die Sammlung* 1, 1946, 530–43.

⁴⁹⁷ Tellenbach 1946, 534.

⁴⁹⁸ Tellenbach 1946, 535–537. See also Lena Foljanty, *Recht oder Gesetz: Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit*. Tübingen, Mohr Siebeck 2013, 115–116 and the post-War use of the concept of *Abendland*, which as a “slogan” turned conservative spiritual values into a geographical term.

⁴⁹⁹ Sylvia Paletschek 2006, 245.

⁵⁰⁰ Fritz Ringer, *The Decline of the German Mandarins: The German Academic Community 1890-1933*. Cambridge: Harvard UP 1969.

conditions and allegations which the learned faced seemed to represent a dissolution of binding national values.⁵⁰¹

To scholars, *Bildung* was both a sphere which was separated from politics – and as such opposed National Socialist barbarism – and was connected to the “Occidental tradition.” Often the learned saw the destiny of the nation depended on the value it gave to *Bildung*. *Bildung* was not just simply training, it provided a general humanist education in which scholars became the guardians of Occidental tradition. Because of this link with the “healthy core” of *Bildung*, the conservative university staff who had retained their working place during the years of National Socialism, and had consented to the demands of the regime to varying degrees, saw themselves as “apolitical,” whereas National Socialists themselves had committed a crime in *politicizing* the realms of science and culture.⁵⁰² In seeing the Nazis as a phase in a larger development, the war generation – the academics born between 1902 and 1908 – could link the totalitarianisms of the twentieth century and the post-Second World War reformation efforts towards the academic realm as symptoms of a larger phenomenon which was distorting the basis of society and law. This modernization process, which was also defined as ‘politicization’ and ‘scientification’ (*Verwissenschaftlichung*), further explained the new interventions by the state bureaucracy against the educational elite as ‘politically’ motivated, as opposed to the *geistig* motives of scholars.⁵⁰³

Tellenbach’s narrative was not a thoroughly misleading or retrospective distortion, after all already in 1933 many, including Fritz Pringsheim, had interpreted National Socialism as destroying education and tradition by submitting them to politics.⁵⁰⁴ In addition, during the modernization process of Germany the administrative power of the state had arguably replaced some structures of communal decision making and deprived the people of some traditional symbols of freedom.⁵⁰⁵ However, the sweeping explanation which Tellenbach’s narrative – and common academic opinion on the totalitarian era – provided, ignored the more subtle and controversial aspects the 1930s also possessed. With some acts and representations the ‘tragedy of modernization’ gave less convincing explanations. The contradictions of conservative

⁵⁰¹ Sylvia Paletschek, ‘The invention of Humboldt and the impact of National Socialism. The German University idea in the first half of the twentieth century,’ in M. Szöllösi-Janze (ed.), *Science in the Third Reich*. Oxford: Berghahn Books 2001, 37-58.

⁵⁰² For example, both Eugen Fehrel and Wolfgang Panzer defended against the charges in the *Spruchkammer* process, referring to their scholarship as “apolitical.” Remy 2002, 185, 190.

⁵⁰³ Thus, Tellenbach asserted in another context, that “Geistigen Aufbau des Abendlandes [...] um die dämonischen Kräfte der Technik binden zu helfen und sie ihrem eigenen grenzenlosen Weiterwachsen ins Unmenschliche zu entziehen. Es ist klar, daß der Humanismus irgendwelcher Art für sich allein diese Bindung nicht erreichen wird, sondern daß nur die letzten und tiefsten religiös-sittlichen Bindungskräfte dazu imstande sind” quoted in Paletschek 2006, 245; cf. Heidegger, *Die Technik und die Kehre* [1962]. Pfullingen, Verlag Günther Neske 1988; Carl Schmitt, *Nomos der Erde: im Völkerrecht des Jus Publicum Europaeum*. Greven 1950.

⁵⁰⁴ See section 3.2. Culture in *Rechtsbewusstsein* 1933–1945: The actualization of the Weimar breakdown and National Socialism in academia and legal science.

⁵⁰⁵ Max Weber, ‘Politik als Beruf’ [1919], in Johannes Winckelmann (Hrsg.), *Max Weber: Gesammelte politische Schriften*. Tübingen, J.C.B. Mohr 1988.

narratives like Tellenbach's should not be considered surprising. In the end, it is the function of communal narratives to deal with disturb and complicate social phenomena; in evoking continuities and discontinuities they dwell on the 'untainted' past in order to make the present circumstances and their causes understandable.

The discontinuities which conservative narratives made understandable, included the more general change in the political field and in ideological power relations. The coupling of fascism and late 1940s political interventions on higher education enabled scholars to create a retrospective explanation of their position vis-à-vis the fascist regime and its ideology, but also to define their position with respect to a new threat that communism seemed to represent to the traditional way of life. *Bildungsbürgertum* had been hostile towards socialism since the end of the First World War, and already in the Weimar conditions domestic communism appeared to threaten national values.⁵⁰⁶ But whereas in the 1930s conservative discourse, communists had been treated as the misunderstood masses, in the Federal Republic their conviction to eradicate social classes and harness formal education to produce workers to serve the state was seen as a real menace to the life style of the educated class.

The wider discussion on the fate of and the relation between *Bildung*, the national institutes of higher education and the post-War social change of Germany in many cases overlapped the narrower legal scientific discourse. Academic discourse on legal and political sciences ultimately concentrated on the fundamental question of the relation between the state and society, or to be more precise between the rule of law and the welfare state, or as translated in the terminology of 1950s German legal theory, between the *Rechtstaat* and the *Sozialstaat*.⁵⁰⁷ In particular, scholars argued over the extent and essence of the values which supposedly held together the national community, and about the meaning one should give to the transformation of the social constellation with respect to economic development, industrialization and political group formation. In a more political sphere, the possible threat whether "Bonn would become Weimar," that the fragile democracy of the Federal Republic would collapse just like the social order of the 1930s, was a practical implementation of this legal scientific search for the stable, systematic and solid common values of society. The two main sides in the dispute over the ideal essence of German society were the "Schmitt School" and the "Smend School," which comprised the former students of the two scholars.⁵⁰⁸

Amidst the political reconstruction process and the rapid social change following the end of the Second World War, the intellectual geography of the Federal Republic took

⁵⁰⁶ Cf. section 2.2 The 'war generation': Franz Wieacker amidst the social history of German legal scholarship.

⁵⁰⁷ Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought*. New Haven, Yale UP 2003, 76.

⁵⁰⁸ Frieder Günther, *Denken vom Staat her: Die bundesdeutsche Staatslehre zwischen Dezsision und Integration 1949–1970*. München, R. Oldenbourg Verlag 2004, 10, 112–190. Smend and Schmitt personally seemed to stay outside the vicious dispute between the two schools. Müller 2003, 68–70.

a peculiar turn. Now it was the former conservative revolutionaries of the war generation, such as Ernst Forsthoff and Werner Weber, who defended in a libertarian manner the rights of the individual against the regulatory actions of the state. On the other hand, the scholars of the Smend School, who often leaned to the left, advocated social cohesion and common values.⁵⁰⁹ The ‘conversion’ of, for example, Ernst Forsthoff was not however a sudden turn at all. His arguments – and more generally those of the Schmitt School – were based on a deep mistrust not of the state in general, but on the newly-drafted Republic, which was ‘artificial’ in the sense that it neglected the conservative value-base on which the community was supposed to be built.⁵¹⁰ The organic and natural whole of society, constituted of different *Stand*, which the Schmitt’s students had tried to articulate in their 1930s texts, continued to represent an ideal which could not be translated to the social and political reality of the Federal. In other words, the Federal Republic was not a concrete order, and thus it should not act like one.⁵¹¹

It also has to be acknowledged that the ‘modernization’ narrative did serve as a fruitful context for many novel conceptualizations of Western society and its history. It was as if no traits remained which linked Germany to the rest of the world or to its own past. The war and the preceding totalitarianism represented an enormous obstacle to any optimistic narratives about future development. Whereas the ‘modernization tragedy’ narrative of the war generation of Franz Wieacker and Ernst Forsthoff, as well as to some older scholars like Hans Freyer and Carl Schmitt, was partly a personal apologia for a bygone era, to the younger generation of “45ers” it appeared a truthful theory of why the world possessed no meaning.⁵¹² It was easy, especially for the “skeptical generation” of the post-war years, to see little hope in the Cold War’s intergovernmental processes and Germany’s destiny within them.⁵¹³ The *Weltbürgerkrieg*, worldwide civil war, into which the world inevitably seemed to slide, symbolized to Carl Schmitt, Ernst Forsthoff and Franz Wieacker a continuation of the Weimar disarray. The younger generation represented by, for example, Helmut Schelsky and Reinhard Koselleck found it a useful tool to explain their experiences of war and imprisonment.⁵¹⁴ Thus, the deep mistrust towards ‘modernization’ and the

⁵⁰⁹ Müller 2003, 70.

⁵¹⁰ Meinel 2012, 410–416.

⁵¹¹ Müller 2003, 73–75.

⁵¹² The sustaining influence which authors who could explicate the scarcity and “abyss of emotions” of the post-war society to the younger generation of lawyers and social scientist has been documented in numerous studies. Teachers like Ernst Forsthoff, Ernst Rudolf Huber and Franz Wieacker were able to transmit some sense of continuity, dignity and reason to their students; Moses 2007, 76; Müller 2003, 61–62; Liebs 2010, 38.

⁵¹³ Helmut Schelsky, *Die skeptische Generation - eine soziologie der deutschen Jugend*. Düsseldorf/Köln, Diederichs 1957.

⁵¹⁴ The concept of *Weltbürgerkrieg* was Carl Schmitt’s and its diffusion in one part also mirrors his strong position as the scientific mentor of young scientists and post-War scholarly circles. Schmitt 1950. About Koselleck, war-experience and Carl Schmitt, see e.g. Manfred Hettling, Bernd Ulrich: *Formen der Bürgerlichkeit. Ein Gespräch mit Reinhart Koselleck* in Manfred Hettling (Hrsg.): *Bürgertum nach 1945*. Hamburg 2005.

world of technology was a common stance in academia, not because it reflected the reality more truthfully than other theories, but because it connected the worlds of the (conservative) older and younger generations of scholars.⁵¹⁵

3.7. Affections in *Rechtsbewusstsein* 1945–1968: The experiences of disorder, scarcity and dislocation

Wieacker felt, with good reason, lucky to have survived the war. After returning from a POW camp, he found his parents alive and relatively healthy. Although the family property had in large part been destroyed, Wieacker was alive and able to continue working in the field he loved. In February 1946 Wieacker wrote to Erik Wolff:

Sie ist bei mir so alltäglich und gewöhnlich wie bei allen jüngeren Leuten, die den Krieg im ganzen intakt zu überleben das Glück oder Geschick hatten; ich meine doch: das Glück in Sinne von "Chance" sich und mit sich zu ihrem Teil die Nation zu restituieren.⁵¹⁶

As his correspondence and early 1940s works demonstrate, Wieacker's earlier scientific stance was not deflected but rather sharpened due to the war experiences and Germany's defeat.⁵¹⁷ In many aspects, with respect to methodology for example, his orientation did not undergo any drastic changes. The notion that Wieacker's works from the 1950s to the 1960s are reconstructive in essence – i.e. that they sought to find and synthesize common patterns in history – is tangible in the light of his war experiences and his consequent vision of German legal culture being partly constituted on a historical misunderstanding.⁵¹⁸ However, post-1945 events also affected Wieacker's thinking and writing. During the postwar years, Wieacker's ideas on the relationship between scholarly work and the political sphere changed. In his personal adjustment process after the war Wieacker tried to understand the changing world with the help of his personal life history and in interaction with his closest friends.

Towards the end of the war, Wieacker's view on the nature of the worldwide catastrophe and the reasons which had led to such chaos began to take on an increasingly clearer form. The intoxicated and unaware masses had provided an opportunity for criminal individuals to seize power and command the nations to

⁵¹⁵ Cf. Conrad 1999, 42, 397; Moses 2007, 71–72.

⁵¹⁶ Wieacker to Erik Wolf 2.2.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. "It is about as ordinary and normal with me as for all young people who had the luck or skill to survive the war fully intact. I mean, after all, the luck in the sense of "opportunity" to reconstitute themselves and do their part to reconstitute the nation." (Translation by HW).

⁵¹⁷ Cf. Winkler 2014, 172.

⁵¹⁸ Reinhard Zimmerman, 'Foreword,' in Wieacker, *A History of Private Law* 1995, v–xiii; Rückert 1995.

war.⁵¹⁹ This fatal error in judgment did not lie solely with the common people or ‘masses.’ The false conclusions of historians who had drawn from the national past had created an atmosphere in which national development and European culture were in conflict. The incorrect belief in a national culture distinct from the wider tradition was according to Wieacker the root of the tragedy of the twentieth century. To him, Germany was possessed by a hostile national *mentality* towards any influence of European (Roman) legal culture. Pre-Enlightenment “juridical humanism” had caused a national counter-reaction, based on a false understanding of the legal tradition, and this had created a belief in a vanguard culture fighting against alien influences.⁵²⁰ Again, Wieacker was confident that explaining the historical development in a truthful manner and offering scientifically constructed arguments for fixing the nature of things, required emphasizing the consciousness, *Bewusstsein*, of the people.

Wieacker found the field of legal science, and himself as a scholar within that scientific paradigm, in a situation where the concept of *Rechtsbewusstsein* needed a twofold redefinition. Wieacker still firmly believed that there was such a thing as common awareness and a common experience of law – a cultural mentality concerning law – and legal historical studies should concentrate on that phenomenon. Yet, both the actual convictions embedded in that mentality, and the scientific elaborations presenting the development of that mentality, were in error. As a result, the German legal consciousness was plagued by an illusion of the foreign and arbitrary essence of the European legal tradition. The first part of the redefinition, to represent the historical development of the law-people-state interaction (in other words the process of emergence of the German *Rechtsbewusstsein*) in a more accurate way, was well underway during the last years of the war. The first steps had already been taken and explicated in his correspondence with both Erik Wolf and Carl Schmitt.⁵²¹ The founding textual work exhibiting that rethinking process was his article *Das römische Recht und Deutsche Rechtsbewusstsein*. In 1944 Wieacker interpreted his own stance within the field of legal sciences as contributing to the continuing struggle against the original miscomprehension of German *Rechtsbewusstsein*, and participating in a ceaseless scholarly debate concerning the history of that legal consciousness.⁵²²

The second task for Wieacker’s ontological premises, however, was set by an unexpected demand to reconsider the previous intellectual practices. After the war, the

⁵¹⁹ Wieacker to Ernst Rudolf Huber 29.3.1946: “Und wo ich solches begegne – was immerhin häufig vorkommt, denke ich mit Schrecken daran, wie wenig ich gewusst habe, wie den damals – 1933 – beiseite Gedrängten zumute war.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵²⁰ It was not that “juridical,” “second,” humanism had not affected Germany, it was that it had created a misunderstanding about the relation between the state, the people and law. Wieacker to Erik Wolf 11.4.1944. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵²¹ Cf. section 3.3 The late 1930s and war as *Erlebnis*.

⁵²² Wieacker’s presentations in conferences after the Second World War concentrated very much on themes related to *Rechtsbewusstsein*. For example, *Vom römischen Staat als Rechtsordnung* (1949) and *Ursprünge und Elemente des europäischen Rechtsbewusstseins* (1955) were both originally talks given in legal history conferences.

crimes of the Nazi regime were revealed in their full enormity, and legal scholars and the discipline of legal science had to clarify their involvement and possible participation in those crimes. On a general level, German jurisprudence had not been able to maintain a ‘sober’ relation with totalitarian ideology and administration, but it also seemed that Wieacker as an individual scholar had contributed in morally dubious fascist projects, which cast a shadow on the legitimacy of his scientific attempts to define ‘justice’ in history and society. No one could deny that as a whole the unconditional obsession with the ‘will of the people’ in the legal scientific works of the preceding twelve years had been a misjudgment. The scholars of the ‘New legal science’ strongly claimed that their intentions had been sincere and were unrelated to the destructive policy of National Socialism, but nevertheless they faced considerable pressure to further distance themselves and their scientific contributions from the legacy of the totalitarian regime.⁵²³ The consequent personal and scientific task in forthcoming scientific presentations was to redefine one’s earlier thoughts as unattached to totalitarian ideology, but at the same time to maintain some kind of connection with the arguments of earlier works. To a historian, a total displacement of one’s historical vision from preceding thoughts, principles and discourses – starting from scratch – would have been a mission impossible in any case. In this chapter I will concentrate on Wieacker’s post-war process of working through the ‘dilemma of totalitarianism’ with respect to higher education and the meaning of science in society. In other words, I will focus on the spheres of *Bildung* and *Stand*. In chapter 4 I will scrutinize how Wieacker dealt with the ontological challenges concerning his personal past and the idea of justice as a scholarly practice.

The original principle that *Rechtsbewusstsein* in Wieacker’s earlier texts had signified, was no longer adequate. The idea that a mental attribute, shared by the people and shaped by their culture, could be used in defining a rightful interpretation of positive law in accordance with social justice, had not proved to be a sustaining idea with respect to the morality of historical representations.⁵²⁴ The fundamental question was whether *Rechtsbewusstsein* could still be used as a methodological tool for the scholar in trying to make sense of the rule of law, both in the past as well as in his contemporary society. Wieacker – like many other scholars – did not want to abandon the concept, rather he adjusted it on the bases of his earlier works and personal

⁵²³ It seems that many war generation scholars were honestly surprised by the accusations made against them. Wieacker did not accept the allegations concerning, for example, Ernst Rudolf Huber and Huber’s consequent suspension from any formal teaching positions in institutes of higher education. Wieacker considered the denazification process to be a “gamble” (*Glückspiel*), and hoped that his friend could return to his work: “Im übrigen bin ich recht unglücklich, dass ich meinem Wunsch, Dich recht bald wieder an der Dir zukommenden Stelle und Rang tätig zu sehen, bei meiner geringen Qualifikation anders als mit Empfindungen und Worten nicht Ausdruck geben kann; denn was kann meine Stimme unter den heutigen Umständen gelten?” Wieacker to Ernst Rudolf Huber 25.10.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. Ernst Forsthoff perceived the denazification at the University of Heidelberg (partly led by philosopher Karl Jaspers) as “Jasperle-theater.” Meinel 2012, 304.

⁵²⁴ See section 3.4 The concept of property.

experiences. As a result, *Rechtsbewusstsein* proved to be useful not only in describing the unimaginable legal havoc of European civilization, but it also fitted very well to the explanation which Wieacker gave to the dilemma of totalitarianism. Before I analyze Wieacker's scholarly texts and the post-War use of the concept of *Rechtsbewusstsein*, I need to elaborate how Wieacker's personal experience of the people, the state and law related to the public discourse of post-war Germany, which further influenced his vision of the German legal consciousness.

Wieacker's hearing and the conclusions derived

Wieacker himself was also accused of disseminating the National Socialistic worldview. In 1946 Ludwig Schnorr von Carolsfeld, professor of civil law at the University of Erlangen charged Wieacker with advocating and propagating fascist views during the Nazi reign.⁵²⁵ Wieacker's involvement in the *Kieler Schule* and the texts published in fascist journals were also reasons enough for an official, legal processing of his relation with the totalitarian state. The allegations came to a head in the winter of 1946/1947, and Wieacker was prosecuted by the local tribunal, *Spruchkammer*, in Göttingen. As was the custom, Wieacker had to provide the board with evidence of his (sincere) motives and intentions during the Nazi regime.⁵²⁶ Several scholars delivered reports on their view of both Wieacker's involvement in National Socialist actions, and on the extent of Wieacker's assimilation of fascist doctrines. Mostly their statements emphasized Wieacker's scientific worldview, which he had not compromised in the face of totalitarianism.⁵²⁷ In addition, Fritz Pringsheim took the side of Wieacker, and defended his former student.⁵²⁸ Wieacker was judged as a 'fellow traveller', *Mitläufer*, to National Socialist crimes.⁵²⁹

⁵²⁵ "monströse Denunziationen eines leider aus dem Gleichgewicht geworfenen (Schnorr v. Carolsfeld) erstaunen [...]" Wieacker to Ernst Rudolf Huber [beantwortet 21.2.1946]. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵²⁶ Wieacker to Erik Wolf 24.4.1947: "Da ich aber jetzt durch eine (nach allgemeiner Auffassung) empörende Denunziation meines Kollegen Schnorr v. Carolsfeld in große politische Not gelangt bin[...] so bin ich, offengestanden, auch Ihrer Hilfe sehr bedürftig." NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵²⁷ The scholars included Erik Wolf, Wolfgang Künkel, Hand-Georg Gadamer, Franz Beyerle, Fritz Pringsheim and Werner Heisenberg, all to a degree Wieacker's friends. According to their statements Wieacker had been an "uncompromising opponent of the NS state" full of "hate" against the ideology which had "destroyed his spiritual world and its best values." The most tentative report came from Wolfgang Künkel, who acknowledged Wieacker's contribution to the 'New legal science' and claimed that Wieacker had "sought the favor of National Socialist students and the administration," but he [Künkel] could not judge whether Wieacker had "believed in finding a political homeland [*Heimat*] in National Socialism." Winkler 2014, 463.

⁵²⁸ Wieacker to Erik Wolf 29.5. 1947: "aber doch von Ihrer Motivierung, die meiner Erinnerung genau entsprach, für meine Argumentation der größten Nutzen gehabt. Pringsheim hatte mir ein Schriftstück gegeben, diesen Inhalt mich [...] herzlich freute." NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵²⁹ Winkler 2014, 571.

One of the charges presented in the *Spruchkammer* process dealt with Wieacker's conduct in one of the *Wissenschaftslagers* (in Todtnauberg) in 1933 and his subsequent enlisting in a National Socialist association.⁵³⁰ This allegation Wieacker saw as coming directly from Ludwig Schnorr von Carolsfeld. The original state of affairs in the camp, led by none other than Martin Heidegger, had been blurry, but in any case Wieacker had been sent home abruptly and prematurely from Todtnauberg. The core of the allegation was, however, that during the Todtnauberg camp in October 1933 Wieacker had offended the church – which had led to his expulsion from the camp – in a way that his later enlistment in the National Socialist association did not appear as a reluctant precaution, but as a natural continuum.⁵³¹ This particular instance, and the allegation, appeared important with respect to the overall decision of the *Spruchkammer*. Since leaving the University of Leipzig after the war, Wieacker did not yet have a professorship, and the future chances of a position in any German university were dependent on the *Spruchkammer* process and its decision.⁵³² Wieacker reached out to Erik Wolf, who as respected fellow at Freiburg University and as a former vice-dean of the University, had been involved in sorting out the original case at Todtnauberg in 1933.⁵³³ Wolf delivered a statement where he explained Wieacker's actions in the camp as a misunderstanding and the consequent enlistment as a necessary procedure amidst the blurry circumstances following the National Socialist coup. Both Wolf and Wieacker emphasized the responsibility of the leader and arranger of the camp, Martin Heidegger (the Rector of Freiburg University in 1933).⁵³⁴

⁵³⁰ Wieacker to Erik Wolf 24.4.1947: “es handelt sich um meinen damaligen Hinauswurf aus dem leidigen Todtnauberger Lager (Oktober 1933) und [...] einer Gliederung der Partei (NSKK) beizutreten.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.; cf. Wieacker to Ernst Rudolf Huber 25.5.1947. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.. The NSKK (Nationalsozialistisches Kraftfahrkorps) or National Socialist Motor Corps can hardly be considered a concretization of the National Socialist race war, nor was it an association close to Wieacker's heart. It is likely that joining the NSKK in 1933 truly was a precautionary move on Wieacker's behalf.

⁵³¹ Wieacker insisted that by that date (spring 1947) he was not sure why he had been expelled from Todtnausberg: (“dessen Gründe mir bis heute nicht klar sind[.]”), Wieacker to Erik Wolf 14.2.1947. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. In the light of what we now know of Heidegger's relation to the Nazi regime, it is hard to comprehend why his disciplinary actions in 1933 towards Wieacker would propose a problem with respect to Wieacker's relation to National Socialist ideology. Or why would Heidegger expel a scholar who might have taken fascism too far? It seems that Heidegger's ambiguous attitude towards Catholicism was at the heart of the original affair. He could support National Socialist doctrines, and be an outspoken atheist, but was nevertheless overtly sensitive towards any slurs against religious faith. To make things even more complicated, Heidegger was, despite his past, a very influential figure at Freiburg University in 1947. Wieacker pleaded with Wolf not to involve Heidegger too much in the clarifications concerning the inquiry on Wieacker (“Es muss möglich sein, über diesen Vorfall zu gutachten, ohne Heidegger (zu sehr) hineinzusehen, das würden Sie nicht wünschen, und ich ebensowenig.”) Wieacker to Erik Wolf 14.2.1947. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵³² “es ist wohl nur der schlechte Ruf Schnorrs, der meine als Suspension verhindert hat - so bin ich, offengestanden, auch Ihrer Hilfe sehr bedürftig.” Wieacker to Erik Wolf 24.4.1947. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵³³ Ibid.

⁵³⁴ Wieacker to Erik Wolf 11.5.1947: “Mein Entwurf für die Rechtfertigungsschrift stellen die Sache genau so dar; er betonte ausdrücklich, daß der damalige Dekan” in “Sorge für eine politische Befolgung

The effect of the 'Todtnauberg incident' in the overall judgment might have been a minor one, and in retrospect it does not stand out as the most decisive event with respect to Wieacker's relation to National Socialism. From a certain perspective, Carolsfeld's accusations were correct, and this might have been the reason for the interest the local tribunal in Göttingen showed on the event in 1947. Schnorr von Carolsfeld held Wieacker's relation towards Christianity as a proof of Wieacker's fascism, and, indeed, Wieacker had never thought highly of the church. His attitude, however, was not the same as the attitude towards religion of the SS wing of the Party, which wanted to abolish churches and set up a Hitler cult instead. Wieacker simply did not believe in the revered position of the church and the particular significance of the religious vocation in the German culture. This conviction was nevertheless one that Wieacker had to suppress during the *Spruchkammer* process. Wieacker's atheism could have been interpreted as sign of sympathy towards National Socialism.⁵³⁵ Frustrated by the process, and especially the charges of Schnorr von Carolsfeld, he wrote to Ernst Rudolf Huber:

Ich empfinde selbst das starke Bedürfnis, meine aus der blossen naiven Anschauung der Wirklichkeit hervorgegangen staatstheoretischen Aufstellungen vor Dir geordnet auszubreiten. Nur eines sei angedeutet: da ich mich dem christlich-europäischen, im Grunde iranischen Gedanken der Geschichte als Heils- und Entscheidungsgeschichte, der Welt als eines entscheidungsträchtigen, einmal anfangenden, moralischen Dramas kraft irgend eines Defekts nicht so verpflichtet weiss, bin ich im Grunde apolitisch, vopolitisch: Staat (und Kirche) haben für mich keine Transzendenz; auf jener Transzendenz aber und der Überzeugung, dass die Menschen (nicht das gleiche tun, sondern) gleicher Meinung sein sollen, beruhen aber die unablässigen Glaubenskriege und Verfolgungspsychosen der abendländischen Geschichte und ihre ideologische Vergiftung, dergleichen es in der Antike kaum in der indischen und chinesischen Welt so gut wie gar nicht gegeben hat, wenn ich recht sehe, nicht zum Nachteil ihrer Grösse in religiöser Tiefe.⁵³⁶

des durch das Lager unter anderen Umstände 'belasteten' Nachwuchskräfte nahegelegt habe usf." NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵³⁵ The sentences given in the *Spruchkammer* could be mildened because of the religious conviction of the defendant, if he was able to assure the tribunal that such a conviction had remained even during the Third Reich. See e.g. Remy 2002, 190, 193.

⁵³⁶ Wieacker to Ernst Rudolf Huber 25.5.1947. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. "I feel in myself the great need to lay out before you my state-theoretical explanations that arose from the sheerly naive contemplation of reality. I mention only one: As I feel myself, by virtue of defect, not particularly bound by the Christian-European ideas of the history of the world (fundamentally Iranian ideas, ideas of history as the history of salvation and decision) as one of a suspenseful, once incipient, moral drama, I am fundamentally apolitical, pre-political: State (and Church) have no transcendence for me. On this transcendence, however, and the conviction that the people (do not do the same, but rather) should be of the same mind are based the unrelenting religious wars and persecution psychoses of Western civilization and its ideological poisoning. This was virtually

To Wieacker, most people were driven by beliefs and superstition, of which ideologies and religions for most part came. There were, however, some spheres which were less contaminated by the “belief psychosis” and “witch hunts.” Such islands were cultures of antiquity (Rome) and law. Since Wieacker had devoted himself to a lifelong learning of these entities, he argued that his textual contributions were not associated with the contemporary world of “politics.”⁵³⁷ The letter also confirms that after the war Wieacker maintained his view on the irrational nature of history. That position reflects largely the apology his peers upheld when explaining their relation to National Socialism.

Bildung and Stand in the social reality of the Federal Republic

The constant underlying feeling that Wieacker possessed during the post-war years was that of a lack of justice.⁵³⁸ Partly this was due to the prosecution of Wieacker and his friends and the disarray brought about the denazification process. More broadly it originated from the subjugated position of the scholars and lawyer class within society. Like Wieacker many scholars had been forced to leave their homes and working places and, finding support only from other scholars, were obliged to search for a new home and circle of colleagues in some other part of the country. The status of the universities within the national cultures became concretized in the living and working conditions of scholars.⁵³⁹ Thus, when the ‘army of the homeless learned’ desperately tried to find a new place to continue their careers, it appeared to Wieacker as if the millennia-long foundations of the European culture had been shattered.⁵⁴⁰ Since in the German culture legal scholars had traditionally been privileged a self-sufficient position between the state and the law, the relative (and concrete) alterations in the practice of legal scholarship seemed like interventions in the binding norms of the society. It is noteworthy that during the Nazi years Wieacker did not feel as if the building blocks

non-existent in ancient times [and] in the Indian and Chinese worlds, which was no disadvantage to their extent of religious depth, if my interpretation is correct.” (Translation by HW).

⁵³⁷ Wieacker considered both Schnorr von Carolsfeld and Heidegger’s intentions to be political as opposed to his own actions. He always thought of himself as being ‘apolitical’: “Ich bin zu wenig politisch und zu sehr Mystiker, um daneben auch noch Sonne und Mond, Himmel und Erde, Musik und unvergängliches Wort, endlich den unausschöpfbaren Reichtum alles ewigen Menschentums gehen zu lassen [...]” Wieacker to Ernst Rudolf Huber [beantwortet 21.2.1946]. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵³⁸ Wieacker to Erik Wolf 14.3.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵³⁹ Wieacker to Erik Wolf 2.2.1946: “dem unseligen Heer heimatloser Gelehrter, dem ich sonst noch mehr Platz wegnehmen würde, ohne das mindeste Anrecht darauf zu haben durch vorherige Leiden oder Zurücksetzung oder vielmehr, wesentlicher gesehen, durch eine vorbildlich unkonziliante, die Maßstäbe laut ins Rechte setzende Haltung.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. See also Wieacker to Ernst Rudolf Huber 25.5.47: “Es ist ein sehr typischer Vergang, der Dir einen Eindruck von den Freuden des heutigen Noch-im-Amte-Seins vermitteln mag.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵⁴⁰ Wieacker to Erik Wolf 2.2.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

of society and the cultural way of life had been threatened, but in the post-war scarcity he saw the destruction of European culture.⁵⁴¹

It has to be acknowledged that the ‘experience-world’ of the scholars was a narrow one. For example, to Wieacker the sad material conditions following Germany’s defeat and the most blatant symptoms of injustice were those relating to higher education and the treatment of scholars, *Bildung* and *Stand*. Thus in January of 1947 he wrote to Rudolf Smend, who had offered to Wieacker and several former members of the *Kieler Schule* a working place at the University of Göttingen, as follows:

Dafür aber fühle ich mich zu lebhaftem Dank aufgerufen, für die grosse Güte, mit der Sie als Rektor die Angliederung der Exulanten an dieser Hochschule möglich gemacht haben, und mit der Sie dem Geist den Zutritt zur Akademie geöffnet haben.⁵⁴²

“Exulanten,” to which in his letter Wieacker equates himself, and for example Wolfgang Siebert and Karl Michaelis, were Protestant expatriates of the 16th and 18th century who had to leave their homeland due to cruel religious persecution. From the perspective of the twenty-first century it is difficult to see the fate of the post-war legal scholars as tragic, as like refugees who had to flee for their lives due to their religious convictions, nor see the question of the ‘spiritual well-being’ of the nation depending on whether the legally trained found suitable places of work. That was, however, the experience of the learned themselves in the years following the end of the Second World War. Their inexorable conviction was that the ‘just order’ of society depended on the status which society gave to legal science and to scientists. When legal scholars had to renounce their traditional right to interdisciplinary self-definition with respect to society and the state, to give up their self-proclaimed entitlement to announce the current form of social justice, it appeared as if the *authority of law* had been degraded and the *Geist* of the nation lost.

The chaotic times were concretized in the threat which Bolshevism constituted to the value base of the German nation. The hazard was a real one since the Soviet Union and German communists announced an explicit intention to overrule the social order of Germany. Indeed, the changes which were carried out in Soviet East Germany – and which socialists in the West supported – already aimed at removing of the bourgeoisie, and at transforming the institutions of formal education to produce workers in the service of the state. Communism was being interpreted as the absolute

⁵⁴¹ Huber 29.3.1946: “Die besonders hervortretenden menschlichen Ausfallserscheinungen sind ein Symptom dieses Zustandes, die Summe menschlicher Gemeinheit ist wohl immer ziemlich gleich gross oder klein; aber sie wird in solchen disorganisierten Zeiten viel sichtbarer als sonst.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵⁴² Wieacker to Rudolf Smend 14.1.1947. NL Rudolf Smend: Allgemeine Korrespondenz. Cod. Ms. R.Smend A 960. Niedersächsische Staats- und Universitätsbibliothek, Göttingen. “Therefore I feel moved to express my most earnest gratitude for the great kindness, with which you as university president have made possible the incorporation of exiles into this university, and with which you have given the spirit access to academia.” (Translation by HW).

dissolution of Western culture, as the extreme opposite to the appreciation of law (legal science), and as an irreversible alteration to the national tradition.⁵⁴³ Conversely, the last fortress of hierarchies which comprised the European cultural heritage, the *Geist* and free creativity, was to be found in academia. In his letter to Erik Wolf of 14 March 1946 Franz Wieacker wrote about the “red alienation” of Leipzig University and the eastern provinces of Germany.⁵⁴⁴ In addition, and in congruence with conservative narrative of the time, he compared the “inhuman” development of the east on the disaster of the Nazi regime.

Hier [in Göttingen] sind natürlich die Dinge durch starken Willen zur Geistigkeit und große Erschöpfung nicht so deutlich sichtbar, aber wie würde man sich freuen, wenn man hier eine wirkliche Reorganisation der alten Werke erkannte. Aber leider viele Eigenschaften, die man selbst bis zum großen Krach den Nationalsozialisten allein zuschrieb; Intoleranz, Egoismus, Kriecherei, rechthaberisches Dogmatisieren, Unterdrücken wollen, Kriegs-geist, [...]; Träger das Feld geräumt zu haben scheinen.⁵⁴⁵

In the letter Wieacker sees the communist restrictions on academic life and the “scholarly spirit” of West German universities as opposites in the larger picture of the fate of European culture.⁵⁴⁶ The communist assault on higher education was true totalitarianism, and as such a direct heir of National Socialism and all the expressions of ‘modernization’ which preceded it. The rise of these totalitarianisms was not a sudden phenomenon. The process of alienation had started long before, when the common value-base and connection to reality had fallen apart in ‘technicalization’ and modernization, which represented the opposite force to the values associated with ‘humanity,’ or *Bildung*.⁵⁴⁷ Thus, along with the communist threat and its intention to

⁵⁴³ Cf. section 3.6 Culture in *Rechtsbewusstsein* 1945–1968: Explaining ‘Point Zero,’ the defensive battle of the German academia.

⁵⁴⁴ Wieacker to Erik Wolf 14.3.1946. See also: “Die Umwandlung dieser (etwa vor allem in der philosophischen Fakultät) so vortrefflichen Universität in eine Arbeitervolkshochschule (was ja ganz sinnreich sein könnte) hat sich in Formen vollzogen, die für lange Zeit jeden ‘Wiederaufbau’ unmöglich machen.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵⁴⁵ Wieacker to Erik Wolf 14.3.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “Here [in Göttingen] things are naturally not so clearly apparent due to a strong desire for intellectualism and great exhaustion, but how happy one would be if one perceived a real reorganization of the old works. Unfortunately, however, several properties that were ascribed to the Nazis alone, even up to the great fight; intolerance, egoism, sycophancy, self-opinionated dogmatization, the desire to oppress, a war-mongering spirit [...]; The authorities seem to have cleared away the field.” (Translation by HW).

⁵⁴⁶ Wieacker to Erik Wolf 14.3.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵⁴⁷ Wieacker cynically stated that it was too late to strip modern society of its aberrations, and distortions as old as the industrial revolution were to be resolved only if “diese Auflösung wäre einmal möglich durch eine Selbstzerstörung der technischen Welt, sodaß nur mehr Ackerbauer, Hirten und Jäger überleben.” Wieacker to Ernst Rudolf Huber 14.6.1946. See also Wieacker to Ernst Rudolf Huber 29.3.1946: “die Zerstörung des politischen Welt (seit langer Zeit).” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

rearrange the traditional order of academia, the German community was overwhelmed and oppressed by sentiments which deprived them of their affection towards culture and tradition, the key attributes in pursuing social justice.⁵⁴⁸ And conversely, actions stemming from the destructive emotions of hate and revenge were incapable of rebuilding a just society.

To Wieacker in 1946, the force that threatened social justice, and spread values opposite to the virtues of *Bildung*, was that of “barbarians.”⁵⁴⁹ The natural contrast to the barbarian worldview was the culture appreciated by himself and his group of friends. Scholars faced barbarism from many directions and in many forms. The hypocritical attitude of the victors, in bemoaning the depths of National Socialist totalitarianism, was not only “gullible” but also in part “barbaric.”⁵⁵⁰ It was as if the nature of war had surprised the Western world. The attempts to rearrange higher education on the basis of a alien political ideology seemed to Wieacker a “brutal crime,” ignoring both the cultural heritage and the affective attitude which scholars had for their work as torchbearers of tradition.⁵⁵¹ The most acute and explicit features of “barbarism” were, however, the demands on behalf of the political realm for scholars to back up the newly-drawn constellation of society. Wieacker wrote to Huber:

Ich finde, es ist nicht meine (oder unsere) Aufgabe, weiter mit Abtragen und Zerstören zu helfen, damit ein neuer Himmel und eine neue Erde entsteht. Wir jedenfalls handeln gegen unsere Kultur, wenn wir die frischen zukunftsfrächtigen Barbaren mitziehen wollen.⁵⁵²

Whereas the “brutal” attacks on the core of the legal tradition of the continent were observable in all areas of contemporary society, “free will” and the “willpower” of history prevailed in the circle of scholars, most notably in the group of his friends and

⁵⁴⁸ Wieacker to Erik Wolf 14.3.1946: the tendency to dismantle the tradition of higher education as embedded in the Humboldtian ideal of the university was “gegen die wissenschaftliche Ausbildung, die wir in Sacksen in den letzten Jahren mit allen zugrundeliegenden Instinkten mehr als lieb kennen lernten.” Cf. Wieacker to Erik Wolf 2.2.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵⁴⁹ Wieacker to Ernst Rudolf Huber 14.6.1946; and Wieacker to Ernst Rudolf Huber 29.3.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz; Wieacker to Erik Wolf 14.3.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau; Wieacker to Gerhard Dulkeit 25.12.1948, NL Gerhard Dulkeit, Nachlass Cod. Ms. Dulkeit 5, Niedersächsische Staats- und Universitätsbibliothek, Göttingen.

⁵⁵⁰ Wieacker to Ernst Rudolf Huber 29.3.1946: “[A]ber die [gutgläubigen und barbarischen] haben ja doch kein Urteil, und keinen Wissen zum Urteil.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵⁵¹ Wieacker to Erik Wolf 14.3.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵⁵² Wieacker to Ernst Rudolf Huber 14.6.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. „I find that it is not my (or our) task to further help with removal and destruction so that a new heaven and earth may emerge. At any rate, we take action against our culture if we want to go along with the promising barbarians.“ (Translation by HW).

their mentality.⁵⁵³ Although the sad conditions of the time, in the form of negative sentiments, extended to the *Stand* of lawyers, and the outer pressure caused a “wave of persecution” inside the “estate,” it nevertheless constituted a constellation which carried on the “spirit of the tradition” and which was able to rebuild the cultural foundations of society. Wieacker wrote to Huber:

Und ferner: die Woge der Abneigung und Verfolgung innerhalb des Standes sollte man nicht überschätzen, denn jeder ist ja viel zu sehr mit sich selbst beschäftigt und noch den unmittelbarsten Daseinsnöten, um sehr viel Zeit für Ressentiments zu haben.⁵⁵⁴

The shady years of legal science during the Nazi regime had not eradicated Wieacker’s unquestioning conviction of the distinguished moral skill brought by legal historical knowledge and the common culture of scholars. Wieacker was confident that he and his friends had the gift of speaking on behalf of and utilizing the “spirit of tradition.”⁵⁵⁵ This capability sprang from their learnedness, their assimilation of past wisdom and their knowledge of the past generation of legal thinkers. Amidst the total destruction and the following widespread scarcity, scholars could evaluate and weigh the importance of things, and give advice on the emphasis of the reconstruction. It was only scholars who had a larger understanding of the causes and consequences of the “collapse.”

aber der totale Umfang der Zerstörung sowie die Abwesenheit aller sichtbaren Mittel zur Rettung ist nicht zu leugnen – was wohl nur wir mit dem traurigen Klarblick des Besiegten richtig genug sehen können.⁵⁵⁶

The consequent scholarly task, which Wieacker assigned to himself, was the one of teaching and writing history. The rebuilding of the German and European *Rechtsbewusstsein* had to be left to experts on justice, namely legal scholars. Since intervening with anything that had to do with politics was out of the question, the

⁵⁵³ Wieacker to Ernst Rudolf Huber 14.6.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵⁵⁴ Wieacker to Ernst Rudolf Huber 29.3.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. “And furthermore, the waves of reluctance and persecution within the estate ought not to be overestimated, because each is much too involved with itself and its most immediate needs to merit much time for disapproval.” (Translation by HW).

⁵⁵⁵ Wieacker to Walther Schönfeld 3.3.1958: in memory of Walther Schönfeld Wieacker wrote to Schönfeld’s widow: “mit ihm wird sich stets eine Leistung verbinden, an der Glaube und Herzblut gesetzt worden war und die darum nicht vergessen werden können. So gesellt sich zu der Trauer auch Ehrfurcht und der Trost eines durchaus menschenwürdigen Lebens in der Würde des Geistes und der Liebe zum Geist.” NL Walther Schönfeld, Bestand 645, UAT, Tübingen.

⁵⁵⁶ Wieacker to Ernst Rudolf Huber 29.3.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. “but the total area of destruction as well as the absence of all apparent means of rescue is not to be denied, which only we can certainly see accurately enough only with the depressing insight of the vanquished.” (Translation by HW).

rebuilding had to be conducted in the spheres of education and legal historiography.⁵⁵⁷ Not only was the educational assignment noble and meaningful from the point of view of the nation, Wieacker was also genuinely worried about the actual living conditions of students. In general he was concerned about the direction in which young people – who had grown up in a totalitarian society – were able to take the country.

Traurig und rührend ist die Ratlosigkeit der jungen Leute; denn die Zeit, in der sie aufwuchsen, hat ihnen ja auch bis auf wenige Dauer güst der Lage oder eigene Kraft begünstigte die Organe zum Urteilen genommen, mit dem sie auf neue Wege kommen könnten.⁵⁵⁸

It was the duty of scholars to educate the younger generation capable of making and willing to make righteous judgments in reconstructing the society.⁵⁵⁹ Since students, in National Socialist state, had been trained to follow, not to criticize, the first task of teaching was to convince students that an ability to carry out critical evaluations was essential for a prosperous future for both themselves and their nation. Only then could teachers provide students with the means to decide and evaluate. To Wieacker the purpose of higher legal education was to introduce students to the rich world of legal tradition, with all its exemplary virtues and “love for the spirit.” Such knowledge would “emancipate” and cultivate “free will,” which on their part would produce practical solutions for the problems plaguing the “inhuman” contemporary society. Analytical thinking and jurisprudential skill necessitated the awareness and assimilation of tradition. Thus, the process of reconstruction, to which Wieacker devoted himself, and which he hoped students would continue, was to rebuild the cultural (i.e. legal historical) premises of Europe.

It was in the attitudes towards the European legal heritage where the juxtaposition between the “inhuman spirit” of the time and the values appreciated by Wieacker (and his colleagues) became most apparent. The war had cut the original cultural bond between the Western cultures, whose rebuilding was increasingly vital in the face of the dark prospects for Europe. Europe was in a state of division, but more sadly, faced the danger of being “united” through mere power politics. Wieacker’s Europe was a “historical ideal” that had to be reconstructed taking into consideration its wider

⁵⁵⁷ Wieacker to Ernst Rudolf Huber 14.6.1946: “Halte ich noch den Erfahrungen mit Partei und Parteien Generalstab, Beamtentum, ‘Wirtschaft’ nicht mehr für möglich [...] Das Geheimnis ist, daß der moderne Staat nicht einmal der Idee noch mehr von den Besten verwaltet wird.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. Emphasis original.

⁵⁵⁸ Wieacker to Erik Wolf 14.3.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “Sad and touching is the helplessness of the young people, because the period in which they grew up has, save for a short period, [] favored by the situation or their own virtue, deprived them of the organs of discernment with which they could find new directions.” (Translation by HW).

⁵⁵⁹ Wieacker to Erik Wolf 14.3.1946: “Wir haben die große Vorgabe, unsere berufliche Aufgabe zu kennen, und sie sogar bei allen äußeren Hemmnissen f[...]gen (freilassen) zu können.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

meaning.⁵⁶⁰ The significance of ‘Europe’ in Wieacker’s correspondence was on account of its peculiar existence both in the past and concurrently in the present. To Wieacker, the foundations of the great past legal cultures resided in their acknowledgment of the *authority* of law.⁵⁶¹ On the other hand, that exact feature was a thing that contemporary Germany and Europe lacked.⁵⁶² Thus, in order to rise again, Germany (and Europe) needed to learn from the past the means and virtues which enabled the restoration of the authority of law and legal science.

Wieacker hoped for the Europe that had once existed in history, “A united Europe on a co-operative basis.”⁵⁶³ Such a Europe would not be one built on nations. Contrary to Ernst Rudolf Huber’s ideas Wieacker rejected the priority of the state and asserted that Europe was built on legal tradition. The state had done what it had to do. Now was the time to build on law:

Daher gebe ich Dir Recht, wenn Du den Staat (noch nicht eine überstaatliche Organisation) als den Bürgen von Kultur, Gerechtigkeit und Humanität noch nicht preisgeben willst. Im ganzen freilich glaube ich, daß der Staat für diese Kultur seine Rolle ausgespielt hat, und daß es erst wieder einer Auflösung dieser ganz verhärteten und versteinerten Machtgebildes bedarf [...]⁵⁶⁴

But the aim of law becoming the “fortress of culture, justice and humanity” in contemporary society, necessitated a subject who would bring about the triumph of law. In order to understand the law one needed to be aware of the European tradition, and furthermore, in order to conduct a successful interpretation of tradition one had to have an education conducted along classic lines. The solution lay in the style of one’s legal thinking, and in this an example was already available in European legal history. The essence of the European tradition could be found in the style of thinking

⁵⁶⁰ Wieacker to Ernst Rudolf Huber 14.6.1946: “Allein, nicht nur aus Egoismus und Haß kommt es nicht zu einer solchen Konzeption, sondern weil ja Europa geteilt ist und die Entscheidung, wem es zufällt, vielleicht noch offen liegt. Und ist diese Entscheidung gefallen, dann wird es wieder keine europäische Macht sein, die Europa organisiert. Sie wird Europa also ähnlich ‘befreien’ und ‘einigen’ wie die Mazedonier Philipp und Alexander und die Diadochen das unselige Griechenland zwischen 346 und 146.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵⁶¹ Cf. Wieacker to Hans–Georg Gadamer 14.7.1965, Nachlass Hans–Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar.

⁵⁶² Wieacker to Erik Wolf 2.2.1946. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁵⁶³ Wieacker to Ernst Rudolf Huber 14.6.1946: “ein vereinigt Europa auf genossenschaftliche Basis.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵⁶⁴ Wieacker to Ernst Rudolf Huber 14.6.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. Already during the war Wieacker had been suspicious of the argument that the state was the original expression of the people’s will (the Schmittian idea of the *gemeinwillen*). He thought that *Rechtsidee* was at least as old as *Reichsbewusstsein*. See Wieacker to Erik Wolf 11.4.1944. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “Therefore I give you law, if you do not yet wish to give up the state (not yet a supranational organization) as the guarantor of culture, justice and humanity. On the whole I believe, of course, that the state has played out its role for this culture, and that a dissolution of this whole hardened and petrified power entity is required [...] (Translation by HW).“

developed by classic Roman law.⁵⁶⁵ The spiritual ability associated with Roman jurisprudence had brought about positive legal achievements in European history, but it had also provided a lasting model according to which lawyers should be trained. Moreover, the style of thinking of past cultural heroes was “European,” and by this means the looming catastrophe could be evaded and a more civilized Europe achieved. In concrete terms one needed to study the history of legal thinkers, especially those who mastered Roman law, not just its texts, but the minds behind the representations. The idea was to become like them on the level of thought. This assimilation of legal tradition – first and originally obtained by the Late Republican lawyers in Rome – would allow the modern legal scholar to teach and cultivate a *Stand* competent enough to steer the common legal consciousness of the nation (and Europe) in a healthy direction. Only in connection to the wisdom of this tradition could lawyers as an “estate” cultivate their own legal capability – a mental ability to make value judgments – in practice. This would bring justice into social reality, and restore the authority of law in the legal consciousness of the people. Wieacker stated:

Vielmehr enthält auch die nun zur Rüste gegangene große Kultur somit einige Elemente, daß wir der Zukunft am besten dienen, indem wir das Vergangene bewahren und verkünden. Die Männer des späten Altertums, die vollkommen bewußt das Alte sammelten, verengten und bewahrten, konnten auch nicht wissen, wofür und es hat sich doch seit dem Hochmittelalter und später herrlich gelohnt, sobald einmal die einst barbarischen Zöglinge zur Ehrfurcht reif wurden. Auf die geschichtlichen Abläufe zu wirken, hat keinen Sinn mehr, wenn sich der empirische Geschichtsablauf zu neuer Folge von Katastrophen zersetzt hat. Außerhalb dieser “Geschichte” liegen also die Kategorien unserer künftigen Arbeitsfelder des kleinsten und des größten Tuns, das “Nächste” d.h. der nur in den konkreten Bezügen Anvertraute und auf uns Angewiesene und “die Menschen” sollten der Gegenstand unseres Tuns und Denkens sein.⁵⁶⁶

⁵⁶⁵ Cf. section 3.5 *Das römische Recht und das deutsche Rechtsbewusstsein* (1944): The historicization of the relation between mentality and law.

⁵⁶⁶ Wieacker to Ernst Rudolf Huber 14.6.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. (Emphasis original). “Indeed the greater culture that is now ending contains, therefore, some elements that we best use to serve the future, whereby we will save and proclaim it. The men of late antiquity who collected, constricted and kept the old traditions in full conscience, could not also know why they did so, and it was nevertheless marvelously worthwhile after the High Middle Ages and later, as soon as the formerly barbaric pupils became ripe for reverence. To have an effect on the historical sequence of events no longer makes sense, if the empirical course of history has corroded to a new series of catastrophes. Outside these “Histories” lie the categories of our future fields of work of the smallest and greatest activities that “the next ones” should be the object of our activities and thoughts, i.e. those entrusted in tangible remuneration, those dependent upon us and “the People.”” (Translation by HW). Here Wieacker refers to Goethe (“*die Menschen sollten den Gegenstand unseres Tuns und Denkens sein*”), but emphasizes the definite article *die*. Thus, instead of learning of and from the common people of the past, he bent the slogan to signify the ‘learned’ of the past.

A scholar's duty was to educate, to rebuild the tradition, to find again the untainted core of jurisprudence, and, in order to succeed, study the legal thinkers of the past. In this way, the learned would again be able to educate the "barbarian youth ripe for reverence" like their historical models in Late Antiquity. To reconstruct the European cultural whole, to rebuild and prevent a disaster occurring again, meant studying the tradition of law with the style of thinking contained in Roman law. According to Wieacker, the metaphorical comparison of himself and Huber to the Glossators was apt also with respect to the aim of their historical works. The Glossators were unable to foresee the fruits of their work, but focused on "guarding" the tradition. Accordingly, the contemporary historiography should not be a report on the levels of guilt, or concentrate on the faults of the recent past, but instead "history" should constitute a support for the larger goals of inner "emancipation" and "freedom." The shadow of the totalitarian past affected all attempts at interpreting recent developments. In order to produce "mature" and "spiritual" results one had to go further, to the cultural heritage of antiquity, and concentrate on the minds of the great thinkers.⁵⁶⁷ To learn from history meant to *be like the learned ones in history*, those who had guarded and applied the tradition. This future-oriented learning from the past, identifying with the thinking of the tradition, or in other words, the merging of tradition and a personal experience of the law, was at the heart of Wieacker's view on legal history and jurisprudence.⁵⁶⁸

The shift in purpose of the scholarly work (or rather a return to origins) also meant the abandonment of 'politics' as they had appeared in the modern world.⁵⁶⁹ The key for both a sound basis for future jurisprudence, and a meaning for one's personal attempts to study history, was to be found in the healthy core of tradition. Along the lines of the classical understanding of *Bildung*, the process of learning from the past was not only socially moral but also a path for personal perfection. Like the *Bildungsbürgertum* in the Weimar Republic, Wieacker wanted to return to a world where all the disturbing elements of 'modernization' had not yet appeared. The challenges had changed, ideals had not.

In the scientific level of Wieacker's texts this 'process of maturation' appeared as a change in the concept of *Rechtsbewusstsein*. To merely identify the sense of justice with a vaguely defined group of people, as in the *Rechtsbewusstsein* of Savigny or 'legal renewal,' ignored the human tendency to slide into irrationality and mass psychosis. To express the skill of interpreting the norms through a personal sense of *Rechtsgefühl* (as Jhering had), could not take into account the distinguishing force of the *correct* kind of *Bildung*. Some senses of justice were more accurate and directed more towards a sophisticated cultivation of the mind than others. During the late years

⁵⁶⁷ Wieacker to Ernst Rudolf Huber 14.6.1946: "Freiheit" "Freilassung." Also "Auf die geschichtlichen Abläufe zu wirken, hat keinen Sinn mehr". NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵⁶⁸ Avenarius 2010.

⁵⁶⁹ Cf. fn 558.

of war, Wieacker realized that the exceptional legal ability, inevitable in creating ethically sustainable laws, conducting justified judgments and reading the contemporary legal system as a part of the long line of European legal tradition, could exist only in relation to a proper context. This context was the common legal mentality prevailing in a given time and society. Thus, in Wieacker post-war texts, *Rechtsbewusstsein* became as the context of the true distinguished legal ability. This legal ability Wieacker started to call explicitly as ‘legal conscience’, *Rechtsgewissen*. In order to preserve its authority the ‘legal conscience’ had to be aware of the development of *Rechtsbewusstsein* – the two had to be related but nevertheless distinct from each other. Now, in post-war Germany, however, the common understanding of the rule of law or legal consciousness – *Rechtsbewusstsein* – was characterized as a battlefield between a sober understanding of law and justice, which the experts represented, and a constant attraction of sliding into beliefs, degeneration and superstition. Or at least that was how Franz Wieacker saw the development. Due to the disarray of the context (*Rechtsbewusstsein*) the distinguished legal ability (*Rechtsgewissen*) was lost in Federal Republic.

This ‘maturation’ – a conceptual change in Franz Wieacker’s scholarly works – was based on the experience of the contemporary social tragedy. If it had not been for the rethinking process that Wieacker had to go through, the transformation of his historical vision might have been different or not as sharp. Wieacker found congruence and proof for his ontological view of legal historical meaning from the everyday acts and ideas of the post-war “anarchical years” of the Federal Republic.⁵⁷⁰ To conceptualize this phenomenon along the theoretical frame of my thesis, Wieacker’s experiences of the post-war years, produced a changed understanding of the social reality. When applied to the writing process, it became a *historical* vision, an ontological stance on the meaning and direction of history. It was not that Wieacker was disappointed about the binding mentality of his own in-group (the scholars of the *Kieler Schule*), or found that it was constructed on biased principles. It was the behavior of other scholars, the alleged lack of justice in occupied Germany, and the irrationality of the common people that drove him to conceptualize the domain of the common understanding of the rule of law in a new way.

Wieacker’s research premises expressed themselves and became intertwined with the entities of higher education, scholarly work and Germany’s relation to the European tradition, in other words in the themes of *Bildung* and *Stand*. Wieacker drafted his attitude on the basis of his previous experiences, which were referred to contemporary events. Thus this set of prejudices (or *Vorurteil* as Wieacker called it, and not in a negative sense of the word)⁵⁷¹ enabled Wieacker to categorize the constantly changing

⁵⁷⁰ Wieacker to Ernst Rudolf Huber [beantwortet 21.2.1946]: “Geht es aus dieser Katastrophe nicht unablässig in dauernde Anarchie hinein, so wird sich auch bald ein Platz zeigen, an dem jeder von uns w[...]en kann.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁵⁷¹ NL Franz Wieacker. Cod. Ms. F. Wieacker, D1. Niedersächsische Staats- und Universitätsbibliothek, Göttingen.

political and social reality of the Federal Republic, but it also had an effect on his scientific works, were he interpreted historical sources through this ontological view of the world. This conviction of the ambiguous nature of *Rechtsbewusstsein* amidst changing historical circumstances, overshadowed his works during the immediate years following the end of the war. The relation between the one reading the tradition and the *true* meaning of that tradition remained, at this stage, an unresolved question. I will deal with this topic in more detail in chapter 4. In the next section I elaborate how this conceptual tool, legal consciousness, appeared in Wieacker's works in relation to the legal history and destiny of Europe.

3.8. *Vulgarismus und Klassizismus* (1955): *Rechtsbewusstsein* and the collapsed legal order

In *Vulgarismus und Klassizismus* Wieacker's explicit attempt was to methodologically review the study of vulgar and Byzantine law. By vulgar law scholars have meant the diverse Occidental laws, which emerged after the collapse of the Roman Empire. Previously (according to Wieacker) the emphasis had been on the breach between the classic law of the Empire as well as on the "outer" influences of Greek and Germanic cultures. To Wieacker these elaborations remained one-sided since they did not take into account the larger conditions, cultural and sociological events which occurred during the "vulgarization" of the classic Roman law. Just as modern law was being studied as part of society, the historical analysis of vulgar and Byzantine law should be a holistic endeavor to understand the entirety of past phenomena and all the aspects this involved. In particular, previous research had undermined the psychological sides which the process of "vulgarization" contained.⁵⁷²

Again Wieacker's view was 'material' in the sense that he intended to scrutinize the living conditions of past people and then derive the mental states the change in those conditions caused. This "affective change" affected the law.⁵⁷³ Wieacker's research task was bold, namely to study historical changes behind the normative system of law while concentrating on language, interpretation and education as they were expressed and appeared in legal sources. As "previous accounts" Wieacker first discussed the

⁵⁷² See e.g. Wieacker, *Vulgarismus und Klassizismus* 1955, 10: "In der rechtsgeschichte die psychologische Durchsetzungs- und Verwirklichungschance der hauptstädtischen Jurisprudenz und selbst des späteren Kaiserrechts leicht überschätze." 24: "der Gesetzgebung als auf rechtspsychologischen Vorgängen beruhen," and 20: "Auch die kennzeichnenden Stilmittel und Ausdrucksformen vulgärer Rechtsvorstellung lassen sich aus den gruppenpsychologischen Vorgängen ableiten, die sich aus der Spaltung einer Kulturegesellschaft ergeben."

⁵⁷³ Wieacker, *Vulgarismus und Klassizismus* 1955, 22: "Die affektive Wahrnehmungsweise der vulgären Wirklichkeitsempfindung."

studies of Heinrich Brunner and Ludwig Mitteis,⁵⁷⁴ although he based his main argument primarily on the works of Ernst Levy, Fritz Schulz and Fritz Pringsheim.⁵⁷⁵

In the text of *Vulgarismus und Klassizismus* the comparison between his own ideas and the preceding ones is marked by a recognition of the merits and virtues of the previous contributions. In 1949 when Wieacker started to concentrate on post-classical Roman law, his attitude was quite different. Schulz's stance in particular was evaluated using categories familiar from Wieacker's wartime writings. In the draft of his article, Wieacker labeled Schulz's premises as "formalistic and materialistic."⁵⁷⁶ Thus, the results Schulz (and his disciples) drew from their analysis of legal historical phenomena, were inevitably contaminated by their 'materialistic' view on the relation between law and society. Since Schulz was not a legal positivist, by 'materialistic' Wieacker meant the (alleged) contemporary political bias of Schulz's writings. According to Wieacker, Schulz quite explicitly used historical meaning (reconstructed from historical, textual sources) to argue on behalf or against a contemporary political tendency.⁵⁷⁷ In one way or another this was the way in which Wieacker (like every other historian) weighed the significance of a given historical "fact," but Schulz had clearly argued on behalf of the "old legal scholarship" and against the 'New legal science.' Wieacker considered Schulz's compositions biased as a whole. To Wieacker, although Schulz was a skilled historian and researcher, the interpretation of past events was overshadowed by his opinions, which were constructed from the bases of the present social and political situation.

Wieacker thought he saw in Schulz's works the dogmatic tendency against which the 'New legal science' had fought; the attachment to liberal and abstract legal theories which penetrated the conclusions of the historian. To understand law as "close to life itself" and as an "awareness" brought about by real engagement with society, were solid heuristic innovations, which Wieacker had realized during the previous decades, and which he saw as lacking in Schulz's attempts to elaborate European legal past. So although the tone of Wieacker's rhetoric was more moderate in *Vulgarismus und Klassizismus*, and he did not explicitly challenge Schulz's results, *Vulgarismus und Klassizismus* is not only a continuation of Wieacker's own construction of the long line of European legal history, but also another argument against the 'materialistic' view of legal history. The text exhibits Wieacker's fundamental distinction between the 'material' study of legal history and 'materialistic' presentations of the past. In 'material' research orientation a scholar takes into account the wide spectrum of possibly involved variables effecting on the object of his study,⁵⁷⁸ 'materialistic'

⁵⁷⁴ Wieacker, 'Vulgarismus und Klassizismus' 1955, 7.

⁵⁷⁵ See e.g. Wieacker, *Vulgarismus und Klassizismus* 1955, 7 fn. 2, 9 fn. 12, and 24–25.

⁵⁷⁶ NLFranz Wieacker. Cod. Ms. F. Wieacker, D1. Niedersächsische Staats- und Universitätsbibliothek, Göttingen.

⁵⁷⁷ Wolfgang Ernst, 'Fritz Schulz (1879-1957),' in Jack Beatson & Reinhard Zimmermann (ed.), *Jurists Uprooted: German-speaking Emigré Lawyers in Twentieth-century Britain*. Oxford, Oxford UP 2004, 105–203.

⁵⁷⁸ Wieacker, *Vulgarismus und Klassizismus* 1955, 12.

orientation is the way of *writing* history, in which the purpose to which a legal historical argument is put is more important than the process of understanding the past.⁵⁷⁹

In *Vulgarismus und Klassizismus* Wieacker on the one hand wants to show the continuity between legal cultures within Europe, on the other he argues against the paradigm of acknowledging the “scientific” (*Wissenschaftlich*) legal system of the Eastern Roman empire as the heir and successor of Roman jurisprudence.⁵⁸⁰ Especially in analyzing the vulgar law of Western Europe, Wieacker uses *Rechtsbewusstsein* as a conceptual tool in scrutinizing the change in legal reality which appeared in Europe after the third century AD. In comparison to Wieacker’s preceding works, the concept has been further developed, and it distinctively emphasizes the tension between the irrational and rational aspects involved in legal worldviews. In addition, Wieacker applies his idea of Reception, which he has now enlarged into a universal model to explain interaction between different legal cultures.

The following analysis of Wieacker’s article concentrates on three traits within it, which, I argue, express the sustaining elements in his legal historical works, namely the process of interpreting history according to one’s personal life history and previous key experiences. Such traits are (i) the existence of a distinguished lawyer *Stand* within Roman society – emblematic of the Roman view of world – as a structure which safeguarded the overall ethicalness of society; (ii) the idea of a latent irrationality affecting all legal cultures; and finally (iii) *Bildung* as a spiritual asset and a concrete structure in legal reality, which maintained the wisdom of past cultures, and especially that of Roman jurisprudence.

Wieacker acknowledges the difficulty in defining the essence of ‘vulgarization,’ and the diverse ways in which the shift from Classical Roman law to post-Classical jurisprudence had been conceptualized.⁵⁸¹ Was it mainly a phenomenon of style, administration or rhetoric? Was it degeneration, Germanification, or should one talk about unique legal cultures of vulgar law and Byzantine law? Wieacker asserted that in order to fully understand the essence of ‘vulgarization’ one was compelled to first give a comprehensive picture of the historical reality of its predecessor, Roman law, and not just its appearance in the Empire, but the “true great jurisprudence” of the Late Roman Republic.⁵⁸² Wieacker’s focus was on the *culture* of Roman law and its afterlife in the European context, thus Roman law was not just a matter of “administrative practices” or “style,” but the “spiritual creativity” of a group of people

⁵⁷⁹ Wieacker, *A History of Private Law* 1995, 348–518.

⁵⁸⁰ Wieacker, *Vulgarismus und Klassizismus* 1955: on continuity and vulgarization as an example of Reception, 12–14; on the “alien” essence of East Roman “scientific” law, see 50ff.

⁵⁸¹ Wieacker, *Vulgarismus und Klassizismus* 1955, 8–10.

⁵⁸² Wieacker, *Vulgarismus und Klassizismus* 1955, 11: “die grossen gedanklichen Schöpfungen der klassischen Juristen und ihre geistige Erbe[.]”

united in their education, vocation and way of perceiving the world.⁵⁸³ To describe Roman law narrowly as the jurisprudence prevailing in the Roman Empire was, according to Wieacker, a mistake. During the late years of the Empire, lawyers and jurisprudence had been assigned a special task to serve the needs of the Emperor, but the legal work of the *consilium* was not the highest form of Roman law, rather a restriction to the previous sphere of creativity.⁵⁸⁴

To Wieacker, the roots and *geistig* essence of Roman law were in the sociological exceptionality of the lawyer class in the Late Roman Republic. They formed an “expert-culture of a distinct and upper social class.”⁵⁸⁵ “Noble jurists” were not exceptional only with respect to their social background – which placed them in the social elite, if measured by their cultural knowledge and learnedness – but in the virtues they expressed while interpreting law and acting as the legal authorities within Late Republican society. The inner culture of the lawyer *Stand* affected the legal norms of the Republic, and the statutes concerning contracts, merchandise and inheritance were constituted on and supported by the virtuous codes for behavior presented by the *Stand*.⁵⁸⁶ From his Late Republican example Wieacker induced a general legal sociological principle: in any particular society in history, the conditions of and valuation given to the lawyer *Stand* mirrored the essence of its legal culture. The “special-culture” of the “legal-experts” (the existence of such a *Stand* was a characteristic of a decent legal order) was a structure in which cultural virtues and social requirements were combined and administrated in a just manner. Thus, the legal expressions produced by the *Stand* were (and are) not just theoretical abstractions of reality-detached scholars, but an inseparable part of practical life:

[E]in Blick auf den angelsächsischen Juristen und vollends auf den klassischen römischen Juristen enthüllt die Gleichsetzung fachjuristischer Spezialkultur mit akademischer Rechtslehre als unbegründet [...] Ausschlaggebend für die Stillhöhe und die Stimmung

⁵⁸³ Wieacker, *Vulgarismus und Klassizismus* 1955, 18: “Wir können unmöglich die öffentlichen Funktionen des Fachjuristen in Gesetzgebung, Rechtsprechung, Kautelarjurisprudenz und Rechtsgutachtung vom Begriff der ‘Praxis’ ausschliessen.”

⁵⁸⁴ Wieacker, *Vulgarismus und Klassizismus* 1955, 19, also 25: “beschränkung der Aufgabe des Juristen auf die *questio iuris*.”

⁵⁸⁵ Wieacker, *Vulgarismus und Klassizismus* 1955, 14: “einer auf sachkundige Oberschichten beschränkten Spezialkultur,” 24: “[Der] einzigen Eigenart der klassischen römischen Jurisprudenz [...] fortentwickelt durch das ständische und und fachliche Selbstgefühl der alten Adelsjuristen, vertieft und geläutert durch logische und ethische Entdeckungen unter dem Einfluss des Griechertums [.]”

⁵⁸⁶ Wieacker, *Vulgarismus und Klassizismus* 1955, 25: “[D]ie äusserste Abstraktion fachjuristischer Kunstvorstellungen von den anschaulichen und sozialrelevanten Lebensverhältnissen [...] entspricht eine solche der Rechtsethik, die sich gegenüber dem vulgären Moralbedürfnis bald durch adeligen Rigorismus (so bei der vollverpflichtenden Kraft des gesprochenen Wortes), bald durch asketische Unnachgiebigkeit gegen unbestimmbare Billigkeitsrücksichten äussert[.]”

einer Rechtskultur sind vielmehr heute wie einst Herkunft, Gesinnung und Denkkraft ihrer Funktionäre.⁵⁸⁷

So the study of the appearance of vulgar law in Late Antiquity had to be conducted bearing in mind the significance of the *Stand* in legal cultures, and in comparison to the legal system – the insurmountable predecessor – of Roman society. Consequently, Wieacker insisted that research on vulgar law should focus on “non-governmental associations” that lay outside of legal “science.”⁵⁸⁸ By “science” Wieacker meant presentations which were theoretically categorized, and the rejection of such legal systemizations was due to the principle that “true great jurisprudence” had been free of such Greek influence. While concentrating on “non-governmental associations” Wieacker was able to analyze the historical continuity of cultural particles outside the indisputable collapse of the “common culture” and legal institutions of Rome. Wieacker acknowledged that administration and law usually went hand in hand, and in the sources which a historian had at his disposal, distinguishing between a “culturally coherent way of thinking” and the actual social conditions and requisites of a situation was often difficult. Thus, Wieacker admitted that the “implementations” of law were always intertwined with the temporal administrative power, but also strongly maintained that in the Roman Empire these “implementations” were above all “creations of legally trained experts, which formed a legally qualified group.”⁵⁸⁹

What distinguished Wieacker’s argument from other contemporary representations, is the “material” extension he gives to the mentality of the *Stand*. While scholars like Friz Schulz and Fritz Pringsheim were more than willing to use the idea that the Roman lawyer was above the common people, and the legal culture of the Rome was a virtuous “Golden age” of European jurisprudence, it was Wieacker who situated this culture in the wider surroundings of European social history.⁵⁹⁰ To him, the superior rationality, the mentality of a Roman lawyer was the result of educational, sociological and demographical factors, and scrutinizing these factors as well as their continuities in European history would result in both a truthful narrative of European legal culture as well as an ideal towards which European law should be developed.

Consequently, Wieacker rejected Ernst Levy’s argument that “vulgarization” manifested itself in the form of practices. To Levy, since post-Classical communities did not have the institutions and rituals which constituted the premises of Roman jurisprudence, the vulgar law of “Occidental” was a system where the distinction

⁵⁸⁷ Wieacker, *Vulgarismus und Klassizismus* 1955, 19. “A view of the Anglo-Saxon jurists, and absolutely the classical Roman jurists, reveals the equation of expert legal special-cultures with academic legal doctrine to be unfounded [...] Today as before, heritage, sentiment and the cognitive power of a legal culture’s officials are decisive for its mood and the height of its style.” (Translation by HW).

⁵⁸⁸ Wieacker, *Vulgarismus und Klassizismus* 1955, 8-9.

⁵⁸⁹ Wieacker, *Vulgarismus und Klassizismus* 1955, 15.

⁵⁹⁰ Cf. Fritz Schulz, *Prinzipien des römischen Rechts*. München/Leipzig, 1934, 152; Fritz Pringsheim, ‘Höhe und Ende der Römischen Jurisprudenz,’ in *Gesammelte Abhandlungen*, Bd. 1. Heidelberg, C. Winter 1961.

between laymen and jurists, juridical concepts and popular terms blurred.⁵⁹¹ Wieacker objected mainly because the whole division between practice and theory was superficial. Moreover, he argued, “great jurisprudence” did not derive its power from administrative premises but from exceptional thinking.⁵⁹² To Wieacker, the jurisprudence of Roman lawyers, was both abstract and thoroughly practical, “close to life.”⁵⁹³ The higher task of jurisprudence in Rome was to act as a guide in and resolve problems arising from everyday situations. The wisdom of Roman jurisprudence was *phronesis*, an abductive handling of experiences where a cumulative knowledge of legal matters resulted in truthful abstract expressions, namely in precise juridical rhetoric and legal concepts.

[The Late Republican jurisprudence was] die äusserste Abstraktion fachjuristischer Kunstvorstellung von den anschaulichen und sozialrelevanten Lebensverhältnissen und zugleich die strenge Reduktion der juristischen Fachbegriffe auf ein Mindestmass einfach geschnittener Vorstellungsmodelle.⁵⁹⁴

The jurisprudence of the Classical period was “truly living” (*wirklich lebende*), meaning that it had originated in a fruitful interaction between everyday actions (in relation to actual jurisdictional questions) and solid assimilation of the awareness or idea of the law. Moreover, due to this practical binding, it was adjustable in different historical conditions.⁵⁹⁵ The “great jurisprudence” was an ethical and vital force within history. Roman lawyers “were experts of the highest practice.” Vulgar law in some sense reflected this skillful way of thinking and, to a degree, it was an “applied example” of this “practice of thinking.”⁵⁹⁶ So, like Levy, Wieacker holds that the

⁵⁹¹ Ernst Levy, *West Roman Vulgar Law: The Law of Property*. Philadelphia 1951, 2, 5–6.

⁵⁹² To Wieacker, Roman jurisprudence managed to abstain from the characteristics which marked other legal cultures in the past: “Die meisten geschichtlichen Rechtskulturen stehen indessen zwischen diesen äussersten Möglichkeiten [either ritualization through “taboo” or relating the “idea-world of its specialist to the cosmos”]. Ihre Rechtsvorstellung ist naturalistisch; sie versucht den gedanklichen Ausdruck eines rechtlichen Zustandes oder Vorganges entweder der allgemeinen unbefangenen Anschauung eines Lebensverhältnisses oder den – was meist dasselbe ist – seiner typischen Sozialfunktion anzupassen.” This was also the case with vulgar law, “Ihre Rechtsvorstellung ist naturalistisch [...] einer Gruppenpsychologie, der ein besonderes ständisches oder intellektuelles Berufsethos und –pathos fremd ist.” As such it was very unlike Roman jurisprudence, which was “durch fachliche Reflexion emotional gedämpft[.]” Wieacker, *Vulgarismus und Klassizismus* 1955, 21.

⁵⁹³ Wieacker, *Vulgarismus und Klassizismus* 1955, 18; also 19: “Ausschlaggebend für die Stilhöhe und die Stimmung einer Rechtskultur sind vielmehr heute wie einst Herkunft, Gesinnung und Denkkraft ihrer Funktionäre.” Here Wieacker argued against an old enemy. “Juristenrecht” and legal science (of the correct kind) was certainly *law*. Cf. Wieacker, ‘Rudolf Von Jhering’ 1942, 9: “Rechtskundigen [meaning legal scientist...] deren Amt es ist, erkennend Handelnde zu bilden, in den alten Streit zwischen Theorie und Praxis, Idee und Erfahrung. [...] Am besten schwiege er darüber ganz und zwänge, wie einst der römische Jurist, dem Zeitgeist durch die guten Früchte seines Tun Autorität ab.”

⁵⁹⁴ Wieacker, *Vulgarismus und Klassizismus* 1955, 25. “[The Late Republican jurisprudence was] the utmost abstraction of the expert legal artistic notion of the descriptive and socially-relevant living conditions as well as the severe reduction of legal terms to a minimum of simply clipped idealized models.” (Translation by HW).

⁵⁹⁵ Wieacker, *Vulgarismus und Klassizismus* 1955, 18.

⁵⁹⁶ Wieacker, *Vulgarismus und Klassizismus* 1955, 18.

institutional practices of Classical Roman law ceased to exist in the legal world of Late Antiquity, but the true “living” practice of Roman law, the style of thinking, lived on in the heritage of *Stand* and *Bildung*. Roman jurisprudential reasoning and its textual expressions suppressed the irrational traits which affected every historical community, and produced knowledge and judgments which ruled over and were in the dominion of social affairs; as such these judgments were not subject to the whims of human behavior and perception.

Of course, vulgar law was a degradation, and the great jurisprudence, along with the material phenomena of *Stand* and *Bildung* to which it was contextualized, faced eradication in post-Classical times. But the distinguishing feature in Wieacker’s article, and also a reason why *Vulgarismus und Klassizismus* has remained a classic, is the way in which Wieacker bypasses the actual economic, administrative, political and environmental disasters which followed from the destruction of Roman Empire, and concentrates on the mental shift in legal consciousness, *Rechtsbewusstsein*. Obviously, that cultural change in *Rechtsbewusstsein* was caused by concrete change in the living conditions of people, but the altered essence of the post-Classical legal consciousness was a universal phenomenon of “naturalization” rather than a case of a particular legal havoc in history.⁵⁹⁷

To Wieacker, every legal system carried within itself the seed of slipping into a state of unreliable judicature, which was marked by superstition and corruption rather than rational and just tradition. Accordingly, not even the legal culture of the Late Republic had been totally free from degrading aspects. Nevertheless, because of the “spiritual tension of the great jurisprudence” and the “pressure from the carefully planned legal order [characterized] by collective essence and expert jurists” these traits remained in the margins of the legal system of the Late Republic.⁵⁹⁸ In short, the *Rechtsbewusstsein* of vulgar law derived its essence from the lack of “spiritual power” of the class of legal experts, which gave way to a more irrational, common understanding of law in society, and which consequently appeared in the ways of reasoning and the linguistic expressions concerning law and legality.

Wieacker asserts that the “naturalization” process of the vulgar *Rechtsbewusstsein* was a side effect of the dismantling of the Roman cultural entity, causing various group-psychological phenomena to surface.⁵⁹⁹ Unlike before, the Western European societies of Late Antiquity were unable to sustain the differentiation between the higher intellectual ethos and the archaic need to “formalize” legal inspection and

⁵⁹⁷ Wieacker, *Vulgarismus und Klassizismus* 1955, 20: “Naturalismus,” 21: “Naturalistisch Rechtsvorstellung.”

⁵⁹⁸ Wieacker, *Vulgarismus und Klassizismus* 1955, 40: “geistigen Spannung einer grossen Jurisprudenz.”

⁵⁹⁹ Wieacker, *Vulgarismus und Klassizismus* 1955, 20: “[Die] Ausdrucksformen vulgärer Rechtsvorstellung lassen sich aus de gruppenpsychologischen Vorgängen ableiten, die sich aus der Spaltung einer Kulturgesellschaft ergeben.”

execution and to make taboo the world of common human existence.⁶⁰⁰ The naturalistic legal idea was:

[D]en gedanklichen Ausdruck eines rechtlichen Zustandes oder Vorganges entweder der allgemeinen unbefangenen Anschauung eines Lebensverhältnisses oder den – was meist dasselbe ist – seiner typischen Sozialfunktion anzupassen.⁶⁰¹

Such a legal culture was the result of “vulgar psychology,” or to put it another way, the realization of the *Rechtsbewusstsein* of the post-Classical societies of Western Europe.⁶⁰² Wieacker represents the psychological takeover of the legal system built on rationality as a very human phenomenon. It springs from:

[D]as bedürfnis einerseits nach sinnlicher Anschaubarkeit der rechtlichen Vorgänge, andererseits nach unbefangener Realisierung der sozialen Funktionen eines Rechtsgutes; beide gehen aus einem naiven Zweckstreben und aus der einem unbeherrschten, durch fachliche Reflexion nicht emotional gedämpften Zweckstreben eigentümlichen affektbestimmten Wirklichkeitsbetrachtung hervor.⁶⁰³

Further, the penetrating psychological tendency of “vulgar society” remained not only in art and literature, but it took over the legal rhetoric. In the “language-psychological” process the words depicting legal entities and procedure were replaced by more “sensual” terms, that were “forceful” and “emotionally loaded.” They referred to the common world of senses, untamed by reason, and the virtues of the specialists. The terms expressing evidence, rights, judgment and litigation forgot abductive abstraction, the logically derived style of previous masters, and became, rather than concepts “grounded on the Logos of a methodological expert art,” words for “emotional expression, self-interest and contestation.”⁶⁰⁴ The distinction between possessions and property, ownership and rights blurred. Another vulgar process was that of replacing social goals with the immediate needs of the people. Since law was no longer based on higher virtues and the rationality of the expert class, legislation became a tool in achieving the objects of the more powerful classes. The legal rhetoric

⁶⁰⁰ Wieacker, *Vulgarismus und Klassizismus* 1955, 20.

⁶⁰¹ Wieacker, *Vulgarismus und Klassizismus* 1955, 21. ”to adapt the intellectual expression of a legal condition or procedure either to the general impartial view of a living condition or to the condition, which is mostly the same, of its typical social function.” (Translation by HW).

⁶⁰² Wieacker, *Vulgarismus und Klassizismus* 1955, 29, 30.

⁶⁰³ Wieacker, *Vulgarismus und Klassizismus* 1955, 21. ”the need on the one hand for meaningful visibility of the legal procedures, on the other hand for impartial implementation of the social functions of a legally protected right. Both come from the naive aspiration for purpose and from the unrestrained aspiration for a characteristically, emotionally-determined view of reality that was not emotionally subdued by professional reflection.” (Translation by HW).

⁶⁰⁴ Wieacker, *Vulgarismus und Klassizismus* 1955, 22; also 23: “Vermöge ihrer direkten, spontanen und affektiven Wirklichkeitsauffassung ist die Vulgäre Stilhaltung auch nicht bereit, juristische Kategorien zu trennen, deren Grenzen nicht durch die Anschauung, sondern durch den Logos einer methodischen Fachkunst gesetzt sind”; 24, “Fühlweisen,” “Willenseinstellung.”

contaminated by group-psychological processes together with the unconstrained economic purposes of the ruling elite determined the judicature, and thus muddled the previously separated worlds of political endeavors and social justice.⁶⁰⁵

The practice which guarded against “naturalist” tendencies was *Bildung*.⁶⁰⁶ *Bildung* – meaning both the common culture of the great jurists and the way of transmitting that culture to succeeding generations – was the opposite of the “naturalistic world view.” The “spiritual power” of Roman law was preserved in its textual expression. Thus learning from and applying the example of great Roman jurists was to hold on to the healthy essence of the tradition. As such, the historical development in the Byzantine Empire presented an opposite to the one taking place in the Western part of the Roman Empire, since in the East law schools continued to study classical Roman law as practiced by the great jurists of the Late Republic.⁶⁰⁷ However, the legal culture in the East Roman Empire was not like the great jurisprudence – it was not grounded on *Stand* and *Bildung* like the “true great jurisprudence” – but was a *scientific distortion* of it.⁶⁰⁸ For example, the compilers of *Corpus Iuris* let the over-theoretical principles of Greek descent corrupt the original meaning of law as expressed by the great lawyers.⁶⁰⁹ The pre-requisites of the great Late-Republican jurisprudence, where the law had been first and foremost derived from *material life*, was forgotten.

To Wieacker, the root of this distortion lay in the process where the political purposes of the Justinian government sidelined the legal work done by the scholars of the Byzantine world.⁶¹⁰ Thus, the East Roman legal culture, and along with it the *Corpus Iuris*, preserved some elements from the era of true classic jurisprudence, but as whole it was “legal science” (*Wissenschaft*) and its legal education and expressions that were intertwined with political intentions. This opened up the possibility of the later abusive treatment of law as found in the theories of *Begriffjurisprudenz* and Pandectism. A healthy example of the cultivating practice found in *Bildung* was the independent, provincial legal schools of Western Roman Empire, which conserved the textual and linguistic heritage, thus expert-jurisprudence, in their education.⁶¹¹

⁶⁰⁵ Wieacker, *Vulgarismus und Klassizismus* 1955, 24: “Wenn auch diese neuen Unterscheidungen zum guten Teil mehr auf wirtschaftspolitischen Zwecken der Gesetzgebung als auf rechtspsychologischen Vorgängen beruhen, so bleibt doch die Ausdrucksweise dieser Gesetzgebung – im Gegensatz etwa zur justinianischen Gesetzgebung – selbst vulgär.”

⁶⁰⁶ Wieacker, *Vulgarismus und Klassizismus* 1955, 24; Also 51: “Eine Renaissance klassischen Rechtes insbesondere ist nur möglich, wo die erhaltenden Bildungsschichten zugleich Träger der gesetzgebenden und rechtspflegenden Gewalt sind.”

⁶⁰⁷ Wieacker, *Vulgarismus und Klassizismus* 1955, 52.

⁶⁰⁸ Wieacker, *Vulgarismus und Klassizismus* 1955, 54–55: Through “philosophically oriented” education “bildet sich zum erstenmal in der Geschichte eine unseren Begriffen angenäherte Rechtswissenschaft, verschiedenen von der wissenschaftliche Praxis der grossen Jurisprudenz [.]”

⁶⁰⁹ Wieacker, *Vulgarismus und Klassizismus* 1955, 54.

⁶¹⁰ Wieacker, *Vulgarismus und Klassizismus* 1955, 56: the “politisches selbstbewusstsein” of Konstantin, and “Erneuerung [der klassischen Jurisprudenz] zu einem politischen Programm.”

⁶¹¹ Wieacker, *Vulgarismus und Klassizismus* 1955, 51: it was just that the Western legal schools had to work without the structures of a functioning society, and thus “Den Trägern der westlichen Bildung

The picture which Wieacker draws is both compelling and puzzling. On one hand, Wieacker firmly emphasises the natural and familiar nature of vulgar law. Unlike previous theorists he does not renounce “vulgarization,” but on the contrary manifests the process as common. In addition, vulgar law is not a breach, catastrophe or perversion; it is not only a part of the continuation in the European legal tradition, but a vital particle and a fruitful stage in the development of what we now understand as European legal culture. *Vulgarization und Klassizismus* is in a way a “rehabilitation” of vulgar law.⁶¹²

As a by-product, such a historical picture and narrative provided an explanation for the immediate European past. In the 1950s, the recent process where totalitarian governments managed to seize the power and lead humanity into an unforeseen destruction, was an unsolvable puzzle. To the legal scholars a more concrete mystery was the fact that their field had not been able to prevent this degradation, indeed it contributed to it. The injustices had been conducted by the ‘civilized’ and by those within the realm of European culture. How was it possible that the European legal culture had slid to such a perversion? What was Europe as a legal phenomenon if it was capable of such actions and so vulnerable to such a metamorphosis?

The anatomy of the destruction of a legal system, which Wieacker presented in *Vulgarismus und Klassizismus*, answered these perennial questions. The process of “vulgarization” which Wieacker described was not, as he explicitly stressed, restricted to the post-Classic world.⁶¹³ Indeed one can find similar tendencies from his works elaborating the legal development of, for example, middle-age society, and, moreover, the description of the latent devastation inside the European legal consciousness extended also to modern societies. The takeover of the destructive elements within the legal consciousness – and embedded in all legal cultures and systems – was an ever present option brought about by the dichotomy between the masters and the mass, or to put it in another way, between the “expert culture” and “naturalism.”⁶¹⁴ As Wieacker had stressed before, and continued to emphasize in his other writings, the mental degradation that appeared in the realm of juridical language and the “pursuit-based” logic of twisted jurisprudence, was the pet peeve of failed modern legal systems. For example, the legal concepts of Weimar jurisprudence were overwhelmed by the “political tensions” within them, whereas the true linguistic expressions of legal conscience were marked by “spiritual substance.” Thus, it was not surprising that the European legal consciousness had collapsed into a state of “barbarism,” indeed it seemed as though it was inevitable.

fehlte die Verfügung über die öffentliche Gewalt, die für die Neubildung einer klassizistischen Rechtskultur neben allem Bildungsbewusstsein unerlässlich ist.”

⁶¹² Cf. Winkler 2014, 25–26 Wieacker describes the middle ages as a “vital” era in the narrative of European legal culture.

⁶¹³ Wieacker, *Vulgarismus und Klassizismus* 1955, 30, 32.

⁶¹⁴ Cf. section 3.3 The late 1930s and war as *Erlebnis*.

The main theme of Wieacker's text, however, is constructive. There was such a thing as European legal consciousness, which should be analyzed in order to prevent further tragedy, and upon it the peaceful coexistence of the future had to be built. Unpleasant tendencies, moreover, needed to be acknowledged. Europe could not escape its past nor deny the fragile basis of its (Christian) culture. The tolerance Wieacker showed towards the vulgar and Christian attributes within European legal culture is shown in the discussions he engaged in with Erik Wolf and Ernst Rudolf Huber. In many respects Wieacker did not share their views on the relation between law, the people and the state (the *Rechtsbewusstsein* of the German people), but all the same he appreciated their thoughts and acknowledged their value.

Nevertheless, 'vulgarization' was inescapably a degradation of the previous high culture. The culture and mentality of the Late Republican lawyers was that of virtuous moral behavior, which unquestionably transmitted to their rhetoric and writings. Their common culture and interaction was characterized by "ethics," "ethos," "rigor," "duty," "responsibility," "ascetism" and "will-power." Such a virtuous core existed only in a distinguished association united by a shared value-base and education, the *Stand* of lawyers.⁶¹⁵ The *Stand* represented the power which held the legal consciousness of a given culture together. By the means of their 'spiritual power' they guarded the language, practices and legal thinking, so that the people's mentality in general would not collapse into anarchy. As the dichotomy between "naturalism" and "expert thinking" was eternal, it was possible to establish social structures which maintained the "spiritual" heritage of the great jurisprudence. The British example, which Wieacker again took up, showed that it was both possible to maintain a "spiritual" *Stand* in modern society, and appreciate the social corporates which cultivated justice within societies. After all, in the time of worldwide legal havoc, the British had been able to retain their legal consciousness and soberly stick to their legal tradition.

Wieacker's study on the ambiguous roots of European legal culture as presented in *Vulgarismus und Klassizismus* were later repeated in *Ursprünge und Elemente des europäischen Rechtsbewusstseins* (1956) and in the second edition of *Privatrechtsgeschichte der Neuzeit* (1967), in which Wieacker explicated and extended the dichotomy between "naturalism" and "expert-thinking" into a coherent narrative of European legal history.⁶¹⁶ Thus, in *Ursprünge und Elemente des europäischen Rechtsbewusstseins* Wieacker defines the European *Rechtsbewusstsein* as a conceptualization in which the knowledge of European history merged with the common experience of recent years, and thus it provided a tool for a legal scientist to

⁶¹⁵ Wieacker, *Vulgarismus und Klassizismus* 1955, 25.

⁶¹⁶ 'Ursprünge und Elemente des europäischen Rechtsbewusstseins,' in *Europa, Erbe und Aufgabe. Internationaler Gelehrtenkongress Mainz 1955*. Hrsg. von Martin Göhring. Wiesbaden 1956. S.105-119.

understand the history and idea of Europe as based on both tradition and atemporal scholarly experience:

Gerade im Detail seiner [der Fachmann] Arbeit erfährt er, dass die Phänomene der europäischen Rechtsgeschichte nur richtig abgebildet werden können, wenn die geschichtliche Welt Europas als eine einzige soziale, politische und kulturelle Organisation menschlichen Zusammenlebens begriffen wird. Für den Rechtshistoriker war also Europas Einheit keine Konvention und kein Postulat, sondern eine Arbeitshypothese, die sich im Laufe seiner wissenschaftlichen Arbeiten ebenso bewährt hat[.]⁶¹⁷

The European *Rechtsbewusstsein* of the twentieth century of which Wieacker was talking about was not equivalent to the Late Antiquity, the topic of *Vulgarismus und Klassizismus*, but the *Rechtsbewusstsein* of today was built on the foundations and mentality following the collapse of the “high culture” of antiquity. The European legal conscience was comprised of three particles: the “expert-spiritual creation” of Roman lawyers, Christian ethics, and the “vital” heritage of societies following the Migration Period and their “living feeling.”⁶¹⁸

Diese Elemente [the three traits] bestimmen bis zum Anbruch des Hochmittelalters das Europäische Rechtsbewusstsein, vielleicht mit Ausnahme der Randgebiete. Die Kraft dieser Ursprünge ist dem heutigen Betrachter deutlich, sobald er die Sedimente der späteren europäischen Umwälzungen abhebt und zum Grundgestein gelangt.⁶¹⁹

In Wieacker's 1956 presentation the relation between justice and *Rechtsbewusstsein* is more complicated than in the case of “vulgar societies” as elaborated in *Vulgarismus und Klassizismus*, but nevertheless, Wieacker maintained that the heritage of vulgar law continued to affect European legal reality. In *Ursprünge und Elemente* Wieacker argued that the world of Late Antiquity witnessed an exemplary legal culture which combined “belief” and “reason,” or in other words, the “conscience” and “social

⁶¹⁷ Wieacker, ‘Ursprünge und Elemente’ 1956, 105. “Especially in the details of his [the specialist’s] work he learns that the phenomena of the legal history of Europe can only be appropriately depicted if the historical world of Europe is to be understood as a single social, political and cultural organization of human coexistence. Europe’s unity was neither convention nor postulate for the legal historian, but rather a working hypothesis that has proven itself in the course of his scientific work [.]” (Translation by HW).

⁶¹⁸ Wieacker, ‘Ursprünge und Elemente’ 1956, 106; on the heritage of Roman law 107: “endlich aber das Verständnis des Rechtes als eine wissenschaftliche, d.h. als eine *fachlich-geistige Schöpfung*. Kürzer: dass Rechtsstaatliche Machtschöpfung ist und zugleich geistiger Besitz, haben die Europäer von den Römern gelernt.” (emphasis mine).

⁶¹⁹ Wieacker, ‘Ursprünge und Elemente’ 1956, 108. “These elements [the three traits] determine the European legal consciousness up to the beginning of the High Middle Ages, perhaps with the exception of the fringes. The strength of these origins is clear to the modern observer as soon as he removes the sediment of the later European revolutions and reaches bedrock.” (Translation by HW).

reality.”⁶²⁰ The Glossators were able to synthesize their learned logic and reason into an experience of tradition and come up with a cognitive apparatus which enabled them to apply law in concrete situations within the social reality. Such a European achievement was however lost, and the succeeding intellectual streams ignored the practical wisdom of the Glossators and their jurisprudence.⁶²¹ Only in England (and with some reservations in the Netherlands) did certain sociological aspects prevent the legal consciousness from degenerating. This was especially due to the strong position which the *Stand* of jurists managed to retain in British society, but also because the corrupting effect of the “rationalism,” embedded in philosophical theories of law, did not extend to the “thinking” of the lawyers of the British Isles.⁶²²

To Wieacker, the *Rechtsbewusstsein* of Occidental however, was overwhelmed by misleading theories and ideologies – especially of Rousseau’s idea of the “common will” – and had lost the shared value base and order necessary for the actualization of social justice. Thus, it was vulnerable to the attacks of “tyrants,” “demagogues,” “dishonest lawgivers” and “a technical bureaucracy which lacked heart and overall vision.”⁶²³ Usually a “solid legal consciousness” would have been able to resist such tendencies, but Europe’s fate was different because of a “jurisprudence of interest,” which broke the last binding value that the common mentality had left. In its determinist ethos, “jurisprudence of interest” presented law as a mere reflection of the intentions of individuals and the lawgiver. It demolished the authority of the law.⁶²⁴ Wieacker argued that this incident was the basic reason for the “disasters following 1914.”⁶²⁵

Europa war zwar von je eine Einheit, aber eben die Erkrankung dieses einen Organismus rief die Todfeindschaften jener neuen Bürger- und Glaubenskriege hervor[...] Diese Kriege müssen in Selbstzerstörung enden, wenn nicht die Umkehr der persönlichen Gewissen die Vernunft zurückruft, die erkennt, dass in einem erkrankten Organismus kein Glied für sich allein gedeihen kann.⁶²⁶

⁶²⁰ Wieacker, ‘Ursprünge und Elemente’ 1956, 109–110.

⁶²¹ Wieacker, ‘Ursprünge und Elemente’ 1956, 110: “Eine Einfügung ihrer Ergebnisse in einem allgemein auf Vernunft und Erfahrung gegründeten Erkenntniszusammenhang war dieser Wissenschaft zunächst noch fremd.”

⁶²² Wieacker, ‘Ursprünge und Elemente’ 1956, 110, 112.

⁶²³ Wieacker, ‘Ursprünge und Elemente’ 1956, 115: “Tyrannen”, “ungerechte Gesetzgeber”, “Demagogie”, “technische bürokratie, der Herz und Überblick fehlt.”

⁶²⁴ Wieacker, ‘Ursprünge und Elemente’ 1956, 115, 116.

⁶²⁵ Wieacker, ‘Ursprünge und Elemente’ 1956, 114.

⁶²⁶ Wieacker, ‘Ursprünge und Elemente’ 1956, 116. “Europe was indeed from a union, but precisely the disease of this single organism evoked the mortal enmity of each new civil and religious war [...] These wars must end in self-destruction unless the reversal of personal conscience calls back reason, which recognizes, that no part of a sick organism can thrive alone.” (Translation by HW).

4. *Rechtsgewissen*: Conscience in history and in legal science

In *Privatrechtsgeschichte der Neuzeit* Wieacker built his narrative of European legal history on the concept of *Rechtsgewissen*, “legal conscience,” which, he asserted, would present a solution to the “crisis of justice” which had plagued the European legal culture throughout modern history. Thus, the meaning of the concept of *Rechtsgewissen* was fundamental not only for the *Privatrechtsgeschichte der Neuzeit*, but for Wieacker’s legal scientific legacy in general. I argue that in order to analyze the longer line in Franz Wieacker’s legal scientific works, understanding the relation between the concepts of *Rechtsbewusstsein* and *Rechtsgewissen* is crucial.

As analyzed in chapter 3, *Rechtsbewusstsein*, legal consciousness, was about the people, social structures and law. *Rechtsgewissen*, legal conscience, on the other hand, signified a more personal (and exceptional) understanding of the law. Whereas legal consciousness signified the common perception of the rule of law, legal conscience was a distinct understanding of justice. Within a common legal awareness of the people (*Rechtsbewusstsein*), *Rechtsgewissen* was a mental tool for the more informed, capable and aware experts, who by means of this skill were able to give judgments in a way which benefitted the whole social constellation and brought about social justice. If the legal conscience was allowed to guide the judicature of a given society, the people of this society would be able to adapt and deal with the economic, political and historical change the society confronted: if this occurred the legal consciousness of the people would be in line with reality. Whereas any European legal system usually included a distinguished class of legal experts who took care that the legal decisions were conducted according to the common idea of the rule of law (the legal consciousness), the authoritative expert position of this ‘estate’ was due to the fact that it was able to foster and apply the mental skill of *Rechtsgewissen*, legal conscience. Whereas *Rechtsbewusstsein* was bound to time, place and cultural principles, *Rechtsgewissen* was timeless, acting beyond and despite temporal and spatial axioms.

This clear conceptual distinction, however, did not occur in Wieacker’s first legal scientific texts. The conceptual change emerged over a period of time and signified a broader development in his historical vision. This vision reflected the changes in the material, political and scientific circumstances of his surroundings. Thus a study of that conceptual change is also an expedition to uncover the reasons which defined and influenced the evolving *Weltanschauung* of a given intellectual historian. Whereas *Rechtsbewusstsein* was comprised with the help of the spheres of social status and learnedness within the nation (which I named as the sub-concepts of *Stand* and *Bildung*), *Rechtsgewissen* was constructed on the ideas of scholarly togetherness and legal wisdom. I have named these sub-conceptual entities *Kameradschaft* and *Schöpfung*, which also include all the terms Wieacker used to signify his belonging to a certain group and the wisdom this group (and its historical paragons) possessed. In

order to analyze the conceptual change of legal conscience, I will proceed just as in the preceding chapter. I study the intertwinement and interaction between the spheres of culture, body and language in the meanings the concept of *Rechtsgewissen* involved, and then analyze how Wieacker's utilization of the concept altered during the turbulent era from the 1930s to the late 1960s.

Thus I study the same historical circumstances which I dealt with in the preceding chapter, but now my focus has shifted. I now concentrate on how the ideas of communality and wisdom introduced by legal science developed and evolved amidst the changing social world, how these entities were handled in the correspondence of legal scholars, and ultimately, how they emerged in Franz Wieacker's scientific texts. First, however, I briefly review the domain of language of *Rechtsgewissen*. That is, how this concept was used by scholars other than Wieacker. I attempt to present the scientific and diachronic meanings that have layered into the concept, and discuss the scientific prerequisites which Wieacker had to take into account when using the concept.

4.1. Language in *Rechtsgewissen*: The preceding and contemporary philosophical approaches

Franz Wieacker was well aware of the preceding work done in the field of legal philosophy, sociology and legal history. He drew inspiration from the argumentation of the previous scholar generations, and then gave an unmistakably personal representation of a given legal scientific and historical dilemma. Thus to track the exact and scientific foundation for his ideas on legal conscience is a futile task, but clearly one influential thinker was Gustav Radbruch. Radbruch utilized the concept of *Rechtsgewissen* during the Weimar Republic period. Radbruch's ideological stance after the First World War has been labelled legal positivist, even relativist,⁶²⁷ but the breach between his late 1940s writings and his original 'materialistic' stance might not be so vast as post-war legal historical research has presented. Radbruch was always interested in the objective principles anchored in 'reality' according to which the law should evolve. Though not (yet) a scholar of natural law, in his 1920s writings Radbruch introduced the idea of *Rechtsgewissen*, a notion which enabled judges to weigh between conflicting interests in society.⁶²⁸ To him 'legal conscience' emerged as a judicatory tool to make sense of the drastically evolved, value-loaded essence of legal questions. The dramatic and violent social changes that had taken place in Germany – from an estate society to a parliamentary democracy in the space of 20 years – brought new variables and different ethical aspects to the awareness of lawyers

⁶²⁷ Wieacker, *A History of Private Law* 1995, 319, 466.

⁶²⁸ Gustav Radbruch, *Politische Schriften aus der Weimarer Zeit 2, Justiz, Bildungs- und Religionspolitik*. Bearbeitet von Alessandro Baratta. Heidelberg, C.F.Müller Juristische Verlag 1993, 63-64, 181.

and judges when delivering a judgment on a given legal case. Where previously there had been a monarchic hierarchy of social values, suddenly a multitude of interests and competing groups existed each with their own distinct appreciations and aims.

Radbruch's earlier writings are, nevertheless, more on the systematic side, and the essence of *Rechtsgewissen* was very much bound to the written norms and provisions enacted by the legislator.⁶²⁹ Radbruch's 'legal conscience' certainly was not what Rudolf von Jhering had conceptualized as *Rechtsgefühl*, the 'sense of justice,' in his 1872 book.⁶³⁰ To Jhering there was an idea of justice, reachable to human senses, which was located outside of positive, temporal law. It was not that positive law and *Rechtsgefühl* were totally separated; *Rechtsgefühl* was being cultivated within people, living under and being aware of the law. So the ability of 'sensing justice' had emerged through experience and socialization, and it could be used to measure the justness of legal decisions and current law.⁶³¹ Although Jhering's *Rechtsgefühl* and Radbruch's *Rechtsgewissen* were not synonymous, both scholars sought to upgrade their concepts from what Carl von Savigny had called *Rechtbewusstsein*.⁶³² The idea of legal capability usable in weighing options and legality was a more diverged and specialized mental faculty than Savigny's common legal mentality of the people. In the works of subsequent legal theorists, and in the legal scientific discourse of Weimar, the 'sense of justice' and 'legal conscience' were increasingly attached to special legal education, and had a connection to the attempts of the legal scholars to define their field and profession against other disciplines and specialists.⁶³³

In the Weimar Republic and due to the deployment of the German codification of law (BGB), the wider idealist problematic in legal scientific discourse concentrated on more narrow and specific questions. How should one turn the inner feeling of justice into a scientific concept – a textual and heuristic device – which would enable jurisprudence to meet the changing social conditions? To this discussion Franz Wieacker also contributed. Wieacker's position in the discussion was constructed around the concept of *Schöpfung*, whose importance to German legal scholarship has

⁶²⁹ Wolfgang G. Friedmann, *Legal Theory*, 5th ed. London, Stevens 1967, 204.

⁶³⁰ Originally Rudolf von Jhering, *Der Kampf um's Recht*. Wien, Verlag der G. J. Manz'schen Buchhandlung 1872; reprinted in Hermann Klenner, *Jherings Kampf ums Recht, Demokratie und Recht*. Freiburg, Haufe 1992.

⁶³¹ Eley, Lothar Eley, 'Rechtsggefühl und materiale Wertethik,' in Ernst-Joachim Lampe (Hrsg.), *Das sogenannte Rechtsgefühl. Jahrbuch für Rechtssoziologie und Rechtslehre X*. Wiesbaden, Springer 1985, 136.

⁶³² Cf. section 3.1. Language in *Rechtbewusstsein*: The scientific horizon and the previous tradition of the concept. See also John Bell, 'Continental European Jurisprudence,' in Michael Lobban & Julia Moses (ed.), *The Impact of Ideas on Legal Development*. Cambridge, Cambridge UP 2012, 114.

⁶³³ Gerhard Dilcher, 'The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization,' In *Rechtsgeschichte – Legal History* 16 (2016), 20-72; Hans-Peter Haferkamp, 'The Science of Private Law and the State in Nineteenth Century Germany,' In *The American Journal of Comparative Law* 56 (2008), 667-689; Cf. Philipp Heck, *Das Problem der Rechtsgewinnung: Gesetzesauslegung und Interessenjurisprudenz: Begriffsbildung und Interessenjurisprudenz*. Bad Holmburg, Gehlen 1968.

been, and is, vital.⁶³⁴ In the early decades of the twentieth century, the concept referred to the situation where the word of the (codified) law did not itself provide the means to decide in a given case. On what bases, and according to what principle or faculty, should a judge interpret the meaning of the law? On the other hand, the theme also referred to the division of tasks between the courts and legislators: Whose responsibility was it to bridge the gap between the norm and an emerged social demand? The dilemma evoked a vast body of legal scientific literature during the Weimar era, of which a few were Romanist, especially because article §242 in the German codification (BGB) announced that such an act of interpretation should be conducted within the borders of *Treu und Glauben*, good faith.⁶³⁵ Originally, the expression was directly derived from the appeal to the *bona fides* of Roman law. Thus, for example, Fritz Pringsheim contributed to the contemporary legal scientific dispute, defending the authority of the written law, but also engaging himself in a determined study on the historical origins of the concept, and highlighting the various attempts of different legal cultures to apply this legal virtue of Roman law. Emblematic of Pringsheim's production was the notion of the inevitable degradation of the original appearance and usage of *bona fides* in history.⁶³⁶ In his works on *Schöpfung*, Wieacker adopted many principles introduced by his mentor.⁶³⁷

The other dimension of the dispute over *Treu und Glauben*, and wrapped up in the dogmatic controversy, was its direct effect on the nature and social value of the work conducted by those using the law. The war generation yearned for the possibility of a 'creative' usage of law since the codification had seemingly robbed the traditional privilege of the lawyer *Stand* to interpret and further develop law to match social equality and people's understanding of the law. In other words, it used to be the responsibility of the legally trained, by means of their creative handling of the law, to seal the gap between law and reality, and produce decisions which were in line with people's *Rechtsbewusstsein*. Thus the prioritizing of *Schöpfung* in the 'New legal science' was eminent and widespread. Both the new *Studienordnung* of 1935 and announcements of 'legal renewal' emphasized the meaning of *Schöpfung*, which legal positivism had temporarily made impossible.⁶³⁸

⁶³⁴ Rüthers 2012, 9. See also 55, 215, 266. As Rüthers acknowledges, the modern understanding of the dilemma owes much to Wieacker's framing, especially his "*Zur rechtstheoretischen Präzisierung des § 242 BGB*" (1956). Nevertheless, the ideas about the 'creative' usage of law and 'living law' are already found in Eugen Ehrlich's works. See E. Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft* [1903] reprinted as 'Judicial freedom of decision: its principles and objects,' in Bruncken & Register, *Science of Legal Method*. Boston Book Co., 1917.

⁶³⁵ Okko Behrends, 'Treu und Glauben: Zu den christlichen Grundlagen der Willentheorie im heutigen Vertragsrecht,' in Gerhard Dilcher & Ilse Staff, *Christentum und modernes Recht*. Frankfurt a.M.: Suhrkamp, 1984, 255–301.

⁶³⁶ Fritz Pringsheim, 'Höhe und ende der Römischen Jurisprudence,' in *Gesammelte Abhandlungen*, Bd. 1. Heidelberg C. Winter 1961, 54–62; Pringsheim, 'Die archaische Tendenz Justinians,' in *Gesammelte Abhandlungen*, Bd. 2. Heidelberg, C. Winter 1961, 9–12, 34–40.

⁶³⁷ Winkler 2014, 67–76.

⁶³⁸ See e.g. Karl Larenz: "So wie alle menschliche Schöpfung und Gestaltung, aus dem Volksgeist und seiner jeweiligen Konkretion hervorgeht, so ist ihre Voraussetzung und ihr Ziel als eine lebendige

From an administrative perspective the above-mentioned theoretical constructions and idealist representations, when (if ever) applied in practice, were mainly academic matters. Thus, during the revolutionary atmosphere of ‘legal renewal’ all of the concepts, *Rechtsgewissen*, *Rechtsgefühl* and *Rechtsbewusstsein*, were often used to explain the same phenomena, and there were no serious attempts to scrutinize the philosophical differences between them. The main theme in German legal science following the *Machtergreifung* was to acknowledge the superiority of the will of the people, and Hitler as its representation. Hence, just as *Rechtsbewusstsein* was used in National Socialist propaganda, so too *Rechtsgewissen* came to mean a legal extension of German *Volksgeist*. The Third Reich Minister of Justice Franz Gürtner stated in 1936:

In dem gesunden Volksempfinden verkörpert sich uns das *Rechtsgewissen* des Volkes, die Anschauung der gerecht Denkenden.⁶³⁹

To many National Socialist legal scientists, the German *Rechtsgewissen* was a feeling of law, deriving from the racial togetherness of the German people. It was an affective knowledge of justice, actualized in history, and could again be obtained in a society united under the will of the Führer. This national awareness enabled the racially purified *Volksgemeinschaft* to uncover the real meaning of law beyond the written statutes.⁶⁴⁰

After the war it might have been impossible for a long period of time in Germany to write about social justice with the help of the concept of *Rechtsgewissen* if it had not been Gustav Radbruch, who decided to undertake such a task in 1946.⁶⁴¹ Yet, after the Second World War Radbruch’s writings were strongly influenced by his religious convictions, and thus it seemed as if he had radically converted from his previous positivist stance to a proponent of natural law theories.⁶⁴² Radbruch attempted to conceptualize the relation between totalitarianism and legal thinking. He sought to explain the breach in legal tradition at the same time aiming for a solution which would

Wirkung die Gemeinschaft des Volkes. Auch das Recht ist Schöpfung und Gestaltung des völkischen Geistes und dient der Gemeinschaft. Es ist weder eine Beziehung *unter* den Individuen noch nur ein Sollen, eine Anforderung *an* die Einzelnen, sondern Form und Gestalt der völkischen Gemeinschaft und als solche eine konkrete Ordnung.” Karl Larenz, ‘Rechts- und Staatsphilosophie der Gegenwart [1935],’ in Herlinde Pauer-Studer & Julian Fink, *Rechtfertigungen des Unrechts. Das Rechtsdenken im Nationalsozialismus in Originaltexten*. Berlin, Suhrkamp 2014, 193. Emphasis original.

⁶³⁹ Franz Gürtner, ‘Der Gedanke der Gerechtigkeit in der deutschen Strafrechtserneuerung. Vortrag, gehalten auf dem XI. Internationalen Strafrechts- und Gefängniskongress am 18.8.1935 in Berlin,’ in Franz Gürtner, Roland Freisler, Rüdiger Goltz, *Das neue Strafrecht: Grundsätzliche Gedanken zum Geleit*. Berlin, R.v. Decker 1936, 25. Emphasis mine. ”For us, the legal conscience of the people, the just thinkers, embodies itself in the healthy public feeling.” (Translation by HW).

⁶⁴⁰ Carolyn Benson, Julian Fink, Raymond Critch, Herlinde Pauer-Studer, David Fraser, Kristen Rundle, Carolyn Benson & Julian Fink, ‘A Symposium on Nazi Law,’ *Jurisprudence*, 3 (2012):2, 461–463.

⁶⁴¹ Gustav Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht,’ in *Süddeutsche Juristenzeitung* 1 (1946), 105-108.

⁶⁴² Wolfgang G. Friedmann, ‘Gustav Radbruch,’ in *Vanderbilt Law Review* 14 (1960): 191–209.

enable the post-War jurisprudence to be based on moral foundations. Radbruch's texts addressed the immorality of the judiciary during the Third Reich, concluding that the judges as a profession should not be blamed for this aberration, rather the degenerating effect of triumphant legal positivism had allowed a politicization of law which had led to social injustice.⁶⁴³ Thus, the concept of *Rechtsgewissen* in its post-war deployment included both an explanation of the immediate historical past, and a passage away from it. Radbruch's intention was not to conceptualize the continuities and discontinuities in the national legal culture as a whole. His *Rechtsgewissen* continued to serve as a concept of and for the legal professionals, and it comprised a moral point of reference in his narrative of legal scholarship.

Akin to Radbruch, Wieacker in his *Privatrechtsgeschichte der Neuzeit* (1952) attempted to explain what in general had happened in the history of German legal culture, and build again the premises of awareness of morality in legal scholarship and jurisprudence.⁶⁴⁴ Wieacker's intention was to present the problem of the 'aberration of jurisprudence' within the long line of the legal history of ideas, nevertheless providing a solution for the current jurisprudential dilemma which he called a "crisis of justice."⁶⁴⁵ The solution was conceptualized with the help of the *Rechtsgewissen*, legal conscience. Since such "spiritual" ability for a just decision was contextualized in the vast history of European legal thinking, Wieacker's concept of *Rechtsgewissen* was explicated with help of the themes which, for example, Savigny and Jhering had scrutinized in their texts. The skill of 'legal conscience' as argued in *Privatrechtsgeschichte der Neuzeit*, took into account the mental sphere of law and legality, just as Savigny and Jhering had insisted, and was comprised of such elements as "experience," "a sense of justice," "the creative use of law" and "tradition," as found in the accounts of romantic legal scientists. *Privatrechtsgeschichte der Neuzeit* was not, however, a mere duplication of previous, romantic works on social justice and jurisprudence. Wieacker's *Rechtsgewissen* was an enriched conceptualization, which discussed such contemporary methodological discourses and theories as those of Hans-Georg Gadamer and Josef Esser.⁶⁴⁶ The 'legal conscience' was situated within the tradition of legal scholarship, the body of law, and the judicial decision-making of a particular community.⁶⁴⁷

So in distinction to Gustav Radbruch's *Rechtsgewissen* – and to the 'school of *Rechtsgefühl*' – to Wieacker the part of *Gewissen*, 'conscience', in the concept was decisive, and here he differed significantly with what Radbruch had meant by 'legal conscience'. The similarities between his and Radbruch's concept lay in the utilization of a similar word and in the objective of analyzing the recent 'aberration' of jurisprudence and producing a solution that would enable an ethical reading of the

⁶⁴³ Radbruch 1946, 106.

⁶⁴⁴ Rückert 1995, 531–532.

⁶⁴⁵ Wieacker, *A History of Private Law* 1995, 484.

⁶⁴⁶ *Ibid.*, 3, 469.

⁶⁴⁷ Cf. Bell 2012, 113.

tradition despite the looming shadow of the recent past. The two concepts were also built in a similar manner. Wieacker, like Radbruch, built upon a) his previous scientific representations, and conceptualized the continuities and discontinuities in legal discipline with b) the help of his view on contemporary society, and c) his personal life history and (shared) experience during the preceding years.

The ‘conscience’, *Gewissen*, to which Wieacker refers in his scholarly works preceding *Privatrechtsgeschichte der Neuzeit*, was a form of wisdom. It related to actual jurisprudence in a way that *Schöpfung*, the situation-bound capability to apply and further develop the law, resulted from a more general orientation of possessing practical wisdom (*Gewissen*). Understanding the ‘sense of justice’ as a mode of practical wisdom, or like ‘common sense’ as Hans-Georg Gadamer proposed, enabled Wieacker to outline a morally sustainable jurisprudential tool. That elaboration was very much akin to Martin Heidegger’s formulation of the right and proper way to make sense of human existence. After all, it was Heidegger who equated Aristotelian ‘practical wisdom’ with the German word *Gewissen*, and utilized this concept in his quest to analyze the ontology of (European) philosophical thinking.⁶⁴⁸ Thus, in order to understand the meaning of *Rechtsgewissen* as elaborated in Wieacker’s scientific works, one needs to study the emergence of *Gewissen* in his texts, its compatibility with Heidegger’s presentations, and the channels and moments which might have brought Heidegger’s influence to Wieacker.

Previous research has not sufficiently addressed the relation between Wieacker and Heidegger, nor in the light of my research task is it sufficient to merely compare Wieacker’s and Heidegger’s ideas and analyze the possible influence Heidegger had on Wieacker’s concept of *Rechtsgewissen*. It is however important to acknowledge that in Wieacker’s concept the existential dimension was essential.⁶⁴⁹ Wieacker’s concept of ‘legal conscience’ – like Radbruch’s and even Gürtner’s terms – also worked as a linguistic and cognitive tool to depict the temporal nature of justice, which, when utilized in historiography, claimed to elaborate not only the past, but the present and anticipated future of this social value in the national and European context. The ‘conscience’ part of the term was nevertheless built on a specific, existentialist understanding of the nature of wisdom, which in Wieacker’s historical vision was constituted on the importance of scholarly communality and the creative and distinguished manner of expert legal thinking. Thus, research on the change in Wieacker’s concepts of *Rechtsgewissen* has to address the changes in ideas – both on the national level and in the scholarly sub-culture shared by Wieacker – of communality and learned thinking.

⁶⁴⁸ Rodney R. Coltman, *The Language of Hermeneutics: Gadamer and Heidegger in Dialogue*. Albany, State University of New York Press 1998, 11-24.

⁶⁴⁹ Behrends 1995, XIV.

4.2. Culture in *Rechtsgewissen* 1933–1945: The contested *Kameradschaft* in the Weimar Republic and the Third Reich

Why did the ‘legal renewal’ upheld by the young scholars of the ‘war generation’ merge with the National Socialist *Gleichschaltung*? The NSDAP of course had its own purposes and a racial ideology which some legal scholars supported. But even those scholars of the ‘New legal science,’ who in private might have perceived the Nazis as vulgar and their worldview as repulsive, were committed to the ‘revolution,’ which was obviously administrated by National Socialist politicians and civil servants. In 1933 few could foresee what the final tragic results of the *Gleichschaltung* in the legal sphere would be, but its radical and exclusive essence could not be ignored. Furthermore, the outspoken ideology of National Socialism was ‘anti-intellectual,’ which the age acknowledged and accepted.⁶⁵⁰ Why did the ‘war generation’ participate with such enthusiasm? One reason was the notion that the ‘old ways’ of university education, with all the dogmatism that entailed, was being fought, and the young conservative scholars of the ‘New legal science’ felt that they were in the vanguard of this battle. This level I analyzed in chapter 3. Another motive, and with respect to this thesis an important one, was the real experiences of togetherness and communality at that time. This level will be analyzed in this chapter.

The congruence between *Gleichschaltung* and the ‘New legal science’ did not remain solely at the level of fashionable slogans. Rather, the war generation saw themselves as a major element in the ‘revolution,’ participating in and developing educational practices which were intended to eradicate the borders between political society and science, but also expressing their identity with the vocabulary provided by fascist discourse. In 1941 Ernst Rudolf Huber defined the *Kieler Schule*, the “academic *Heimat*” of both himself and Franz Wieacker as follows:⁶⁵¹

Was man als “Kieler richtung” bezeichnet hat, war kein wissenschaftliche schule im Sinne eines bestimmten Lehrgebäudes, sondern eine kameradschaftlich verbundene Arbeitsgemeinschaft junger Rechtsgelehrter, die durch das Erlebnis des Jahres 1933 zu gemeinsamen wissenschaftlichem Einsatz verbunden waren.⁶⁵²

The above quote is illuminating on many levels, but here the most important feature is that to Huber the scholars of the *Kieler Schule* were a ‘camaraderie,’ which at that time referred to National Socialist rhetoric and to a fascist view of society constructed

⁶⁵⁰ Folker Schmerbach, *Das “Gemeinschaftslager Hanns Kerrl” für Referendare in Jütetborg 1933–1939*. Tübingen, Mohr Siebeck 2008, 19–20; Jean Grondin, *Hans-Georg Gadamer: eine Biographie*. Tübingen, Mohr Siebeck 2013.

⁶⁵¹ Wieacker’s letter to Huber in 29.8.1947: “Unserer gemeinsamen frühere akademische Heimat.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁶⁵² Ernst Rudolf Huber, ‘Rechts- und Staatswissenschaften,’ in *Die Bewegung* 9 (1941), H48/49, 7. “What has been designated as the “Kiel way” was not a scientific school in the sense of a particular system of theories, but rather a comradesly associated work collective of younger jurists who came together through the events of 1933 in a mutual scientific effort.” (Translation by HW).

on the virtues of male communality. Huber asserts that the communality appreciated and upheld by the *Kieler Schule* was analogous with the National Socialist idea of national communality. To understand how this congruence came about, one needs to look at the shifts in the meaning of ‘communality’ both in the national and the academic cultures of early twentieth-century Germany.

In his groundbreaking book *Kameradschaft* Thomas Kühne analyzes the common way of working through the experience of the Great War in the Weimar Republic.⁶⁵³ He asserts that the incompatibility between a personal experience of a violent event (the war) and the public explanation given to that event was circulated with the help of myth-making. This meant that an individual recollection and an official explanation could be fitted together and dealt with by means of a commonly-acknowledged symbol and a narrative attached to it.⁶⁵⁴ In Weimar, *Kameradschaft*, brotherhood-in-arms, came to mean a widely accepted social constellation, a physical formation of togetherness, among which one could feel understanding, containment and approval even amid contrary or distorted emotions and reminiscences.

In art, tradition and oral memory the experience of *Kameradschaft* was uplifted above everyday life. The sense of male camaraderie during the First World War was remembered as exceptional for its level of feelings (compassion, self-sacrifice, caring and friendship) and gestures (unselfish assistance, piety, diligence and commitment), in comparison with the other-worldliness of war. Although this sacred brotherhood necessarily had nothing to do with the reality of battle, the vast majority felt it comfortable and healing to talk about *Kameradschaft* as if it had been as important and distinguished a phenomenon as the official version suggested.⁶⁵⁵ Thus *Kameradschaft* became a concept and myth which aspired to and cherished the values of togetherness between men, both in the trenches and in peace-time. It was a linguistic tool to express and share emotions relating to the reality of the Weimar Republic. Kühne writes how “socially originated emotions were experienced through *Kameradschaft* and were compared and arranged with its help.”⁶⁵⁶

Since *Kameradschaft* had become the representation of the national community in miniature, the question of who decided on its master-narrative became a struggle in the public sphere for the power to decide what was good and what was bad.⁶⁵⁷ In the beginning *Kameradschaft* was not a word which fitted the National Socialistic ideology. It was a “bourgeois invention” which emphasized “man to man” (human to human) compassion. There was no space for empathy in the “morality of the dead”

⁶⁵³ Kühne 2005.

⁶⁵⁴ Cf. Bo Stråth, ‘Introduction. Myth, Memory and History in the Construction of Community,’ in Bo Stråth (ed.), *Myth and Memory in the Construction of Community: Historical Patterns in Europe and Beyond*. Bruxelles, Peter Lang 2000, 19–48.

⁶⁵⁵ Kühne 2005, 50.

⁶⁵⁶ Kühne 2005, 77; cf. Folker Schmerbach, *Das “Gemeinschaftslager Hanns Kerrl” für Referande in Jüteborg 1933–1939*. Tübingen, Mohr Siebeck 2008, 80.

⁶⁵⁷ Kühne 2005, 33, 39.

advocated by the *Freikorps* and Nazi ideologists.⁶⁵⁸ In the Nazi *Weltanschauung* the priority was placed on the *Männerbund*, an all-male group, which especially in the SA and *Freikorps* language represented the pure way of social being. Military units and fraternities had special status in this view as organizations which carried the virtues of the nation. These groups were exclusive, defined their activities and interaction according to a strict code, and drew a very heavy line between themselves and opposing “others” in society.⁶⁵⁹ Whereas *Männerbund* were violent, misogynist and exclusive, *Kameradschaft*, to some extent, paid attention to women and children, and the concept was also used in workers’ language. Despite the obvious differences, these two concepts could be, and were, merged, since they both encapsulated a longing for a masculine, prestigious and uncompromising world.⁶⁶⁰ Such an ideal world was one where men had the will-power to resist, the prestige to judge, and the strength to fight (successfully) against the variety of immaterial and concrete dangers that threatened the reality or mentality of the bourgeois male.

It was, in fact, the NSDAP who ultimately won the battle for the right to define what exactly *Kameradschaft* meant in political and social reality. After April 1933 it was the National Socialists who used the term and gave it substance. In the late 1930s if one wanted to write of *Kameradschaft* it was impossible to avoid Nazi connotations, and most often using the word meant that one was maintaining or re-distributing fascist ideology.⁶⁶¹ The concept was deployed to argue on behalf of destructive social and political aims, and because of its rhetorical capital, it was easier for people to consent, obey and participate.⁶⁶² At the same time, the term continued to carry along with it positive associations from the immediate years following the First World War, so that it still signified a strong, pure, and correct kind of communality. Thus, *Kameradschaft* represented the common ground for a better future. In addition, expressions born from the *kameradschaftliche Erlebnis*, the experience of communality with a sense of shared values and shared destiny, were supposed to be both exceptionally close to the national reality and ethical with respect to the way of being of the German people.

In the German academia the idea of communality had its own history. As elaborated in chapter 2 and 3, lawyers perceived themselves as an ‘estate’ inside the *Bildungsbürgertum*. Hence, to Franz Wieacker the idea of a distinguished *Stand* of

⁶⁵⁸ Kühne 2005, 45; Theweleit 1989, 43–46.

⁶⁵⁹ Klaus Theweleit, *Male Fantasies. Volume 1: Women, Floods, Bodies, History*. Minneapolis, University of Minnesota Press 1987, 27.

⁶⁶⁰ Kühne 2005, 90, 95, 96.

⁶⁶¹ I need to stress that the distance between accepting the Nazi definition for *Kameradschaft* and committing crimes against humanity is vast, and embodying political rhetoric is not comparable to conducting violent or discriminative acts. I also do not want to diminish the guilt of the Nazi perpetrators. Adopting and fulfilling the false realism of fascist rhetoric is not an excuse for illegal deeds, but deconstructing the rhetoric enables one to understand why some executed those deeds. The starting point for making a certain collaborative path understandable, in my view, starts from the level of rhetoric.

⁶⁶² Kühne 2005 97, 109–110.

lawyers was foundational both in history and in the present moment⁶⁶³ Moreover, the more abstract and vague ideal of an ‘estate’ distinct in its learnedness had a more concrete realization in the structures of the higher education. The students in German universities were exceedingly organized in student corporations and *Burschenschaften*, and the academic traditions highlighted the ambiguous opposition between professors and students as a community.⁶⁶⁴ The student organizations cultivated a culture of spiritual togetherness, tradition and honor which transcended corrupt worldly affairs.⁶⁶⁵ It was within this worldview emphasizing ‘spiritual communities’ within the national community that Franz Wieacker grew up.⁶⁶⁶ But in the time of *Machtergreifung*, Wieacker’s reference group and culture was the tradition cultivated by university staff. Peter Lambert and Philipp Schofield have written on the academic culture of early twentieth-century Germany:

[The] professoriat contained within its ranks an elite of incumbents of full, established chairs, *Ordinarien*. These were the eminent mastercraftsmen of what German historians came to refer to as ‘the guild’ (*die Zunft*), an imagined community of scholars which gradually developed rules and rituals of admission. The word ‘guild’ is itself suggestive of the past-mindedness of the men who created it. It gave a curiously pre-modern inflection to the highly modern process of professionalization and academic specialization.⁶⁶⁷

The “guild” of professors was united in their belief of the “aristocratic” essence of their spiritual community, its opposition to the “barbarism” of left liberals and Bolsheviks, and trust in the “autonomy” of the “guild” with its inner tradition and detachment from political administration.⁶⁶⁸ Along with full membership in the

⁶⁶³ Cf. Chapter 2. The Biographical Background of Franz Wieacker in the Collapsing Bourgeois Society before 1934, and section 3.2 Affections in *Rechtsbewusstsein* 1933–1945: Personal redefinition of *Bildung* and *Stand*.

⁶⁶⁴ Peter Lambert, ‘Generations of German historians: patronage, censorship and the containment of generation conflict, 1918–1945,’ in Mark Roseman (ed.), *Generations in Conflict: Youth Revolt and Generation Formation in Germany 1770–1968*. Cambridge, Cambridge UP 2003, Lambert 168.

⁶⁶⁵ It is a fact that the young scholars of the ‘New legal science’ had mostly been members in conservative student organizations or *Burschenschaften* or had first-hand experience of military organizations. This worldview was very familiar to them. Ernst Rudolf Huber, for example, participated in *Nerother Wandervogel*, Ernst Forsthoff in *Deutsch-völkischen Schutz- und Trutzbund* (Meinel 2012, 16). Wieacker was an active member in the *Corps Rhehania* (Liebs 2010), Arnold Ehrhardt had even participated in the *Freikorps*, and Erik Wolf was a *Freiwillige* in the First World War (Hollerbach 1982). On the other hand, that was not in any case unfamiliar to the young men of the *Bildungsbürgertum*. To be totally outside of the clubs and communities characteristic of the Wilhelminian academic and bourgeois culture would have been exceptional. Even Max Weber had been an active member in the *Burschenschaft Allemannia Heidelberg* (Dirk Kaesler, *Max Weber: Preuße, Denker, Muttersohn. Eine Biographie*. München, C. H. Beck 2014, 195–197).

⁶⁶⁶ Cf. Chapter 2. The Biographical Background of Franz Wieacker in the Collapsing Bourgeois Society before 1934.

⁶⁶⁷ Robert Harrison, Aled Jones & Peter Lambert, ‘The institutionalisation and organisation of history,’ in Peter Lambert & Philipp Schofield, *Making History: An Introduction to the History and Practices of a Discipline*. New York, Routledge 2004, 10.

⁶⁶⁸ Lambert 2003, 168, 169, 174.

community of *Ordinarien* came a guarantee of a certain social status, but also a secured financial position. In 1933 Wieacker – like so many other young scholars of the war generation – was not a member of the “guild,” but waited for his opportunity to receive a permanent chair at university. This does not mean that he had not assimilated the value-base of the Wilhelminian academic culture. Rather, the general opinion among the academically trained offspring of *Bildungsbürgerum* was that the political arrangements conducted by the Weimar Republic had hindered their chances of admission to the “inner circle” of the academic elite.

This Wilhelminian tradition the National Socialists stirred with their educational politics. As early as 1933 the Nazis started to incorporate their idea of *Kameradschaft* into the academic world in the militant manner common to the SA and the *Freikorps*. The tradition, “the knowledge,” of the paramilitary troops was the guideline for education in books like Alfred Bäumler’s *Männerbund und Wissenschaft* from 1934.⁶⁶⁹ The aim was to “introduce the group as the typical National Socialistic form of life and education.”⁶⁷⁰ By the means of structural rearrangements, the “group-experience” was intended to become the key pedagogical tool of the education conducted in the Third Reich.⁶⁷¹ Further, this experience would usher in a common, ethnic, ahistorical and directed *will* of the people. This cultivated spiritual force was intended to be superior to all former modes of knowledge and was a prerequisite for the further training of citizens in the National Socialist regime.⁶⁷² In emphasizing the significance of experience-based knowledge the Nazi strategy to take over the German academia did not have to go against the grain. Martin Heidegger, Henri Bergson and Walter Benjamin were only a few of the multitude of scholars utilizing and analyzing the meaning of experience in their texts.⁶⁷³ However, fascist aims were not as sophisticated as were academic pursuits. The Nazis’ overall objective thus was not only to reinstate the form where education, *Bildung* in a widest sense of the word, was being “produced,” but to influence its essence in introducing the ‘spirit’ of the *Männerbund* as the root and model for common learning.

Consequently, camps and distinct working groups, arranged in the outdoors for a short period time, with a schedule, theme and a physical curriculum, became an essential part of the education in all its levels.⁶⁷⁴ The obsession for communality in the Third Reich was sweeping and penetrated all areas. The administrators responsible for education were eager, though quarrelsome, in practicing this “ideology of

⁶⁶⁹ Alfred Bäumler, *Männerbund und Wissenschaft*. Berlin, Juncker u. Dünnhaupt 1934.

⁶⁷⁰ Volker Losemann, ‘Zur Konzeption der NS-Dozentenlager,’ in Manfred Heinemann (Hrsg.), *Erziehung und Schulung im Dritten Reich. Teil 2: Hochschule, Erwachsenenbildung*. Stuttgart, Ernst Klett 1980, 87. Emphasis mine.

⁶⁷¹ Ernst Krieck, ‘Der Neubau der Universität,’ in *Die deutsche Hochschule, Heft 1*. Marburg 1933, 1–7.

⁶⁷² Bäumler 1934.

⁶⁷³ See Martin Jay, *Songs of Experience: Modern American and European Variations on a Universal Theme*. London, University of California Press 2005.

⁶⁷⁴ Losemann 1980, 106–107.

communality” along the lines of the Führer’s ideas and as echoed by SA-minded writers.⁶⁷⁵ Hans Kerrl, for example, a Prussian politician and official, saw it important to reeducate young people to meet the standards introduced by Hitler. He organized a series of camps which were directed at students and researchers of law. Kerrl writes:

Der nationalsozialistische Staat muss vor allen Dingen wissen, dass derjenige, den er [the lawyers] als Richter oder Staatsanwalt mit der Wahrnehmung wichtigster Hoheitsaufgaben des Staates zu betrauen gedenkt, ein Charakter ein deutscher Mann ist.[...] Der Charakter des Mannes zeigt sich im Zusammenleben mit anderen. Nur durch ein solches Zusammenleben wird offenbar, ob der betreffende als Richter oder Staatsanwalt brauchbar sein wird.⁶⁷⁶

Likewise, the 1935 renewal of the legal *Studienordnung* followed the larger principles of the time. It asserted that all students of law needed to complete the introductory studies, which in practice comprised the first academic year. Ewald Grothe summarizes its meaning:

[It was] intended to be intertwined with the communal experience, which the student has had in the SA, the Hitler Youth, work-service, and thus assists the prospective jurist in evaluating German law from the national basis and in recognizing foreign law.⁶⁷⁷

The camps directed towards university staff (*Gemeinschaftslager*, *Wissenschaftslager* and *Dozentenlager*) represented the dual significance of ‘communality’ in 1930s German culture. First, from the point of view of the Nazi administration, the camps were an important attempt in re-educating academics in a National Socialist manner.⁶⁷⁸ In practice, if one wanted to have a good chance to obtain a permanent position at any university, active participation in the camps was a must. As expressed in Hitler’s rhetoric, scholars of the bygone bourgeois world with their obsession for unhealthy reading and mastering information, had no role in the destiny of the nation.⁶⁷⁹ Hence “the learned” needed to be retrained. National Socialist educators did not distinguish between students and docents; everyone working in the academic realm had to be indoctrinated to sincerely participate in *Volksgemeinschaft* and thus both obey and further express the common will of the people. Second, and with respect to the legal sphere, the concrete symbols of the “healthy communality,” the educational camps directed at students and professionals, were intended to root the “new reading” (*neue*

⁶⁷⁵ Schmerbach 2008, 153–158.

⁶⁷⁶ Quoted in Schmerbach 2008, 22. “The National Socialist state must know above all that the one who he [the NS state] intends to entrust as a judge or a public prosecutor with exercising the most important public duties of the state has the character of a German man. The character of the man reveals itself in cohabitation with others. Only by such cohabitation will it become apparent if the man in question will be suitable as a judge or public prosecutor.” (Translation by HW).

⁶⁷⁷ Grothe 2005, 199.

⁶⁷⁸ Schmerbach 2008, 192–216.

⁶⁷⁹ Scholars were constantly ridiculed in the newspapers close to the NSDAP. Cf. Koonz 2003, 47.

Auslegung) of law to the *Stand* of German jurists.⁶⁸⁰ The educational camps were the new form of education and a serious attempt to replace the ways that *Bildung* had produced, used and manifested.⁶⁸¹ Ernst Krieck, the education ideologist of the party and the principal at the University of Frankfurt designed a special *Dozentenakademien* at the University of Frankfurt as examples of the “revolution” in education:

Die Dozentenakademie sollte als örtliche Arbeitsgemeinschaft von Hochschulprofessoren, Dozenten, Assistenten und Studenten höherer Fachsemester, einer bislang an deutschen Hochschulen nicht gekannten Gemeinschaft von Lehrenden und Lernenden, das interdisziplinäre Zentralorgan der Universität sein und auf der integrierenden Basis der “völkisch-politischen Anthropologie” im Laufe der Zeit zur festen Institution der neueren philosophischen Fakultät ausgebaut werden und die “Front” “junger” und reformwilliger Wissenschaft umfassen. Die Avantgarde der “revolutionären Wissenschaft” sollte sich einmal wöchentlich zu einem interdisziplinären Gespräch treffen, dem ein vom Referenten frei wählbarer Vortrag vorausging, der freilich an die Zielsetzung der Dozentenakademie anknüpfen sollte. In dieser Diskussionsrunde sollten die Fachbarrieren abgebaut, methodische Fragen besprochen, die Beziehung von Wissenschaft und Berufspraxis reflektiert, die Reform der überlasteten Studiengänge diskutiert und der “landschaftsgebundenen” Hochschule durch Reflexion der Forschung auf die Bedürfnisse des gesamtgesellschaftlichen “Lebensraumes” des jeweiligen Hochschulstandortes neue Forschungsprioritäten gesetzt werden.⁶⁸²

The words ‘culture’ and ‘education’ remained essential symbols of social prestige, and the anchoring of these concepts to the interaction between citizens, and the groups of people which they connoted, was subject to heavy redefinition. Krieck proclaimed in

⁶⁸⁰ Rütters, 1992, 23.

⁶⁸¹ In the beginning of the 1930s scholars were largely unanimous that the new educational curriculums concerning legal affairs should emphasize “general knowledge” (*allgemein Bildung*). The National Socialist plans on *Studierechtsordnung*, by contrast, highlighted the importance of “general knowledge of one’s people” (*allgemein völkische Bildung*) or “political education” (*politische Bildung*). Grothe 2005, 191, 193.

⁶⁸² Müller 1978, 389. “The lecturer academy should, as a local work collective of university professors, lecturers, assistants and advanced students of a community of teachers and the taught which had been until then unknown in German universities, be the interdisciplinary central organ of the university. It should be converted over time into a permanent institution of the new philosophical faculty on the basis of the “national-political anthropology” and comprise the “spear head” of the “younger” reformist science. The avant-garde of the “revolutionary science” should meet weekly with an interdisciplinary discussion in which one of the speakers should lead with a freely-chosen presentation that should naturally be connected to the goals of the lecturer academy. In this round of discussions the barriers between the departments should be removed, methodological questions discussed, the relationship between science and professional practice reflected upon, the reform of the overburdened courses of study discussed, and new research priorities of the “territory-bound” university put into place through reflection of the research of the needs of the macro-societal “living space” of the respective university’s location.” (Translation by HW).

his inaugural talk in 23 May 1933, that the *Gleichschaltung* with respect to higher education was about “[W]hether the universities as institutions need to be re-installed, as Akademias in the original meaning of the word, which are able to bring the teachers and the students together as a community and towards a common direction.”⁶⁸³

At the level of University administration, combined with the educational reform of the *Studienordnung*, the intention was to create “stormtrooper faculties” which would carry on and cherish the political spirit of the Third Reich.⁶⁸⁴ K.A. Eckhardt was, at least at the beginning, the leading figure in the process. He was also personally in charge of guiding one of these “stormtrooper faculties” at the University of Kiel. Determined to make the “small university, without a trace of the old scientific tradition, to be fighting one and mold it fundamentally new”, he assigned a group of young lawyers to replace the old faculty, which had been largely sacked because of their Jewish descent.⁶⁸⁵ These minds of the war generation constituted a *school* in the sense that they wrote and lectured on the ‘New legal science,’ but also in the ideological sense. They were supposed to comprise “a fusion of the faculty into a politically and ideologically homogenous whole.”⁶⁸⁶

The plan of Eckhardt and the Nazi officials in the Ministry of Culture was to introduce a distinguished institution (*geschlossene Kameradschaft*) within the University of Kiel, and to make sure from the beginning that the staff of the institution shared the same values and worldview.⁶⁸⁷ These values were supposed to represent the *Volksgemeinschaft* (in a National Socialist manner) in miniature. This entity, a group united by its inner virtues, would produce scientific works and new legal tools for the benefit of the whole national community. These expressions, texts, concepts and education for their part would enable law in the future Germany to be studied, understood and applied according to the *Weltanschauung* of the original “distinctive institution,” and at the same time, reflect the values of the National Socialist *Volksgemeinschaft*. In other words, the faculty of law at the University of Kiel was supposed to become a “concrete order” within the world of legal science in German academia – not far from the “guild-like” ideal of the academic tradition – but in a National Socialist, fighting manner. Thus, when the scholars of the *Kieler Schule* referred to their scientific community they spoke and wrote of *Kameradschaft*.⁶⁸⁸

The *Kameradschaft* of the *Kieler Schule* managed to combine the good sides of the ‘communalities’ of both academic culture and the “völkisch revolution.” The young

⁶⁸³ Losemann 1980, 87-88.

⁶⁸⁴ The central administration in Berlin had similar plans also for the University of Leipzig. See Grothe 2005, 171.

⁶⁸⁵ Grothe 2005, 172.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ Eckert 1992, 54: “kleiner Universität und unbeschwert von alter wissenschaftlicher Tradition kämpferisch zu wirken und grundlegend Neues zu gestalten”.

⁶⁸⁸ K.A.Eckhardt, ‘Recht oder Pflicht?’ in *Deutsche Rechtswissenschaft* 1 (1936), 7: “eine Verschmelzung der Fakultät zu einem politisch und weltanschaulich homogenen Ganzen”.

scholars maintained their distinctive academic prestige and belonged to a “guild of the learned” bound by common virtues and shared purpose. On the other hand, their work seemed to be “close to reality,” meaningful from the point of view of national destiny. The *Kieler Schule* did indeed produce the results that the Ministry of Culture intended. The new outlook of the *Studienordnung* and its emphasis on political and “völkisch” education in university training for lawyers and judges was supported not only by K.A.Eckhardt, who had a decisive role in forming the new curriculum, but also by scholars working in the “stormtrooper faculty.”⁶⁸⁹ In the “legal renewal” following the April laws, the scholars of the *Schule* were a visible group. They also understood the assignment they were given: to introduce a novel view of the legal world from the bases of a new kind of scholarly communality. Karl Larenz referred to the “mission” which the official in the Ministry of Culture had given him, Ernst Rudolf Huber and Georg Dahm when they were recruited to the newly-erected “stormtrooper faculty” at Kiel:

Nachdem der Nationalsozialismus nunmehr die Macht erlangt habe, käme es darauf an, ihn geistig so zu beeinflussen, dass die nun eingetretene Wendung letztlich zum Segen und nicht zum Unsegen werde. Unsere Gruppe sei nicht zufällig zusammengestellt. Sie solle in Kiel ein Geisteszentrum bilden, von dem wesentliche Impulse auf die Entwicklung ausgehen sollten. Meine spezielle Aufgabe sei es, mit dafür zu sorgen, dass der nun in der Entstehung begriffene Staat nicht auf dem blossen Machtdenken, sondern auf den ethischen Fundamenten der idealistischen Rechts- und Staatsphilosophie, wie ich sie eben im Handbuch der Philosophie dargestellt hatte, errichtet würde.⁶⁹⁰

Both the National Socialist educators in the Ministry of Culture and the target groups, the students and scholars, called the participants in the camps and the communal higher education *Kameradschaft*.⁶⁹¹ The concept of *Kameradschaft* had a slightly different meaning to different people, but everyone considered it desirable. The initiative in practical, camp-like educational reforms came from the officials of the National Socialist regime. Their larger purpose and educational philosophy followed and executed the ideology of the party elite. Since the purpose of National Socialist officials was to raise soldiers, they arranged concrete opportunities for students and scholars to experience togetherness. These solid experiences of communality in the

⁶⁸⁹ Grothe 2005, 196.

⁶⁹⁰ Karl Larenz to K.D.Erdmann, cited in Eckert 1992, 50. “Now that National Socialism had gained power, what still mattered was influencing it intellectually so that the newly materialized transformation would finally change into a blessing and not into a curse. Our group had not be randomly compiled. It was meant to form an intellectual center in Kiel from which the fundamental inspiration on the development ought to start. My special task was to make sure that the state that was now in the process of forming would be founded not in mere power, but rather on the ethical foundation of the idealistic legal and political philosophy, as I have only recently depicted it in the handbook of philosophy.” (Translation by HW).

⁶⁹¹ Schmerbach 2008, 79–80.

context of National Socialist ideology were supposed to foster thinking and writing which supported the fascist worldview. The intervention was not as abrupt as it might seem at first glance. It did break the hierarchic tradition of learning and teaching in German universities, but to the young scholars of the war generation it managed to combine two ideals which they have not been able to achieve in 1933: belonging to a “guild” of professoriate and participating in the “brotherhood-in-arms.” Suddenly, for this generation, which had been too young to participate in the First World War and was too inexperienced to be admitted to the ‘inner-circle’ of science, the chance to gain both in one go was possible.

As intended, this communality brought about a new view of the relation between law and the people. And unintentionally this ‘renewal in education’ encouraged young academics to engage in multifaceted and collaborative dealings with their subject matter.⁶⁹² I do not wish to whitewash the racial and ideological context in which the educational camps operated, or the results they aimed at, but undoubtedly from these camps genuine experiences of togetherness and joint group-mentality emerged. Whereas the political message of the camps, like in the case of Franz Wieacker, was often ignored by the participants, the concrete experience of communality stayed. This experience, *Erlebnis*, remained a decisive event in the life-history of many participants, and affected later perceptions of the significance of personal life, communality and history. It was important that the camps as a pedagogical arrangement marked a decisive difference towards the traditional manner of studying. It was apparent that the structure and atmosphere of traditional academic studies had not evoked experiences of communality or supported collaborative learning. In this sense the camps were revolutionary and even efficient.

4.3. Affections in *Rechtsgewissen* 1933–1945: Wieacker’s community and legal wisdom

Wieacker’s participation in the *Dozentenlager* and his relationship to the *Kieler Schule* aroused and has continued to arouse disputes on his orientation towards National Socialism.⁶⁹³ Detlef Liebs explains Wieacker’s connection to the atmosphere and scientific work of the *Schule* and camps as juvenile mistakes and lapses in judgement.⁶⁹⁴ Viktor Winkler doubts whether Wieacker as the youngest participant had any true influence on the “synthetic and spiritual” result of either the Kitzberger or the Todtnauberg camps.⁶⁹⁵ Bernd Rüthers, however, asserts that the Kitzberger lager and Wieacker’s report on it are symptoms of the alienation of the late 1930s

⁶⁹² Cf. Winkler 2014, 279–282. For contemporaries, the *Kieler Schule* was the ideological institution behind the new legal curriculum. See Lange 1941, 11.

⁶⁹³ Cf. section 3.7 Wieacker’s hearing and the conclusions derived.

⁶⁹⁴ Liebs 2011, 26.

⁶⁹⁵ Winkler, 468. This is also Okko Behrends’ view, see Behrends 1995, XXXII.

academia. In a “strange and comical” atmosphere scholars regressed to a level which not only made serious research impossible, but enabled the Nazis to transform Germany into a totalitarian nation without facing any severe resistance.⁶⁹⁶ Both Rütters and Ralf Frassek see the Kitzberger camp as a manifestation of the *Kieler Schule*, which for its part was nothing more than an offshoot of the National Socialist worldview. Frassek maintains that the Nazi-oriented legal thinking nourished in and around the *Kieler Schule* continued to have an effect on legal science in Germany even after the Second World War had ended, and, for example, Wieacker’s *Privatrechtsgeschichte der Neuzeit* (1952) is the fruit of this thought.⁶⁹⁷ Thus, different interpretations of Wieacker’s inclination towards the scholarly camp-life of the 1930s remain. More widely, the explanation one gives to Wieacker indicates the interpretation one accordingly gives of the wider question of Wieacker’s possible Nazi sympathies.⁶⁹⁸ Furthermore, did the participation result in long-term consequences which emerge in Wieacker’s texts?

In his texts Wieacker emphasized the meaning of the “educational consciousness,” which laid the base for the whole European legal tradition.⁶⁹⁹ The forms and ethos of the juridical *Ausbildung*, as well as the relevance which the surrounding society gave to the educational reproduction of tradition, reflected the ethicalness of a given society. The fundamental importance which he gave to the phenomena of “community” and “experience” in legal science and education is also acknowledged.⁷⁰⁰ Thus, the relation which Wieacker had to the new forms of legal education following the new *Studienordnung* and the administrative compulsion to arrange university teaching around camps, is not relevant with respect to his attitude towards National Socialism, but it is in the context of the birth and development of some of the basic ideas of his texts. Consequently, these ideas need to be studied in a manner which is also characteristic of Wieacker’s own methodology; one needs to concentrate on the “material” circumstances which cultivated them.

Although Wieacker’s relation to the “camping” of the ‘legal renewal’ is often reduced to his report of the Kitzberger camp, that occasion was not the only politically-oriented scientific gathering in which he participated. He also attended at least the camps of Todtnauberg and Bad Elster.⁷⁰¹ Through his correspondence it is possible to reconstruct his attitude towards the pedagogical arrangements of the ‘legal renewal,’

⁶⁹⁶ Bernd Rütters, *Entartetes Recht. Rechtslehren und Kronjuristen im Dritten Reich*. München, Dtv 1994, 42: komisch-befremdliches Bild.”

⁶⁹⁷ Frassek 2008, 366 fn. 53, 374–377.

⁶⁹⁸ Winkler 2014, 466.

⁶⁹⁹ “Bildungsbewusstsein” in e.g. Wieacker, ‘Vulgarismus und Klassizismus’ 1955, 51; Wieacker, ‘Privatrechtsgeschichte’ 1952, 236. See also Wieacker, ‘Privatrechtsgeschichte’ 1952, 235: “Das römische Recht ist ihm [to Savigny], und zwar zutreffend, das konstituierende Element der deutschen Rechtskultur, insofern sie als Bildungsvorgang verstanden.”

⁷⁰⁰ See e.g. Winkler 2014, 252–253; Avenarius 2010, 122; Wolff 2007: “Für Wieacker war die Universität wirklich Genossenschaft der Lehrenden und Lernenden.”

⁷⁰¹ Thomas Ditt, *Stoßtruppfakultät Breslau. Rechtswissenschaft im “Grenzland Schlesien” 1933 - 1945*, Tübingen, Mohr Siebeck 2011, 216. Cf. section 3.7 Wieacker’s hearing and the conclusions derived.

along with the “new form of education,” especially with respect to the teaching which took place at the National Socialist “model university” of Johann Wolfgang Goethe University in Frankfurt am Main.

In September 1933 the Johann Wolfgang Goethe University was nominated a *Reichs-Universität*.⁷⁰² With it came the honor and obligation to work as a torchbearer for higher education in National Socialist Germany. The person in charge of this task was Ernst Kriek,⁷⁰³ and in April 1933 Kriek asked Ernst Forsthoff to teach at the university. In the coming autumn, Forsthoff received a professorship in public law in Frankfurt, and along the lines of the university’s promotion, he accepted the responsibility of renewing the faculty’s working methods.⁷⁰⁴ In 1933, most likely in October, Franz Wieacker was also called to work as a *privat-dozent* [outside lecturer] at Frankfurt University.⁷⁰⁵

Forsthoff took his duties seriously and started to arrange studies in line with “Carl Schmitt’s orientation,” bringing students and scholars “bound by a common purpose” together to engage in the “communal scientific-political studying and educating.”⁷⁰⁶ The aim was to approach legal training from a very down-to-earth angle, and the emphasis was on the practical jurisprudential problematic. The studies encouraged students to apply their own understanding, trained argumentative skills and logical procedure in a commonplace context. Education was partly carried out in the form of projects, where students and teachers analyzed realistic cases in a collaborative manner.⁷⁰⁷ The pedagogical orientation of the legal teaching in Frankfurt was ahead of its time. Forsthoff’s ideas followed the methodology and aims of the new national legal *Studienordnung*, although it was not officially launched until January 1935. The underlying agenda defining the structure of the teaching and studying conducted in Frankfurt was that law was not an entity separated from the surrounding society. Moreover, the changes in the ideological or material spheres of society produced

⁷⁰² Mussgnug, Mussgnug & Reinthal (Hrsg.) 2007, 7.

⁷⁰³ Notker Hammerstein, *Die Johann Wolfgang Goethe-Universität Frankfurt am Main Bd. I: Von der Stiftungsuniversität zur staatlichen Hochschule 1914-1950*. Wallstein 2012, 284–286; cf. Chapters ,3.2. The Culture in Rechtsbewusstsein 1933–1945: The actualization of Weimar breakdown. National Socialism in Academia and legal science.’; , 4.2. The Culture in *Rechtsgewissen* 1933–1945: The contested *Kameradschaft* in the Weimar Republic and the Third Reich.’

⁷⁰⁴ Meinel 2012, 52.

⁷⁰⁵ On the establishment of special *Dozentenakademia* in Frankfurt, see Mussgnug, Mussgnug & Reinthal 2007, 8 fn. 40; cf. Wieacker to Erik Wolf 19.11.1933: “Ich bin in Frankfurt sehr freundlich aufgenommen worden und habe viele und viel kennengelernt.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷⁰⁶ Mussgnug, Mussgnug & Reinthal 2007, 8. The authors note that Forsthoff was able to accomplish “political schooling in the meaning of National Socialism.” Cf. section 3.2. Affections in *Rechtsbewusstsein* 1933–1945: Personal redefinition of *Bildung* and *Stand*.

⁷⁰⁷ Ernst Forsthoff’s “working communities” (*Gemeinschaftarbeit*) and educational camps (*Wissenschaftslager*) concentrated on actual themes of legal science and education while connecting them to the political atmosphere of National Socialism. The themes included e.g. *Arbeitsgemeinschaft für Rechtserneuerung*, *Erörterung des Wissenschaftsbegriffs* and *Problem der Erziehung*. Mussgnug, Mussgnug & Reinthal 2007, 8 fn 40; Meinel 2012, 53; Wieacker to Erik Wolf 19.11.1933, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

changes in law. The question was not whether law and politics should remain unattached, rather the problematic concerned to *what extent* law should be political. Thus the explicit purpose of Forsthoff (with Franz Beyerle) was not that conventional; it was to carry out a “*fundamental renewal of our [German] juridical thinking.*”⁷⁰⁸

A fixed part of the curriculum of the academic year were the activities and camps arranged for both the staff alone and with students.⁷⁰⁹ The camps had a settled structure and form. The participants met outside, most preferably in a place where one could hike and some place of historical interest was nearby. Castles or monasteries sufficed very well.⁷¹⁰ In a seminar-like first part, the members gave talks or presentations on a theme, which was comprised of a methodological dilemma bound to a concrete political or judicial question in the light of National Socialist ideology. A free and enthusiastic discussion followed the presentations. The more informal part constituted hiking, songs and competitions. The physical side of the camps was notable, and the participants were truly tested in their physical endurance.⁷¹¹ The local newspaper *Frankfurter Zeitung* reported about a particular camp arranged by Forsthoff on 29 July 1934:

Der Stil des Seminars war durch soldatische Straffheit und kameradschaftliche Verbundheit gekennzeichnet. Akademische Titel waren aus der Lagersprache verbannt. Auch Sport und Ausmarsch hatten neben der geistigen Arbeit ihren Platz. Der Ablauf des Tages war dienstplanmässig streng geregelt. Die inneren, wesensmässigen Zusammenhänge zwischen dem Staat und dem geistigen Leben der Nation bildeten den Arbeitszusammenhang des Seminars.⁷¹²

In the report the emphasis is on the physical composition of the educational event, as well as in the way the National Socialistic slogans of “combat,” “duty,” “leadership” and “togetherness” were embodied in the appearance of this new manner of conducting “spiritual work.” The camps seemed to promote the “new values” of the Third Reich in action. Forsthoff’s camps were committedly National Socialist, and

⁷⁰⁸ “grundlegenden Erneuerung unseres juristischen Denkens,” quoted in Meinel 2012, 53.

⁷⁰⁹ Wieacker to Wolf 19.11.1933: “Die Lage in der Studentenschaft ist sehr interessant. Die Fachschaftsarbeit geht fakultativ, in drei Arbeitsgemeinschaften der juristischen Fachschaft über lockere und zwanglos ausgewählte Themen vor sich.” NL Erik Wolf, -Albert-Ludwig-Universitätsarchiv.

⁷¹⁰ “Die Möglichkeit, [vom] Schloss Trifenstein, ist eine besondere Freude für unsere Arbeitspläne.” The presence of nationally relevant landscape and historic buildings seemed to be essential for the arrangement of camps. Wieacker participated in camps at Trifenstein castle, and in the towns of Oberursel and Todtenauberg, which were located amid impressive landscape. Wieacker to Erik Wolf 3/1934; also Wieacker to Erik Wolf 2.4.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv.

⁷¹¹ Wieacker to Wolf 12.7.1935, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv.

⁷¹² “Das Wissenschaftlager,” in *Frankfurter Zeitung* 29.7.1934, quoted in Meinel 2012, 1. “The calm of the seminar was marked by soldierly strictness and comradely connection. Academic titles were banned from camp language. Sport and marching had their place next to intellectual work as well. The course of the day was strictly planned like a duty roster. The inner, natural connections between the state and the intellectual life of the nation made up the working context of the seminar.” (Translation by HW).

marked a serious ideological change from the previous style of university education. From a strictly pedagogical point of view they were also revolutionary. Not only were the studies combined with physical exercises and the conditions were very informal, but also the relation between students and teachers, as well as among teachers, was intentionally more dialogical and non-hierarchical.⁷¹³ These two levels, the National Socialist performativity around the fashionable contemporary key concepts and the true breach with the academic pedagogical tradition, existed concurrently in the camps. The camps diverged in their nature; some were merely anti-intellectual play. Nevertheless, in order to study the possible effect they had, both levels have to be acknowledged. When one studies how “combat,” “duty” and “togetherness” as experienced in the camps relate to the concept of “spiritual work” in the worldview of a single individual, it is important to keep in mind that camps as an educational experience, like the whole concept of *Kameradschaft*, bore a wide set of meanings.

The revolutionary pedagogy which the camps seemed to represent is strongly present in Wieacker’s correspondence with Franz. Of the eleven letters he wrote to Erik Wolf from Frankfurt, camps and working groups are mentioned eight times, and always in a positive light. The Johann Wolfgang Goethe University diverged from Wieacker’s previous studying and working places on account of its *milieu*, namely the people and the atmosphere of Frankfurt University. He quickly found a “circle” of friends, consisting of Forsthoff, Arnold Ehrhardt, and Werner Weber, who regularly attended and arranged *Wissenschaft* and *Arbeitsgemeinschaft* camps as fixed parts of the teaching and studying plan of the university.⁷¹⁴ Wieacker felt physically better in pleasant company. He wrote to E. Wolf on 25 January 1934:

Die Frankfurter Tätigkeit ist fruchtbar, befriedigend und fördert/ vielleicht das neuere Ausreifen stärker als die Jahre einsamen Untersuchens, und Aus-sich-herausspinnens vor der Habilitation.⁷¹⁵

It was not just that the working atmosphere in the faculty of law was relaxed, but this new kind of communality elevated the pursuit of academic work to another level.⁷¹⁶

⁷¹³ Meinel 2, 52; Wieacker to Erik Wolff 3/1934: “Es [The camp arranged in castle Trifenstein] ergibt sich daraus eher eine noch elastischere und freiere Arbeitsmöglichkeit.” About the increased physical content of the academic work, cf. Wieacker to Erik Wolf 19.11. 1933: “Der Wehrsport ist gegenüber dem Sommer zugunsten politischer Schulungsarbeit zurückgestellt worden; er findet nur in den Wehrverbänden statt.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau; cf. Schmerbach 2008, 20 fn. 8.

⁷¹⁴ Although these three comprised the core of Wieacker’s network in Frankfurt, he also mentions Franz Beyerle, Friedrich Klausling, Hermann Heimpel, and Fritz von Hippel. See Wieacker to Erik Wolf 3/1934; 2.4.1934; 14.4.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷¹⁵ Wieacker to Erik Wolf 25.1.1934; also e.g. Wieacker to Erik Wolf 2.4.1934: “ich würde mich sehr freuen, wenn ich an dem Pfingstferien-lager [in Oberusel] , das Sie im Kaiserstuhl planten, teilnehmen dürfte.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “The activities in Frankfurt are fruitful, satisfying and promote, perhaps, the newer maturation better than the lonely years of inspection and giving one’s all before habilitation.” (Translation by HW).

⁷¹⁶ Wieacker perceived his stay in Frankfurt as an experience of exceptional scholarly activity: “[D]ie umfangreiche fachschaffliche Arbeit, deren exemplarische Entwicklung eines der Hauptgründe meines

In his letters, while expressing individual, personal feelings, he used these same contemporary concepts and terminology which occupied the public discourse and sought to emphasize the exceptionality of the national, *völkisch* revolution. The terms “togetherness” and “troop” in Wieacker’s letters are applications of the rhetoric of the *Zeitgeist*, but nevertheless signify a personal experience; they were embodiments of the contemporary concepts. The mere idea of the near future gatherings with the “circle” [*Zusammenhäng*] brought pleasant emotions to Wieacker:

Es scheint nach dem, was ich jetzt höre, so zu liegen, dass das amtl. Fachschaftslager nach wie vor in Oberursel stattfindet, dass aber die Seminar- und Arbeitsgemeinschaftslager, die den gleichen guten Stamm umfassen, von dem ich Ihnen erzählte, in T. stattfinden.⁷¹⁷

Behind the common contemporary vocabulary, the existence of a genuine emotional experience emerging from a new kind of scholarly practice is obvious. Wieacker, however, connects the significance of the learning camps directly to the results of academic work. The exercises and togetherness experienced through the communal working method could not be separated from the “spiritual” essence of one’s scholarly pursuits.⁷¹⁸ Wieacker described them as being “overloaded but uplifting” and they were an important, and pleasant, part of the work of a researcher.⁷¹⁹ The preliminary work, which Wieacker prepared e.g. for the camp in Oberusel (Forsthoff’s) was substantial, and he perceived it as a true scientific endeavor.⁷²⁰ The objective of these camps was to find a new way to do science. To interpret camps as theater is in my opinion a mistake. According to Wieacker’s correspondence, he experienced the camps as significant and authentic meetings because of their scientific contribution:

Das Fachschaftslager während der Pfingstferien findet wohl in Oberursel statt. Es soll so gleich zu Beginn Kurs und Richtung bestimmt werden und uns Gelegenheit gegeben werden, Begabungen und

vorläufigen Verbleibs in Frankfurt sein sollte (...),” Wieacker to Erik Wolf 2.4.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷¹⁷ Wieacker to Erik Wolf 3/1934 NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “It seems, according to what I hear, that it is likely that the government professional organization’s camp will still take place in Oberursel, that the labor and teaching collective camps, that have the same good roots I told you about, will take place in T.” (Translation by HW).

⁷¹⁸ Wieacker was confident that Forsthoff’s method, which the faculty of law in Johann Wolfgang Goethe University adhered to was productive, exceptional and transferable. He wanted to take it with him to other universities, possibly to Freiburg, as he wrote to Wolf: “Ich würde mich für diese Arbeit, an der ich in Frankfurt mit großer begeister Anteilnahme und Freude teilnahm, sehr gern auch in Freiburg bereithalten [...] es wäre für mich sehr schmerzlich, diese Möglichkeit zu einer ganz neuen Ausfüllung des Lehrberufs durch neue Formen der Zusammenarbeit wieder zu verlieren.” Wieacker to Erik Wolf 2.4.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷¹⁹ Wieacker to Erik Wolf 12.7.1935: “eingefüllt mit verdrießlicher (und mit erfreulicher) Arbeit”. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. The letter was sent to Wolf after the Kitzeberger-camp cf. section 4.2. Culture in *Rechtsgewissen* 1933–1945: The contested *Kameradschaft* in the Weimar Republic and the Third Reich.

⁷²⁰ Wieacker to Erik Wolf 2.4.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

Leistungen vor Beginn der Semesterarbeit, nicht wie im Winter, am Semesterende zu kennen. Das angeredete Publikum des Lagers werden die studentischen Leiter von Argeitsgemeinschaften sein. Nach den Ergebnissen des Februars wird es sicher sehr nett. Das Borkener Lager war ausschließlich sportlicher Schulung bestimmt, die das Zusammengehörigkeitsgefühl stärken sollte, und wird von uns allen als im organisatorischen und seinem Geist und Sinn nach als sehr gelungen empfunden. Ich bin sehr froh, dass ich es nicht versäumt habe, denn ich fühle mich geistig ausgeruhter und habe bessere Nerven wie nach Semesterschluss. Körperlich war es nicht ganz unbedeutend.⁷²¹

The camps appeared as elevating experiences, where a scholar could physically feel the essence of the “spiritual work,” which he conducted in academia. Before, cultivating the heritage of national culture in an academic context, in other words conducting *Bildung*, had mainly been a textual process of reading, writing, presenting and occasionally sensing a meaningful connection with the linguistic cultural entity one was studying. In the camps, however, learning became more of an event of going through and living the meaning of abstract subject matter. The concrete pedagogical shift at which the new administrative actions aimed can be elaborated with the help of two German terms, both signifying an experience: *Erfahrung* and *Erlebnis*. Whereas *Erfahrung* had traditionally been emphasized as the founding phenomenon involved in learning, the new modes of education attempted to make the learning experience *Erlebnis*.⁷²² That is, learning was supposed to become a process of going through concrete sensations which would permanently change the view which one had on society and science. Studying and assimilating information would shift from a metaphorical journey to becoming a more concrete one.⁷²³

When the failure of the experiment of Frankfurt University became obvious and the “troop” of colleagues dismantled, Wieacker had to rethink his career and work possibilities:

⁷²¹ Wieacker to Erik Wolf 5.4.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “The professional organization’s camp during the Pentecost holidays will take place indeed in Oberursel. It is scheduled that right at the beginning, course and direction will be determined, and we will be given the opportunity to get to know abilities and performances before the start of the semester, not at the end like in winter. The addressed public of the camp will be the student leaders from the labor collective. After the February results, that will certainly be nice. The Borken camp was determined to solely involve athletic instruction, which was meant to strengthen solidarity, and was regarded by all of us afterward as having succeeded well in organizational spirit and meaning. I am very delighted that I did not miss it, because I feel spiritually more relaxed and have better nerves, as if the semester had ended. It was not physically insignificant.” (Translation by HW).

⁷²² Cf. section 4.2. Culture in *Rechtsgewissen* 1933–1945: The contested *Kameradschaft* in the Weimar Republic and the Third Reich.

⁷²³ In 1940 Paul Ritterbusch formulated it thus: “Für die Kieler Fakultät und die Angehörigen ist dieses ‘Experiment’ wohl das entscheidendste *Erlebnis* ihrer wissenschaftlichen Entwicklung gewesen,” quoted in Winkler 2014, 275. Emphasis mine. See also Eckert 1992, 57: the camps as *Gemeinschaftserlebnis*.

Doch gibt die Unsicherheit der nächsten Semester der ganzen Tätigkeit etwas heiter Unverbindliches und Trauriges zugleich: Wie wird es weiter mit Frankfurt werden, und wie mit Freiburg, wenn ich dorthin zurück gehen sollte? Hoffentlich ist wenigstens der Lehrbetrieb in Freiburg erfreulich. Die Frequenz scheint ja ausreichend, und sie ist ja im Augenblick für den Aufbau eines arbeitsfähigen Studentenkreises das Entscheidende, weil sie Auswahl verbürgt. Hier in Ffm. in haben wir viele von den Ordentlichsten und Tätigsten durch Wegzug verloren; es bildet sich nicht eigentlich mehr die erfreuliche Truppe in den Wissenschaftslagern des vorigen Winters.⁷²⁴

It is obvious that the sensation Wieacker wrote about was not just a fashionable textual trope. But did the *Kameradschaft* extend to the work of a scholar? And if it did, how did it manifest itself in Wieacker's historical vision? Wieacker's correspondence reveals that by 1934 he had already understood the essence and benefits of group identity, but this notion grew ever stronger after he participated in the practices of the stormtrooper faculty of the *Kieler Schule*.⁷²⁵ The sense of a community and the new kind of working method which prevailed in the *Kieler Schule* were not just Wieacker's ideas. To Ernst Rudolf Huber, for example, the *Kieler Schule* was first and foremost a "community" built upon "youthful experience," which produced novel insights and applications in legal science precisely because of that particular mentality. The education and study in all the forms expressed by the *Schule* manifested a new kind of communality and a combative stance towards previous models of legal thinking. The *Kameradschaft* at Kiel signified both an actual experience and a distinct scientific custom when compared to its predecessors.⁷²⁶

The idea of a revolutionary turn in the academic work, echoing the goals of educational reform, in which *Kameradschaft* or *Gemeinschaft* were introduced into academic work, was explicitly reported by Wieacker in 1935. During the summer of

⁷²⁴ Wieacker to Erik Wolf 12.12.1934. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. "After all, the uncertainty of the next semester gives the whole job something cheerfully noncommittal and at the same time sorrowful: How will things continue in Frankfurt, and in Freiburg, if I should need to go back there? Hopefully the teaching activities in Freiburg would at least be pleasant. The number of students certainly seems sufficient, and at the moment that is certainly the deciding factor for the development of a group of students who are capable of working, because it guarantees selection. Here in Frankfurt we have lost many of the most decent and active in the exodus. The pleasant troop in the science camps of the previous winter is no longer studying." (Translation by HW). The rearrangements in Frankfurt, which led to the dissolution of the "circle" of friends meant an end to the "experience of fruitful work": "Aber sie wird nach unsrer aller Erachten an Fruchtbarkeit dadurch sehr verlieren, dass sie später nicht fortgesetzt werden kann; vielleicht zerstreut sich der alte Stamm schon jetzt." Wieacker to Erik Wolf in 14.4.1934. Moreover, when the uncertainties in Frankfurt actualized, one of the saddest things was that the scheduled camps were also cancelled: "Leider finden nun auch die Fachschaftslager nicht statt." Wieacker to Erik Wolf 2.4.1934, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷²⁵ Cf. Winkler 2014, 470–473.

⁷²⁶ On the "new form of education," see Eckert 1992, 55–56. On its "fight" against the old practices, see Rütters 1992, 23–24.

1935 the *privat-dozent* of legal science from all over Germany gathered in a camp in the town of Kitzberger in an already familiar fashion. This time, however, the purpose was not only to reeducate the scholars into healthy and productive work, but to produce a series of foundational scientific results which would help to shape the legal study of the future Germany. Consequently the “summer-school” became both the most renowned and productive conference in the context of “legal renewal” and later a notorious symbol of the politicizing of legal science.⁷²⁷ The event was summoned by K.A.Eckhardt and his creation, the *Kieler Schule*, with all the involved scholars, was well presented. As a result of the lectures given in the Kitzberger camp the participants published articles in the volume of the fascist journal *Deutsches Recht* in 1936. Wieacker’s responsibility was to write a review of both the activities of the camp and the presentations given. In his article Wieacker wrote about the schedule and content of the camp days:

Wanderungen, Ausmärsche, Frühsport und die kleinen Ereignisse des Lagerlebens schufen die Entspannung und kameradschaftliche Beziehung, in der die Übereinstimmung im Denken sich zur kämpfenden Arbeitsgemeinschaft vertieft.⁷²⁸

Unlike in Hitler’s talks, where physical education was the prior objective, and cultivating the mental faculties a secondary matter, in Kitzberger the togetherness and sport activities were a tool to give shape to an intellectual and cognitive achievement:

Über die in den letzten Jahren überall geförderte und erfolgreiche Polemik gegen die Voraussetzungen des älteren Rechtsdenkens hinaus wurden in gemeinschaftlicher Arbeit die neuen Formen sichtbar, in denen das völkische Recht lebendig sein wird. Daher hinterliess das Kitzberger Treffen bei den Teilnehmern den Eindruck, dass hier im Kampf um die neue Rechtswissenschaft eine neue Art der Gemeinschaftsarbeit ins Leben trat: es sind in einer Lagergemeinschaft die Voraussetzungen für eine gemeinschaftliche Grundhaltung festgestellt und diese Grundhaltung selbst an einer Reihe von wesentlichen Fragenkreisen bewährt worden.⁷²⁹

⁷²⁷ Bernd Rüthers, *Geschönte Geschichten – Geschonte Biographien. Sozialisationskohorten in Wendeliteraturen. Ein Essay*. Tübingen, Mohr Siebeck 2001, 48.

⁷²⁸ Wieacker, ‘Das Kitzberger Lager’ [1936], 163. “Hikes, marches, early-morning exercise and the little events of camp life create the relaxation and comradely connection in which the conformity of thought becomes absorbed into the struggling work collective.” (Translation by HW).

⁷²⁹ *Ibid.* “Beyond the polemic that was promoted and successful everywhere against the requirements of older legal theory in recent years, the new form in which national law will come alive became apparent in collective work. This is how the Kitzberg meeting made the impression on its participants that a new kind of collective work came alive here in the struggle for a new jurisprudence: in a camp collective the requirements for a fundamental collective attitude are identified, and this fundamental attitude itself was maintained in a series of essential issues.” (Translation by HW).

One can take the quotes above as mere scribbles, where a young scholar (a 28-year-old docent) repeats the keywords which he has heard and understood as fashionable. On the other hand, and against the former opportunistic explanation, the Kitzberger report can be categorized as the unintelligent nonsense of National Socialist “science,” like Ernst Krieck’s pamphlets on educational reform. I hold that both explanations do not fully capture the significance of Wieacker’s writings. To lean excessively on either of them makes one’s analysis too narrow, and some essential sides are lost from sight.⁷³⁰

In the 1936 report ‘Das Kitzberger Lager’ Wieacker presented this particular camp as a “visible form of the method of new legal science.” He seems to assert that inside the informal gatherings of the young scholars, one could find a methodological wisdom, usable in interpreting the past, present and future society. Thus in the Kitzberger report Wieacker puts into words the methodological vision he not only believed in the 1930s, but to some extent maintained throughout his career.⁷³¹ Judging by his correspondence, Wieacker did not assimilate or find attractive the ideological part of the *Kieler Schule* or ‘Dozentenakademie’ in Frankfurt University. But the foundational principles of the experience as a pedagogical key, and the community as the material context for an “inexhaustible, ideal experience” of law, were important to him.⁷³² The pervasive idea of the above quote is that a basic attitude (*Grundhaltung*), mentality, which appears among the similar-minded in a friendly gathering and healthy atmosphere, is *the wisdom* that a dogmatism needs in order to become science. This notion remains in his thought more or less explicitly through the decades. The spiritual substance of these groups (a) represents the ‘New legal science,’ and which is (b) living, closest to life, and could (c) be useful in scientific work as a methodological tool. At this point Wieacker did not have a specific concept for this mentality he sensed and in which he participated. Later, however, he started to express it with the term *Rechtsgewissen*.

Creative legal thinking as ‘conscience’: The War and the dissolution of the *Kameradschaft*

Wieacker gained a permanent position at the University of Leipzig in 1937. This did not, however, mean that his network of colleagues would have drastically changed. By 1939, Ernst Rudolf Huber, Karl Michaelis and Georg Dahm had joined him at this distinguished University with its glorious reputation. Moreover, the National Socialist

⁷³⁰ In his letter to Wolf, Wieacker describes the work in Kiel and the camp in Kitzberger: “In ganzen war es sehr schön und außerordentlich anstrengend.” Wieacker to Erik Wolf 12.7.1935 Freiburg-Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷³¹ Both Winkler (2014) and Avenarius (2010) hold that the methodological core of Wieacker’s texts largely remained the same from the 1940s to the late years of his scholarship.

⁷³² Franz Wieacker, ‘Europa und das römische Recht,’ in Wieacker, *Vom römischen Recht*. Stuttgart 1961, 329.

Ministry of Education had plans to transform the legal training at Leipzig University into a similar “stormtrooper faculty” than the one at Kiel University.⁷³³ Although the original *Kieler Schule* dispersed, the network and friendships stayed. Moreover, the original *Schule* managed to man the key positions in model universities such as Leipzig and Strasbourg (and after the war in Göttingen).⁷³⁴

To Wieacker the University of Leipzig offered a highly satisfying working place. Later he recollected it as a “true scientific working community.”⁷³⁵ Although the decision to move from Kiel to Leipzig was not an easy decision, the history and landscape of this traditional university brought Wieacker pleasure.⁷³⁶ The most satisfying factor was, however, the faculty, with his old friends and some new acquaintances.⁷³⁷ One of the “new philosophic acquaintances” was Hans-Georg Gadamer, who received a professorship in Leipzig in 1938, and with whom Wieacker had a lifelong friendship.⁷³⁸ With Gadamer, Wieacker extended his scientific curiosity to drama, literary criticism and hermeneutics. During his stay in Leipzig Wieacker established his status as the leading young scholar in Roman law, and published many highly influential and innovative texts on legal history, legal education as well as continuing his work on new conceptualizations in the fields of property and land law.⁷³⁹ To

⁷³³ Grothe 2005, 171. See also Winkler 2014, 473: The network was “strongly bound personally, scientifically and politically.”

⁷³⁴ To Ernst Rudolf Huber, for example, the *Kieler Schule* was not a faculty tied to one school (Huber 1941), nor did Heinrich Lange mean a physical faculty when he talked about the legacy of the *Schule*. See Lange 1941; cf. Winkler 2014, 470–476. The members looked after each other: cf. Friedrich Schaffstein to Gerhard Dulckeit 1.6.1951: “Wie Sie gehört haben werden, habe ich es hier in Göttingen ganz gut getroffen. Ich bewohne Sieberts früheres sehr schönes und grosses Zimmer in günstiger Lage und stehe in angenehmen, aber losem und rein gesellschaftlichem Kontakt mit der Fakultät. [...] Im März u. April war ich 6 Wochen in Tirol zum Skilaufen u. traf dort u.a. auch Hubers u. Forsthoff.” Friedrich Schaffstein to Gerhard Dulckeit 3.7.1952: “Aber dazu [in a book project] bedarf ich sehr der sachverständigen Beratung, die ich mir von Wieacker und Ihnen erhoffe.”; Karl Larenz to Gerhard Dulckeit 21.1.1940: “Schön war es, daß wir in Leipzig Dahm, Huber, Michaelis, die alle mal Urlaub hatten, wiedersehen konnten.” NL Gerhard Dulckeit, Cod. Ms. Dulckeit 5, Niedersächsische Staats- und Universitätsbibliothek, Göttingen; cf. Wieacker to Huber 21.7.1961: “ich war durch auswärtigen Besuch wie belagert; später noch durch die Tübinger Fakultätenkonferenz aufgehalten (wo ich Dahm und Larenz sah) Wir freuen uns weiterhin auf den nun nahgerückten Tag, an dem Du einen der einge[...]en angemessenen Platz in unserer Fakultät [...] und hoffentlich recht aktiver wirst, in der Du viel Freunde hast, die sich auf die Zusammenarbeit freuen.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁷³⁵ “echte wissenschaftliche Arbeitsgemeinschaft,” quoted in Winkler 2014, 473.

⁷³⁶ On Wieacker’s hesitation, cf. Larenz to Dulckeit 4.4.1939. NL Gerhard Dulckeit, Cod. Ms. Dulckeit 5, Niedersächsische Staats- und Universitätsbibliothek, Göttingen. On Wieacker’s emotional bond to Leipzig, see Wieacker to Erik Wolf 4.5.1942, NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷³⁷ Wieacker to Salvatore Riccobono 2.2.1940: “Ich bin hier nun seit vier Jahren in Leipzig und habe mich in dieser äusserlich wenig anziehenden, aber wissenschaftlich und künstlerisch bedeutenden Stadt nun sehr gut eingelebt. Nicht nur im meiner eigenen Fakultät, sondern auch Historiker, Philologen und Philosophen verbindet mich dauernde Zusammenarbeit.”

⁷³⁸ Robert J. Dostal, ‘Gadamer: The Man and His Work,’ in Robert J. Dostal (ed.), *The Cambridge Companion to Gadamer*. Cambridge University Press 2002, 20; on the friendship, see Wieacker’s letters to Hans-Georg Gadamer 10.2.1975, NL Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar.

⁷³⁹ Behrends 1995.

Wieacker himself, the work conducted in Leipzig was a natural continuum in his career. Although he had moved from the questions of property law in contemporary society to more historically-oriented themes, the original research interest, the “material conditions of immaterial things” stayed.⁷⁴⁰

The dilemma of the ungraspable nature of unchanging and just legal reasoning in changing historical times remained. In other words, how did the entities of expert knowledge (*Stand*), education in the context of tradition (*Bildung*) and justice relate and necessitate each other? In his wartime letters and textual works Wieacker started to approach the dilemma from the point of view of *Gewissen*, conscience. As a professor, with an extended teaching duty and pedagogical responsibility when compared to his *privat-dozent* times, Wieacker became more interested in matters of contemporary legal training. Engagement in this scientific field was also a logical continuation. After all, in Kiel Wieacker had been part of and amidst the “revolutionary renewal” of higher legal education, which had had an effect on his scholarly identity, especially on the pedagogical level.⁷⁴¹ In some of his wartime articles Wieacker transformed his knowledge on land law into a proposal on the essential thematic structures behind this field, according to which future legal education should be directed.⁷⁴² Drawing a larger picture, Wieacker’s contribution can be connected to the drafting of and discussion over the new “peoples law” of Germany. This codification, collected and constructed from the viewpoint of the National Socialist ideology, was supposed to replace the old codification BGB. At a practical level the project did not ever really even begin, but it did not prevent scholars from arguing over the matter.⁷⁴³

⁷⁴⁰ Wieacker to Gerhard Dulceit 14.6.1950: “Meine Anschauungen über die Entwicklung des römischen Eigentumsbegriffs habe ich an leider ziemlich unzugänglicher Stelle (Das Neue Bild der Antike II (Rom) 169ff, C.F.Koehler, Leipzig 1942 und 1944) so eingehend und vergleichsweise deutlich auseinandergesetzt, dass ich die Verweisung ohne weiteres an die Stelle einer Diskussion setzen darf. Hausgenossenschaft und Erbeinsetzung und anderes war Ihnen ohnedies bekannt, und ich kann leider nur hinzufügen, dass ich meine Methode, die Dinge zu sehen, nicht ändern werde, unbeschadet aller historischen Korrekturen, die sich mir ständig aufnötigen werden.” NL Gerhard Dulceit, Nachlass Cod. Ms. Dulceit 5, Niedersächsische Staats- und Universitätsbibliothek, Göttingen.

⁷⁴¹ Winkler 2014, 263, fn. 36.

⁷⁴² Cf. Franz Wieacker, ‘Vielfalt und Einheit der deutschen Bodenrechtswissenschaft der Gegenwart. Über die Umgestaltung des Grundstücksrechts durch die heutige Bodenpolitik’ [1942], in Wollschläger (Hrsg.) 2000.

⁷⁴³ See Wieacker to Carl Schmitt 6.5.1941. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg. The theme of the *Volksgesetzbuch* is in itself a very interesting case study on the relation between National Socialist purposes and the scholar’s willingness to respond to those demands. To Hans Frank, for example, creating the new codification was a priority and a fulfillment of the NSDAP party program. Wieacker contributed to the process of drafting the new “people’s law” to some extent (cf. Schubert 1988, 33–36.), though he later denied that he had had any significant part in the planning process. (a.o.o., 17). From the original *Kieler Schule*, Georg Dahm, Karl Michaelis and Wolfgang Siebert also participated. Wieacker was reluctant about any codifications from a legal theoretical point of view. Systemizations hindered the vital connections between the law and reality.

To Wieacker, legal education had to cultivate the future lawyers' own mental faculties, as well as initiate them to the virtuous and binding discipline of legal scholarship, where the personal examples as well as textual expressions of the preceding masters exhibited an uncompromising paragon. As already elaborated, to Wieacker the legally trained comprised a *Stand*, which was comparable to other legal associations in history, and in the long line of different social manifestations of the "lawyer-estates," the example of Late Republican Rome was the most virtuous and workable.⁷⁴⁴ All this he discussed with Carl Schmitt:

Aber auf der anderen Seite gebe ich doch der kasuistischen Methode der Rechtsfindung den relativen Vorzug, weil sie am angemessensten der Aufgabe des Rechts ist, Einzelsituationen der sozialen Existenz geschmeidig und doch mit guter Richtungstendenz zu verarbeiten; ähnlich wie Strategie, Erziehung u. ähnliches Situationsgebundenes – aber doch von orientierenden Maximen, nicht normendurchsetzte Künste des sozialen Handelns sind. Diese schöpferische Elastizität vermisste ich beim logisch-exegetisch-pragmatischen Legisten Frankreichs und beim philosophisch-systematischen Dogmatiker Deutschlands seit der Rezeption gleichermaßen; ich glaube doch zum Nachteil beider Völker, denen die freiere Hingabe an den Geist (Idee oder Ideologie) einen höheren stellvertretenden Rang, aber auch geringeren Lebenserfolg gegeben hat als etwa die römische oder englische Methode zu verzeichnen hat; denn diese beiden Völker sind ja, im Gegensatz zum griechischen und den Völkern des Kontinents, die von der griechischen Art, die Welt zu erkennen, leben, wahre Fetischisten, aber gute oder leidliche Juristen.⁷⁴⁵

The two-way reference between the "great jurisprudence" and Wieacker's contemporary legal culture was constantly present. Legal thinking to Wieacker represented an ability to subordinate a given case to a more general principle (not just derive a decision from a rule), and recognize the similarities and differences between legally relevant events. It was a skill not only to use the law, but to further *develop* it

⁷⁴⁴ Cf. section 3.8. 'Vulgarismus und Klassizismus' (1955): *Rechtbewusstsein* and the collapsed legal order.

⁷⁴⁵ Wieacker to Carl Schmitt 25.8.1942. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg. "But on the other hand I assign relative priority to the casuistic method of finding justice, because it is most appropriate for the purpose of law to work agilely through individual situations of social life and also with good directional tendency. Like strategy, upbringing and similar things connected to circumstances, but certainly from orienting maxims, are not skills of social action that are attached to norms. I find the logical-exegetical-pragmatic legal expert of France and the philosophical-systematic dogmatist of Germany have equally lost this creative elasticity since my reading. I believe, however, to the disadvantage of both peoples to whom the more liberal devotion to the mind (idea or ideology) has given a higher representative rank but also a lower success in life than that which the Roman or English method can show for. For in contrast to the Greek and continental nations, who live from the Greek way of recognizing the world, both these peoples are true fetishists, but good or reasonable jurists." (Translation by HW).

in one's profession along with previous legal decisions. As such, legal praxis would be *Schöpfung*, a creative usage of the law, and, furthermore, it would bring just results from the point of view of the community:

Wenn Sie die Aufmerksamkeit auf die spezifisch englische, französische und deutsche [Weise]der Ausforschung des Rechts lenken, so möchte man wünschen, daß bei uns auch die Lehre daraus gezogen werde [the roman jurisprudence [...]].⁷⁴⁶

The pedagogical discussion in 1940s Germany did not circle around whether the previous dominant status given to *Schöpfung* should be reinstated, rather scholars quarreled on which way and following what “axioms” it was to be done.⁷⁴⁷ Franz Wieacker both individually and as part of the *Kieler Schule* contributed to this discussion. Wieacker believed that the essence of the correct, “creative,” legal thinking also provided a passage for successful legal education.⁷⁴⁸ The theme constituted a frame which knitted together his wartime writings. After all, Wieacker's major project during the 1940s was to complete *Privatrechtsgeschichte der Neuzeit*, which was originally meant to serve as a legal historical textbook for legal education, and which is in particular a book on legal thinking.⁷⁴⁹ Hence, his enthusiasm for Erik Wolf's *Große Rechtsdenker der deutschen Geistesgeschichte* (1939) becomes understandable on many levels, and the prominent and continuing feature in the correspondence between Erik Wolf and Wieacker is the interest Wieacker has in Wolf's book.

Wieacker's own project of completing *Privatrechtsgeschichte der Neuzeit* seemed to progress at the same pace as he read Wolf's book.⁷⁵⁰ Especially from 1940 to 1943 Wieacker often wrote to Wolf about *Große Rechtsdenker*. Wieacker's attempt was to “embody” the characters which Wolf wrote about, and understand their view of the world. In this task of “total hermeneutics” he asked for Wolf's assistance in which he would either confirm Wieacker's own insight on the intentions of a given *Rechtsdenker*, or help Wieacker to more fully understand the borders of the horizons of past social theorists.⁷⁵¹ Wieacker proceeded in the project of making sense of the

⁷⁴⁶ Wieacker to Carl Schmitt 25.8.1942. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg. “If you direct your attention to the specific English, French and German ways of investigating the law, one might wish that doctrine were taken from there [the roman jurisprudence [...]].” (Translation by HW).

⁷⁴⁷ Cf. Frassek 2008, 360–364.

⁷⁴⁸ Wieacker to Carl Schmitt 25.8.1942: “Diese Frage [of emphasizing a correct way of legal thinking] möchte auch über den Denkstil unserer kommenden Richter und Rechtsdenker bestimmen.” NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

⁷⁴⁹ Winkler 2014, 135–136.

⁷⁵⁰ See e.g. Wieacker to Erik Wolf 4.5.1942: “Jedesmal wenn ich die neuere Privatrechtsgeschichte lese, nehme ich aufs Neue mit neuer Freude Ihre Rechtsdenker zur Hand.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷⁵¹ Wieacker to Erik Wolf 18.10.1940. “Auch der lutherischen Lebensgesinnung dieser Männer wollte ich nicht präjudizieren. Nun konnte ich darüber nicht schreiben, denn der, dem der evangelische Geist selbst tot ist, kann sich auch nicht anmaßen, dergleichen in der Geschichte wiederzuerkennen; ich kann gleichsam das evangelische Erlebnis der Zeit nur an seinem literarischen Niederschlag wahrnehmen. So gebe ich zu, daß mein Bild notwendig unvollständig bleibt; aber ich habe mich wohlweislich gehütet,

thinking of past paragons in phases; he was clearly and concurrently with the individual translation process trying to conceptualize the long line of German legal thinking. How did the past scientist see justice? What were the axioms which distinguished noteworthy from mediocre theories? What about the unchallenged truths which guided their thinking, and which changes marked a larger transition between the paradigms of intellectual history?

Wieacker recognized a certain style of thinking in the works of past cultural heroes. Although they had not all been lawyers, their argumentation and reasoning followed a juridical pattern. Despite being poets or politicians Wieacker read them as legal thinkers. He started to see the intertwining of culture, the individual and law appearing in the distinct ways of thinking of lawyers, a thinking which education had cultivated:

Es sind grosse Rechtsdenker, nicht notwendig grosse Juristen, die Sie zeigen, und ich halte dies für keinen Zufall. »Gross« im überlieferten Sinn der geschichtlichen Größe ist der Staatsmann, der Dichter, der Prophet oder Reformator, der Musiker, der Künstler und der Denker, auch der Rechtsdenker; die Jurisprudenz als die ungreifbare, aber unerhört dichte Lebensmacht des Herkommens, der Lebenskruste, der fähigen Macht ist selbst Routine, ist zu massiv und gewaltig, als dass sich ihr Diener, der Jurist, zu individueller Höhe erheben könnte. Gross sind daher Ihre Rechtsdenker mit den Zügen mit denen sie über ihr juristisches Amt hinausreichen und zu Sozialethikern oder Verkündigern der Rechtsidee werden; umgekehrt sind gross nicht die römischen Juristen – die »grössten« unter allen –, sondern die römische Jurisprudenz.⁷⁵²

There were different types of legal reasoning varying in time and place and these culturally constituted ways of legal understanding could be compared to an ultimate model of legal wisdom.⁷⁵³ In the correspondence, the statutes of positive law (*Gesetz*)

Oldendorfs und Melanchthon einzubeziehen.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷⁵² Wieacker to Erik Wolf 10/1940. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “It is great legal thinkers, not necessarily great jurists, who you mention, and I consider this to be no coincidence. “Great” in the traditional sense of historical significance is the statesman, poet, prophet or reformer, musician, artist, thinker and also the legal thinker. Jurisprudence as the intangible but enormously dense life-force of ancestry, the crust of life, capable power is practice itself, is so massive and enormous that its servant, the jurist, could rise to his own summit. Great are, therefore, your legal thinkers with the movements with which they reach beyond their legal functions and become moral philosophers or proclaimers of the legal concept. The Roman jurists are, conversely, not great (the “greatest” of all), but rather Roman jurisprudence.” (Translation by HW).

⁷⁵³ Wieacker to Carl Schmitt 25.8.1942: “Ihre Forderung, durch Herausarbeitung eines besonderen Berufsbildes die allgemeinen Aufstellungen über den französischen Geist oder Charakter erst konkret zu machen, ist sehr berechtigt; ebenso der Grundsatz, daß es nicht eine juristische Begabung gibt, die einigen Völkern zukommt, anderen nicht. Ich halte auch den römischen Juristen nicht für den einzigen denkbaren Typus “der” juristischen Begabung, freilich für einen, der einem etwa denkbaren phänomenalen Typus “des” Juristen am nächsten kommt.” NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

and social justice (*Gerechtigkeit*) were separated ever more drastically and determinedly. Skillfulness in the former did not necessarily bring about learnedness in the latter. To be able to apply the idea of law, *Rechtsidee*, was a characteristic of a legal thinker.⁷⁵⁴ European culture was not in its essence the carefully ordered and regulated social reality of the modern world, rather it was originally based on the capability of the legally trained to be *aware* of their legal reality and consequently apply the legal ideas of a given society to judgments. The most important feature of a lawyer, judge or a legal scholar was to understand the particularities of one's society, to read the "existence" of one's social and temporal reality. It was understanding the peculiarities and borders of one's time and its worldview, and in congruence with the preceding legal thinking, and utilizing one's legal education, to deliver a judgment in a single case. In concrete terms, a lawyer, judge or legal scholar had to be aware of, even assimilate, the prevailing mentality of his legal culture. Nevertheless, the legal consciousness of one's culture had to be addressed from the perspective of the community of legally trained individuals. The sub-culture, the community of the 'legally skilled' provided the means for an "anthropological" study of ones "being." In other words, the underlying virtuous mentality of the scholars' guild enabled a metalevel scrutiny of the ways of thinking prevailing in one's time. In 1936 Wieacker had called this shared and uniting mentality of scholars *Grundhaltung*, in 1939 he continued to use the idea while writing about the *Grundgedanken* of Roman lawyers, which formed a point of departure in their legal "art", and in 1942 he wrote of the lost *Grundanschauung* of medieval Germany.⁷⁵⁵

In the context of the German legal science of the early twentieth century, Wieacker's interest in the mental faculties involved in "creative" jurisprudence is not surprising, but it is noteworthy how with the help of the concept he understood and evaluated historical agents and epochs in order to contribute to the contemporary discussion of the interpretative activity of law. As the 1940s proceeded, the essence of legal thinking and the ability to use one's legal capability, as presented in the letters to both Carl Schmitt and Erik Wolf, were conceptualized with increasing explicitness and sophistication. The position of the "true great jurisprudence" of Roman law retained its place as a superior point of reference even to the legal culture of the modern world. As such, the view which Wieacker appreciated and upheld towards jurisprudence could have been articulated as *phronesis*, practical legal wisdom, as presented by Aristotles and after him by a subsequent tradition of thinkers.⁷⁵⁶

⁷⁵⁴ Wieacker to Erik Wolf 4.11.1941. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷⁵⁵ See RG before the war and 'Vom römischen Juristen' further in this book; cf. Wieacker, 'Die Stellung' 1942, 51; section 4.3 Affections in *Rechtsgewissen* 1933–1945: Wieacker's community and legal wisdom; section 4.4 'Vom römischen Juristen' (1939): The historical paragon of community and creativity.

⁷⁵⁶ Cf. Avenarius 2013, 67; Gadamer 2000, 308, 320-321. In another context Gadamer stated: "*Phronesis* [...] is the only methodological model for self-understanding of the human sciences if they are to be liberated from the spurious narrowing imposed by the model of the natural sciences," quoted in Coltman, 1998, 19.

To Wieacker, however, legal thinking which allowed one to relate an individual case to a more general principle, and through a comparative perception to recognize the similarities and differences between one's subject matter and existing decisions, as well as the skill to *develop* law, were explicated with the help of "conscience," *Gewissen*. Such a choice of terminology clearly suggests a strong existentialist influence. It was after all Martin Heidegger who replaced the Aristotelian idea of "phronesis" with the German concept of *Gewissen*.⁷⁵⁷ The influence of Heidegger's thinking might have been direct, but it was also indirect, stemming from Wieacker's acquaintance with Hans-Georg Gadamer and Erik Wolf, who used the concept, although in a different context, in their works.⁷⁵⁸ It is also noteworthy that in his wartime correspondence Wieacker started to refer to the social reality more and more as *Existenz*, as a complex web of assumptions, values, beliefs and images, which determined individuals being in the world.⁷⁵⁹ There were limits to the human understanding of reality, and thus mechanical descriptions of social reality were both inaccurate and spoke of some sort of fear in admitting the finitude of human knowledge.⁷⁶⁰

This existential tendency was obviously an extension of the familiar attack on legal formalism and naturalism of the preceding generations, but it is notable that contemporaneously, both Ernst Forsthoff and Carl Schmitt took steps in the same, more hermeneutically and existentially oriented, direction in their respective legal theorizations. Forsthoff returned to the teachings of Carl von Savigny, analyzed the temporal limitations of legal language, and placed custom before positive law.⁷⁶¹ Carl Schmitt praised Savigny for his attempts to distance the law from mere legality. Thus Savigny appeared to be pioneer in the jurisprudential battle against the "technicality" and "scientification." The task of modern legal science was to follow Savigny's "existential" attempt in order to become "the last safe haven of *Rechtsbewusstsein*."⁷⁶²

Whatever Wieacker's ultimate leanings were, from the point of view of his historical vision, the important outcome was that he started to incorporate the notion of "conscience" into contemporary ideas regarding education and legal ability. The

⁷⁵⁷ Coltman 1998, 12.

⁷⁵⁸ Erik Wolf stated: "Die Tatsache des menschlichen Gewissens ist theoretisch unableitbar und von historischen Bedingungen unberührt," cited in Ernst E. Hirsch, *Zur Juristischen Dimension des Gewissens und der Unverletzlichkeit der Gewissensfreiheit des Richters*. Berlin, Duncker & Humblot 1979, 55.

⁷⁵⁹ See e.g. Wieacker to Erik Wolf 25.9.1940 (Hölderlin managed to capture the *Existenz* of the law). NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau; Wieacker to Ernst Rudolf Huber 23.2.1945 (On war and existence). NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz; Wieacker to Carl Schmitt 25.8.1942 (the correct jurisprudential method was to find a pattern or a form from social existence). NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

⁷⁶⁰ Martin Heidegger, *Being and Time: A Translation of Sein und Zeit* [1953]. Albany, State University of New York Press 1996, 7–9.

⁷⁶¹ Meinel 2012, 261–266; Forsthoff's turn was familiar to Franz Wieacker. Forsthoff recalled in his letter to Fritz von Hippel Wieacker's response to his turn towards juridical hermeneutics: "Der gute Wieacker knurrte brieflich etwas ob meiner conservative Grundhaltung [...]," quoted in Meinel 2012, 266.

⁷⁶² In Meinel 2012, 261 fn. 186.

existentialist claim of *Gewissen* as the ontology of the highest form of individual human understanding was combined with the principles of the distinct position of the jurist *Stand*, and the cultivation of cultural knowledge (*Bildung*). Thus Wieacker was able to bypass the fundamental dead end which obstructed the translation of Heidegger's philosophy into a *secular* legal science. Now "conscience" could be attached to a tradition of legal knowledge so grounded on *common mentality* and *virtues* that rather than a temporal construction it constituted a metaphysical structure.⁷⁶³

The application of this heuristic historiographical device started to take shape in his 11 April 1944 letter to Erik Wolf. In the letter Wieacker gave credit to Wolf, who in the second edition of his *Große Rechtsdenker der deutschen Geistesgeschichte* (1944) added sixteenth- and seventeenth-century theorists.⁷⁶⁴ At the same time Wolf came to deal with the era of the reception of Roman law as well as the origins of the idea of the state (*Reichsidee*) in Germany. Such themes were, of course, close to Wieacker and he congratulates Wolf for his vivid descriptions of past legal thinkers who "amid the blurring time" conducted their scholarly work without altering the particular spirit of law⁷⁶⁵ Wolf's book was grounded on the same principles as before; without restricting himself narrowly to legal theorists, he included important national figures who (according to Wolf) had contributed to the evolution of German legal culture. Wieacker commented:

Ich darf Ihnen ruhig sagen, dass ich durch mein unruhigeres und flackernderes Temperament auch hier (wie bei den Rechtsdenkern) zuerst versucht bin, mich "daran zu ärgern"; aber es wird mir dann bald klar, dass diese Abtönungen und Vermittelungen der Ausdruck des *wissenschaftlichen Gewissens* sind.⁷⁶⁶

Thus the idea of "scientific conscience" was a leitmotif which gathered the thinkers of the past into a distinguished group, and vice versa, this concept constituted a heuristic tool in understanding the diverse writings, representations and expressions of people in varying times and places.

In the 1930s Wieacker had connected exceptional legal thinking with the idea of communality among legal scholars and explicated that shared mentality with the fashionable and national slogan of *Kameradschaft*. In the late years of the war, these

⁷⁶³ Wieacker elaborated the problem in 1967 as follows: "The difficulty lies in the very basis of this novel way of thinking, for it sees man as inevitably *alone* in his situation, and its criticism of post-Platonic idealist metaphysics and its system of values destroys all possibility of any transcendent binding content of law." Wieacker, *A History of Private Law* 1995, 469. See also Wieacker to Erik Wolf 4.11.1953. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷⁶⁴ Wieacker to Erik Wolf 11.4.1944. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁷⁶⁵ *Ibid.*: "Umsicht, mit der Strömungen, die die Zerisseheit der Zeitspiegeln, geordnet und vereinfacht sind ohne dass irgendeine in ihren besonderen Recht vergewaltigt wird"

⁷⁶⁶ *Ibid.* Emphasis mine. "I can safely tell you that I am also first tempted to get "annoyed" about it here (as with the legal thinkers) due to my restless and more flaring temperament, but it becomes clear to me that this toning down and negotiation are the manifestation of the scientific conscience." (Translation by HW).

connections fell apart. Despite the fact that distinct “legal art” yet took place within the “estate” of lawyers, and the circle of his *Kieler Schule* friends continued to represent the “academic homeland,” legal conscience was no longer tied to the ‘legal renewal’ of Germany. The form and core of superior legal knowledge remained, but it could no longer be merged with contemporary politically loaded concepts. Such was the case with the idea of ‘communality,’ previously presented with the concept of *Kameradschaft*, both in public and scientific spheres.

In the public culture of wartime Germany the concept of *Kameradschaft* now mostly signified the togetherness of and culture prevailing in the military troops.⁷⁶⁷ Wieacker, however, had no point of connection to this language. To him, serving in the military was foremost a duty, *Dienst*, and it did not contain any spiritual or higher meaning.⁷⁶⁸ Moreover, military service was a natural responsibility, but nevertheless a “spiritually laborious duty.”⁷⁶⁹ In his letters from the frontline to Ernst Rudolf Huber and Hans-Georg Gadamer he never referred to his regiment as a *Kameradschaft*, nor was it even a “troop.” Wieacker’s frontline letters to Huber contain a repertory of the emotions of disappointment, boredom, and cynical amusement at the bizarre reality of the war. The destruction of German cities saddened Wieacker, and the army unit and military culture provided an environment which Wieacker could do nothing but wonder at with a sneer.⁷⁷⁰ The overall tone of the letters is melancholic and lonely. Wieacker even refers to actual battle as a “friend.”⁷⁷¹ *Bildung*, learnedness, distanced Wieacker from most people, since that ability, according to Wieacker, allowed him to understand the common life in a larger, historical context, and to notice connections which were opaque to most.⁷⁷² He did not perceive the *Zeitgeist* as a warring for strategic resources, but as an eternal clash of “consciences,” *Gewissen*.⁷⁷³

Wieacker’s secondment and following stay in Italy, however, did produce important results with respect to his later scientific view and historical vision. The experience of

⁷⁶⁷ Kühne 2005, 113–171.

⁷⁶⁸ Cf. Wieacker to Ernst Rudolf Huber 6.1.1944[1945] and 23.2.1945. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁷⁶⁹ “geistig mühsame Dienst.” Wieacker to Hans-Georg Gadamer 14.3.1945. NL Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar.

⁷⁷⁰ In his letter to Ernst Rudolf Huber from 23.2.1945, after bitterly deploring the bombing of Freiburg, Wieacker cynically reported about his service: “Denn der gegenwärtige Zustand, so wichtig wie immer, ist nicht gerade der regelmässige für den Mittelpunkt meiner persönlichen Bestrebungen. Übrigens ist es ununterbrochen menschlich recht nett und dienstlich unerhört vorteilhaft.” He found constant amusement about his rank and work in the service. See e.g. Wieacker to Ernst Rudolf Huber 6.1.1944[1945]. After comparing himself to Corporal Gottlieb Köpke from Willibald Alexis’s book *Isegrim*, he continued: “[D]essen so sehr erfreuliche menschliche (und dienstliche) Eigenschaften ich Dir also nicht erst zu [brauche] [...]; Unter diesen Umständen fungiere ich [als] Hilfsoffizier, was in sachlicher Hinsicht ein Expert in menschlich-dienstlicher aber sehr angenehm und ansprechend ist. Von den übrigen Umständen, der vorzüglichen Verpflegung wie der angenehmen Unterkunft, der interessanten Beschäftigung zu berichten, versage ich mir heute, weil ich zu müde bin, um weitere Briefseiten zu schreiben.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁷⁷¹ See section 3.3 The late 1930s and war as *Erlebnis*.

⁷⁷² Wieacker to Ernst Rudolf Huber 23.2.1945: In the letter Wieacker hopes that Huber would inform him about the latest “spiritual” matters: “Also schreibe selbst fleissig und ermuntere auch andere dazu. Auch über Deine wissenschaftlichen Vorhaben höre ich gern und lasse mich gern auf ein Fachgespräch ein.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁷⁷³ See section 3.3 The late 1930s and war as *Erlebnis*.

war enabled Wieacker to further elaborate what *Gewissen* did or did not signify in modern society. Moreover, the distinction between “the people” and the individual cultivating of *Rechtsgewissen* was being empirically proved. In a given “existence” people seemed to resort to different modes of understanding and explanation. In the harsh reality of the war, the different views could be simplified with the dichotomy of superstition and “conscience,” where the former continued to oppress the people, but the latter provided tools to understand reality. In 1945 Wieacker described the *Dasein*, existence, of the Italian/German people to Gadamer as follows:

So abscheulich der öffentliche Zustand des Landes ist, dieser Mensch, ohne Gemüt, ohne Gewissen und Schicksal im Guten und im Bösen, ohne Humor im eigentlichen Sinne und ohne Sentimentalität, ohne das Bedürfnis, hinter seiner Wirklichkeit eine neue, nur der Einzelsee sichtbare transzendierende Wirklichkeit zu sehen, – dieser Mensch ist sonderbarerweise ein tröstliches und erheiterndes Bild, und und auch im Täglichen sympathisch. Wie das Urteil “ohne Gewissen hier” zu verstehen ist, muss ich doch wohl ausdrücken: statt des Gemüts die helle Heiterkeit, statt der Verantwortung die Absolution, statt des Gewissens das Gesetz, statt des Schicksals die Gnade.⁷⁷⁴

As elaborated, right after the war he announced to Ernst Rudolf Huber (quoting Goethe) that “*people* should be the object of our actions and thoughts!”⁷⁷⁵ In the preceding pages I have argued that this slogan emerged from a conviction to study the ambiguous nature of the relation between the people, law and prevailing social circumstances (the state). This dynamic constellation Wieacker had already started to call *Rechtbewusstsein*. Nevertheless, with respect to his quest to study *Rechtsgewissen*, the war also represented an important point of culmination. Wieacker became confident that in order to prevent such a tragedy occurring again, and to further repair what had been distorted, he had to promote the indispensable importance of distinguished legal thinking, increasingly highlight its origins and different historical phases, and cultivate the art of ‘legal conscience’ within the people.

⁷⁷⁴ Wieacker to Hans-Georg Gadamer 14.3.1945. NL Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar. “The condition of the public of this country is so abominable. These people, without soul, without conscience and destiny in the good and the bad, without humor in the proper meaning of the word, without sentimentality, and without the need to see a new reality that is only visibly transcendent of their own souls behind their own reality, - these people are peculiarly a comforting and exhilarating form, and also likeable in the everyday world. To understand the judgement “here without conscience”, I must use these words: instead of the soul, a bright cheerfulness, instead of responsibility, absolution, instead of the conscience, the law, instead of destiny, grace.” (Translation by HW).

⁷⁷⁵ See section 3.7 *Bildung* and *Stand* in the social reality of the Federal Republic.

4.4. 'Vom römischen Juristen' (1939): The historical paragon of community and creativity

One of Franz Wieacker's most celebrated articles is 'Vom Römischen Juristen,' published in the journal *Zeitschrift für die gesamte Staatswissenschaft* in 1939 and later included in the collection 'Vom römischen Recht' (1944).⁷⁷⁶ The article was based on Wieacker's inaugural lecture at the University Leipzig, where he moved in 1937. In this particular article Wieacker managed to explicate in an exceptionally vivid and clear way the essence of Roman jurisprudence. The conventional stance, which Wieacker greatly influenced, and not least with 'Vom Römischen Juristen,' acknowledges that Roman lawyers worked in a totally different legal culture than contemporary legal professionals. Nevertheless, their art of understanding and applying the law as well as the reasoning it required was an admirable ability, which intrigued and continues to intrigue modern lawyers. Hence, in comparison to the twentieth century German legal culture, Roman law seemed to be an ideal both at the level of the actual work of lawyers as well as in their status within a society.

The article's influence, however, went beyond a mere description of the historical circumstances which prevailed in the Roman world. In his text Wieacker attempted to explain how the social conditions of the Late Republic shaped the thinking of lawyers, how Roman law became what it was through the interaction of social and cultural structures, and how Roman jurisprudence became transformed into a tradition which seemed to enable lawyers (even modern lawyers) to reach a true and just legal decision. In the article Wieacker continued in the footsteps of, for example, Fritz Pringsheim, who had intended to reinterpret the Roman law and release the discipline from the theoretical frames created by among others Rudolf von Jhering and Carl von Savigny, in order to find a new significance for it within the changed legal system and German society.⁷⁷⁷ Like the scholars of the previous generation, Wieacker defended the particularity and genuine nature of Roman law, and sought to prove its self-standing essence. The bad name which Roman law had in contemporary German culture was due to a misunderstanding and to a twisting of the original, pure idea.⁷⁷⁸ Roman law was a unique craftsmanship for understanding and dealing with the immediate world, and it was fundamentally different from Greek scholastic and modern theories of law. The attachment of these theoretical frameworks to Roman law had emerged in its later historical development, and they had distorted the true core of Roman jurisprudence.⁷⁷⁹

In 'Vom römischen Juristen' Wieacker held on to his preceding scientific claims, especially those concerning the idea of property in jurisprudence. Thus, his construction was not at odds with the "official line" of the Nazi regime. He was also able to place his argument within the field of Roman law scholarship. From the

⁷⁷⁶ Wieacker himself, at least until publishing of *Privatrechtsgeschichte der Neuzeit* in 1952, considered this text as the most telling presentation he had come up with. cf. Wieacker to Salvatore Riccobono 2.2.1940; Wieacker to Gerhard Dulckeit 14.6.1950.

⁷⁷⁷ Rückert 2010, 84–85.

⁷⁷⁸ Cf. Wieacker, 'Der Standort' 1942; Wieacker, 'Die Stellung' 1939.

⁷⁷⁹ Cf. Wieacker, 'Vom römischen Juristen' 1939.

methodological point of view, his study was unlike the *Interpolazionforschung* or more conventional stances like those of Paul Koschaker and Fritz Schultz, but addressed a similar problematic as these senior scholars did in their research.⁷⁸⁰ However, Wieacker's methodology and philosophical starting point was fundamentally original. Wieacker bypassed the earlier epistemological custom, where previous studies were challenged through a more thorough handling of the ancient texts, or where a particular collection was seen as more authentic than the sources which other scholars had focused on. Rather, he sought to understand the worldview of the Roman lawyers. He tracked down the questions they had presented to their sphere of being, and which guided their thinking and acts in their task of constructing a workable society. In other words, Wieacker sought to understand and further analyze the meaning of the common *experience* shared by the group of Roman lawyers in the Late Republic.

Thus, 'Vom römischen Juristen' is not significant only from the viewpoint of the canon of German legal and intellectual history; the text lays down the seeds of Wieacker's legal hermeneutics and was an important point of reference to, for example, Hans-Georg Gadamer.⁷⁸¹ The text can also be read as the outlining of a perfect legal system within a political society. As such the situation of 'Vom römischen Juristen' in Wieacker's scholarly career its relation to the development of the political climate in National Socialist Germany is akin to the turn Ernst Forsthoff's writings took at the end of the 1930s. Forsthoff, who in his 'Totale Staat' of 1933 formulated a very straightforward analysis of contemporary society, which included clear suggestions on the arrangement of social structures and legal practices, by the end of the decade had shifted his focus to more distant spheres of legal history and legal theory.⁷⁸² Scholars slowly started to realize that their ideas of a "correct" contemporary society were not appreciated by the party or by the fascist administration. Moreover representing such direct claims might even be dangerous. In fact, Forsthoff's and Wieacker's texts did comment on the contemporary world, but in a mild, camouflaged and indirect way. In what follows I shall analyze 'Vom römischen Juristen' with respect to the concept of *Rechtsgewissen*, discussing what the text tells us about Wieacker's foundational idea of legal conscience, and its emergence in the European legal history.

In the article Wieacker continued his study of the ancient legal world in an already familiar manner; in order to transmit the meaning of the bygone legal phenomenon to the modern world, a scholar needed to concentrate on the social and cultural reality on which the phenomenon was situated. He set out to represent the mentality of historical agents, the thoughts, virtues, values and beliefs they possessed. Accordingly, when he formulated the essence of Roman jurisprudence and its lasting effect on modern society, the key structure in his construction was the social constellation of ancient lawyers and their position within society. He called this association of lawyers a *Zunft* (guild) or *Juristenstand* (the estate of jurists). It was thus an association solely for

⁷⁸⁰ Cf. Winkler 2014, 179–219.

⁷⁸¹ Gadamer 2000, 18.

⁷⁸² Meinel 2012, 226ff.

lawyers, which at the same time formed an “estate” within Roman society as a whole. Wieacker considered the social mission of the *Juristenstand* to be an indispensable part of the political functioning of Roman society. The praetors and laymen who were responsible for the political leadership of society, needed to rely on the expertise of those who knew and understood the law. The “lawyer-guild” was a natural and obligatory part of society, a tool for the authorities to rule and direct the people. The indispensability of the “lawyer-guild” was based on the one hand to the overarching significance of law to the Romans, and on the other hand to the highly differentiated and sophisticated nature of this jurisdiction.

Solche Fachtechnik erwächst der Routine und der ständigen Überlieferung; sie kann daher nur von einem sachverständigen Kreis in Form gehalten werden. Und da sie ein ständiges fachliches Interesse voraussetzt, muss dieser Kreis notwendig von allgemeinen politischen Führungsaufgaben dispensiert sein.⁷⁸³

In formulating the notion of lawyer guild Wieacker compares it to the English inns of court, which to him and to Carl Schmitt represented a modern constellation where legal knowledge flourished among the like-minded.⁷⁸⁴ In doing so Wieacker, albeit in an indirect way, refers the guild to a concrete order. A more accurate twentieth century counterpart, however, would be that of a *Burschenschaft* (a German students’ corporation) or an exclusive *Kameradschaft*. Wieacker’s guild was a group with closed borders, and it cultivated its inner culture distinct from other groups within society. The acceptance of new candidates into the guild was decided democratically and according to a tradition; participants came from different backgrounds, but all went through an “apprenticeship” and an established “routine” in becoming full members of the circle. The guiding principle in selecting new members was the “high masculine authority” which those nominated were supposed to possess and express.⁷⁸⁵ The participants were “men of spotless reputation, great in importance and reliability.” Such men comprised “the proficient and honorable core of the *Stand*,” which was distinguished from the “[Windelkonsulenten] and legacy hunters” on the outskirts of the guild. The latter nevertheless occasionally managed to bring the whole *Stand* into disrepute with their immoral and incompetent deeds, hence the bad name which some ancient sources gave to jurists.⁷⁸⁶ Wieacker’s division into noble and ignoble lawyers, is compatible with the one he later used in describing the essence of the “lawyer *Stand*”

⁷⁸³ Wieacker, ‘Vom römischen Juristen’ 1939, 445. “Such specialized expertise grows out of practice and consistent tradition. It can therefore only be kept in shape by a group of experts. Since it requires a constant expert concern, this group must necessarily be dispensed from a general political executive authority.” (Translation by HW).

⁷⁸⁴ See section 3.3 The late 1930s and war as *Erlebnis*.

⁷⁸⁵ Wieacker, ‘Vom römischen Juristen’ 1939, 446: “Das Auswahlprinzip einer freien Zunft ist notwendig demokratisch [...]; Zutritt hat, wen Routine und fachliche Bewährung ausweisen.”; 446: „Die hohe menschliche Autorität steht immer ausser Frage.“; 447: “[Ein Jurist ist] ein makelloser Mann voll Gewicht und Verlässlichkeit.”

⁷⁸⁶ Wieacker, ‘Vom römischen Juristen’ 1939, 447: “dem Tross der Winkelkonsulenten und Erbschleicher, die den tüchtigen und ehrenwerten Kern des Standes begleiten.”

during the later eras of European history.⁷⁸⁷ Such divisions enabled him to maintain his idea of the unchanging, moral and spiritual core of the community of legal practitioners within German (and European) history. The historical sources which reported the shady and illegal acts of lawyers, could thus be ignored in the legal historical analysis, and be seen to refer to “inauthentic material” outside the lawyer *Stand*.

According to Wieacker, the existence and acknowledgment of the Roman guild of lawyers was based on its “authority”. So not only was the “circle” a necessity for the functioning of society and the administration, but the guild as a whole also enjoyed the respect of citizens and leaders. Authority came from the virtues which the members embodied and expressed. These virtues were Roman, but in a refined manner, since members of the legal fraternity were distinguished from other learned and public figures in Roman society. The lawyer *Stand* was a special community of experts, which elevated lawyers to an incomparable social and moral status. The experience of togetherness, the acknowledgment of the bond which connected jurists as a distinct entity, was reinforced in their routines of conducting legal assignments and creating legally binding decisions. The “life-form [of the guild of lawyers] was permeated by close male relationships” and the habit of consulting each other in their duty, and as such they represented the rational backbone of Roman society.⁷⁸⁸

[D]em *freien Dienst* am Gemeinwesen, der durch Gutachtung und Unterweisung geübt wird, und dessen strengste Gewähr die überwiegende Unentgeltlichkeit ist. Eben dies unterscheidet den honos vom Erwerb auch höherer Art, besonders auch vom gebildeten, aber rechtskundigen Prozessredner, auf den er mit der stillen Geringschätzung des wirklich Sachkundigen herabblickt.⁷⁸⁹

Another key prerequisite for Wieacker’s construction was that the guild of jurists cultivated a distinct, common mentality, which he calls “common knowledge” or “guild-knowledge” (*Zunftwesen*).⁷⁹⁰ The thinking of the guild welled from “class-based spiritual cultivation,” “political freedom,” “interest of the legal experts” and above all the custom of “mutual assistance and collegial advice.”⁷⁹¹ The guild was at the same time a vital and fundamentally apolitical organ in the community of Rome.

⁷⁸⁷ Cf. section 3.4 *Das römische Recht und das deutsche Rechtsbewusstsein* (1944): The historicization of the relation between mentality and law.

⁷⁸⁸ Wieacker, ‘Vom römischen Juristen’ 1939, 443: “[The method of the Jurists] liegt in der Lebensform des *consilium*, die das römische, von engen menschlichen Beziehung durchflochtene Leben durchwirkt.”

⁷⁸⁹ Wieacker, ‘Vom römischen Juristen’ 1939, 447. “[...] to this free service for the community that is exercised through expert opinion and instruction and of which the strictest guarantee is the predominant lack of fees. Just this distinguishes the “honos” from the highest professions, especially the literate ones, even legally trained court speakers, who he looks down on with the cold contempt of the real expert.” (Translation by HW).

⁷⁹⁰ Wieacker, ‘Vom römischen Juristen’ 1939, 447: “Denn nur ein offenes *Zunftwesen* gibt die Bedingungen für eine solche Gruppenbildung, für die in der späteren Amtsjurisprudenz kein Raum mehr war.“

⁷⁹¹ Wieacker, ‘Vom römischen Juristen’ 1939, 446: “das ständige Interesse gelehrter und praktischer, namenloser und vornehmer Liebhaber bestätigen sie.”; 447: dem *freien Dienst* am Gemeinwesen, der durch Gutachtung und Unterweisung geübt wird[.]” Emphasis original.

The bonds which attached it to society were strong ties of sacred duty. Essentially, members of this guild were free. They were masters of the cultural tradition, but not restricted by it. The guild rested on individual agency, but as an entity it formed a tradition. Guided by a worldview of highly specialized professionals, it also had down-to-earth convictions based on common virtues. It is obvious that Wieacker's description of the inner culture of Roman *Juristenstand* managed to include all of the (sometimes contradictory) virtues which he and his time valued. According to Wieacker the mentality of the guild was not explicitly defined in terms of strict principles, code or regulations. It was more of a perception and horizon, founded on common virtues and a common lifestyle. Rather than norms regulating ones thinking, the defining world view of the Roman Jurist-estate was a vocation or conviction.

Aber tiefer verbindet sie mit der religio die Gemeinsamkeit von Vorstellungsgesetzlichkeiten, die im römischen Grundcharakter ruhen. Es ist das enge, aber konzentrierte Vorstellungsvermögen eines bäuerlichen Menschen mit händlerischem Einschlag und der schroffen Disziplinierung des Soldaten.⁷⁹²

The important feature with respect to jurisprudence was that this mentality was the starting point for the superior legal skill (*Rechtskunde*) of the Roman jurist. "Self-aware guild knowledge" formed a common ground and principle which knitted casuistic decisions to a coherent "legal art" and "orientation."⁷⁹³ Roman legal culture was comprised of case law, casuistic derivation from previous decisions, and the development of the form of jurisdiction. Actual jurisprudence was based on precedence.⁷⁹⁴ In time, with the ongoing differentiation between the economic and administrative spheres of Roman society, the mastering of legal culture became a difficult task. Moreover, the understanding and utilization of Roman law was more than mere political decision-making and law-giving. Wieacker asserts that due to its complicated and sophisticated nature, conducting jurisprudence in Roman culture was more a matter of "creating" [*Schöpfung*] than of mere "judging."⁷⁹⁵ Such a creative construction of tradition without ignoring the particular nature of a given legal case, and the way in which a decision was connected to the wider "orientation" of legal culture, necessitated some guiding principles within legal reasoning. The "guild-knowledge" constituted such "pre-judice" (*Vorgriff*);⁷⁹⁶ it was an orientation which

⁷⁹² Wieacker, 'Vom römischen Juristen' 1939, 450. But they associate the common ground of conceptual legalisms that rest in the basic Roman character more deeply with religion. It is the narrow but concentrated power of imagination of an agricultural person with a quarrelsome element and the brusque discipline of a soldier. (Translation by HW).

⁷⁹³ Wieacker, 'Vom römischen Juristen' 1939, 449: "eine selbstbewusste Rechtszunft," "praktisch-traditionelle Richtung." "Die Forderung dieser wissenschaft: der Aufbau einer geistigen Welt durch die Erkenntnis und die Einfügung der Einzelercheinung in ein übergeordnetes Gesetz ist der römischen Rechtskunde kraft ihres Ursprungs entgegengesetzt."

⁷⁹⁴ Wieacker, 'Vom römischen Juristen' 1939, 441, 448.

⁷⁹⁵ Wieacker, 'Vom römischen Juristen' 1939, 441: "An bescheidenem Ort erbringt er also die grösste dauernde eigenrömische Schöpfung. Denn das römische Recht ist echtes *Juristenrecht*." Emphasis original.

⁷⁹⁶ Wieacker, 'Vom römischen Juristen' 1939, 449.

directed the argumentation of Late Republican lawyers. Wieacker describes the underlining stream (*Grundgedanken*) in the Roman legal thinking as follows:

Denn ein Präjudiz kann nur angewendet werden, wenn man den gemeinsamen Grundgedanken, das *tertium comparationis* erkennt. Dieser Grundgedanke kann mit unbewusster Anschauung angewendet, aber auch ausdrücklich als *Regel* formuliert und überliefert werden. Solche Regeln sind noch keine abstrakten Obersätze, sondern durch Anschauung und Erfahrung gewonnene Richtschnuren künftiger Praxis.⁷⁹⁷

This quotation captures three essential traits in Wieacker's article. First, Roman jurisprudence was a "praxis" and a form of "practical wisdom". Furthermore, this wisdom was born out of a shared "experience" of jurists. And finally, this experience-based knowledge lived on as a skill of "legal knowledge," *Rechtswissen*. It is striking that the fundamental themes on which Wieacker worked throughout his career, are clearly expressed in a text, which was published when he was no more than 31 years of age. The themes of "practical wisdom," "experience," and "*Rechtswissen*" were lasting ontological principles in his vision concerning contemporary legal science and the legal history of Europe, and one can find these paradigms in Wieacker's works even in the 1960s. In order to give a comprehensive presentation on the meaning of these themes in Wieacker's production, it is important to discuss the significance he attached to them in 1939. It is also essential, that these foundational themes emerge as ideals in the context of Roman law, and more precisely, as mental faculties within the guild of Roman lawyers.

In Wieacker's reconstruction of Roman jurisprudence, Late Republican law and lawyers served as a "golden age" to which he attributed features which he saw as lacking in the present. However, this golden age, an ideal type of society for scholarship, was reconstructed with the help of his contemporary acknowledgment and understanding of society. The things he valued as important and noble remained such in his reconstruction of Roman society, only in an emphasized manner. In what follows I scrutinize more closely each entity of "*Rechtswissen*," "experience" and "practical wisdom," acknowledging that to Wieacker these conceptualizations were not separate domains. Rather they marked different spheres of the same phenomenon which Wieacker later called legal conscience, *Rechtsgewissen*.

Wieacker's "legal experience" (*Juristenerfahrung*), even on the semantic level, as a term within an individual text, is comprised of many particles. The social status of jurists played one part, as did their common education and deep relationship with each other. The process of legal reasoning, causality and translating recognition into exact verbal expressions were all fundamental. The existence and acknowledgement of a body of accumulated knowledge, tradition, enabled this phenomenon to rise above

⁷⁹⁷ Wieacker, 'Vom römischen Juristen' 1939, 449. "For a precedent can only be used when one recognizes the common fundamental idea: the tertium comparationis. This fundamental idea can be used with unconscious contemplation or explicitly formulated and handed down as a rule. Such rules are not abstract major premises but rather guiding principles of future practice that are acquired by contemplation and experience." (Translation by HW).

mere “knowing.” Words and their relation to reality was the playground in which *Juristenehrfahrung* performed and emerged. It was partly unconscious, but at the same time it was a skill which one could cultivate.⁷⁹⁸ Nevertheless “experience” was a theme which distinguished Wieacker from most of the scholars working in the field of Roman law, especially in the way he connected it with the spheres of conceptualization and tradition.

Wieacker was confident that the lawyers of the late Republic were exceptionally gifted linguistically. This did not mean that they were mere public speakers, since he saw the rhetorical school – its most famous representative being Cicero – as a contributing to the fall of true Roman jurisprudence.⁷⁹⁹ Rather, lawyers were able to articulate with high accuracy and creativity the process by which they sought to decide a given case. They managed to develop a legal language (*Rechtssprechung*) which enabled them to connect the elements of a case to jointly and historically created abstractions.⁸⁰⁰ In other words, Roman lawyer *Stand* conceptualized some particular spheres of beliefs and actions, which then had an effect on the outcome of many legal cases. This however was not at all the modern “jurisprudence of concepts.” Whereas scholars like Savigny and Jhering had created “another, artificial world” of concepts, “beside the real material world,” the legal terms of Roman lawyers were derived from life itself. The legal rhetoric of Roman jurisprudence had a “different logical and ontological structure.”⁸⁰¹ This was due to the transmission of a common experience within the tradition of the lawyer guild. The wisdom of the past translated into linguistic tools, which were fundamental in the cognitive process of decision-making. The concepts of Roman lawyers were:

Aber diese Denkgebilde haben eine andere logische und ontologische Struktur. [...] im übrigen aber Anschauungsbilder von feststehenden juristischen Aussagen, die sich in uralter überpersonlicher Erfahrung und Kunstüberlieferung gebildet haben; gleichsam in Begriffe geronnene Juristenerfahrung von unumstösslicher Festigkeit, wie technische oder ärztliche Fachbegriffe.⁸⁰²

So the wisdom, which pre-classical linguistic constructions contained, was partly “symbolic.”⁸⁰³ These constructions explained reality far more comprehensively than

⁷⁹⁸ Wieacker, ‘Vom römischen Juristen’ 1939, 455.

⁷⁹⁹ Wieacker, ‘Vom römischen Juristen’ 1939, 453.

⁸⁰⁰ Wieacker, ‘Vom römischen Juristen’ 1939, 455.

⁸⁰¹ Wieacker, ‘Vom römischen Juristen’ 1939, 451: “So schafft sie ein selbständiges System juristischer Beziehung, das wie eine zweite irrealer Welt neben die natürlich tritt,” “lebendige Wesen”; on the relation between juridical expressions and reality in Roman jurisprudence: “Die Aussagen über juristische Bedeutungen sind nicht wie unsere logische oder ethische, auf Geltung bezogene, sondern ontologische, auf eine besondere juristische Existenz bezogene.”

⁸⁰² Wieacker, ‘Vom römischen Juristen’ 1939, 455–456. “Though these thought structures have a different logical and ontological structure.[...] they are, incidentally, examples from fixed legal statements that formed from ancient transpersonal experience and artistic tradition in terms, so to speak, of curdled jurisprudential experience from incontrovertible firmness, as with technical or medical specialized terms.” (Translation by HW).

⁸⁰³ Wieacker, ‘Vom römischen Juristen’ 1939, 456: “Die römischen Rechtsbegriffe haben daher auch die Fruchtbarkeit von Symbolen.”

later, more theoretical forms of conceptualization which effected European legal culture. Wieacker described Roman jurisprudence by partly juxtaposing it with *wissenschaft*, science. Here “science” meant a form of theorization and a feature of “Greek justice theories,” “Byzantine thought” and modern “jurisprudence of concepts.”⁸⁰⁴ Wieacker asserted that the fundamental misrepresentation with respect to Roman law, which all of the above-mentioned views possessed, was that they treated the works of the classic lawyers as attempts to formalize the legal world. The later ‘scientifications’ of Roman legal practice interpreted the texts of the *Juristenstand* as expressions of some hierarchical cognitive construction or comprehensive theory. Here lay the fundamental misunderstanding, since – according to Wieacker – Roman law was a “practical routine,” and conducted “partly unconsciously.” The process of deciding necessitated “intuition.” Wieacker asserted that probably the Roman lawyers themselves (if asked) could not have been able to explain how they they found an ultimate solution in a given case.⁸⁰⁵ The “art” of mastering Roman jurisprudence was like a craft, where the skill of completing the process was prior to being aware of all the social and juridical results one’s decision brought about. The Roman lawyers embodied the worldview and “legal skill” of the Free State of Rome; “the [guild of] expert-jurist were themselves their structure and method.”⁸⁰⁶ Like a doctor or experienced artist a Roman lawyer did not reflect on what he was about to carry out; the assimilation of the tradition and solid awareness of treat “existence,” enabled him to create laws which reproduced the Roman values and maintained social order.⁸⁰⁷

Sondern seine Entscheidung lebt von den in seiner Erfahrung aufgespeicherten *gelernten* Anschauungs- und Entscheidungsbahnen, Vorstellungswege, aus denen auch der erfahrene Künstler oder Arzt spontan handelt. Aber dabei steht dem Juristen nicht nur *eigne* Erfahrung zu Gebote. Sondern sein Fallverständnis wird objektive Autorität durch die ununterbrochene Erfahrungsüberlieferung der Juristen, die sich zu feststehenden Vorstellungen und Grundsätzen verdichtet hat, deren der Jurist absolut gewiss ist.⁸⁰⁸

Wieacker added that the theme of “social justice” was foreign to Late Republican lawyers; what mattered was the relation between a decision and the legal tradition. This tradition, however, was not opposed to social justice. Since the “guild knowledge”

⁸⁰⁴ Wieacker, ‘Vom römischen Juristen’ 1939, 454, 461.

⁸⁰⁵ Wieacker, ‘Vom römischen Juristen’ 1939, 456: “Die alten Juristen können uns nicht sagen, wie sie hier zur Entscheidung gelangten. Denn dieser Vorgang ist im genauen Sinn intuitiv, er verläuft wie viele produktive Schöpfungen nicht diskursiv.”

⁸⁰⁶ Wieacker, ‘Vom römischen Juristen’ 1939, 453: “[Die] Zunft [...war] einintaktes und dienendes Glied der *res publica*. Die Fachjurisprudenz behauptete sich in ihrem Aufbau und ihrer Methode.”

⁸⁰⁷ Wieacker, ‘Vom römischen Juristen’ 1939, 451: “juristische Existenz.”

⁸⁰⁸ Wieacker, ‘Vom römischen Juristen’ 1939, 456. Emphasis original. “His decision lives rather from contemplation, decision and conceptual pathways that are learned from his accumulated experience, and out of which the adept artist or doctor acts spontaneously. In this way the jurist’s own experience not only stands by precepts, but also his situational understanding becomes objective authority through the uninterrupted tradition of experience of jurists that has been consolidated to fixed concepts and principles, of which the jurist is absolutely certain.” (Translation by HW).

of the lawyers was an elemental part of the Late Republic – it was a “limb” in the body of society – the judgments which the lawyers delivered were just from the point of view of the society and the Roman worldview.⁸⁰⁹ Moreover, and in time, the classical jurisprudence of Rome assimilated Greek theories of justice into their tradition. The Roman jurists of the second century A.D. equated (and correctly according to Wieacker) their ‘legal skill’ with that of social justice. The creative power of the *Juristenstand* came to mean the process which produced just results, at the same time confirming the “productive” or pro-active essence of the tradition of Roman jurisprudence.⁸¹⁰ Within the tradition previous intuitive decisions were actually present; the experiences of past lawyers were at the disposal of a Roman lawyer through his own experience while performing the process of reaching a correct decision.

Denn mit der juristischen Reduktion ist in der Regel auch schon der Anschluss an die endlose überlieferte Kasuistik gewonnen, deren rationes dem Juristen aus Erfahrung und Überlieferung so vertraut sind, dass er sie oft unbewusst anwendet.⁸¹¹

Socialization to an ontological attitude towards infinitude within the ‘guild,’ learnedness in legal subject matter, cultivating an ability to express verbally the spheres of human being and an assimilation of the craft of legal procedure, comprised the Roman legal tradition. Thus the individual experience of being a Roman lawyer was one with the inner justice which the tradition embodied and reproduced.

Seine [The Roman lawyers] Leistung ist objektiv, daher Schöpfung; Kunst nicht im Sinn eines beziehungslosen Könnens, sondern eines produktiven, lebenvermehreren Schaffens.⁸¹²

It is fair to present such intuitive, creative legal reasoning within a circle of scholars as *Rechtsgewissen*. To Wieacker, Late Republican jurisprudence was an incomparable model and ancient paragon for succeeding legal cultures, not only in the sense that the legal terms it had produced continued to inhabit the twentieth century German legal rhetoric, but as material legal order (*Ordnung*) involving the intertwining of cultural, religious, linguistic and social systems. Wieacker admits that Roman law as *Dasein* like this is unreachable to modern lawyers, but nevertheless its example should inspire modern jurists and legal scholars to search for “common knowledge” on which to base their legal system. They should acknowledge “the relation to their völkisch community [...], be aware of this community’s basic values, and articulate more

⁸⁰⁹ Wieacker, ‘Vom römischen Juristen’ 1939, 454.

⁸¹⁰ Wieacker, ‘Vom römischen Juristen’ 1939, 456.

⁸¹¹ Wieacker, ‘Vom römischen Juristen’ 1939, 456. “For the connection to the endless traditional casuistry is usually also obtained with the legal reduction. The casuistry’s role is often used unconsciously from experience and tradition.” (Translation by HW).

⁸¹² Wieacker, ‘Vom römischen Juristen’ 1939, 456–457. “Their [The Roman lawyers] output is objective, thus creation; art not in the sense of an inconsequential skill, but rather of a productive, life-multiplying act of creation.” (Translation by HW).

powerfully than the jurists of the high-classical times” in order to hear the “living voice of the *völkisch* Law”.⁸¹³

The skill (practical wisdom) and ontological prerequisites (shared experience) of the Roman lawyers comprised their comprehensive understanding of the legal application (*Rechtswissen*). Their *Lehre*, embodiment of legal practice, was transmittable, learnable and applicable throughout the centuries. Thus, this trinity of wisdom, experience and application comprised the custom which distinguished the lawyers of the Late Republican world from other legal cultures. In the long line of Franz Wieacker’s legal scientific works this trinity sustained its place as a superior paragon to all other legal practices in European legal history. Although not yet clearly explicated, expressions of the custom of “great jurisprudence” as a whole, and as a part of the respected social reality, amounted to legal conscience, *Rechtsgewissen*. Thus, every given legal mentality studied by Wieacker, within its respected historical circumstances, was related to this legal culture. His construction of the legal conscience of Late Republican lawyers represented a point of reference from which legal cultures which developed later could be evaluated.

Wieacker’s construction of the legal culture of “great jurisprudence” was in line with the previous legal historical works on the division between theoretical legal science and “living jurisprudence.” Fritz Pringsheim’s writings clearly had an effect on Wieacker’s formulations, although he did not want to quote Pringsheim directly, due to the restrictions on references to Jewish scholars in the German legal academia.⁸¹⁴ Certainly Pringsheim’s work on the differences between Greek and Roman legal cultures, and his claim that a theoretically overloaded jurisprudence could not reach a socially just result, should be taken into account.⁸¹⁵ On the other hand Wieacker’s article echoed the legal philosophy of the ‘New legal science’ and *Lebensnähe* which advocated jurisprudence’s closeness to the values of actual life.⁸¹⁶ Wieacker represented the *Rechtsgewissen* of the late Republican lawyers as *phronesis*, practical wisdom, which connected his thoughts on scholars like Giambattista Vico and Hans-Georg Gadamer, and Martin Heidegger.

My analysis introduces two sources of inspiration in Wieacker’s ideas of legal conscience or legal experience, which have not been sufficiently considered in the research literature: the influence of Martin Heidegger’s existentialism, and the togetherness experienced in the working communities of the ‘New legal science.’ In his philosophy Heidegger exhibited a novel way of interpreting the European philosophical tradition, but also a new approach of understanding the philosophical act.⁸¹⁷ To Heidegger understanding and questioning about the world were always bound to the inevitable finitude of the human mind. Science was only a limited way of gaining information about the world, and should not be equated with the “truth.”

⁸¹³ Wieacker, ‘Vom römischen Juristen’ 1939, 463.

⁸¹⁴ Cf. section 3.2 Culture in *Rechtswissenschaften* 1933–1945: The actualization of the Weimar breakdown and National Socialism in academia and legal science.

⁸¹⁵ Pringsheim, ‘Höhe und ende der Römischen Jurisprudence’ 1961.

⁸¹⁶ Cf. Winkler 2014, 398–403.

⁸¹⁷ Coltman 1998.

Philosophy, on the other hand, was a way of thinking which was based on robust, everyday practical knowledge on “being-in-the world” (*Dasein*).⁸¹⁸ In describing the existentialist thinking – and *Dasein*’s immediate relation to the world – Heidegger used the image of a craftsman who almost unconsciously masters his skill but might not be able to explain it to others.⁸¹⁹ The knowledge of a master is exhibited in what he does. Knowing how was always prior to knowing that. The concepts and names which people have given to “things” served as tools in *Dasein*’s attempt to make sense of the temporal world it inhabits, and concepts themselves were not a sufficient passage to truth. Heidegger built his theory on ancient classics, but he did not attach his theory to any thinker too strictly. He was, however, explicit in rejecting Plato’s theory on ideal-world, and instead emphasized the significance of pre-Platonists like Parmenides. His point of departure was Aristotle’s three-level division of knowledge, and he strongly underlined the importance of “phronesis,” practical wisdom.⁸²⁰ This he called *Gewissen*, conscience. Conscience was a channel in rethinking the complexities of one’s own and others’ *Dasein*.

In 1933 Wieacker lectured at the University of Freiburg, where Heidegger was rector. Wieacker participated in the Todtenauberg docent camp led by Heidegger, and although the events in the camp were unfortunate from Wieacker’s point of view,⁸²¹ Heidegger’s thoughts had a definite influence on him, as they did for a whole generation of young scholars working in Freiburg. Wieacker’s letter to Erik Wolf from 1947 show that Wieacker had personal contact with Heidegger even after the war, and respected him as a philosopher and thinker.⁸²² One also has to take into account the indirect influence of Heidegger, via Erik Wolf and Hans-Gerorg Gadamer, who were close colleagues of Wieacker from the 1930s onward. Wieacker’s letters to Erik Wolf prove that in principle he believed that Heidegger’s teachings could be highly beneficial in studying legal history, if properly adjusted.⁸²³ The image, which ‘Vom römischen Juristen’ provides of from the thinking of Late Republican jurists, is, in any case, very Heideggerian. The legal skill of Roman jurists was an “unconscious craft,” beyond “mere definitions.” In a strange bond, the jurists were one with their tradition, whose wisdom was part of their “common knowledge” and identity, and did not dictate their “productive” creativity. To Roman jurists legal definitions were not detached from “practical life,” but like “symbols” and attached to the “things” to which they related. Their concepts had a different, ontological existence. Even the rejection of Greek theories in Wieacker’s article was justified on the basis that the “justice theories”

⁸¹⁸ Heidegger 1996, 3–6.

⁸¹⁹ *Ibid.*, 62–67.

⁸²⁰ *Ibid.*, 1–7, 9–13.

⁸²¹ See section 3.7 Wieacker’s hearing and the conclusions derived.

⁸²² See section 3.7 Wieacker’s hearing and the conclusions derived.

⁸²³ Wieacker to Erik Wolf 4.11.1953: Wieacker praises the work of Werner Maihofer, and continues: “Das Schönste ist, dass diesem durch “Sein und Zeit” erweckten denkenden Menschen Gewissenhaftigkeit und Ernst ein [a greek word] zum “uneigentlichen Man” verboten habe. Seine Kritik hat Heidegger mit Recht als eine Hilfe empfinden können. [...] Dieser unphilosophische Kopf [Wieacker is talking about himself] möchte sich wünschen, dass das in den Einsichten grosser Juristen obiter eingeschlossene ontologische Sachwissen von M[aihofer] bei einer anderen Gelegenheit ans Licht gehoben werden möge.”

and “rhetorics” devalued the essence of the craft, or praxis, of the original legal wisdom of Roman jurists.

Nonetheless, as Wieacker himself expressed in *Privatrechtsgeschichte*, Heidegger’s theoretical guidelines did not in the end provide a foundation for constructing legal thinking which might be applicable to a community of people. Heidegger’s *Gewissen* was, after all, interested in individuals. Wieacker’s own legal historical model for legal thinking was contextualized in a group, but not just any group, but a community which was bound by virtues, a worldview, and by “basic thought.” The guild of Roman jurists was a compelling example of a “circle of the learned,” but clearly resembled some of the communities (or ideals of those communities) which existed in Wieacker’s time and society. There are indications that Wieacker did capitalize on some of his own, firsthand experiences when constructing the phenomenology of the guild of Roman jurists. For example, both the guild and the legal communities of the 1930s Germany were guided by a “basic thought” or “mentality.”⁸²⁴ A more direct point of reference can be found in the expressions which Wieacker used when referring to the Roman guild of jurists and his own community of scholars. In his article *Religion und Recht im römischen Stadtstaat* (1935), Wieacker writes about the “harmonious and distinct way of existence of the core” of Roman jurists in describing the fundamentals of the Roman legal thinking and the core of the guild of jurists. The “Stamm” (the permanent staff) was also a concept which Wieacker used from his circle of friends in the *Dozentenakademie* of the University of Frankfurt.⁸²⁵

So in this sense the communal working method of the 1930s provided new views on legal history. Insistence on *Erlebnis* did provide Wieacker with tools in his quest to trace the uncorrupted basis of legal knowledge, which would be transmittable, learnable and applicable throughout the centuries. To Wieacker “experience” (*Erlebnis*) comprised a shared spiritual property, which was achieved through collaborative scientific work, and a principle on which he was able to build the construction of legal wisdom. This “practical wisdom” – later called *Rechtsgewissen* – was a construction of the ‘New legal science’ and opposed to the “old science.”

4.5. The articles on legal education: Conscience in contemporary legal praxis

By the early 1940s, Wieacker had already written on the concept of “property” (the mentality of the people) and about the legal culture of Roman lawyers (and their infinite legal skill). From another point of view these themes dealt with the legal consciousness (*Rechtsbewusstsein*) of Germany and the superior legal skill (which

⁸²⁴ See section 4.3 Creative legal thinking as ‘conscience’: The War and the dissolution of the *Kameradschaft*.

⁸²⁵ Franz Wieacker, ‘Religion und Recht im römischen Stadtstaat,’ in *Zeitschrift der Akademie für Deutsches Recht – Sonderheft Ausland* 2 (1935), 273: “spannungslos geschlossenen Daseinsweise des Stammes”; Cf. e.g. Wieacker to Erik Wolf 14.4.1934 and Wieacker to Erik Wolf 3/1934. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

was later conceptualized as *Rechtsgewissen*) of the Romans. In his three articles ‘Die Stellung der römischen Rechtsgesichte in der heutigen Rechtsausbildung’ (1939), ‘Der Standort der römischen Rechtsgeschichte in der deutschen Gegenwart’ (1942), and ‘Vielfalt und Einheit der deutschen Bodenrechtswissenschaft der Gegenwart’ (1942)⁸²⁶ he bound the superior example of Roman legal skill to the circumstances of his contemporary society. At the same time Wieacker took his first steps in comparing and contrasting the two jurisprudential spheres of *Rechtbewusstsein* and *Rechtsgewissen*. This was carried out in the context of legal education. After receiving a professorship from the University of Leipzig, his responsibilities concerning practical education had enhanced. His interest in the subject was nevertheless genuine.⁸²⁷ While contributing to the academic discussion on legal training he was able to further develop the ideas he had had during his stay in Kiel. These involved the more general acknowledgment of the national importance of educating the youth in accordance with the new *Studienordnung*, but also the conviction of the fundamental significance of “experience” in learning and legal science.

Wieacker’s personal feeling at the Universities of Frankfurt and Kiel had been that a concrete experience of togetherness and common purpose was a key for successful and sustaining scholarly work.⁸²⁸ Then the *Kameradschaft* of friends and colleagues had provided him with a premise for invoking academic work, whose results seemed to grow straight out of the emerging social change, and also in return seemed to shape the destiny of the national community. In the articles of ‘Die Stellung,’ ‘Der Standort’ and ‘Bodenrechtswissenschaft’ Wieacker translated his personal recollection of the revolution in education to a model concerning teaching and learning law in the Third Reich. Since Wieacker was not a pedagogist, he did not concentrate on teaching as such, but focused on the way of thinking which should guide the understanding of and learning from one’s own and other legal cultures. The articles scrutinize the premises which necessitate the transmission of the creative use of law, *Schöpfung*, and the ways in which it should be applied to society.

In the articles Wieacker’s intentions are threefold. First, he sought to secure the position of legal historical studies and especially the teaching of Roman law within it. Here, rather banally, he also tried to prove the significance of proper legal historical study to the National Socialist state.⁸²⁹ Second, he emphasized the fruitful and groundbreaking work done by the ‘New legal science’ which enabled the studying and teaching of tradition in a novel and useful way. From these standpoints he concluded his stance on the form of legal education in the future. The teaching, learning, and perceiving law should evolve around “experience.” This opening was one where legal history had a decisive role, since the “experience of law” was not an atemporal

⁸²⁶ Franz Wieacker, ‘Vielfalt und Einheit der deutschen Bodenrechtswissenschaft der Gegenwart. Über die Umgestaltung des Grundstücksrechts durch die heutige Bodenpolitik [1942],’ in Wollschläger (Hrsg.) 2000, 431–462.

⁸²⁷ See section 4.3 Creative legal thinking as ‘conscience’: The War and the dissolution of the *Kameradschaft*.

⁸²⁸ See section 4.3. Affections in *Rechtsgewissen* 1933–1945: Wieacker’s community and legal wisdom.

⁸²⁹ Wieacker, ‘Der Standort’ 1942, 55.

phenomenon; it was a mentality which connected the legal consciousness of the present to preceding scholar generations and legal cultures, enabling a multifaceted, thorough and proper understanding of law.

The route to a productive usage of legal knowledge proceeded from acknowledging the “experience” which characterized the past legal cultures adjusting this enriched understanding of law to the “practical experience” prevailing in one’s contemporary society. Legal history provided an entity which mediated this translational task and enabled the “creative” use of law. In the end, Wieacker saw such a *bona fide* legal scientific process – a skill in which law students should be educated – as a work of conscience, *Gewissen*.

In ‘Der Standort’ Wieacker elaborates the prevailing theories and orientations in the discipline of legal history. From his viewpoint the discipline as a whole had progressed remarkably and had been able to leave behind the unhealthy methodology of the Pandectists and the infiltration of the liberal worldview.⁸³⁰ Wieacker gives credit to Paul Koschaker’s work, which he includes in the body of “novel” insights on legal history. Nevertheless, the prevailing orientations – and this also includes Koschaker’s stance – were partly bound to the old “education forms” and did not fully capitalize on the latest innovative improvements which had been introduced into the field of legal science during the recent years.⁸³¹ Here Wieacker draws a strong distinction between him and the old generation represented by Koschaker. Later Wieacker called this “old generation” as “Wilhelminian generation”, and perceived his wartime writings as a fight against that constellation.⁸³² By improvements Wieacker meant the works of his network, especially Ernst Forsthoff’s studies, and the possibilities provided by the new legal *Studienordnung*.⁸³³ In general, the biggest failure of the old orientations was that they did not succeed in transmitting the wisdom of past generations to students of law. Since the major perversion and corruption in the German jurisprudence was due to the liberal era, the cultures preceding it were seen as healthy in their legal understanding, and learning from them would be beneficial. The lack of true historical contact with the past, which according to Wieacker plagued contemporary legal science, was mostly about the nonexistent relation of the old orientation with the great jurisprudence of Late Republic.

This failure naturally did not concern Koschaker (who was a romanist), but a flaw in Koschaker’s use of legal history was its dogmatic understanding of historical development. It assumed that a “historical form” of the past could be adapted as such to modern legal thinking and education.⁸³⁴ Legal historians, who in Wieacker’s article were represented by Koschaker, concentrated on the secondary aspect of history, on

⁸³⁰ Wieacker, ‘Der Standort’ 1942, 49.

⁸³¹ Wieacker, ‘Der Standort’ 1942, 49; Wieacker, ‘Die Stellung’ 1939, 405.

⁸³² The theme of the “Wilhelminian generation” will be dealt with in section 4.7 The Damascus of 1968 and the conscience of a scholar. Koschaker was offended by the criticism Wieacker elaborated in ‘Der Standort’ (Winkler 2014, 207). So the antagonism between Wieacker’s generation and the “older generation” did to a degree take place.

⁸³³ Wieacker, ‘Die Stellung’ 1939, 405; Wieacker, ‘Der Standort’ 1942, 54.

⁸³⁴ Wieacker, ‘Der Standort’ 1942, 50, 51; Wieacker, ‘Die Stellung’ 1939, 403.

linguistic representations. In doing so they were more or less still bound to the dogmatic understanding of *Corpus iuris*, as had been the Pandectists. Wieacker admitted that the linguistic jurisprudential devices of the Roman world were sophisticated, but they were a mere side-product and a historical expression of the true jurisprudential capability of the Romans. To illustrate his claim, Wieacker shows how the German reception of Roman law had produced disastrous results – the “scientification” of German legal culture – in adopting the plain rhetoric of the *Corpus iuris*.⁸³⁵ One could not merely adopt alien forms of education from another time and legal culture. The forms had to be adjusted to one’s own legal existence. The adjustment, learning from another culture and applying its legal thinking to contemporary society, had to focus on and occur through experience.

Nicht als herkömmliche Bildungsform, sondern als einmalige beispielhafte Ehrfahrung gewinnt die Rechtsgeschichte diese neue Gegenwartsbeziehung und ihre Unersetzlichkeit in der Rechtserziehung.⁸³⁶

Wieacker’s conviction – and the claim of his pedagogical articles – was that the new way of legal education had to be constructed around the idea of “experience,” and legal history provided the context in which this mental skill could be achieved and further trained. Wieacker’s idea also worked other way around; by means of proper juridical “experience” German legal history would be able to study past cultures with increased insightfulness. European legal history provided a dual example of the significance of “experience” in people’s legal consciousness. At the same time these examples offered learning spheres for future generations of lawyers. Via history it was possible to scrutinize the wrong turns taken by legal science and the mechanics defining the life of legal cultures, as in the case of the German Reception. The development and indeed the actual vitality of a given legal culture depended on the way it valued the meaning of legal experience.

Second, through legal history it was possible to learn from the masters of jurisprudence – Roman lawyers. In their superior legal culture the “experience of common values” had been a phenomenon which enabled their jurisprudence to advance to such a high level. The “powerful concepts” and “explosive force” of Roman jurisprudence lay in its close connection with Roman society, for the values guiding Roman legal skill emerged from the community.⁸³⁷ The capability of lawyers of the Late Republic was

⁸³⁵ Wieacker, ‘Der Standort’ 1942, 51: “das recht würde nun nicht mehr erfahren, sondern erlernt; nicht mehr besessen, sondern erlitten”; 52: “So hat sie [the Pandectist] einer literarischen Form, nicht einer Begegnung mit den ursprünglichen Kräften des altrömischen Rechts, also einer echten geschichtlichen Ehrfahrung, ihre Formen abgewonnen.” In binding his idea of the essence of German Reception to a presentation on contemporary education, Wieacker was, of course, able to introduce his theory of Reception. That example defended Roman law against Germanist accusations of the corrupting and liberal force of Roman law itself. Overall, the pedagogical articles show the multidimensional core of Wieacker’s idea of Roman law, and how it was being forged partly against dismissive claims and partly through a genuine attempt to have an effect on contemporary legal education.

⁸³⁶ Wieacker, ‘Der Standort’ 1942, 53. “Legal history obtains this new connection to the present and its irreplaceability in legal education not as a conventional form of education, but rather as a unique exemplary experience.” (Translation by HW).

⁸³⁷ Wieacker, ‘Der Standort’ 1942, 53.

not primarily associated with textual sophistication, but based on an understanding of “the concrete conditions of situations.” From this “experience” the Roman lawyers constructed their jurisprudence in relation to the “foundational order,” the gathering ethos, of their society.⁸³⁸ Thus the “conscientious” Late Republican jurisprudence could not be replicated in the legal reality of the Third Reich, but contemporary scholars and students of law could learn from its “creative tradition.”⁸³⁹ The “creativity” of classical lawyers was due to their awareness, “experience”, of current values and the social ethos. This combined with their technical skills and superior knowledge of tradition enabled their “creativity” to rise above other legal cultures. With his final comparison between ancient Roman jurisprudence and the society of Third Reich Germany, Wieacker defends the meaning of historically oriented legal education, but also implicitly asserts that Roman legal skill, and indeed the “creativity” of contemporary lawyers, resides in a distinguished community of those who are legally trained.

Consequently, understanding the importance of the shared horizon of thought behind any functioning legal culture, and comparing one’s vision to other perceptions in history was the only way for legal thinking to be in touch with social reality and consequently produce socially relevant and consistent results. In other words, if legal reasoning attempted to make just claims which were in congruence with the valuations of the present day, it had to be aware of the limits of its own thinking, the “existence” in which it was situated. Each time and place had its distinct way of perceiving justice; the set of communal values directed the cultural mentalities and distinct ways of thinking which grew out of the material conditions of life in their different societies.

“Conscientious”⁸⁴⁰ legal thinking had to be aware of and understand its relation to the prevailing mentality of the present age. Cultivating “conscientious” legal thinking – a form of meta-level reasoning, which acknowledged the historicity of mentalities – was the most important task of legal education. The historical understanding of law was the means which would enable students – future lawyers – to interpret and apply law in a productive and proper way. The cultivation of such skills in education would raise a community of legally learned individuals within the national community, who, in placing their knowledge at political leaders to utilize, would ensure that society in general followed its “destiny.” Here one can see an emerging conceptual distinction between the *Rechtsbewusstsein* and *Rechtsgewissen*, between legal consciousness and legal conscience, which came to be the characteristic feature of Wieacker’s later classics.

In ‘Vielfalt und Einheit’ Franz Wieacker defined a novel way to approach the complicated legal phenomenon of land law. The text was in most parts based on his book ‘Bodenrecht’ (1938),⁸⁴¹ but in ‘Vielfalt und Einheit’ Wieacker derived from

⁸³⁸ Wieacker, ‘Die Stellung’ 1939, 404: “konkreten Bedingungen der Lage”; 405: “Grundordnung.” See also Wieacker, ‘Der Standort’ 1942, 55: “aus der eigenen Lebensordnung seines Volks Antworten gefunden.”

⁸³⁹ Wieacker, ‘Der Standort’ 1942, 51, 55: “schöpferische.”

⁸⁴⁰ Wieacker, ‘Der Standort’ 1942, 49.

⁸⁴¹ Franz Wieacker, *Bodenrecht*. Hamburg, Hanseat. Verlag 1938.

‘Bodenrecht’s’ argument the possible effects his “conscientious” view on law would have on education and legal practice. The purpose of the text was to combine the new legal scientific ethos of the ‘New legal science’ with the actual work of the courts; to combine theory and practice in a way which would produce just decisions from the point of view of the national community:

Sie umschliesst drei wesentliche Gegenstände: die Frage nach Möglichkeit und Notwendigkeit einer methodisch einheitlichen Bodenrechtsdisziplin, die Frage nach dem Verhältnis dieser Wissenschaft zu Gesetzgebung, Rechtspraxis und Unterricht und endlich die Frage nach der inneren Gliederung des Bodenrechts.⁸⁴²

Like in the case of property law, the contemporary relevance of Wieacker’s text was based on the one hand on the incapability of the BGB to respond to the new kind of challenges the developing society brought about, and on the other hand ‘Vielfalt und Einheit’ was an attempt to shape the existing legal conventions and customs to meet the demands of the National Socialist state. With respect to the first premise, Wieacker saw the complexity and disjointedness of land law as the result of the “bourgeois world-view” and the shortcomings of positivist legal science. Although the “stockpile of concepts” created by the legal positivists had not extended drastically to the field of land law, according to Wieacker coping with recent developments demanded the introduction of new legal tools from the linguistic and conceptual point of view.⁸⁴³ Wieacker’s ‘Vielfalt und Einheit’ was connected to this ‘legal renewal’, not only in his way of referring (solely) to the scholars of the ‘New legal science’, but through combining the *Studienordnung* of 1935 with his construction of the future gestalt of land law.⁸⁴⁴ Yet, the text is also in line with Wieacker’s other texts. Wieacker sought to overcome the incoherence of legislation concerning “things,” and not only define a unified theory that could be easily applied and learned, but also prove that legislation and a judicature of “assets” bore a sphere of values within it, and that sphere should be acknowledged when making decisions on and about legal matters.

Wieacker considered that the reconstruction of law as a discipline was a matter of current urgency, and himself able to accomplish that redefinition because of the developments that had occurred “during recent years,” that is, due to the implementations of the National Socialist ideology in legislation and the theoretical work conducted by the ‘New legal science’.⁸⁴⁵ Wieacker was firm that the legal

⁸⁴² Wieacker, ‘Vielfalt und Einheit’ 1942, 431. ”It encompasses three essential subjects: the question about the possibility and necessity of a methodical, uniform land law discipline, the question about the relationship of this science to legislation, legal practice and education, and finally the question about the inner structure of land law.” (Translation by HW).

⁸⁴³ Wieacker, ‘Vielfalt und Einheit’ 1942, 432, 433. Wieacker presented that then (1942) the distinction between the State and community, private and public “did not anymore bind the legal scholars?”/”für uns nicht mehr verbindlich sind” (441).

⁸⁴⁴ On *Studieordnung* of 1935, Wieacker, ‘Vielfalt und Einheit’ 1942, 436; On legal positivism Wieacker, ‘Vielfalt und Einheit’ 1942, 432; On the effect of National-Socialist ideas on legislation considering land, Wieacker, ‘Vielfalt und Einheit’ 1942, 434.

⁸⁴⁵ Wieacker, ‘Vielfalt und Einheit’ 1942, 433, also 434: “schon vorhandene “öffentlich-rechtliche” Materien gewannen eine höhere Bedeutung mit dem Zwang zu einer unbedingteren Nutzung des deutschen Bodens und mit der Ausweitung der Aufgaben, an welche der neue Staat herantrat.”

science formulated by him and his circle of colleagues would be a perfect means to adjust legislation to meet the requirements of ongoing social change, since the methods and legal thinking that the circle had cultivated had been developed from and within that social change.⁸⁴⁶ Translating Wieacker's implicit conviction of the distinct model of thinking of his circle to the terminology of the 'New legal science', we could say that Wieacker's "creative" usage of law and that of the *Kieler Schule* as well as Ernst Forsthoff's enabled them to give "conscientious"⁸⁴⁷ legal advice which was "close to reality" and just, for the particular reason that in being "close to reality" they were "conscientious" and "creative."

'Vielfalt und Einheit' is an example of a text where Wieacker attempted to put his existentialist understanding of the essence of law into practice. In concrete terms, Wieacker's suggestion to reformulate *Bodenrecht* combines the existing legislation and conventions into an idea of *Raumrecht* as defined by Ernst Forsthoff.⁸⁴⁸ The material conditions of a given time, and the underlying ethos that emerged from it, should direct the legal thinking of that time. In other words the "existence" and preconditions of being (*Daseinvorsorge*) of a legal scholar were the starting point of his scholarship:

das Raumrecht durch das Denken in einzelnen Verwaltungsaufgaben und in der täglichen Daseinvorsorge bestimmt, um eine glückliche Prägung von Forsthoff in etwas abgewandelten Sinn aufzunehmen.⁸⁴⁹

Wieacker's personal emphasis in his argument in 'Vielfalt und Einheit' is evident in the way he stresses that the meaning and purpose of the new theoretical openings of the 'New legal science' – and the adjustments brought about by *Studienordnung* – should not overrule the practical value of the previous legal conventions concerning land law. New theoretical openings such as Wieacker's should instead sharpen and underline the pedagogical value and practical wisdom of the existing – and historical – legal praxis.

Es ist deutlich, dass bei den Vertretern einer systematisch zurückhaltenderen Einstellung der Sinn für die pädagogischen und rechtstechnischen Werte der Bodenrechtspraxis überwiegt, während die weiter gehenden Reformvorschläge stärkeres Gewicht auf systematische oder theoretische Folgerichtigkeit der Darstellung des neuen Bodenrechts legen.⁸⁵⁰

⁸⁴⁶ cf. Wieacker, 'Die Stellung' 1939, 404.

⁸⁴⁷ Wieacker, 'Vielfalt und Einheit' 1942, 432: "gewissenhaft."

⁸⁴⁸ Wieacker, 'Vielfalt und Einheit' 1942, 438; Forsthoff had formulated his idea on "Raumrecht" in *Die Verwaltung als Leistungsträger* (Stuttgart/Berlin, Kohlhammer 1938). On Forsthoff's influence, see also Wieacker, 'Vielfalt und Einheit' 1942, 440, 458.

⁸⁴⁹ Wieacker, 'Vielfalt und Einheit' 1942, 439. "the space law [is] determined through the thinking in individual administrative tasks and public provisions, to include a fortunate coinage from Forsthoff in a somewhat varied sense." (Translation by HW).

⁸⁵⁰ Wieacker, 'Vielfalt und Einheit' 1942, 437. "It is clear that the sense for the pedagogic and legal-technical values of the practice of land law predominate in the representatives of a systematically more restrained attitude, while the further-reaching proposals for reform put more weight on the systematic or theoretical consistency of the representation of the new land law." (Translation by HW).

The connection between theoretical information and practical knowledge was emblematic of Wieacker's legal scientific stance. The foundational significance of legal practice always overrode the temporal demands for adjustments in statutes and norms. The shifts in administrative or scientific styles merely supported the development of "praxis," which to Wieacker meant a tested and evolved knowledge, used for generations, and which resembled more a skill than an accumulated body of information.⁸⁵¹ In other words "praxis" in the context of 'Vielfalt und Einheit' had its reference point in the assimilation of the tradition which had appeared in the legal culture of Late Republican Rome. In 'Vielfalt und Einheit' Wieacker's continues to utilize the concept of "experience" as a distinguished mode and tool of legal scholarship. The experience of law was a feature which connected the practical work of the courts, sound theoretical contributions and the presentations of past generations of scholars. It was a device used in conceptualizing jurisprudential questions, but it was also a foundation on which legal education should be based. In 'Vielfalt und Einheit', while writing on the difficulty of combining theoretical presentations and a practical understanding of the subject matter, Wieacker suggests that "experience" should be used as a guiding principle. "Experience" did not merely signify accumulated knowledge or a by-product of ageing; The "experience of law" was a horizon which grew out of an understanding of the essence of law, and as such it provided a common ground on which attempts to combine legal praxis and legal theories could be built.

Aber auch hier kommt alles auf den praktischen Versuch an. Gerade der reife Hochschullehrer, dessen Erfahrung ihn von der Wiedergabe eines verwickelten und unübersichtlichen Stoffs abzuraten scheint, wird die entgegengesetzten Erfahrung machen.⁸⁵²

Nonetheless in 'Vielfalt und Einheit' "experience" as a timeless cognitive asset, a conceptual tool of legal scholars, and a pedagogical medium, was explicitly combined to the demands and ethos of his contemporary world. Since Wieacker assumed that he, as a representative of the 'New legal science,' was perfectly aware of the demands of the *Dasein* – the "existence" where the current law was situated – he was able to give suggestions on the reformulation of the legal conventions.⁸⁵³ Thus, Wieacker's own experience of social change – shared by other young legal scholars – was a medium which allowed him to combine theory and existing legal practice in a "conscientious"

⁸⁵¹ Thus, with respect to *Volksgesetzbuch*, Wieacker objected to the attempts to include land law under a new unifying codification. His stance was probably due to a general ideological resistance to any codifications, but also because the codification could not take into account the "distinct nature of land law" and its relation to "practice." See Wieacker to Carl Schmitt 6.5.1941. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg.

⁸⁵² Wieacker, 'Vielfalt und Einheit' 1942, 457. "Everything also depends on the practical trials. Especially the new university lecturer, whose experience seems to dissuade him from rendering entangled and unclear material, will have the opposite experience." (Translation by HW). See also 458: "Dass dieser pädagogische Vorschlag nicht mit der Elle messen will, dass vielmehr Umfang und Art der Darstellung der Erfahrung und Einsicht des Rechtserziehers überlassen bleiben muss, versteht sich wohl selbst."

⁸⁵³ Wieacker, 'Vielfalt und Einheit' 1942, 458: "Wir fanden, dass das Grundstücksrecht überwiegend nach der richtigen Norm, das Raumrecht überwiegend nach der richtigen Lösung konkreter Aufgaben der Daseinsvorsorge für das Ganze fragte."

manner. To him, the synthesis where he interpreted the current law and customs from the point of view of the 'New legal science' was a last phase in the historical continuation of true legal scholarship. Like skillful scholars before him, he was applying the craft of legal thinking, only now in very particular circumstances. Thus in 'Vielfalt und Einheit' he considered himself to be applying *Gewissen*, practical legal wisdom, to the field of German land law:

[...] bedarf es nach unserer Meinung einer einheitlichen Wissenschaft, die gleichsam als *Gewissen* der gemeinschaftlichen Aufgabe des Bodens die Gegensätze zusammenfasst und ausgleicht. Dies gilt sowohl im Verhältnis zur Verwaltungspraxis als im Verhältnis zur Rechtspflege auf dem Gebiete des Bodenrechts.⁸⁵⁴

The way in which Wieacker used the concept of *Gewissen* in 1942 contained the idea of totally unprecedented and progressive social change. The relation between the people, the state and law had taken a novel direction which the legal theories of the bourgeois world could not understand or control. On one hand, and in comparison to most other theorists of the 'New legal science,' Wieacker constantly reflected on his ideas of legal history, and carried with him the insurmountable ideal of Late Republican Roman law. This separated him from scholars like Karl Larenz or Ernst Forsthoff, with whom he shared many ontological premises about legal science. On the other hand, Wieacker's idea of the significance and essence of Roman law diverged drastically from the arguments of for example Ernst Schoenbauer, who rather one-dimensionally compared the past and present societies, seeking for historical justifications for the National Socialist regime.⁸⁵⁵ Wieacker was interested in the mentality, the experience, of the past lawyers. The "art" in which Roman lawyers transferred their knowledge, horizon and perception – their "existence" – to legal language represented an example of just judgments, legal education and theories in his contemporary reality. Thus, Wieacker's thought was more or less situated in between or outside of most legal scientific presentations prevailing in the Third Reich. It was firmly constituted on the ethos of young conservative lawyers of the war generation, but mostly interested in the cultural, "spiritual" sphere of the law.

Built on legal historical paragons and established concepts, Wieacker considered *Gewissen* to be the ability to read and direct the constantly evolving legal culture. As opposed to previous theories of Roman law, his idea of legal conscience was connected to the experience of violent revolution in legal education and abrupt metamorphoses in civil society. As such it comprised the core of Wieacker's historical vision, and his later works on legal history and hermeneutics have to be read in the light of this ontological principle. In 1942 the idea of *Gewissen* is not a mere synonym for the concept of *Rechtsgewissen*, which Wieacker used in *Privatrechtsgeschichte de*

⁸⁵⁴ Wieacker, 'Vielfalt und Einheit' 1942, 442. Emphasis mine. "[...] it is our opinion that it requires a uniform science that, at the same time as the conscience, unites and balances the opposition with the joint tasks of the land. This applies to the relationship with administrative practice as well as to the relationship with the administration of justice in the area of land law." (Translation by HW).

⁸⁵⁵ Cf. Schönbauer 1935.

Neuzeit, since the “legal conscience,” as elaborated in Wieacker’s classic book, had to deal with the inescapable precondition of guilt.

4.6. Culture in *Rechtsgewissen* 1945–1968: Abstract guilt

The Second World War proposed an ungraspable dilemma to German Society. A dilemma which, explicitly or implicitly, overshadowed the public debate on the meaning of the national past, present and future. Unlike the discussion which emerged after the First World War, this time the War had been a criminal one; it had been launched against civilians and fought against the helpless. There was no “Symmetry of Death” in the Second World War or in the race war of the National Socialism.⁸⁵⁶ The war, and along with it the warriors, were unconditionally marked with the “stigma of [one-sided] violence”.⁸⁵⁷ The abstract guilt experienced was comparable to the vastness of the crime. Karl Jaspers formulated that the *Schuldfrage*, question of guilt, should be divided into four categories in order to be understandable. The categories of criminal, political, moral and metaphysical guilt meant that almost all Germans were responsible with respect to the sins conducted in and by the Third Reich.⁸⁵⁸ Obviously the existence of such a “stigma” demanded treatment in order to make it manageable for both to the national community and for individual citizens.

The means adopted to make the guilt bearable can be seen in three ways. First there were demands for the “general amnesty” of implicitly accused Germans.⁸⁵⁹ According to this view, the acts of ordinary people should be disregarded when litigating the crimes of the Third Reich. After all, the Second World War was a war, and in wars people attempt to kill each other. If misconduct on the German side was under scrutiny, then one should also consider the justness of, for example, the firebombings of German cities or Russian mass rapes on the eastern frontier. International justice could be seen as a political invention used for intergovernmental purposes, and thus it should not be a starting point in weighing the justice or injustice of a particular behavior in particular circumstances. The accusations of the Allied countries generated a strong and acute counter-reaction; A vast majority of the German people rejected the idea of “collective guilt” after the Second World War equating the attempts to cast the blame for the Holocaust on the Germans as a people to Fascism.⁸⁶⁰

In the second common view the retrospective narratives about the era of the Third Reich splintered the guilt, sentencing some agents to total guilt while releasing some from responsibility. For example, the SS, the SA and the *Einsatzgruppen* were

⁸⁵⁶ Kühne 2005 229.

⁸⁵⁷ M. Geyer, ‘Das Stigma der Gewalt und das Problem der nationalen Identität in Deutschland,’ in C. Jansen, L. Niethammer & B. Weisbrod (Hg.), *Von der Aufgabe der Freiheit. Politische Verantwortung und bürgerliche Gesellschaft im 19. und 20. Jahrhundert*. Berlin 1995, 673–698.

⁸⁵⁸ Karl Jaspers, *Die Schuldfrage*. Heidelberg, Lambert Schneider 1946.

⁸⁵⁹ Moses 2007.

⁸⁶⁰ According to Habbo Knoch, in 1947 95 percent of Germans rejected the idea of ‘collective guilt.’ Knoch, *Die Tat als Bild: Fotografien des Holocaust in der deutschen Erinnerungskultur*. Hamburg, Hamburger edition 2001, 170, also 152–153, 212.

perceived as fundamentally and spiritually evil. These groups were led and participated in by corrupt and malevolent people, who managed to seize just enough power in society to fulfill their murderous fantasies.⁸⁶¹ These organizations were perceived ambiguously as both undemocratic and “political” in nature. In the common narrative, these groups had stolen legislative and parliamentary power for themselves by deception, and afterwards became affiliated with the political sphere where bureaucratic decisions on criminal acts were made, leaving common people as passive witnesses to their crimes.

The third part comprised the *redemptive republican* discourse, which Dirk Moses attaches especially to the character of Jürgen Habermas.⁸⁶² This stream of thought was mostly upheld by a younger generation of scholars, writers and public figures, or communists. Although redemptive republicans were not unconditional supporters of Allied austerity and “purge” politics in German administration and education, they called for radical and decisive actions, even at the expense of sliding into social turmoil. Redemptive republicans wanted to detach themselves from the *German tradition* (which after a few decades was named the *Sonderweg*) and in more concrete terms wished to get rid of people who were complicit with the Third Reich, and to abolish the nationalistic sentiments from German culture.

At the same time, the institutional form of the new Republic was under serious and bitter discussion. Konrad Adenauer’s time as the chancellor of West Germany cannot be seen as a model achievement of liberal public engagement or as a sign of flourishing and pluralistic exchange of opinions, although rebuilding the spiritual structures of society was nevertheless a discursive one. To intellectual historians this period nowadays appears to have been a discussion on the meaning of the German past in relation to the present and future of the Republic.⁸⁶³ In this discussion several competing intellectual communities could be distinguished. However, in the discursive reconstruction process significant aspects were not only the past of the nation as a whole or the respective intellectual constellations, but the personal past and the memory of those who contributed to the discussion.⁸⁶⁴ As such, rebuilding the legal, cultural and social essence of the Federal Republic was a “struggle with one’s conscience” both at the public and personal level.⁸⁶⁵ There were no easy or quick solutions in dealing with abstract guilt. “Working through” the national and personal

⁸⁶¹ Gudrun Brockhaus, ‘The Emotional Legacy of the National-Socialist Past in Post-War Germany,’ in Aleida Assmann & Linda Short (ed.), *Memory and Political Change*. New York, Palgrave Macmillan 2012, 36; Kühne 2005, 230, 245.

⁸⁶² Moses 2007.

⁸⁶³ Moses 2007, 10.

⁸⁶⁴ Dirk Moses (2007, 40) defines the situation which he calls the “dilemma of republican democracy in a post-totalitarian, post-genocidal society”: “On the one hand, such societies must distance themselves in all respects from the evil regime that they replaced in order to establish their moral credibility. On the other, they must usually integrate a substantial number of persons who were implicated in the crimes of that regime if the new republic is to be a stable entity. West Germany institutionalized this ambivalence. It was the successor regime of the Nazis, liable for its political crimes, while regarding itself as the legitimate representative of the German cultural nation (Kulturnation).”

⁸⁶⁵ Norbert Elias, *The Germans: Power Struggles and the Development of Habitus in the Nineteenth and Twentieth Centuries*. New York 1996, 16.

past was a process in which healing and productive results seemed to occur only with time. In addition, remembering the past and further assimilating it into a coherent narrative through which one could interpret the present and anticipate the future, was either overshadowed or backed up by numerous psychological mechanisms.⁸⁶⁶

For the most part coming to terms with the past on both the public and the personal level was impossible. People wanted to keep some concrete part of the past “untainted,” no matter what the official judgment on the past was. Around or on this memory one could construct continuity and an atemporal meaning in one’s life. Thus, public memory and private (or family) memory are never synonymous.⁸⁶⁷ A positive memory of an event, acquaintance, achievement or response usually remains significant, even though it might be devalued by the official stance. In this task of remembering, an individual usually needs positive appraisal from people he or she feels close to.⁸⁶⁸ Such a mechanism also applied to post-war German society. Again, like after the First World War, the idealized social constellation of togetherness became a tool to understand and interpret the common past, present and future in a way that it could bring meaning both to public and personal life.

An illuminating case is the afterlife of the concept and form of *Kameradschaft* in the Federal Republic. Although militant organizations were prohibited by law, and all kind of militant rhetoric was often treated with silence, disinterest, and even hostility, people continued to need symbols which carried along the positive meanings one had experienced in a bygone world.⁸⁶⁹ The changed social content to which the concept referred, no longer being equated with the militant concept of *Männerbund*, was related to the larger and shifting orientation in the policies, mentalities and values with respect to such questions as the family, masculinity, career, politics and nationality in the new Federal Republic.

After 1945 *Kameradschaft* no longer referred to the organizations and hierarchies of *Übermenschen*, as had been the case in the repressive rhetoric of the Third Reich. In the fall of 1945 German troops were made up of individuals dependent on the help and mercy of others; *Kameradschaft* was a community of prisoners of war. In the prison camps many men lost their physical and mental health, dignity or future prospects. Nevertheless, many soldiers survived the harsh conditions with, and even because of their fellow men.⁸⁷⁰ In addition to the concrete, life-saving help men offered to each other in the prison camps, the hope and expectations they had imposed on the *Heimat* which allegedly waited for them after imprisonment, were cherished and constituted within these male circles.⁸⁷¹ In all these the symbolic value of

⁸⁶⁶ Cf. Theodor W. Adorno, ‘Schuld und Abwehr,’ in Theodor W. Adorno, *Gesammelte Schriften* 9. Frankfurt am Main, Suhrkamp 1975, 144–324.

⁸⁶⁷ Aleida Assman & Ute Frevert, *Geschichtsvergessenheit: Vom Umgang mit deutscher Vergangenheit nach 1945*. Stuttgart 1999; Edgar Wolfrum, *Geschichtspolitik in der Bundesrepublik Deutschland: Der Weg zur bundesrepublikanischen Erinnerung, 1948–1990*. Darmstadt 1999.

⁸⁶⁸ Cf. Chapter 1. Introduction.

⁸⁶⁹ Kühne 2005, 229–270.

⁸⁷⁰ Kühne 2005, 211–212.

⁸⁷¹ See D. Cartellieri, *Die deutschen Kriegsgefangenen in der Sowjetunion: Die Lagergesellschaft*. München 1967 167–169, 272; Kühne 2005, 213.; The “visits of normalcy,” in which men, when a rare

Kameradschaft was not lost; quite the opposite, it was redefined to explain the spiritual essence of the circle of men who now possessed a shared history as POWs, as members in a peacetime democratic society and as members of the modern family. The heritage of this common experience of unity and of a common past circled around and often involved references to an ideal, *geistig* cause, and the theme of *Kameradschaft* continued to surface frequently in the public discourse of the new republic.⁸⁷²

The redefined concept of *Kameradschaft*, however, carried within it meanings of suffering and sacrifice. When this concept was deployed in post-war discussions, it nostalgically reminded people of the sacrifices of the past, but also of times when “everything was in its place.”⁸⁷³ In the shared mental sphere of *Kameradschaft*, the optimal society had been different from the one prisoners of war faced on homecoming. Thus, talking about the mentality of *Kameradschaft*, or the *kameradschaftliche* world, usually connoted a negative claim in the social reality of post-war Germany.⁸⁷⁴ Whereas in the rhetoric of the 1930s, *Kameradschaft* had referred to the quest for national unity and dignity after the humiliating Treaty of Versailles, in the post-war discussions the notion was an important part of the terminology which implied to coming to terms with the twisted and criminal past. This was especially due to the problematic nature of individual deeds as part of a national entity, *Volksgemeinschaft*, which was now proved to be a criminal one. Thus, talking about the spiritual heritage of the old days, of which *Kameradschaft* clearly represented, was an important level in both private discussions and in public discourse.⁸⁷⁵

For academics, talking and writing about the distinct social purpose and position of the scholarly sphere was for their part a means to resolve the “dilemma of the post-totalitarian society.” They had to both distance themselves from the illegal acts, agents and thoughts of the previous years, but also defend their personal motives during the days of totalitarianism, and the continuing significance of their “learned world” in a drastically changing society. While doing so they, and especially the conservative scholars of the war generation, constantly experienced a frustrating incompatibility between their own understanding of “correct communality” and the official direction of Germany amidst the modernizing process. After the Second World War the legal scholars of the war generation felt doubly dislocated. The concrete communities of researchers that existed in pre-War universities were no more. The denazification

chance for it occurred, let themselves enjoy a memory or a touch of civil society, took place within the framework of the all-male camps. These “visits” were often “coffee-breaks,” or like in the case of Franz Wieacker’s imprisonment, lectures like in university. On camp academies, see Liebs 2010; Avenarius 2010.

⁸⁷² K. Naumann, “Soldaten sind Mörder.” *Erkundungen auf dem Feld der Ehre*, in *Mittelweg* 36, Jg. 11 (2002), 65–74.

⁸⁷³ Alon Confino, ‘How Nostalgia Narrates Modernity,’ in Alon Confino & Peter Fritzsche (ed.), *The Work of Memory: New Directions in the Study of German Society and Culture*. Chicago, University of Illinois Press 2002, 62–84.

⁸⁷⁴ Thomas Kühne (Kühne 2005, 223–225, 228) writes how the Federal Republic became the “society of men’s grief,” where the war experience was the maxim around which the gendered roles in families and civil society were supposed to be arranged. In the gatherings of male circles, such as veteran assemblies in the 1950s, the participants tried to re-enact the shared positive memory of the past, as opposed to everything which was wrong in the present.

⁸⁷⁵ Kühne 2005, 215, 219, 221.

policy and the dividing up of Germany questioned and partly destroyed the notion of *Heimat* which the learned had constructed during the preceding centuries. In addition, conservative scholars witnessed the eradication of values which they had found fundamental, and were forced to give up some of their traditional prestige, especially with respect to the administration of universities and the independence of jurisprudence.⁸⁷⁶ Due to the compelling economic and political circumstances these social structures had no other choice but to adapt, leaving the academics with no other role than that of protesters against the contemporary “social state” and “mass-university.”⁸⁷⁷

The academic culture of social sciences in post-war Germany was characterized by the importance of semi-official study circles arranged outside the formal structures of the university. In these meetings scholars attempted to understand and analyze contemporary social changes and connect the old theories to the novel circumstances as well as redefine established views to better match the challenges of the modern day.⁸⁷⁸ This phenomenon went beyond “official” academic culture, and historical research has acknowledged the need to apply anthropological and social psychological models to understand the form of “doing science” that was typical of this time.⁸⁷⁹ Joachim Ritter spoke for many when he wrote that to him, these meetings of “small personal circles, like islands of personal continuity, are important for the further existence of the *Geist*.”⁸⁸⁰ So the existence of regular meetings where scholars could experience a *kameradschaftliche* mentality were important for the future and for the vitality of the scholarly culture (as remembered and cultivated by the learned), but also for the participants themselves in their individual task to fit their sometimes contradictory experiences of totalitarianism, war and imprisonment to the larger narrative of the national community.

This way to dichotomizing social reality between the opposite ideals of the “guilds” of the learned and “barbarism” as way to make sense of the “anarchy” of the first years of the Federal Republic, was typical of academics, but it did not necessarily reflect reality. As Peter Lambert has presented, after the First World War the “guilds” of academics were not unattached “spiritual islands,” for they interacted with the political and social spheres of society like any other community within the nation. For the most part, the “unworldly” atmosphere which was commonly associated with the original “imagined communities” of the professoriat, was projected from informal gatherings between a mentor and his “school.”⁸⁸¹ In short, the ideal of the “guild” very much represents the overall mentality of *Bildungsbürgertum*: the “lost world” to which *Bildungsbürgertum* wanted to return never had existed in reality. Cultivating the ideal

⁸⁷⁶ Cf. section 3.6 Culture in *Rechtsbewusstsein* 1945–1968: Explaining ‘Point Zero,’ the defensive battle of the German academia.

⁸⁷⁷ Meinel 2012, 3.

⁸⁷⁸ Dirk van Laak, *Gespräche in der Sicherheit des Schweigens: Carl Schmitt in der politischen Geistesgeschichte der frühen Bundesrepublik*. Berlin, Akademie Verlag 2002; Jerry Z. Muller, *The Other God that Failed: Hans Freyer and the Deradicalization of German Conservatism*. Princeton, Princeton University Press 1987, 316–402.

⁸⁷⁹ van Laak 1987, 11.

⁸⁸⁰ Joachim Ritter to Carl Schmitt, quoted in Müller 2003, 117.

⁸⁸¹ Lambert 2003.

of a bygone absolute social premise to express one's learnedness and conduct an inner journey towards perfection, nevertheless served as a powerful metaphor and helped historically oriented scholars in their task to rediscover meaningful phases in the course of both national and European history in the years following the end of the war.⁸⁸²

More recent historiography has underlined the moral problematic of these "spiritual circles" since little seemed to have changed in the mentality of these communities.⁸⁸³ Especially the influence and importance of Carl Schmitt behind the "scientific *Kameradschaft*" of the legal scholars of the Federal Republic presents a paradox to a history of historiography which wants to see a drastic breach between National Socialist Germany and the post-war West German intellectual atmosphere. Schmitt refused to go through the denazification program, was excluded from the institutions of higher education, and rejected any possibility of remorse or personal apologies with regard to his actions and writings during the Third Reich.⁸⁸⁴ Schmitt's intellectual legacy was of course a multifaceted and even fruitful point of departure for social scientific theoretizations in a permanently altered world, but one could not ignore the anti-parliamentary and racist worldview behind his scientific constructions. Both the war-generation scholars and even the younger generation of 1945ers continued to be intrigued by the powerful writings and charismatic personality of this now self-proclaimed prophet and "Grand Inquisitor" of German social science.⁸⁸⁵ It is not accurate to claim that they shared Schmitt's morals or all of his jurisprudential conclusions, rather they eclectically picked out some of his remarks or remained in awe of the scholarly superiority which surrounded the "hermit of San Casciano."⁸⁸⁶ In other words Schmitt was both a symbol which scholars were reluctant to give up and an intellectual provocateur challenging the control they wished to place on social change. Thus, the "scientific *Kameradschafts*", and Schmitt's position within them, represents the wider process of coming to terms with the past which legal scholars had to undergo.

Since the scholarly task of post-war German reparation was both official and personal, the key-themes of legal science were ambiguously social scientific but partly intimate or confessional. The "call of conscience" and the search for sustaining "values" were paradigms to which the reflective and interpretative methods were most applicable and the influence of (Catholic) religion natural.⁸⁸⁷ Such a quest to analyze and fortify the "collective conscience" of West German society marked the legal scientific discourse of post-war academia.⁸⁸⁸ All paradigms, whether one leaned heavily on the Christian and Catholic tradition, classic natural law theories or insisted on the necessity of a commonly acknowledged system of values guiding the practical work

⁸⁸² Conrad 1999, 81–82, 126–131.

⁸⁸³ Meinel 2012, 2–4, 444; Jürgen Habermas, *Der philosophische Diskurs der Moderne*. Frankfurt am Main, Suhrkamp, 1985, 90–93.

⁸⁸⁴ Mehring 2014, 407–428.

⁸⁸⁵ On the 45ers, see Moses 2007, 55–73; for Schmitt as Grand Inquisitor, see R. Gross, *Carl Schmitt and the Jews: The "Jewish Question," the Holocaust, and German Legal Theory*. Madison, University of Wisconsin Press 2007, 85, 278 fn. 21.

⁸⁸⁶ Müller 2003, 54.

⁸⁸⁷ Foljanty 2013.

⁸⁸⁸ Müller 2003, 70.

conducted in the courts of law, agreed in blaming legal positivism for the destruction of the legal order.⁸⁸⁹ The fact that legal positivism was commonly perceived as the root of all evil, like in the 1930s theories of “legal reweal,” enabled legal scientists to hold on to the ontological premises of their constructions of justice. Hans Kelsen’s “pure legal theory” was buried, and not until the reinvention of analytical philosophy in the late 1960s did his thoughts undergo rehabilitation. Likewise Heinrich Mitteis suggested a return to the “living values of legal history,” which in practice were situated in the times before the emergence of positivistic streams in legal science and in German history.⁸⁹⁰ Gustav Radbruch when drafting the foundations of post-war German jurisprudence explained the “aberration” of the Third Reich legal sphere as deriving from the corrupting effect of legal positivism.⁸⁹¹ The first president of the Federal Court (*Bundesgerichtshof*), Herman Weinkauff, further applied Radbruch’s theses (from even more religious foundations than Radbruch) while blaming the legal positivistic idea of “law is law” on the jurisdictional havoc of the Third Reich.⁸⁹² Although most acknowledged the need to “find again” the core values of actual jurisprudence, legal scientists defended their view of essential values against other philosophical or political worldviews.

But “coming to terms with the past” involved more personal aspects. When the shocking reality of the National Socialist rule and its legacy reached conservative academics, the experience of the catastrophe of the 1930s had to be explained in terms of a general historical narrative of the national community, but also on a more personal level. The contribution of scholars as a group to the “suppression of the truth” was a dilemma whose solving was far more difficult than to make sense of the historical narrative leading to the totalitarian regime.⁸⁹³ Very often the questioning of one’s personal narrative about the twelve years of the Third Reich had to wait until the more material structures of life were repaired. When the immediate conditions affecting one’s everyday reality – with respect to for example nutrition, housing and employment – had been secured, people were able to rethink their life from a wider perspective. The war years brought about traumas, disabilities and disturbing memories, which prevented any self-reflection. With regard to academics, immediate self-reflections mostly remained inside their own networks and group of friends.

There was no immediate Damascus or revelation in the self-understanding of legal scholars if one considers public statements and texts dealing with their relation to the Nazi regime and ideology. The personal and vocational “coming to terms with the past” of legal scholars, at least in the ranks of the more conservative part of the *Stand*, included clinging very strongly to the abstract “past” when things had seemed brighter and the virtuous foundations of society were in their place. Thus, scholars hung on to the sphere which still belonged to them, in other words they concentrated on teaching

⁸⁸⁹ Cf. section 3.6 Culture in *Rechtsbewusstsein* 1945–1968: Explaining ‘Point Zero,’ the defensive battle of the German academia.

⁸⁹⁰ Heinrich Mitteis, *Vom Lebenswert der Rechtsgeschichte*. Weimar: Böhlau 1947.

⁸⁹¹ Radbruch 1946.

⁸⁹² Herman Weinkauff, *Die deutsche Justiz und der Nationalsozialismus*. Stuttgart, Deutsche Verlags-Anstalt 1968.

⁸⁹³ Conrad 1999, 146–149.

and “spiritual rebuilding,” like their predecessors had done before them within the Humboldtian tradition.⁸⁹⁴

In the early years of the 1960s the memory of recent years resurfaced when the legal process against Adolf Eichmann was broadcast all over the world. In 1963 the Auschwitz trials began in Frankfurt. Along with increased media attention, public interest turned towards the years of Third Reich years, and when questions of guilt were given practical definition in the courts, in more informal settings discussions on individual responsibility within a criminal nation (re-)appeared. The fragile continuity in German universities was interrupted by a generational revolt, which again constituted an inescapable objective for the consensual culture of German academia. The smoldering discontent among the young in the Federal Republic flared into violent protest in 1968. Throughout West Germany students demonstrated against the conservative government, the conditions of studying and political leaders whose Nazi-past did not seem to disturb their involvement in the political life of the Republic. Much of the protest was targeted against politicians and publishers, but the most dramatic action often took place in universities. Students demanded that those university staff who had connections with totalitarian past should immediately be dismissed. During the late years of the Adenauer regime and the student riots of the late 1960s many academics were forced to rethink their personal histories, the premises of their scholarship and the relation which their work had with the mentality of the nation.

4.7. Affections in *Rechtsgewissen* 1945–1968: The community and creativity in the Federal Republic

Franz Wieacker perceived that everyday reality of the immediate years following the “collapse” was marked by both “resentment” and practical difficulties, which made scholarly work almost impossible.⁸⁹⁵ Although Wieacker himself found an academic safe haven, first in Göttingen and then in Freiburg, he felt far from happy. Living conditions were marked by scarcity and many previously important landmarks and symbolic landscapes had been destroyed or contaminated in the events following the 1930s *Machtergreifung*. Some of his friends were not as lucky as him, and were ousted from the academia. Wieacker, like many others, tried to construct a meaningful new life in a world where previous common appreciations no longer mattered. To Wieacker the physical ruins were a symbol of the inner spiritual wreckage of the nation.⁸⁹⁶ It

⁸⁹⁴ Fritz Pringsheim to Arthur Schiller 3.3.1946. Columbia University archives, Arthur Schiller papers, Uncatalogued correspondence, Box 5 Columbia University, New York.

⁸⁹⁵ Wieacker to Karl Larenz in 15.5.1951: “Zusammenbruch”; Wieacker to Ernst Rudolf Huber 12.5.46: “Ressentiment.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁸⁹⁶ Wieacker to Ernst Rudolf Huber 29.3.1946: “Aus der äusseren Zerstörung hebt sich besonders deutlich und mit starker symbolischer Wucht die Zertrümmerung der meisten grösseren Städte hervor, deren Wirkung Du in einer mir sehr vertrauten Weise beschreibst. Ich hing nachdem an den alten Stadtbildern und werde deren Vernichtung nicht verwinden; wir werden ja wohl auch das Wiederstehen wirklicher Stadtorganismen aus den Trümmern nicht mehr erleben.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

was the duty of scholars to rebuild the *geistig* structures of Germany in order that the nation could again rise from its sad demise. Again, and increasingly after the war, Wieacker connected the physical environment to the spiritual work of a scholar.⁸⁹⁷

Ich fühle mich, nachdem an die Stelle der jahrzehntelagen, lemurartigen Drohung das klare, nüchterne Leid über den Ruinen getreten ist, zur geistigen Arbeit rüstiger wie je.⁸⁹⁸

The process of reconstructing legal science's core and direction was as necessary (and demanding) as was the rebuilding of the physical structures of society. In their response to the fundamental dilemma regarding the necessity of a sound new base for legal science, many scholars leaned on theories of natural law. Wieacker reacted to these accounts with relative understanding. Especially in Erik Wolf's texts he found familiar aspects.⁸⁹⁹ After all, the natural legal search for suprapositive principles beyond positive law was an orientation in which Wieacker had distinguished himself and continued to engage himself in the Federal Republic. Nevertheless, Wieacker was reluctant in linking his view of legal history to "fashionable" theories of natural law. There were many theoretical obstacles, which will be dealt with in detail in section 4.8, but on the ideological level the main reason was the original contradiction between casuistic Roman law and Greek theories of social justice. Wieacker's historical ideal, the jurisprudence of the Late Republic, presumably had been free from any influence of systemization and theory building. According to the same legal historical stance, the later "corruption" of Roman law was due to the excessive emphasis and assimilation of the theories which assumed the existence of some kind of perennial natural justice.⁹⁰⁰ Moreover, modern natural law theories came too close to the religious worldview. In the end "conscience" and the religious vocation represented two distinct ways of perceiving the world, and whereas the former had subsumed the superstitious human nature, the latter had not.⁹⁰¹ On the other hand,

⁸⁹⁷ In his letter To Huber from 6.1.1944 Wieacker mourned the fate of the city of Freiburg: "das Gesicht der Stadt, in der ich mich heimisch fühle, und die als Wohnstätten eines des Geistes, der mir lieb geworden war, verschwunden." Wieacker to Ernst Rudolf Huber 6.1.1944[1945]. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁸⁹⁸ Wieacker's letter to Forsthoff from 1945, quoted in Meinel 2012, 306. „I feel more apt to intellectual work than ever, since the decades of impending threat have changed to a clear, sober suffering above the ruins.“ (Translation by HW).

⁸⁹⁹ Wieacker to Erik Wolf 23.4.1959: "ich [habe] zu meiner grössten Freude die zweite, so sehr veränderte und erweiterte Auflage Ihres »Naturrechtsproblems« vorgefunden. [...] Es ist ein unerlässlich [Berichtigung] für die Orientierung in die gewaltige Kaltenrealität "Naturrecht", und es ist mehr als das. Mir fällt bei dieser Aufgabe auf, wie eigenartig gebildet solche Objektivationen sind und wie ungeeignet die üblichen Werkzeuge des Rechtshistorikers für ihre "Erfassung" (im eigentlichen Sinne) sind." NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁹⁰⁰ Cf. section 3.8 *Vulgarismus und Klassizismus* (1955): *Rechtsbewusstsein* and the collapsed legal order.

⁹⁰¹ Cf. section 4.3 Creative legal thinking as 'conscience'. The war and the dissolution of the *Kameradschaft*, and section 3.7 Wieacker's hearing and the conclusions derived. Cf. Wieacker to Ernst Rudolf Huber 1.9.1946: "Ich widerspreche Dir nicht – bis auf der Notwendigkeit einer Reformation der Gemüter. Dass ich nur diese wahrscheinlich dienstlich aber nicht kirchlich denke, wird Dich nicht wundern. Auch über das Museale und das "säkularisierte" Naturreich denke ich etwas anders." NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

many natural law theories leaned too much on “calculative” reasoning and were as such (according to Wieacker) closer to legal positivism than sound jurisprudence.⁹⁰²

The stance adopted by Wieacker can be elaborated by comparing it to two other major lines of “existentialist” legal science, namely to Carl Schmitt’s and Hans Georg Gadamer’s post-war production.⁹⁰³ The last letter sent by Wieacker to Carl Schmitt is from 1944. Although the two later most certainly met, for example in the “Ebrach seminars,” Wieacker seemed to have kept a healthy distance towards Schmitt. He rarely refers to Schmitt in *Privatrechtsgeschichte der Neuzeit* nor does he mention him in his letters. In the Federal Republic it was possible to work on Schmitt’s ideas, actually quite a few distinguished scholars did, but in doing so, the author had to be prepared for vocal resistance and public resentment.⁹⁰⁴ In the 1950s Schmitt altered his previous “institutional turn,” which had intrigued Wieacker, to an orientation which dealt mostly with international law.⁹⁰⁵ He also retreated into a kind of adapted isolation outside academia – mostly because he was not allowed to return, although he himself preferred the story in which his retreat was a deliberate personal choice – bitterly commenting on the political life of the Federal Republic and maintaining his own shadow academy for young scholars.⁹⁰⁶ In his works Schmitt combined older themes with contemporary circumstances in order to give a presentation of the (unjust) ontology of his current reality. Thus, he chose the metaphor of the Grand Inquisitor from *Römischer Katholizismus und politische Form* (1923), by which he illustrated the ambiguous relation of the Catholic Church and the common awareness of justice. In short, the Catholic Church as an institution representing justice, had the right to act against what was commonly held as just or against individual ethical purposes: it was the Grand Inquisitor. After the war the metaphor slightly altered. Now it was Schmitt himself who is equated with the Grand Inquisitor.⁹⁰⁷ Schmitt was neither willing to reconsider his ideas nor question their moral superiority with respect to the scientific paradigms prevailing in the Federal Republic.

Wieacker used the same Grand Inquisitor metaphor when giving a presentation in 1949. To Wieacker, Roman law in European history was like the Grand Inquisitor. Even when contrary to public opinion in any given historical moment, Roman law had managed to retain the connection to atemporal justice. The tradition of Roman law had went through different phases during European legal history, but nevertheless continued to provide a source for correct and moral legal decisions, even though they

⁹⁰² Cf. Wieacker to Erik Wolf 23.4.1959: “Kaltenrealität ‘Naturrecht.’” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁹⁰³ To label Schmitt and Gadamer as “existentialist” is highly tentative, but that was nevertheless the category in which Wieacker himself situated them. Wieacker, *A History of Private Law* 1995, 469 fn. 13.

⁹⁰⁴ Cf. Jürgen Habermas’ critique of Reinhard Koselleck’s *Kritik und Krise* (1959), which Habermas saw as an heir to Carl Schmitt’s thinking. Jürgen Habermas: ‘Zur Kritik an der Geschichtsphilosophie,’ in Jürgen Habermas, *Kultur und Kritik*. Suhrkamp, Frankfurt am Main 1977, 355-364.

⁹⁰⁵ Mika Ojakangas, ‘A terrifying world without an exterior: Carl Schmitt and the metaphysics of international (dis)order,’ in Louiza Odysseos & Fabio Petito, *The International Political Thought of Carl Schmitt*. London, Taylor & Francis 2007.

⁹⁰⁶ Cf. Müller 2003, 51–62, 91.

⁹⁰⁷ The presentation was later turned into a book. Franz Wieacker, *Vom römischen Staat als Rechtsordnung*. Freiburg, Zähringer 1949. The Grand Inquisitor metaphor is on page 6.

might have appeared unjust to the general public. Here the conceptual distinction between *Rechtsbewusstsein* and *Rechtsgewissen*, based on Wieacker's war time experience, is evident. On closer scrutiny, it is clear that Wieacker emphasizes the meaning of tradition more than Schmitt.

Wieacker held on to the principles that Roman lawyers had managed to combine the necessities of their social being with their legal method, to relate their *Rechtsgewissen* to the prevailing *Rechtsbewusstsein*. Their jurisprudence had been "conscientious," a form of legal wisdom, and thus their texts provided priceless examples for modern legal scholarship. In addition, the correct understanding of the tradition had to be derived from and was situated in the community of legal scholars. Although in historical comparison society as a whole was constantly evolving, the "common culture" of the learned provided a premise from which these changes could be evaluated, coordinated, and analyzed. To Wieacker the question was whether the methods deployed in the research process were appropriate and solid, for not only was the truth reachable only through certain, correct methods, but the question of methodology extended to the notion of the morality of science.⁹⁰⁸

From the mid 1950s onwards Wieacker engaged himself ever more determinedly in discussions on legal hermeneutics, and was fascinated by the thoughts of Hans-Georg Gadamer. Wieacker's idea of legal conscience, although there were several points of connection, was difficult to translate into Gadamer's hermeneutical model. To Gadamer true interpretation existed in dialogue. When scholars engaged themselves in a discussion or reading, the quest for understanding was a dialectic one. Both the understanding of the phenomenon at hand, *and* the scholars' own prejudices changed. The core of Wieacker's historical view was that a distinguished model of just interpretation had existed in European history, and should be studied and applied to contemporary society in order to correct "the crisis of justice."⁹⁰⁹ Gadamer was ready to abandon historical knowledge as *überzeitlich*; it had no pre-given direction. Written history was a series of acts of interpretation where people tried to understand their past and present. Clearly there were some consistent elements in human beings that had stayed the same through time, but to Wieacker, historical narrative was more about the present than the past. Wieacker's idea of history was, as Reinhard Zimmermann rightly asserts, distinctly constructive in nature.⁹¹⁰ According to Wieacker, and in distinction to Gadamer, the post-war "crisis of justice" was a result of actual historical events and development. A side-effect of this historical development was the incorrect interpretation of the law, which legal science (or more precisely, legal positivism) had disoriented in its methods. He wrote to Gadamer:

⁹⁰⁸ Wieacker to a degree accepted Gadamer's view, but held on to the assumption that Roman law as practiced by the ancient lawyers themselves represented the truth. Their virtuous judgments presented a model to modern legal theorists in their quest for just legal decision: "[D]en alten römischen Texten (für die dogmatische Auslegung) mit zunehmenden Zeitenabstand wirklich ein neuerer, gerechterer Sinn sich entfalten kann; (wie im Abstand Hochgipfel hinter den vorgelagerten Hügelketten aufsteigen)." Wieacker to Hans-Georg Gadamer 14.7.1965, Nachlass Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar. cf. Wolf 2007, 78.

⁹⁰⁹ Wieacker, *A History of Private Law* 1995, 482.

⁹¹⁰ Reinhard Zimmermann, 'Foreword,' in Wieacker, *A History of Private Law* 1995, v-xiii.

[...] für die modernen Gesetze scheint der heutige Jurist eine solche Erfahrung nicht zu machen. Ich wüsste für diese sehr eigentümliche Erscheinung im Augenblick keinen anderen Grund anzugeben als die besondere Respektlosigkeit der heute herrschenden Auslegungslehren (Interessen - oder Wertungsjurisprudenz; teleologische, selbst "verfassungskonforme" Auslegung) gegen die im Gesetzeswort erscheinende Autorität; diese könnte zusammenhängen mit der allgemein akzeptierten Diskreditierung und "Entlarvung" des Gesetzespositivismus. Diese Dinge sind heute so in Unordnung, dass die alten Grundverhältnisse von Gesetz und Dogmatik heute nur in Trübung erscheinen.⁹¹¹

Wieacker linked his idea of *Rechtsgewissen* to the European tradition of law, but it was "experience," which enabled the lawyer or scholar to make a sound interpretation of law. So in Wieacker's theory there was a connection between feeling and interpretation, or to be more precise, a just understanding could not be reached by means of pure reason.⁹¹² Justice involved such emotions as respect, modesty and dignity, and law had to be authoritative in the eyes of those whose actions it sought to guide and regulate. This dimension had a correlative in the actual premises of academia. The community of legal scholars was also affected by the values of law, and, in Wieacker's conviction, law was supposed to reflect this distinct, virtuous being in its reality.⁹¹³

The "guild" of scholars

During the War, while serving on the frontline, Wieacker had pondered about the possibility of scientific work after the war was over. In his letter to Ernst Rudolf Huber on 6. January 1945, he referred to the constant and pervasive public demands to "keep on trying and stay together." Wieacker's view on the wellbeing of the nation was not congruent with the public stance. As always, in his thoughts the national destiny was tied to the structures of academic work, and from that viewpoint a return to "normalcy" was no longer possible. In Italy he heard news about the destruction of German universities and the relocation of his former colleagues. Thus, he confessed to Huber:

[D]ass es im geistigen und gemutmässigen Zusammenhang etwa uns, solche Organisation [the University] nicht bedarf, und dass man zwar im Hinblick auf den nationalen Glücksfall einer alsbaldigen dauernden

⁹¹¹ Wieacker to Hans-Georg Gadamer 14.7.1965. Nachlass Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar.: "[...] for the modern law does not seem to make such an experience for today's lawyer. I cannot think of any other reason for this very peculiar phenomenon at the moment, than particular disrespect of today's interpretation teaching (Auslegungslehre) against the authority which appears in the words of law. This [crisis] could be related to the generally accepted discrediting and "unmasking" conducted by legal positivism. These things [methodology] are now so in disarray that the old fundamental relations of law and dogma today appear only in turbidity."

⁹¹² Wieacker, *A History of Private Law* 1995, 619.

⁹¹³ Wolf 2007, 78.

Wiedergewinnung in Verbindung bleiben müsse, [...] sich in dauernden örtlichen Zusammenhang zu halten und dadurch die besten Kräfte der ohnedies furchtbar geschwächten übrigen Hochschulen zu entziehen.⁹¹⁴

The future of the ‘spiritual well-being’ of the nation was not dependent on the concrete structures or bureaucracy, but on the ‘togetherness’ of the learned. Indeed, the cultural core of Germany, the tradition of *Bildung*, would do even better without the “weakened” universities. In his letter Wieacker is explicit about the importance of learned “togetherness” in the “recovery” of the national community, but implicitly his claim also presents the personal need to keep in contact with the common culture of his circle of friends. After the war Wieacker indeed had to start from scratch, without the structures and premises which had previously defined the routines and everyday reality of the scholar. His 1945 anticipation of the indispensability of the close communities of scholars proved to be right, both on the general level, since many scholars shared Wieacker’s opinion, but also personally when he had to face the physical relocation and the changed political climate of the Federal Republic. While starting “afresh” he tried to both visit spaces and companies which still carried a positive significance and was afraid that the experiences he had gathered would become obsolete. In his letter to Ernst Rudolf Huber he expressed his fear that the “catastrophic decomposition of memory”⁹¹⁵ would slowly eradicate the meaningful emotional bond between him and his friend. On the other hand, the circle of close comrades was a mental space in which he among others was able to deal with difficult memories and disturbing experiences.⁹¹⁶

In his need for “scholarly togetherness” Wieacker was not alone. Many scholars, which before the war would have mostly been categorized as representing the war generation and conservative revolutionary thoughts, acknowledged the necessity to cultivate their common culture beyond the walls of the university. A good example of the “semi-private discussion circles” of conservative legal scholars, and an attempt to retain the memory and experience of the past *Kameradschaft*, were the seminars arranged by Ernst Forsthoff. Forsthoff organized regular “summer academies” in the town of Ebrach, which were attended by Franz Wieacker, but also many other distinguished scholars of the Federal Republic, ranging from Carl Schmitt and Arnold Gehlen to Niklas Luhmann.⁹¹⁷ At the same time, the Ebrach seminars were an “intitiation experience” into the worldview of the conservative mentors for many

⁹¹⁴ Wieacker to Ernst Rudolf Huber 6.1.1944[1945]. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. ”given that such an organization [the university] does not really need us in a spiritual and soulful respect, and that one must remain involved in a prompt, constant recovery in view of the nation’s misfortune, [...] and in the constant local context thereby extract the best employees of the incidentally dreadfully weakened universities that are left.” (Translation by HW).

⁹¹⁵ Wieacker to Ernst Rudolf Huber 25.10.46. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹¹⁶ Wieacker to Ernst Rudolf Huber 25.10.46: Wieacker describes how he had traveled to the coast with Helmut Becker, (who used to be Huber’s assistant) and “mich in meiner seit mehreren Jahren sich verdichtenden Überzeugung bestätigt sah, dass er [...] Richtung und »Substanz« (um dieses Schlagwort zu brauchen) gut seinen Kriegserfahrungen beständig gewinnt. [...]die angesammelten Beschaulichkeit zu kommen.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹¹⁷ Meinel 2012, 3–4; Müller 2003, 73.

students participating in the annual gatherings.⁹¹⁸ Depending on the view of the given contemporary historian, the Ebrach seminars either presented a latent academic threat to the parliamentary establishment, or acted as an essential premise for conservative legal scholars in their scientific endeavors, since many of them still felt themselves to be outsiders within the academic community of post-war Germany.⁹¹⁹ The seminars did result in some noteworthy academic outcomes. For example, Carl Schmitt first introduced his theory of the “tyranny of values” in Ebrach, and later dedicated his book on the subject to “the Ebrachers.”⁹²⁰ Like the *Dozentenlager* of the 1930s, the “spiritual *Kameradschafts*” of the Federal Republic served many purposes, and were not merely a kind of academic holiday. However, to the contributors, the togetherness and experience of belonging to the same-minded group of scholars descending from an abruptly ended world of bourgeois learnedness and virtues, which the regular reunions offered, were more important than the possible scholarly significance of the seminars. In 1960 Joachim Ritter wrote to Ernst Forsthoff about his experience of the Ebrach seminar:

Der Kreis junger, weltoffener und kluger, denkender Menschen, den Sie dort um sich gesammelt haben, hat mich recht ermutigt und mir Hoffnung gegeben, dass das, was wir zu tun haben, nicht ganz in der gegenwärtigen Massenuniversität untergehen und schliesslich diejenigen finden wird, die es weitergeben. Vielleicht ist es ja immer in der geschichtlichen Welt die Bestimmung des vernünftigen Geistes, in esoterischer Wirkung auf den kleinen Kreis beschränkt zu sein, und wir lassen uns nur durch die bürgerliche Bildung des 19. Jahrhunderts über das täuschen, was an sich normal ist.⁹²¹

To the participants the image of the bourgeois order of bygone Germany represented a golden age, whose absence they bitterly acknowledged in the Federal Republic. The learnedness, social order and virtues that the past world seemed to them to possess, were absent in their contemporary world, but nonetheless offered a mental position from which they were able to analyze the post-war society. Although in the Federal Republic *Bildungsbürgertum* had turned into *Bürgertum* without the social respect which its monopoly in higher education had previously provided it, the conservative scholars desperately clung to the *Bildung* part of the word in order to achieve some understanding and sense of significance in a world they no longer felt to be their own. Franz Wieacker, who naturally also participated the Ebrach seminars, shared this nostalgic yearning for the past, which he tried to regularly re-enact in the reunions of the scientific *Kameradschafts*. Moreover, the standpoint that the experience within

⁹¹⁸ Cf. Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*. Oxford, Oxford UP 2017, 375.

⁹¹⁹ Meinel 2012, 306; Müller 2003, 68; Habermas 1977.

⁹²⁰ Müller 2003, 73.

⁹²¹ Quoted in Meinel 2012, 3. “The circle of young, cosmopolitan and bright, thinking people that you gathered there around yourself quite encouraged me and gave me hope that that which we have to do will not be lost in the current mass universities and will eventually find those who will pass it on. Maybe it is always the fate of the reasonable intellect in the historical world to be limited in its esoteric influence on the small group, and we let ourselves be deceived about what is normal by the education of the 19th-century middle classes.” (Translation by HW).

these communities offered provided a mental tool to “know right” and evaluate different values in a blurry modern world.⁹²² In a complex modern world, Wieacker prioritized the loyalty between the *Kameraden* of these “spiritual circles.”

The importance of “togetherness” between scholars and the loyalty between circles of friends in scholarly practices became evident when Wieacker arranged Ernst Rudolf Huber’s return to academia. After the Second World War Huber was not allowed to teach nor was he able to obtain a position in institutions of higher education. Wieacker felt that the treatment of his friend was part of the political theater of post-war Germany and was fundamentally unjust.⁹²³ Thus, Wieacker was the initiator and central figure in arranging an official teaching post for Huber at the Albert Ludwig University in Freiburg im Breisgau, where Huber was accepted as an honorary professor in 1952. The prominent figure in presenting Huber’s case to the Freiburg University board and promoting his rehabilitation was Franz Wieacker.⁹²⁴ Wieacker was not alone in promoting Huber’s rehabilitation, but the opposition was also marked. Fritz Pringsheim, who had now returned from exile to Freiburg, found it unacceptable that a scholar who had been “one of the leading figures in perverting the law” could be granted acceptance at Freiburg University.⁹²⁵ He wrote to Erich Weniger:

Es geht wirklich darin um die Wahren Probleme, und die sind warhaftig ernst genug. Das behagliche Zúruckschauen und Zúrúckdrehen ist nicht erlaubt. Deutschland schickt sich an, eine bedeutende Rolle zu spielen, und ich zweifle sehr, ob es dazu innerlich schon reif ist oder auch nur den Willen zur Reife hat [...]Mir kommt manchmal, wenn ich mir die Leute hier ansehe, die Furcht sehr nahe, dass sie garnicht wissen und nicht wissen wollen, was von ihnen verkannt wird.⁹²⁶

In the personal sphere Wieacker missed the togetherness, friendship and common culture of the circles in which he had been a member. Thus, writing to Ernst Rudolf Huber in 1947, he referred to Kiel University as “our earlier [and] common academic

⁹²² In his 1945 letter Wieacker wished a “prosperous academic stay” to Ernst Rudolf Huber, who had to flee from Strasbourg to Heidelberg. In this respect the most important factor was to find a suitable community of scholars: (“Hoffentlich hast du in Heidelberg vernünftige Verhältnisse vorgefunden”). Such an assembly was in contrast to the “spiritually ill statesmen and military leaders” whom “history will judge” (“geistige Erkrankung der verantwortlichen feindlichen Staatsmänner und Militär erscheint und über der die Geschichte richten wird”). Wieacker to Ernst Rudolf Huber 6.1.1944[1945]. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹²³ Wieacker to Ernst Rudolf Huber 25.10.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹²⁴ Grothe 2005, 320–322; cf. Wieacker’s letter to Erik Wolf 9.5.1952, where he forwards Huber’s request to Wolf. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁹²⁵ Grothe 2005, 322.

⁹²⁶ Fritz Pringsheim to Erich Weniger 21.9.1952. NL Erich Weniger, Cod. Ms. E Weniger, 1:676, Niedersächsische Staats- und Universitätsbibliothek, Göttingen. “It is really about the True Problems, and they are truly serious enough. Contented looking back and turning around is not allowed. Germany is preparing itself to play a meaningful role, and I very much doubt if it is really ready to do that or even has the will to mature [...] When I take a look at the people here, the very real fear comes upon me that they do not know at all and do not wish to know what they still do not recognize.” (Translation by HW).

homeland.”⁹²⁷ To Wieacker the memory of the “good old days” comprised friendship, scholarly culture and the fatherland, *Heimat*, which to him meant national places of symbolic value. In one way or another, the war had displaced all of these elements. The occasions when he could briefly enjoy the company of his friends thus appeared in stark contrast to the prevailing mentality and circumstances of the Federal Republic. Or conversely, the marked loss of values in the post-war time and society was compared to the experience of *Kameradschaft* and togetherness. Writing to Huber in 1946, Wieacker grieved over the pitiful nature of the post-war academic culture and the witch-hunt of denazification.⁹²⁸ He contrasted the contemporary turbidity to his and Huber’s stay at the University of Leipzig in the late 1930s:

Mit Sicherheit jedenfalls ist zu sagen: es ist für mich das Schmerzlichste, dass ich nicht in Leipzig im alten Kreise sein kann. Hier in G[öttingen]. lernt man die innere Freiheit und Souveränität jenes Kreises doppelt schätzen. Wir haben in G[öttingen]. unzählige anregende Leute, mit denen ich vollkommen eines Sinns bin: Grewe, Raiser, Scheuner (der hier abwartend lebt), Aubin, Smend selbst, auch wohl Felgentraeger, und über keinen der anderen habe ich irgend zu klagen: aber eine Gelehrtenrepublik bilden wir (noch?) nicht.⁹²⁹

In the post-war conditions the previous ideal of virtuous academic work conducted within a group of fellows, united by their common mentality and shared destiny, was felt as a twofold loss. The “inner freedom” and “sovereignty” of the “guild” no longer existed. The idea of the “Republic of the learned,” combining academic learnedness with the ethos of the restructured German society, was to Wieacker both strange and very distant. To Franz Wieacker the ideal of the “guild” nevertheless had a very concrete realization. The “old circle” in Leipzig was a constellation which he dearly missed. His own experiences of the *Dozentenakademie* at the University of Frankfurt and the communality of the *Kieler Schule* and the “scientific community” of Leipzig, were times when he had participated in scholarly circles which had enabled him to conduct insightful and fruitful academic work. Although the colleagues with whom he worked in Göttingen were by no means unworthy scientists, the sense of togetherness which he had experienced before was lacking. The community of scholars, or “guild,” represented a material context for just legal reasoning. Thus in 1956 Wieacker wrote

⁹²⁷ Wieacker to Ernst Rudolf Huber 29.8.1947: “Unserer gemeinsamen frühere akademische Heimat.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹²⁸ Wieacker to Ernst Rudolf Huber (beantwort 21.2.1946): “Noch einiges Faktische aus Göttingen: man liest dort bis Mitte Februar; vorige Woche wurden wieder mehrere Ordinarien und viele andere Lehrkräfte aus unbekanntem, doch mannigfachen Gründen entlassen; Einspruchsverfahren laufen jedoch; monströse Denunziationen eines leider aus dem Gleichgewicht geworfenen (Schnorr v. Carolsfeld) erstauen und setzen nicht nur die davon Betroffenen ausser Fassung.” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹²⁹ Wieacker to Ernst Rudolf Huber (beantwort 21.2.1946). NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. “It is safe to say that what most pains me is that I cannot be in the old circle in Leipzig. Here in Göttingen one learns to appreciate the inner freedom and sovereignty of each group doubly. In Göttingen we have countless stimulating people with whom I am completely of one mind: Grewe, Raiser, Scheuner (who lives here in a transitory state), Aubin, even Smend, and of course Felgentraeger, and I don’t have anything to say against any of the others, but we’re not (yet?) forming a republic of letters.” (Translation by HW).

to Erik Wolf, who had extended his research on ancient legal history: “Also noch einmal meinen aufrichtigsten Dank und Glückwunsch für das Geschenk, das Sie mir, das Sie *unserer* Zunft bereitet haben.”⁹³⁰

The Damascus of 1968 and the conscience of a scholar

The organic relation between tradition, and those deriving decisions from that tradition as the root of ethical jurisprudence, provided a simple explanation for the “collapse” of 1930s German legal culture. Legal positivism had distorted the core of law, allowing political forces to take over the legal system.⁹³¹ On the other hand, the retrospectively suspicious actions one had conducted in collaboration with the National Socialist administration, could be reasoned away with the help of the fundamental historicity of both law and legal scholars. This did not mean that the process of explaining and narrating the recent past was an easy one. Self-examination was, to most, a difficult task. Likewise, Franz Wieacker also acknowledged the vastness of National Socialist crime and understood that the projects which he had participated in were now highly suspect and should be subjected to serious reconsideration. The situation caused him severe emotional distress. He wrote to Ernst Rudolf Huber:

Ich bin, wie auch Du selbst wohl, etwas müde mich damit zu martern, wie es bis zu diesem Punkt gekommen ist. Die inneren Qualen, die man den Deutschen in Vermutung ihrer Hartgesottenheit nachträglich über die Scheußlichkeiten der Braunen kranken will, habe ich (wie Du und jeder Anständige und leidlich Unterrichete), seit 1933 so gründlich ausgekostet, daß ich etwas matt bin.⁹³²

It was, however, difficult to admit that the views one had believed in and the actions one had sincerely participated in, had proved to be twisted. In his letters to Ernst Rudolf Huber from 1946, Wieacker argued against collective guilt. How should one have taught, written and lectured about law in a totalitarian country where public opinion was undoubtedly unanimous on the justness of the national cause?⁹³³ Wieacker had a deep emotional tie with Huber, and had experienced nothing but

⁹³⁰ Wieacker to Erik Wolf 6.9.1956. NL Erik Wolf Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. Emphasis original. “And so, I send you my most sincere thanks and best wishes for preparing my, or rather our, guild.” (Translation by HW).

⁹³¹ Cf. Wieacker to Erik Wolf 1964, on Radbruch, legal positivism and “political monstrosity.”

⁹³² Wieacker to Ernst Rudolf Huber 14.6.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. „I am, as you certainly are too, somewhat tired of torturing myself over how it came to this. I have completely had my fill since 1933 of the inner torment that one wishes the Germans to suffer belatedly in supposition of their irrepentance over the atrociousness of the Nazis, to the point that I am somewhat weak.“ (Translation by HW).

⁹³³ Wieacker to Ernst Rudolf Huber 29.3.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

loyalty and good intentions from him.⁹³⁴ It was impossible to think that Huber, as a person, would have been a representative and an archetype of a scholar who had participated in National Socialist crimes. In his letters to Huber, Wieacker comforted his friend (who did regret his involvement in the “legal renewal” of Germany), pointing out that Huber’s public exclusion was due to the resentment that plagued post-war German academia.⁹³⁵ Wieacker explained Huber’s (and his own) actions with the help of the same existential concepts he had used in his post-war works to illuminate the historicity of law. Huber’s collaboration was the result of “requirements of the time” [*Daseinsnöte*] and the deeds he had done then could not be judged retrospectively.⁹³⁶

Wenn es mir, der ich z. Zt. übrigens streng auf die geschichtlichen Fächer beschränkt worden bin, schon oft nicht leicht fällt, mein Amt (praktisch als Privatdozent) auszuüben, wie würdest Du es jetzt fertig bringen, ”Deutsches Staatsrecht” und Ähnliches zu lehren? Ich sehe also mit feigem Ernst die soziale und unmittelbare Bedrohung Deiner Existenz [...]; aber darüber hinaus die paradoxen Vorzüge einer eindeutigen und respektablen moralischen Situation. Ich vertraue darauf, dass Du dies nicht als billiges Geschwätz, sondern als wahre Willensmeinung nimmst.⁹³⁷

Wieacker saw his and the *Kieler Schule* members’ acts from the generational point of view. The 1930s fight against legal positivism and the university elite was just one stage in the longer disagreement between the commonly held and contemporary false prejudices, and Wieacker’s scholarly devotion which he shared with his in-group. Wieacker resented those who, in hindsight, easily judged the *Kieler Schule*’s complicity during the Nazi era. Wieacker insisted that the primary target of these young scientists had been the dethronement of the educational elite, and to judge someone for trying to do that was doubly hypocritical if it came from those who did not have to do anything and had not done anything. Those who accused Huber (and himself) of amorality represented the original anonymous nemesis of the *Kieler Schule*, the “old generation” of legal science:

Gewiss hatten wir es im Grunde ebensoschwer wie die anderen, sei es ganz in ihren Ämtern Belassenen, sei es im Frieden Emeritierten; aber für die sah es immer so aus, als ob wir im Schatten der Macht gegen sie

⁹³⁴ Wieacker to Ernst Rudolf Huber (beantwortet 21.2.1946). NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹³⁵ Cf. Wieacker to Ernst Rudolf Huber 29.3.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹³⁶ Wieacker to Ernst Rudolf Huber 14.6.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹³⁷ Wieacker to Ernst Rudolf Huber 29.3.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. “If it is often not easy for me to do my job (I am practically an outside lecturer. My function, by the way, is strictly limited to the historical subjects for the time being), how would you manage to teach “German Constitutional Law” and similar courses now? I am watching, with fearful seriousness, a social and direct threat to your existence [...]; but additionally the paradoxical preference of an unambiguous and respectable moral situation. I trust that you do not take this as cheap gossip, but rather as an honest opinion.” (Translation by HW).

kämpften, also unfair kämpften; das war ein so eingewurzelt Vorurteil, dass ich es, obwohl ich in den letzten Jahren weit klarer und radikaler verurteilte als die wilhelminische Generation, fast nie habe brechen können.⁹³⁸

Moreover, the post-War *Spruchkammeries* were not “authoritative” or “conscientious” enough to judge Huber (or Wieacker) according to his 1930s and 40s activity.⁹³⁹ Admittedly, one can see here a blind spot in Wieacker’s reasoning. Wieacker had devoted his career to searching for the timeless bases of social justice around which the legal foundations of European history had been arranged. According to his correspondence in the 1940s he believed he had at least a hunch what such an idea would look like and of what it might be constituted. Yet with respect to his own writings (and his friend’s representations) he was inclined to compromise due to their *temporal* context. To Wieacker, the biased legal reasoning of the 1930s was in general valid, and the “flaws” should be excused on account of the contemporary circumstances.

When the temporal distance towards the totalitarian era and the Second World War grew, Wieacker had to rethink his narrative. After the chaotic immediate years following the end of the war, life in the Federal Republic entered a relatively peaceful era. Everyday life was no longer characterized by continuing crises and turbulence. One’s view of law and legality was not overshadowed by a constantly looming catastrophe. Although the legal system of the Federal Republic did not seem to be based on a correct understanding of law, nor founded on common values – it was *ungebildet* – it produced social harmony and was in general respected by people.⁹⁴⁰ Moreover, when going ever deeper into the realms of legal hermeneutics and theories of interpretation, Wieacker had to set his historical vision against more far-reaching and contesting thoughts of historicity. If law was fundamentally historical, and its understanding was due to the necessities brought about by one’s historical situation and temporal perception, how could one suggest that there was only one correct point of reference from which an individual view of justice could be derived? And even if there was a true tradition, how could one be certain that one’s personal interpretation was comprehensible within the true *meaning* of that tradition?

In 1964 Wieacker received the new edition of Erik Wolf’s *Grosse Rechtsdenker*. Again the book stimulated Wieacker to reflect not only on the essence of legal scientific research in general, but also on the premises of his personal scholarly

⁹³⁸ Wieacker to Ernst Rudolf Huber 29.3.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz. “Certainly we had it essentially just as difficult as the others, be it those that were kept in their positions or be it those to whom emeritus status was given; but for them it always seemed as if we fought against them in the shadows of power, and unfairly. That was an ingrained prejudice, that I could almost never overcome, although I condemned more clearly and radically than the generation who was in office in the period of Kaiser Wilhelm II.” (Translation by HW).

⁹³⁹ Wieacker to Ernst Rudolf Huber (beantwortet 21.2.1946): “Zum gewissenhaften Nachrichtenorgan bin ich aber zu unordentlich, und zum Erteilen guter Ratschläge eine gar winzige Autorität [...] In Dein und der Deinen Ergehen mich mit naiven Fragen oder Ratschlägen mit dem ersten Wort zu mengen liegt mir nicht [...]” NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

⁹⁴⁰ Wieacker to Ernst Rudolf Huber 22.4.1961. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

identity. In 1964 Wieacker was a renowned legal scholar in the Federal Republic who had contributed to and further developed the theoretical understanding of many subfields of legal science. *Privatrechtsgeschichte der Neuzeit* was widely held to be a foundational work in the legal history of modern times. Among Romanists and in the field of Roman law his “third way,” which emphasized the intellectual history of Roman law as well as its sustaining ideas, types and mentalities which explained its relation to the general historical development, was a strong theoretical stream between the “neo-pandectists” (Paul Koschaker) and the “neo-classicists” (Max Kaser).⁹⁴¹ He had experimented with Hegelian theories and published important works dealing with the problem of hermeneutics and interpretation. He worked as a respected professor with his friends Ernst Rudolf Huber, Karl Michaelis and Friedrich Schaffstein at the University of Göttingen. To sum up, Wieacker had established his status in the Federal Republic and workwise things could have not been better. At the same time, however, the Auschwitz trials had begun in Frankfurt, and earlier Adolf Eichmann had been sentenced to death in Jerusalem.

In his correspondence with Erik Wolf, Wieacker does not state why in January 1964 he started to rethink the meaning which legal science had in shaping the “consciousness” of society, and his own position as a scholar with respect to common public values. Probably the rethinking was due to the above-mentioned historical events and development, but in any case Wieacker again processed his scholarly identity by comparing himself to the legal scholars of the past. He wrote to Wolf about the feelings which reading the new edition of Wolf’s book had evoked in him:

Die innere Reife, die dazu gehört, auch den biographischen Lebensbezug und die Herkunft eines grossen Menschen aus einem sittlichen Klima ganz zu würdigen, habe ich erst spät zu erwerben mich bemüht; in diesem Masse wuchs auch das Gewicht des Buches für mein persönliches Leben und Forschen. Wir haben uns durch einen hochgezüchteten und sicherlich fördernden und vertiefenden Historismus allzusehr an die Einordnung in die grossen Schubfächer der geisteswissenschaftlichen Kategorien gewöhnt; heute wird es mir manchmal bedenklich zumute, wenn ich schon bei den Begründern Dilthey, Troeltsch, M. Weber, geschweige denn bei ihren Epigonen das hurtige Einordnen, das hegelische Alles-ganz-genau-zum-Weltgeist-zuordnen erneut betrachte. Demgegenüber ist die Aufgabe, die mit Recht Ihr Buch aufgegriffen und immer bedacht hat: wie nämlich “Rechtsdenker” auf die moralische Kultur ihrer Zeit gewirkt haben und noch fortwirken, mir immer wichtiger geworden.⁹⁴²

⁹⁴¹ Winkler 2014, 173.

⁹⁴² Wieacker to Erik Wolf 12.1.1964. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “I have endeavored late to acquire the inner maturity that belongs to it. The biographical reference to life and heritage of a great person from a moral climate is also to be fully appreciated. The weight of the book for my personal life and research grows in this mass. We have all gotten too used to the sorting in great drawers of the liberal-arts categories through an overbred and surely promotional and deepening historicism. Today I sometimes feel apprehensive when I take another look at the quick classification, the Hegel-like everything-attributed-just-perfectly-to-Weltgeist of the founders: Dilthey,

First, Wieacker admitted that he had lately “matured” in his thinking and awareness, meaning that to a certain extent he had found his previous explanation of the relation between “great men” (scholars) and their “moral climate” not entirely accurate. Thus, this suggests that his historical vision had undergone a shift; historical events and developments were now being measured in the light of “mature experience.” He continues by expressing his tiredness at the theoretical constructions which were now being used to illuminate different aspects of law. They were useful, but in the end they might well conceal what was really important, namely how a given scholar “has interacted with the moral culture of his time and further continues to rework it.” So although Wieacker himself discussed contemporary methods, and in one way Wolf’s book was about different perceptions of legal matters, to Wieacker reading *Grosse Rechtsdenker* raised questions about the *morality* and *meaning* of scholarly work. He continued:

Ich kenne kein Buch, dass diese Frage ernster nimmt und sie vom stillen reifen Wahrnehmen des inneren Wertes der Person aus beantwortet. Was aber erst diesem Ziel Fleisch und Blut gibt, ist die [...] Gabe, das Lebensgeschichtliche mit dem Wohl und Wehe, dem Auf und Ab von Lebenskultur der kleinen und der grösseren Zentren zu verbinden; auch die glücklichste Wendung der uns gelegentlich als heitere Medisance begegnenden Aufmerksamkeit auf den persönlichen Zug eines Menschen in der Gemeinschaft zu achten – ich meine, die glücklichste Wendung dieser Gabe ins Pädeutische [meinung]. [...] Im Zug der persönlichen Bilder wird dann das Ganze einer so geschichtlichen wie exemplarischen Kulturmöglichkeit, ein richtiger und ein falscher Weg unserer Nation vollkommen offenbar.⁹⁴³

The metalevel understanding of a personal path within a set of cultural meanings, where “personal values” were in constant interaction with cultural “centres” both “large and small,” was at the core of the scholarly activity of a historian. This was the key to understanding past people (as in *Gross Rechtsdenker*), and to acknowledge this intertwinement was the purpose of scholarly maturation. To Wieacker, reading *Grosse Rechtsdenker* was like “no other book” a path towards a moral approach to scientific work. Furthermore, while Wolf’s book sparked an inquiry into the morals of legal science, it also clarified the meaning of scholarly work. A metalevel understanding of constantly evolving personal values within a cultural frame, could “educate” one

Troeltsch, M. Weber, let alone their imitators. In contrast the task that their book took up with law: how “legal thinkers” have affected the moral cultures of their time and still continue to do so, has become more important to me.” (Translation by HW).

⁹⁴³ Wieacker to Erik Wolf 12.1.1964. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “I know of no book that takes this question more seriously and answers it from the calm, mature perception of the inner values of the person. What gives this effort flesh and blood, however, is the [...] gift of connecting the biographical with the well-being and sorrow, the ups and downs of the living cultures of the smaller and larger centers, as well as the happiest expression of the attention, which we sometimes encounter in the shape of a serene medisance, to the personal movement of a person within the community – I mean, the happiest expression of this gift in the pedeutical [opinion]. In the course of the personal forms the whole of such a historical as well as exemplary cultural opportunity, a right and wrong way for our nation becomes completely obvious.” (Translation by HW).

towards “virtues” (*Pädeutische*). The historical worth of “examining” the “personal examples” of the past scientist was shown in the manner in which the examination offered insights into the “correct and wrong ways for the nation.” The idea that a scholar’s devotion would bring harm to the national community and in the end prove to be unethical, was not a new idea in Wieacker’s thoughts. To him the worldview (and along with it the texts) of legal positivists was a consistent example of the “wrong” way. A new dimension was nevertheless evident in the attempt Wieacker made to understand the reasons which had led to such a situation. In this sense he wrote about Gustav Radbruch:

[W]ie gut, dass Sie nicht Radbruch von seiner “Konversion” aus adventisch nach rückwärts vordatieret haben, sondern ihn gerade in seiner früheren Stufe als ihn selbst gelten lassen. Es gibt eine Ebene, in der Relativismus und selbst Positivismus konsequente Bedingungen für die Entscheidung zum Guten sind; mir ist immer Savigny’s wort lieb [geblieben], dass das Recht nicht das Sittliche selbst herbeizuführen, sondern die Bedingungen sittlichen Handelns zu garantieren habe (er sagt es mit sehr anderen Worten). Andererseits begegnet Ihre Würdigung dem immer etwas schmerzlichen Gefühl der Unklarheit [...] an der ungeheuerlichen politischen Erfahrung: als habe er etwa die fürchterliche Konsequenz eines relativistischen Positivismus selbst erfahren müssen und nun ein naturrechtliches Damaskus erlebt. Der richtigen Auffassung der Dinge kommt wiederum Ihre Art entgegen, die Persönlichkeiten ganz als gelebte, konkret, sittliche zu sehen.⁹⁴⁴

This excerpt reveals both the continuities and the discontinuities of Wieacker’s view. The principle that legal positivism was to blame for the legal havoc of Germany was an explanation which he saw no reason to rethink, but he was nonetheless ready to soften his former view: to some scholars and in some situations “even legal positivism” was an approach that could decide what was “good.” The law was not in itself moral but it did guarantee the conditions that enabled moral deeds. But as a legal scientist, how was one supposed to measure the sustaining ethicalness of one’s claim on the nature of justice? The evaluation of jurisprudential ideas, which might have been drafted amidst an “ambiguous political experience,” seemed to be possible only in retrospect, in experiencing the consequences of one’s former view. To Wieacker, that had been the sad fate of Radbruch. Moreover, Wieacker was impressed how the “consequences of [Radbruch’s] relative positivism,” which Radbruch himself had to

⁹⁴⁴ Wieacker to Erik Wolf 12.1.1964. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “How good that you did not predate Radbruch from his “conversion” backwards to the origin, in Adventist fashion, but rather accepted him in his earlier phase as himself. There is a level on which relativism and even positivism are consequential requirements for the decision to do good. What Savigny said always remains dear to me, that the law need not itself bring about morality, but instead must guarantee the requirements of moral action (he says it with very different words). On the other hand, your acknowledgement encounters the ever somewhat painful feeling of uncertainty [...] in the enormous political experience: as if he himself must have endured the terrible consequences of relativistic positivism and now must experience a natural-law Damascus. On the other hand, the correct understanding of the nature of things goes hand in hand with your way of seeing persons fully as lived, concrete and moral entities.” (Translation by HW).

“experience,” resulted in a “natural law Damascus.” In Radbruch’s later perception of justice, which was deeply influenced by his trust in natural law, his previous conviction conflicted with the actual social “experience.” This gave Radbruch’s character a “living concrete and moral” dimension. One’s historical vision could be one in which different perspectives, which had all been correct at one time, although some later proved to be incorrect, coexisted. This was not indecisiveness, but maturation. Wieacker concluded that Wolf’s book would clearly have an effect on the second, revised version (1967) of *Privatrechtsgeschichte der Neuzeit*:

Ihr Buch kommt sehr zur guten Stunde für die Neuauflage meiner Privatrechtsgeschichte; ich werde es dort noch auf Schritt und Tritt zu Rate ziehen müssen (so wie ich auch, z.B. bei Savigny, ohnedies gründlich neuern muss).⁹⁴⁵

What had begun as a self-reflective historical reading of autobiographies, developed into existential doubt during the student riots of 1968. One of the most notable victims of the accusatory campaign was Ernst Forsthoff, who decided to resign after considerable pressure as early as 1967.⁹⁴⁶ To Wieacker accusations and a violent atmosphere was a shock. He wrote to Wolf of the “horror” when “our most illustrious colleagues” were attacked and stripped of their “dignity.” The “swarms grasped” even those who showed some understanding of their cause.⁹⁴⁷ To Wieacker, these developments were heartbreaking.⁹⁴⁸ He hoped for a harmonious society and the authority of law, but a return to such times was not possible before leading politicians and administrators started to make a genuine attempt to understand the student revolts. However, there was nothing from the government but “viel Verstehen, viel schlechtes Gewissen für andere, aber wenig Empfindung, dass es human und menschenwürdig gerade auch gegen die Studenten ist, Haltung zu zeigen und vorzuleben.”⁹⁴⁹

Most importantly the protesting students reminded Wieacker of his own youth. Their accusations against the scholars of the war generation, although not directly pointed at Wieacker, compelled him to reevaluate his life history in a “mature autobiographical manner.”⁹⁵⁰ Amidst the “chaos” of 1968, and in an attempt to understand what was happening, Wieacker recollected how he as student had talked about *Grosse Rechtsdenker*, at that point still an idea, with Wolf:

⁹⁴⁵ Wieacker to Erik Wolf 12.1.1964. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “Your book comes just in time for the revision of my history of civil law. I will still need to consult it at every turn (and others, like Savigny, for example).” (Translation by HW).

⁹⁴⁶ Meinel 2012, 478.

⁹⁴⁷ Wieacker to Erik Wolf 21.8.1968. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. Carl Schmitt and Ernst Forsthoff were partly satisfied by the student partisanship. The militarization of society backed up their theories of the structural emptiness of the Federal Republic. Meinel 2012, 479–478.

⁹⁴⁸ Liebs 2010.

⁹⁴⁹ Wieacker to Erik Wolf 21.8.1968. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

⁹⁵⁰ Wieacker to Erik Wolf 21.8.1968: “wenn ich an reife autobiographische denke.” NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

Die besten [...] Erinnerungen haben angedauert seit den Wintersemester (29/30 oder 30/31) seit ich Ihre “grossen Rechtsdenker” hörte; ich sehe und höre Sie noch heute, als wäre es gestern gewesen, und habe dann immer Ihren weiteren inneren Weg begleiten und dankbar davon Frucht ziehen dürfen. Auf solche Weise in diesen Zeiten der Beständigen versichert zu sein, gehört zu de besten Gaben, die man empfangen hat – übrigens unverdient wie alles wirklich gute, wie ich beim Nachdenken über mein Leben mit Überraschung und der daraus hervorgehenden Art einer gewissen Frömmigkeit (wenn das Wort erlaubt ist) gefunden habe.⁹⁵¹

The time when Wieacker had first discussed about the “inner path” of the great legal thinkers with Wolf was also a turbulent time, and the society as well as the public moral discourse seemed be at odds with what young scholars thought of as just. Wieacker and Wolf had chosen their path and revolted against the old generation. Their revolution had felt justified in the light of legal tradition, and the fight was accompanied by an unquestionable sense of an unprecedented remediation of the moral structures of society. But, although their intentions were sincere, was the fight which Wieacker and Wolf had engaged themselves in any more justified than that of the students of 1968? Was there something good in the generational revolution itself which would provide a covering ethical entitlement for the revolution and excuse the unintended effects? On this Wieacker had no clear answer. He tried once again to understand the moral and historical paradox with the help of Gustav Radbruch’s experience. Expressing his “own poetic-moral feeling,” he wrote to Wolf:

[I]ch willige mit dem besseren Teil darin ein, in “den Wirbeln festzustehend zu retten, was bewahrt und tradiert werden muss,” wie Sie schreiben.⁹⁵²

The “whirl” which Wieacker and Wolf discussed was a concept which Radbruch used in *Biographische Schriften*. In a section named *Innere Weg* (the inner path), Radbruch characterized his experience of the time following the German Revolution of 1919 as a “romping whirl.”⁹⁵³ Radbruch’s experience of the revolution was one which

⁹⁵¹ Ibid. “The best [...] memories have persisted since the winter semester (29/30 or 30/31), since I heard your “great legal thinkers.” I see and hear you still as if it were yesterday, and I have always followed your longer, inward path and could thankfully benefit from it. Being reassured in such ways of consistencies in these times belongs to the best gifts that one can be receive. It is unearned, like all that is truly good, as I have found with surprise a kind of a certain religiousness (if the word is permitted) developing while thinking about my life.” (Translation by HW).

⁹⁵² Wieacker to Erik Wolf 21.8.1968. NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau. “I agree with the better part of “the whirl to save as fixed, what must be maintained and passed on,” as you write.” (Translation by HW).

⁹⁵³ “Welch anderes Bild zeigte sich mir, als ich den tollen Wirbel eintrat, den Berlin in den ersten Revolutionsmonaten darstellte.” Gustav Radbruch, *Biographische Schriften*, C.F. Müller Juristischer Verlag, Heidelberg 1988, 243.

Wieacker could identify with, and reading about it awoke recollections of the years of “legal renewal.” Radbruch wrote about his experience thus:

Es war ja die Zeit der politischen Unruhen [...] Es war die Zeit, wo mannigfache politische Ideen leidenschaftlich miteinander kämpften und Stellungnahme verlangten. Damals erst nahm meine Abneigung ihr Ende, den Reichtum der Möglichkeiten für eine begrenzte Wirklichkeit, die Fülle der Widersprüche für eine feste Überzeugung dahinzugeben [...] Von jetzt an gewann ich eine Reihe von Freundschaften neuer Art, in denen nicht der Mensch unmittelbar dem Menschen sich erschloss, sondern beide über einer gemeinsamen Sache, Überzeugung oder Aufgabe einander fanden. *Idem velle adque idem nolle ea demum firma amicitia.* (Dasselbe wollen und dasselbe nicht wollen, das erst ist zuverlässige Freundschaft. *Catilinia* bei Sallust).⁹⁵⁴

To Radbruch, out of the revolt had emerged lasting and noble experiences, friendships, the questioning of social injustices, and passionate scholarly presentations. But to Wieacker and Wolf – still conservative enough not to identify with the socialist revolution – it was obvious that the insight of a rebel was not reality *per se*. Wieacker could understand the emotions that emerged from the revolt, but the “whirl of revolution” as such was not desirable to him. Even a sincere interpretation of social justice, constructed in a battle against a stagnant and unjust social system, might in practice lead to disastrous results. This had happened in 1919, in 1933 and now in 1968. The intoxicating movement of revolution had to be halted, scrutinized for what was worth saving, and the noble elements handed over to subsequent generations.

In hindsight, this should have been the case with ‘legal renewal.’ Wieacker acknowledged that the “fight against the Wilhelminian generation” was mostly a call to action of him and his peers, rather than a definite feature of 1930s legal science.⁹⁵⁵ The conviction which he had had on the relation between the timeless principles of justice and the legal science produced during the Nazi regime now seemed inadequate. What in concrete terms was left from those days were the crimes, whereas the good intentions and learned theoretical constructions had not stood the test of time.

⁹⁵⁴ Radbruch 1988, 243. “It was in fact the time of political unrest [...] It was the time when multifarious political ideas fought amongst one another passionately and called for statements. For the first time my dislike reached its end to give up the wealth of possibilities for a bounded reality, to give up the richness of contradiction for a solid conviction [...] From then on I won a series of friendships of a new kind in which one person did not reveal himself to the other, but both found to each other through a common thing, conviction or task. *Idem velle adque idem nolle ea demum firma amicitia.* (Agreement in likes and dislikes—this, and this only, is what constitutes true friendship. *Lucius Sergius Catilina* quoted by *Gaius Sallustius Crispus*.” (Translation by HW).

⁹⁵⁵ Cf. Wieacker to Ernst Rudolf Huber 29.3.1946. NL Ernst Rudolf Huber, Bestand 1529, Bundesarchiv Koblenz.

4.8. *Privatrechtsgeschichte der Neuzeit* (1967): *Rechtsgewissen* and the modern state

Privatrechtsgeschichte der Neuzeit is a masterpiece of European legal history, which perhaps more than any other text written by Franz Wieacker continues to bring praise to its author. There Wieacker connected his decades-long learnedness of law to a coherent representation of the essence and state of European legal science. On one hand, the book mirrors the larger tendency in post-war German legal science, where scholars attempted both to explain the immediate past of the Nazi regime and reconstruct new solid foundations for jurisprudence.⁹⁵⁶ On the other hand, *Privatrechtsgeschichte* was the end result of a project which Wieacker had started in the last years of the 1930s, and which aimed at representing European legal history from the point of view of the modern world, *Neuzeit*. As such it belonged to a scientific paradigm which explicitly took history as a tool to define the confusing social (and legal) development of the twentieth century.⁹⁵⁷ In what follows I concentrate on a substantial aspect of the book: the manner in which Wieacker explained the concurrent “crisis of justice” with the help of the concept *Rechtsgewissen*. In this task I build on the analysis of the previous pages of this thesis, and seek to show how Wieacker used this concept, which signified an ability to achieve just legal reasoning, a notion he had developed for years, to make sense of the legal reality of post-war Germany and Europe.

Privatrechtsgeschichte was published in two editions; the first appeared in 1952 and the second in 1967. Wieacker made significant revisions to the second edition, but in this section I will look at the editions side by side in support of my argument that Wieacker’s thoughts on the relation between justice and society in principle remained the same. Later developments, as discussed in the second edition of *Privatrechtsgeschichte*, lie more in the domain of legal interpretation, and the passages concerning the concept of *Rechtsgewissen* are more or less identical in the two editions. However, the 1967 edition is far more reflective in one important sense: there Wieacker, for the first time in a public text, commented on his involvement with the “legal renewal” of the 1930s and his relation with National Socialist legal science. Since this feature is of great importance in my work, it is reasonable to start the analysis from that theme.

It is possible to treat *Privatrechtsgeschichte der Neuzeit* as a whole as a kind of indirect apologia.⁹⁵⁸ Wieacker did not provide a very thorough or explicit report of his personal participation in the *Rechtserneuerung*, or give much space to that phenomenon in *Privatrechtsgeschichte*. However, where he does touch upon these times, his tone is humble. Wieacker writes in the second edition:

It is difficult enough for the distant observer, let alone those who were involved in it at the time, to reach a balanced judgement on private law

⁹⁵⁶ Foljanty 2013.

⁹⁵⁷ Rückert 2010.

⁹⁵⁸ Rückert 1995.

scholarship between 1933 and 1945. Sensible reforms which had been thought out long before had to defer to a government completely contemptuous of all principles of the rule of law. Sometimes the alliance was superficial and tactical, sometimes corrupt. In the prevailing atmosphere of the utter contempt of law, ideological prejudice, and abuse of power for political ends, private law scholarship, which perhaps could in any case not have stood firm in that decade, proved unable to remain in critical control of its method and social role. Racism in statutory form engendered dreadful injustices in the law of persons and marriage; and if other parts of the private law were less affected this was perhaps more because of the nature of the material than because the specialists were any more resistant to the warped fallacy and brutal perversion of legal ideas. Nevertheless, one can perhaps say that thanks to the professionalism of the practitioners and professors involved in the 'Academy for German Law', much of the reform work done by its committees in the area of private and commercial law was, on sober appraisal by those better qualified than the author, both well thought out and appropriate. This is true despite the painful tactical or naïve accommodations to Nazi terminology and ideology which readers today must find offensive.[...] They [Wieacker and his generation] had some of the false assurance of the graduate in Faust Part II ((6770 'Admit that what was ever known/Is not the knowing worth' or at 6794: 'The world until I made it, wasn't there.' Compare also 6807: 'You may be hurt by what I say, /But nothing stupid, nothing smart,/ Can be imagined that has not/Already been conceived') and were insufficiently respectful and mindful of their predecessors' scholarship under the rule of law.⁹⁵⁹

Although Wieacker was in the above excerpt open about the "failings" of the lawyers of his generation and himself, he maintains that the era of National Socialist "legal renewal" itself was not a reason or source for the contemporary "crisis of justice," which is the coherent theme in *Privatrechtsgeschichte der Neuzeit*.⁹⁶⁰ Rather, the writings of his generation of scholars were attempts to resolve the more general dilemma in legal science: the incompatibility between social reality and legislation, and the latent possibility of legislation being unjust from the point of view of society as a whole.⁹⁶¹ The injustices embedded in legislation, legal decisions and applying the law was the result of centuries- old developments in European legal history, where the law was no longer in accordance with what people considered to be just, and the methods of legal science were no longer able to overcome that breach. Modern legal science theories further widened the gap and enabled the legislator to make laws which

⁹⁵⁹ Wieacker, *A History of Private Law* 1995, 409–410 fn.2.

⁹⁶⁰ See e.g. Wieacker, *A History of Private Law* 1995, 482.

⁹⁶¹ Wieacker, *A History of Private Law* 1995, 481–482: "All the main problems of private law today, namely the conditions of private autonomy, substantive contractual justice, the restriction of private rights and powers by social law, and above all the extent of judges' freedom to develop the law, all of these lead back to the central question of the relationship between justice and reality."

oppressed some for the benefit of the powerful. Wieacker posited the work of the ‘New legal science’ within this larger narrative as follows:

The criticism directed at the traditional constructions of Pandectism and private law by the younger generation of private law scholars [of the war generation] is another matter, in which the author was also involved. Although their reasons were predominantly sound in substance, they were at fault, especially in the early years, in embracing the tendentious terminology and ideology of the time. [...] For a period after 1945 these faults or failings naturally but regrettably cast a blight over their perfectly legitimate criticism of doctrine or system, matters which had nothing at all to do with Nazi ideology but had been discussed by the great Pandectists of the nineteenth century or by jurists in other legal systems.⁹⁶²

The perennial incompatibility was partly due to the fact that lawyers were no longer in charge of the legislative process. Modern democracy prevented lawyers from being in charge of legislation. Wieacker asserts that the massive crimes against humanity of the twentieth century would have not been possible in an era when jurisdiction was in the hands of the “representatives of this legal culture, scholars and jurists with scholarly training.”⁹⁶³ In the modern world the process of legislation was dictated by the “general will” of the people, which as a concept and concrete entity was a vague constellation, vulnerable to outer influence and the pursuits of corrupt politicians and “demagogues.”⁹⁶⁴ As senators had no understanding of the law, and since such an understanding could only be obtained through “juristic-experience,” even at its best parliamentary legislation did not achieve a proper approach to the relations between law and justice, and one could not trust its ability to provide just laws.⁹⁶⁵ This double-bind formed a permanent “crisis of justice” whose resolution seemed impossible

Wieacker did not suggest that the essence of democratic society should be reversed and the lawyers again be given the dominant position in creating the law, but strongly emphasizes the latent dangers of the contemporary system. Like other conservative legal scientists, such as Ernst Forsthoff,⁹⁶⁶ Wieacker was suspicious of the idea that the state, meaning the people, decided and regulated in a parliamentary process on social justice and the realization of individual rights in society.⁹⁶⁷ In practice, the

⁹⁶² Wieacker, *A History of Private Law* 1995, 409–410 fn. 2.

⁹⁶³ Wieacker, *A History of Private Law* 1995, 443.

⁹⁶⁴ Wieacker, *A History of Private Law* 1995, 444–445: “The crisis of positivism is in truth the crisis of the legitimating power of the general will in a democracy.”

⁹⁶⁵ Wieacker, *A History of Private Law* 1995, “[S]tatutes could be passed which were no longer in harmony, or were indeed grossly out of harmony, with the principles of law which had long been founded in religion, philosophy, or history.”

⁹⁶⁶ Cf. Meinel 2012, 318–352.

⁹⁶⁷ Wieacker, *A History of Private Law* 1995, 443: “This risk is inherent in modern democracies.” Embedded in Wieacker’s argument is a strange twist, given that the conservative “war generation” had not succeeded very well in defending human rights during an era when they perceived that jurisprudence, “the jurists’ law,” was being given the status it was entitled to. Nevertheless, Wieacker’s, as well as Ernst Forsthoff’s and even Carl Schmitt’s, claim about the antinomy within the democratic theory and legislation is not without significance in the light of recent developments in Western

“crisis of justice” was a symptom of the havoc of the common and shared values on which laws had previously rested, and from which they had been derived:

Indeed the legitimacy of enacted law depends in the long run on such integration [of law and a shared value-base], and such legitimacy is lost if the continuous reassertion of the general will is frustrated by the disappearance of any *common sense* of values [...]⁹⁶⁸

In Wieacker’s view the modernization process, in practice, had occurred in two distinct, but similarly challenging, tendencies. First, the modern state had turned into a social state (*Sozialstaat*) which regulated the actions of its citizens with the help of statutory system. This system for its part was legislated from the point of view of purposes. That is, laws were drafted in order to produce desirable economic, social or political effects in society.⁹⁶⁹ Even if one supposed that parliamentary legislation worked unattached to economic influence and political ideologies, of which Wieacker was highly suspicious, the chances of such a system bringing *justice* were negligible. Wieacker was confident that a sound legal system had to work from its own inner dynamic. With respect to his previous works and to his scientific context, he coherently maintained that an autonomous judiciary within a democratic nation meant not only independent judgments made in courts of law, but judges’ privilege to *create* the law:

The strongest and most durable legal systems have always claimed such autonomy, as in ancient Rome, in England, in the Middle Ages, and in general in well ordered societies with pre-scientific legal systems. They all presume the immanent justice of the actual law and rely on producing just results by applying their own standards, such as the maintenance of tradition, of authority, of logical argument and concepts.⁹⁷⁰

Second, although the legal system of the Federal Republic acknowledged the need for a “law above laws,” a “transcendental” basis for jurisprudence, such beyond-legal principle(s) had not been thoroughly reasoned and explicated. The constitution of the Federal Republic, the courts in their practical work as explicated in their verdicts, and recent theories of legal science, all adhered to and strove to apply some kind of “call to conscience.”⁹⁷¹ It was not, however, irrelevant which kind of “conscience” one turned to, and on which bases it was built. Referring to a religious vocation while conducting operations in the basically secular spheres of law and administration did produce space for critical questions and comments.⁹⁷² Likewise, a mere remark that

democracies. One need only take a look at the difficulties which European countries are facing in dealing with populism and anti-democratic movements, or the enthusiasm which scholars, politicians and writers show in explaining the global order and Western democracies using Schmittian concepts and theories in a “post-truth world.”

⁹⁶⁸ Wieacker, *A History of Private Law* 1995, 443. See also 443: “[The] moral quality [of law] [...] was true only so long as the legislative organs, government and parliament continued to respect the traditional axioms of law.”

⁹⁶⁹ Wieacker, *A History of Private Law* 1995, 427–428, 432–434.

⁹⁷⁰ Wieacker, *A History of Private Law* 1995, 348.

⁹⁷¹ Wieacker, *A History of Private Law* 1995, 440, 470–472.

⁹⁷² Wieacker, *A History of Private Law* 1995, 473.

one should follow one's conscience in deciding issues regarding the whole population, did not result in any ethical commitment or general guideline. Again, Wieacker called for an autonomous, mental tool for ruling and deciding justly, which would derive its legitimacy from ethical principles beyond individual experience, but nonetheless would be applicable in a wide range of practical and moral dilemmas brought about by the rapidly developing modern society:

Basic law, [...] lays down that Members of Parliament are bound only by their own conscience, though this is hard to reconcile with the reality of political parties such as we have. When voting on laws, the conscience of the member should include *legal conscience*, a less subjective matter!⁹⁷³

Hence the mental tool Wieacker suggested for creating and upholding justice in society was one situated in the sphere and tradition of legal reasoning. Such a tool could even be used in a society like the Federal Republic, where the scope of the legal system, in comparison to the preceding legal cultures, was somewhat restricted. In 1967 Wieacker was more at ease with the social state and gave credit to its durability from the point of view of the rule of law, and acknowledged that in the legal consciousness, *Rechtsbewusstsein*, of the German people the contemporary form of administration and jurisdiction were accepted.⁹⁷⁴ In 1952, however, in the first edition of *Privatrechtsgeschichte*, he still struggled to welcome the post-war order with all the changes in its relations between law, politics and legal science.⁹⁷⁵ At that time he perceived the legal system of the Federal Republic to be an heir to the intellectual streams which achieved their notorious high point in the mindset which he so much despised, namely legal positivism:

Ja diese Wirklichkeitvorklärung ist unentbehrlicher geworden als je zuvor, seitdem der Machtwille des modernen Bewusstseins die alten, einst im Unterbewusstsein vorgegebenen und dort unverletzlichen Bedingungen der Ordnung des menschlichen Lebens bewusst gemacht, diskutiert und schliesslich zerstört hat, wie es nach der Zerstörung des alten abendländischen hellenisch-christlich-vernunftrechtlichen Wertesystem durch den wissenschaftlichen Positivismus geschehen ist.⁹⁷⁶

The old European value system was being destroyed *by* scientific positivism, and that value system was being destroyed *through* bringing it under public discussion and subjecting it to twisted (positivist) theoretical conceptualizations. In the 1952 edition Wieacker saw “recent answers” in legal science to be particles in a long line of causal

⁹⁷³ Wieacker, *A History of Private Law* 1995, 444 fn.2, emphasis original.

⁹⁷⁴ Wieacker, *A History of Private Law* 1995, 438, especially fn 4.

⁹⁷⁵ Cf. section 3.7 Affections in *Rechtsbewusstsein* 1945–1968: The experiences of disorder, scarcity and dislocation.

⁹⁷⁶ Wieacker, ‘Privatrechtsgeschichte’ 1952, 338. “This pre-clarification of reality has become as indispensable as ever since the will to power of modern awareness has brought to consciousness, discussed and finally destroyed the old, inviolable conditions of the order of human life that were once pre-given in the subconscious, just as it occurred after the destruction of the old western Hellenistic-Christian-reason-oriented value system by the scientific positivism.” (Translation by HW). On the resentment which old the students of Carl Schmitt had on *Sozialstaat*, see Müller 2003, 86.

explanation theories. In the end, causal theories had achieved the status of a “layman religion” (*Laienreligion*) and an authoritative position in “the public consciousness” (*öffentliche Bewusstse*n).⁹⁷⁷ Thus, positivist reasoning had not merely remained within the intellectual circles of the legal theorists, for its concepts had been assimilated as axioms which guided administrative decisions leading to a “conscienceless disdain” for justice in the legal reality.⁹⁷⁸

Die Wurzeln dieses Niederganges reichen weit zurück. Der wissenschaftliche Positivismus des 19. Jhs. hatte mit der Ausbildung eines geschlossenen Privatrechtssystems und einer allgemeinen Privatrechtstheorie zum erstenmal nicht nur die Forderungen des cartesianischen Wissenschaftsbegriffs und des Vernunftrechts an die Methode des Jurisprudenz erfüllt, sondern zugleich das Rechtsbild der bürgerlichen Gesellschaft seiner Zeit wissenschaftlich ausgedrückt und geistig legitimiert.“⁹⁷⁹

Both editions of *Privatrechtsgeschichte* are built on the same “degradation narrative” of European legal culture. Wieacker’s book is quite unusual since the preceding works on the same subject had mostly concentrated on legal institutions and the history of legal thinking. He narrates the phases and development in the European way of perceiving legal phenomena side by side with the more general changes in the intellectual history of the continent. The text proceeds from the Glossators to natural law theories and to the Age of Reason, which are succeeded by legal positivism, textual formalism, and finally legal naturalism. Each of the epochs carry within it the seed of the subsequent paradigm, and the legal culture evolves like an “organism,”⁹⁸⁰ but the story as a whole can be reduced to a dichotomy between two views on social phenomena: causal theories and practical wisdom. Wieacker is not hesitant to equate the juridical naturalism of the twentieth century with the scholasticism of the ancient world, which in contemporary Romanist discourse was seen as the nemesis of Roman legal thinking.⁹⁸¹ His vehement opposition to forms of causal explanations in humanities and legal science was not only a consistent element in his texts, but also a feature which irreversibly connected him to thinkers like Hans-Georg Gadamer and Martin Heidegger.

Since it was juridical naturalism which seemed to dominate the “public consciousness” in post-war Germany, it is understandable that Wieacker’s narrative turned out to be a history of spiritual degradation and its subsequent effects on modern society. *Privatrechtsgeschichte* is far from being a one-sided declaration, but its underlying

⁹⁷⁷ Wieacker, ‘Privatrechtsgeschichte’ 1952, 335; also 333.

⁹⁷⁸ Wieacker, ‘Privatrechtsgeschichte’ 1952, 332: “gewissenlose Verachtung des Rechts.”

⁹⁷⁹ Wieacker, *Privatrechtsgeschichte* 1952, 317. “The roots of this decline go a long way back. The scientific positivism of the 19th century had for the first time fulfilled not only the demands of the Cartesian concept of science and the law of reason for the jurisprudential method with the development of a closed system of civil law and a general civil law theory, but at the same time it scientifically expressed and intellectually legitimized the legal picture of the civil society of its time.” (Translation by HW).

⁹⁸⁰ Wieacker, *A History of Private Law* 1995, 447.

⁹⁸¹ Cf. RB Vulgarismus; RG Vom römischen.

message is clear: causal theories rip the law from its substantive moral binding force, and open up possibilities for modes of apparently legitimate injustice in society. Ultimately, causal theories treat people as “species” not as “free men,” and laws as “vehicles for gaining certain purposes” rather than “expressions of values.”⁹⁸² Thus, scholars who were prejudiced by the principles of legal naturalism were unable to define “the conscience” in a balanced way, where it would be bound by law, in connection with tradition as well as with reality, and usable in a multitude of legal cases. Thus, Rudolf von Jhering, the *Freirechtsschule* and the “jurisprudence of interest” did enrich the field of legal science with their contributions on the essence of legal reality and interpretation, but with respect to the question of “legal conscience” their works deepened the “crisis of justice” rather than offered any solutions in reconnecting the spheres of social reality and justice.⁹⁸³

Inquiry into causes and analysis of motives of individuals or groups are perfectly good ways of apprehending the reality to which the norms are to be applied, but they do not of themselves provide us with the standards we need in order to apply law properly, to legislate rightly, or to adopt apt legal policies: the values of justice are related to social reality but they are not inferable from it.⁹⁸⁴

In the second edition of *Privatrechtsgeschichte* Wieacker’s tone was not as cynical and disenchanting as in his first edition, and succeeding research on legal and intellectual history has in general focused not on comparing his idea of *Rechtsgewissen* to his previous texts, but on other streams of legal theory current in the first decades of the Federal Republic.⁹⁸⁵ It is obvious that Wieacker’s *Rechtsgewissen*, the “supralegislative legitimation” as he represented it in the second edition of *Privatrechtsgeschichte*,⁹⁸⁶ has been constructed both in relation to theories of natural law and to substantive legal values. As such it mirrors the larger tendency in post-war German legal science, where scholars attempted to both explain the immediate past of the Nazi regime and reconstruct new solid foundations for jurisprudence. The extent to which scholars admitted or realized these arguments as part of the post-war *Vergangenheitspolitik* varied. Nevertheless the “turn to natural law” was being acknowledged, and most understood this as a counter-reaction to the injustices of the previous decades. As a result, the attempt to go beyond positive law and find a

⁹⁸² Cf. Wieacker, *A History of Private Law* 1995, 446–450.

⁹⁸³ As a whole, juridical naturalism “knowing no justice but the purposes of the party in power, is perhaps the greatest threat to the idea of law in Europe in recent centuries.” (Wieacker, *A History of Private Law* 1995, 458). On the other hand, Wieacker, *A History of Private Law* 1995, 458 fn. 20 states: the jurisprudence of interests “rates the demands of individual conscience above the requirements of any objective and binding rule” and further, 455: “the rift is due to the fact that the jurisprudence of interests can offer no suprapositive reason for preferring one competing interest over another, and therefore like every related form of naturalism must make a leap from what is in fact to what should be in law.”

⁹⁸⁴ Wieacker, *A History of Private Law* 1995, 450.

⁹⁸⁵ See Avenarius 2010; Foljanty 2013.

⁹⁸⁶ Wieacker, *A History of Private Law* 1995, 445.

transcendent justification for law was a defining feature of post-war German legal science.⁹⁸⁷

In *Privatrechtsgeschichte der Neuzeit* Franz Wieacker also contributed to discussion on natural law, though opinions vary as to what extent Wieacker's texts can be situated under this label. As Lena Foljanty shows, however, Wieacker's argument in *Privatrechtsgeschichte* certainly comes very close to natural law theories.⁹⁸⁸ Wieacker's friendship with Erik Wolf, one of the most notable friendships in natural law discourse, and the extent to which he was influenced by Wolf's view on legal theology, makes it easy to take Wieacker as a proponent of natural law. In addition, especially in the second edition of *Privatrechtsgeschichte*, Wieacker frequently discusses *Rechtsgewissen* in light of the arguments of renowned natural lawyer Hans Welzel.⁹⁸⁹ But having said that, Wieacker himself never agreed to be a "natural law man." Quite the contrary. He stuck with his original idea that in the end natural law theories were not "practical," as jurisprudence was supposed to be, and had been for example in ancient Rome.⁹⁹⁰ Wieacker upheld his own view on the "route to justice," and although he was impressed by the works of Leo Strauss and Hans Welzel, they did not alter his vision of the relation between reality and justice in the decades following the end of the Second World War.⁹⁹¹ Wieacker concludes:

[W]e shall avoid the hasty impression [...] that no transcendental justification of law is possible, while realizing that any absolutist and doctrinaire natural law with authoritarian 'conclusions' is unacceptable.

A more difficult task is to distinguish Wieacker's view from Nicolai Hartmann's and Max Scheler's theories on the substantive ethical values of law, Theodor Viehweg's work on "topoi" of legal arguments, and existentialists like Werner Maihofer (who was both a student of Erik Wolf and a friend of Wieacker).⁹⁹² Scheler's work was highly appreciated in the Federal Republic. He seemed to offer a philosophically solid

⁹⁸⁷ Foljanty 2013, 327–329.

⁹⁸⁸ Foljanty 2013, 188–190. Nevertheless, the theme can be read through the dispute between the "Smend school" and the "Schmitt school." Wieacker does not seem to be interested in taking part in this dispute. He gives credit to both "Protestant" and "Catholic" readings of the law and its substantive value. Furthermore, in his review on contemporary trends in searching for the "superlegislative" basis for law within democratic society, he treats different tendencies in a sober manner, not preaching about the "tyranny of values." What is emblematic, however, is the long-standing dislike of natural law theories and his personal emphasis on the synthesis of tradition and experience as a means to read and apply law. Cf. Müller 2003, 70 fn 27.

⁹⁸⁹ E.g. Wieacker, *A History of Private Law* 1995, 466, 469, 476.

⁹⁹⁰ Wieacker to Hans-Georg Gadamer 14.7.1965. Nachlass Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar; cf. section 4.4 'Vom römischen Juristen' (1939): The historical paragon of community and creativity.

⁹⁹¹ "The way back to material justice" was the topic of the concluding chapter of the first edition of *Privatrechtsgeschichte der Neuzeit* (Wieacker, *Privatrechtsgeschichte* 1952, 348). Wieacker gave credit to Strauss in illuminating the critical question of the historical nature of any given formulation of justice (Wieacker, 'A History of Private Law' 1995, 451, fn. 12; 478, fn. 34). He also discussed Strauss's ideas in his letter to Hans-Georg Gadamer, see Wieacker to Gadamer 1965: "Strauss hat mir übrigens fürs Naturrecht viel gegeben; ich denke, in den Punkten, wo Sie mit ihm übereinzustimmen bekennen." NL Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar.

⁹⁹² Cf. Wieacker to Erik Wolf 4.11.1953. NL NL Erik Wolf, Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau.

system, detached from Catholic theories of natural law, in weighing the necessary values guiding legislation and the judicature.⁹⁹³ Thus, Wieacker in an apparently explicit statement, though on closer inspection it is somewhat ambiguous, conceded: “For Scheler justice is a personal virtue, the individual’s insight into competing values, that is, *legal conscience*.”⁹⁹⁴ Wieacker did not propose a similar system and hierarchy of values as a foundation for legal reasoning as Scheler. Scheler’s and the existentialists’ scrutiny of the way people had tried to find the basis for the absolute transcendental principles of law were to Wieacker the different approaches to “legal anthropology”.⁹⁹⁵ Thus, Wieacker shared with them a common task in revealing the forms of thinking, and the mentalities of different legal cultures and jurisprudential practices, in order to comment on the “superstatutory means” of European legal culture: “Ein Wissen vom rechtlichen Sollen des Menschen ohne Kenntnis des menschlichen Seins, d.h. ohne eine juristische Anthropologie, nicht möglich ist.”⁹⁹⁶

Wieacker’s *Rechtsgewissen* necessitated knowing the society in which the law was situated, and, contrary to the legal positivists, from the material conditions of that given society derive the form of legal thinking which marked the particularity of this society or community. To Wieacker, legal communities had their distinctive virtues, customs, beliefs and norms, which were not merely institutional or “materialistic” in a way that they could be reduced to symptoms of a battle for some resource or social psychological purpose.⁹⁹⁷ *Privatrechtsgeschichte der Neuzeit*, especially its second edition, shows that in the quarrel on the “tyranny of values” between the Schmitt school and the Smend school, Wieacker cannot be clearly connected to either school. Like the Smend school, Wieacker appreciated Scheler’s and Hartmann’s attempt to define a system of values on which legislation should be based, he even calls Scheler’s result *Rechtsgewissen*.⁹⁹⁸ Nevertheless, a “hierarchy of values” which does not grow out of the practice of legal thinking, or of the domain of understanding the law *per se*, cannot truly reflect justice. It lacked the connection between *Rechtsbewusstsein* and *Rechtsgewissen*, the people’s consciousness of law and the experts understanding of it, thus it embeds the possibility of eradicating the *authority* of the law, something

⁹⁹³ Foljanty 2013, 178.

⁹⁹⁴ Wieacker, *A History of Private Law* 1995, 466. Here Tony Weir’s translation of *Privatrechtsgeschichte der Neuzeit* is inaccurate, since he translates Wieacker’s concept *Rechtsgewissen* as “consciousness of law,” although the original text (Wieacker, *Privatrechtsgeschichte* 1952, 353) says: “Als das Wesen der persönlichen Gerechtigkeit ist damit die Wertesicht der Person in das Recht, d.h. das *Rechtsgewissen* gewonnen.” Emphasis mine.

⁹⁹⁵ Cf. Wieacker, *A History of Private Law* 1995, 451, 468, 469. The turn towards “legal anthropology,” and concurrently the acknowledgment of the necessity of an existentialist view of legal historical study, was emphasized by Wieacker as early as 1941 in ‘Zum System des deutsche Vermögensrechts.’

⁹⁹⁶ Wieacker, *Privatrechtsgeschichte* 1952, 338. “A knowledge of the legal imperative of a person without knowledge of the human reality, that is, without a legal anthropology, is not possible.” (Translation by HW).

⁹⁹⁷ In post-war German legal science it was not uncommon to include Carl Schmitt among the “existentialists” (Wieacker, *A History of Private Law* 1995, 469 fn. 13). Given that Wieacker included many different approaches to his “legal anthropology,” and the way he combined “concrete order” thinking with Martin Heidegger’s idea of *Dasein*, (cf. Wieacker, ‘Vom römischen Juristen’ (1939), it seems that to him both Schmitt’s and Heidegger’s ideas were legitimate paths in discovering the dominant mentality of a legal community.

⁹⁹⁸ See fn. 42 in this text; cf. also Wieacker, *A History of Private Law* 1995, 478 fn. 34.

which had plagued natural law theories, legal positivism and juridical naturalism. Scheler's and Hartmann's system of values had not been built on the correct kind of (legal expert's) experience of law.⁹⁹⁹ Here Wieacker was closer to the opinions of the Schmitt school (though maybe not Schmitt himself). A system of values in itself was arbitrary if it was not preceded and backed up by a homogenous common sense notion of legal values.¹⁰⁰⁰

With respect to Viehweg's work on the basic principles of judicial decision-making, Wieacker appreciates Viehweg's attempt to develop "open systems consistent with the factual structures" in legal doctrines.¹⁰⁰¹ In other words, Viehweg invoked the sphere of scholarly dialogue within the legal culture one was studying, and emphasized the importance of learned practical wisdom in legal reasoning. According to Wieacker, Viehweg "transmitted the understanding of *sensus communis*" to modern legal science.¹⁰⁰²

Within his contemporary scholarship on the history of European private law, Wieacker's search for "superlegislative legitimation" was comparable to other theories, though it was nevertheless highly original. He acknowledged other works in analyzing the "call of conscience," but perceived *Rechtsgewissen* as fundamentally different from individual vocation, since it occurred within the sphere of legal tradition.¹⁰⁰³ It belonged to a specific world of thinking, arguing, learning and presenting, which could only be achieved through its own methods:

[L]aw is a social phenomenon which has its own way of developing through time, like 'species' in biology or humanity in positivist sociology. If law is a manifestation of life then the subjective aspects of its validity which outlast the individual, such as consciousness of law, sense of justice, and conviction of legitimacy, are the results or superstructure of secondary effects in consciousness of a causally

⁹⁹⁹ Wieacker, *A History of Private Law* 1995, 477 fn. 31: "When Max Scheler placed justice before aesthetics and intellectual values but after the 'values' of mercy and love of God, he was speaking from *personal experience*; we might well agree with him, but that is no basis for inference." Emphasis mine.

¹⁰⁰⁰ Cf. Ernst-Wolfgang Böckenförde, 'Entstehung und Wandel des Rechtsstaatsbegriffs' in *Recht, Staat, Freiheit. Studien zu Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*. Frankfurt am Main, Suhrkamp 1991.

¹⁰⁰¹ Wieacker, *A History of Private Law* 1995, 469.

¹⁰⁰² Wieacker, *A History of Private Law* 1995, 469. To Wieacker, Viehweg's work dealt with past legal thinking and saw theories as "'sensible drafts' [...] [which] constitute topics for discussion of what solution would be just, for a debate in which we would gradually learn what justice requires." Wieacker, *A History of Private Law* 1995, 481. The fundamental significance of the concept of "*sensus communis*," and its meaning to Wieacker's legal hermeneutics, is a theme which unfortunately does not fit within the scope of this thesis.

¹⁰⁰³ Wieacker, *A History of Private Law* 1995, 477: "Legal conscience differs from other instances of ethical insight in that it has consciousness of what is required in one's conduct towards other men. This distinctiveness of the experience of law is the foundation of the autonomy of justice: if we see the question of what is legally due in this light, there is no higher value into which justice can be absorbed (such as 'cultural norm', 'public benefit' or love) and there is no priority of ranking among such values. A person thinking about law as it really is must accept that justice does not directly serve any other absolute good (such as religious ardour, enjoyment of God, pity, truth, beauty, or the general welfare)[.]"

determined development of psychological qualities in Homo sapiens[.]¹⁰⁰⁴

In *Rechtsgewissen*, and with its help, it was possible to connect the spheres of values, tradition, and personal experience in jurisprudence. As a “subjective aspect” of the “validity” of the normative system, and as an exclusive human attribute, *Rechtsgewissen* was traceable throughout the European legal tradition, only sometimes being more hindered in one era than another. Legal conscience emerged from the mentality, *Dasein*, of a given legal community. The distinctive awareness of a group of people sharing virtues, values, ways of life, social practices and understanding their culture as successors of previous generations, nevertheless positing their own questions with regard to the boundaries of their knowledge, formed a mental community which created its own “conscience.”¹⁰⁰⁵ To be conscious of and appreciate this mentality of the communal bond, whether in one’s own time, or while studying other cultures or eras, was to “experience” law.

It follows that by justice we must understand the superior mandate of which a person becomes aware when he experiences a sense of the obligatoriness of law. It is not some general obligation severable from individual experience, but a distinctive and spontaneous behest to every individual in every decision he has to make.¹⁰⁰⁶

The legal thinking of the past provided a “stock” of “experiences of law,” thus it provided the modern world with both a vehicle in cultivating one’s legal conscience, and a treasury to further learn from past experience.¹⁰⁰⁷ Since, from Wieacker’s point of view, the modern world suffered from the “crisis of justice” it was crucial to understand and utilize legal conscience. In conducting peaceful co-existence in a modern society mere application of norms or subjecting the rules of communal being solely to parliamentary procedure, was not enough. The “authority” of the law needed to be reinstated, and such a task had to be carried out by making people aware of the value-based nature of law: “The art of living together calls for longer and deeper experience than the application of the laws of nature.”¹⁰⁰⁸ Such “longer and deeper experience” was provided by assimilating the past legal thinking, the tradition of understanding the law.

The *Rechtsgewissen* as elaborated in *Privatrechtsgeschichte* signified all the aspects Wieacker held fundamental after the “point Zero” of post-war Germany, but in

¹⁰⁰⁴ Wieacker, *A History of Private Law* 1995, 447. In the text of the 1952 edition (Wieacker, *Privatrechtsgeschichte* 1952) this part is explicated as follows: “Dann aber erscheinen die subjective Elemente der Rechtsgeltung, die das Leben der Individuen als kollektive psychologische Phänomene überdauern, wie Rechtsgefühl, Rechtsüberzeugung und Rechtsgewissen, als determinierte Resultate einer biologischen Entwicklung psychologischer Eigenschaften der Gattung ‘Mensch’ [.]”

¹⁰⁰⁵ Wieacker, *A History of Private Law* 1995, 348: “These methods of finding law [relying on the standards of one’s own legal culture] [...] certainly depend on shared beliefs about the existence of some law superior to all positive law, beliefs of the kind that existed in Rome and in the High Middle Ages[...], guaranteed principles endorsed by the legal conscience of the community.”

¹⁰⁰⁶ Wieacker, *A History of Private Law* 1995, 477.

¹⁰⁰⁷ Wieacker, *A History of Private Law* 1995, 481.

¹⁰⁰⁸ Wieacker, *A History of Private Law* 1995, 482.

reference to the contemporary discourse of searching for “metajuristic moral values”, and it was constructed on his previous scholarly works. It meant that a legal scholar had to be like the learned ones in history – who had guarded and applied the European legal tradition – asserting that the experiences and understanding of the learned ones were vital and necessary in order to steer the modern legal system, indeed the whole society, in a healthy direction.

5. Conclusion

Franz Wieacker's scholarly production offers an invaluable case study concerning the history of historiography. During his life he personally experienced two world wars, served as a soldier in battle, witnessed three abrupt changes of social systems, lived under a totalitarian rule, saw his home country divided and united again, was accused of supporting fascist crimes and celebrated as the reinventor and highest authority of European legal history. These different phases all surfaced in his scholarly texts. Thus, to study the intertwining of his personal experiences in the historiography he produced, brings forth results, not only from a biographical point of view, but for the history of ideas in general. These results show the dynamic relationship between personal vision, scientific tradition and social circumstances in historical writing.

My attempt has not been to study the extent to which Wieacker's texts were embodiments of any political ideology. It is important to analyze the "politics of history" and reveal the function historiography in general had, and has, in supporting and legitimizing political ideologies. In this study, however, I intended to go beyond such questions as whether Wieacker's 1930s texts can be seen as an extension of National Socialist ideology. I consider, in fact, that historiography is *always* political in the sense that it is produced within a political framework set by the society of the time, and the historian's aim is to have an effect on the prevailing common opinion. The actual audience might just occasionally be more restricted and comprised of other scientists. I have also wanted to refrain from analyzing Wieacker's texts solely in relation to other texts and only within scientific discourse. While analyzing the meaning of a given text, one should not forget the agency of a scholar, and the continuous interpreting and reinterpreting of both the social context and the scientific tradition in which authors are more or less always engaged. Thus, the relevant question in the context of this thesis and of Franz Wieacker's texts is *why* does a scholar choose a *particular message* in any given *moment*, which he/she then further presents to the audience in a political act of writing history.

I consider this approach to be a fruitful way of making sense of historiographical texts, at the same time avoiding the caveats of overemphasizing either the influence of the prevailing ideology on the text or the text's descent from the preceding tradition. This is also a natural stance towards Franz Wieacker's works, since his intentions to have an impact with his writings are explicit, but he just was not interested in political ideologies. His writings took part in politically oriented disputes over the fate of the nation, and especially in the 1930s clearly supported some sides of the National Socialist 'legal renewal.' But to explain Wieacker's intentions through the ideological principles upheld by the National Socialist party, or after the Second World War, by Konrad Adenauer's CDU, would be very artificial. Wieacker mastered the field of Roman law, and was quick to pick up and adapt new theoretical openings from another fields of science. Nevertheless, and despite his political ambiguity and scientific

eclecticism, Wieacker had a strong personal understanding of the essence of social justice, which was the prior point of departure for his writings.

This further underlines the ambiguity of his texts. Although they reveal an exceptional knowledge of previous and contemporary legal scientific contributions, and some of them seem to be steeped in a political ideology, they nevertheless always speak of the commitment to consistent, atemporal values. In addition, Wieacker was among the few legal historians who explicitly admitted the effect of political discourse on his historiography, but at the same time insisted that this was not opportunism. Franz Wieacker was a charismatic teacher and a loyal friend. His colleagues remember him as a kind and polite man, with impeccable manners, but as a researcher he never ceased to be interested in new things and fresh approaches. Although an active and social member in the scientific community, his personal world was virtually impermeable to others.¹⁰⁰⁹

Above all Franz Wieacker was a scholar. Like any historian of the modern world, Wieacker saw political changes and new scientific ideas in the light of his own moral standpoints about society, his personal understanding of historical development, and his idea of the role of scholarship in relation to the national and public good. From the viewpoint of the twenty-first century, Wieacker was exceptional in his unquestionable belief in the value and social relevance of scientific work and higher education, and in the significance which he gave to historical examples in the construction of his contemporary world. His scholarly identity was molded by a conviction of the uncorrupted essence of *Bildung*. This conviction gave added weight to the concepts which he used in his attempt to transmit the lessons of history to the present day. In this thesis I have analyzed the concepts of *Rechtsbewusstsein* (legal consciousness) and *Rechtsgewissen* (legal conscience).

In the early texts of Franz Wieacker which I have analyzed in this thesis, there is no distinction between *Rechtsbewusstsein* and *Rechtsgewissen*. Indeed, in these texts Wieacker did not use precisely these concepts to elaborate the features of a common understanding of the rule of law and justice. However, it is evident that these two major entities were often seen by Wieacker as synonyms. If we reflect on the textual devices which Wieacker later deployed to his 1930s texts, the result is obvious. The concepts of *Rechtsgewissen* and *Rechtsbewusstsein* overlapped, and with respect to the larger claim which Wieacker intended to make with his writings, their separate existence was not a matter of importance to him. This was still evident in 1944, when Wieacker for the first time introduced precisely these two concepts in the same article. The hierarchy and differences between them were fuzzy.

During the years following the National Socialist *Machtergreifung*, the common understanding of the rule of law and justice were often perceived to be the same thing.

¹⁰⁰⁹ I am deeply grateful to Detlef Liebs, Michael Stolleis, Laurens Winkel, and Geoffrey MacCormack for sharing their personal recollections of Franz Wieacker with me.

This was the case with the National Socialist rhetoric – which further subordinated the common understanding to the will of Führer – but also in legal scientific discourse. *Rechtsbewusstsein* was the source for social justice. Deploying this at the time fashionable idea in a legal scientific text could have been experimental and a scholarly mind-game, but Wieacker went further. The conviction that the ‘New legal science’ had indeed uncovered something scientifically sound and relevant, continued to occupy his texts until the early 1940s.

That this idea of the identical nature of the common understanding of the rule of law and justice inspired Wieacker is explained by his socialization to the values attached to *Bildung* and *Stand*. Wieacker’s personal experience during the early years of the 1930s was that the social appreciation given to the higher, humanistically oriented education and learnedness as well as to the estate of the legally skilled, was becoming violently degraded. In Wieacker’s view, learnedness, and the virtues of responsibility and honor annexed to it, was a way to make sense of the relation between people, the state and law. In an authentic national culture, the *Stand* of the legally skilled should be acknowledged as a vital “limb” in the body of society.

Paradoxically, the social context of the years following the National Socialist *Machtergreifung* seemed to rehabilitate this socially conservative ideal. The legal *Studienordnung* of 1935 – or to be more precise, Wieacker’s interpretation of it – highlighted the importance of a historical, general understanding of law. The working communities in which Wieacker participated, had apparently been assigned the task of redefining the relation between legal education and society, and in their ethos the communities stressed the meaning of a wider, culturally constituted meaning of law. Not only was the “aberration” of the Weimar Republic being fixed, but Wieacker was in the vanguard of the task of novel restoration. In Wieacker’s texts on the concept of “property,” the idea of *Berufstand*, “vocational estates” as the foundational structures within society, gave old ideals new social significance. The “lawyer estate” was again, like in Roman times, at the disposal of the political order when refining its own virtuous culture and advising in administrative decisions concerning the national destiny.

During the war years, at the latest, Wieacker along with many other legal scientists and historians realized the vagueness of the legal ideology of new regime. From the point of view of the National Socialist state, the function of legal reasoning was to serve as a respectable façade for the crimes and destructive policies carried out in the totalitarian nation. While finding the racial premises of the National Socialist laws incomprehensible and irrelevant, Wieacker at the same time furthered his existentialist approach to jurisprudence. Concentrating on the history of definitions given to the material “things” which existing laws spoke about enabled the scholar to deal with the non-contemporaneous, abstract level of law, but also to contemplate the more general – and acute – dilemma of the liaison between scholarly ideas and administration.

The war experience brought empirical evidence to Wieacker's understanding of human affairs and his legal scientific stance. The political domain of society and its rhetoric could no longer be used to describe his personal experiences. *Kameradschaft* and "concrete order" became mere slogans which existed in a realm detached from Wieacker's view of the world. *Rechtsbewusstsein* and *Gewissen* did nevertheless appear in his writings and personal letters. Wieacker, who as a representative of the 'New legal science' had committed himself to redefining the existing legal concepts in order to meet the social "revolution" and to detach legal science from the twisted old theories, returned to the concepts of Friedrich Carl von Savigny in order to explain legal phenomena. The irony of this turn reveals that it was not a mere textual choice, but a more basic shift in the historical vision of Wieacker as a scholar.

The newly-adapted old concepts were, however, precise in explicating the turbulence of the late years of the Second World War as well as the period of scarcity in post-war Germany, a time to which Wieacker struggled to bring historical meaning. It was obvious that the legal scientific equation of legal consciousness and justice had been a mistake. The *Rechtsbewusstsein* of the people was misinterpreted, mistaken and unable to understand the deeper historical reasons behind current events. During his service on the frontline, Wieacker realized that not only did the people blindly participate in the war effort, but the study of their historically and culturally constituted set of beliefs would help prevent such a destructive illusion from occurring again. The scholar's duty was to provide information on the origins and development of the awareness with which people explained their existence.

Wieacker maintained that due to one's social status and education there was a significant difference in how one understood the meaning of time. To ordinary people the tragic play of historical forces was hidden, but Wieacker and the "learned" in general could interpret the larger picture, placing the "collapse" within a historical context. Furthermore, the "learned" could teach future generations to use the law in a proper way. To contextualize himself (and his group of friends) within a rapidly altering society, Wieacker again resorted to historical examples. Consequently, the legal scientist needed to be the "Glossators" of the Federal Republic, to humbly cultivate tradition, educate, and ward off "barbarism." The constant and continuous historical reflection between the past and the present in order to bring meaning into one's social context indicates Wieacker's learnedness, but also the significance which humanistic education along with the virtues of *Bildungsbürgertum* had in his identity. *Bildung* was a value in itself, but it also provided means to understand one's being.

To rebuild meant to write and engage in scholarly activity. Due to the widespread destruction and scarcity brought about by the war, people, according to Wieacker, were separated from their cultural heritage and character and were deprived of their "destiny." The reconstruction of the nation necessitated an awareness of the historicity and particular nature of the German people, that is, an acknowledgment of legal consciousness. Only after Germany had understood its destiny – which meant a path

that respected the social structures and values important to the nineteenth-century bourgeoisie – in relation to historical examples and the European tradition, could it (re)construct a just society. In this process, necessitated by the collapse of the common culture, it was, according to Wieacker, perfectly human to lean on superstitious explanations, ideologies, and religion. Nevertheless, only after a true awareness of the material values, principles and virtues comprising the common legal culture had been achieved was it possible to apply conscience, *Gewissen*, to jurisprudence, legislation and court decisions. In his works following the end of the Second World War, Wieacker set about reinstating the legal culture in such a way that the law could be used in a “conscientious” manner. In reconstructing the legal foundations of Europe, the scholar’s task was to spread an awareness of the true causes leading to the “collapse,” and to highlight the distortions in common thinking which had enabled legal havoc to take place. Thus, it was necessary to write on the history of the German and European legal consciousness.

In this task of historiographical reconstruction, Wieacker used the methodological stance he had absorbed during his stay at the University of Leipzig. In *Vulgarismus und Klassizismus*, instead of tracing the concrete reality and structures of past legal culture, he sought to understand the mentality and thinking of the people inhabiting that time. He tried to understand the common experience of the post-Roman legal culture. Thus, Wieacker’s approach to the phenomenon of “vulgarization” was novel, but it also enabled him to construct a solid historical continuation of the particles which he appreciated in Roman culture, outside concrete temporal structures and institutions. Such immaterial assets had survived the collapse of the Roman culture; they would survive another collapse, and secure the continuation of the essence of legal tradition. With his “psychological” approach to the distortion of the ancient world, Wieacker also explained the more recent “irrational” aberration of the legal culture, and further emphasized the importance of virtuous, historical structures in the material context of the present. In other words, he reminded his audience of the essential value of *Stand* and *Bildung* within the legal culture. *Vulgarismus und Klassizismus* was more than just a historical case study, it was a framework which Wieacker developed further in ‘Ursprünge und Elemente’ to explain the wider narrative of European legal history.

In addition, in the years following the end of the Second World War, Wieacker had to adjust his scholarly identity with respect to the abstract guilt brought about by the public attempt to come to terms with the totalitarian past. In the beginning this process was overshadowed by the material obstacles which scholars faced in their everyday lives. It seemed that law academics had lost their previous respected position as the mediating civil servants between the people and the state. During the denazification of the German academia, Wieacker, along with his close colleagues, was charged with supporting the National Socialists in their oppressive restructuring of Germany. To Wieacker, denazification was a manifestation of the lack of a “conscientious” legal

culture, and an expression of the takeover of superstition in society. Nevertheless, the compelling need to redefine a sound legal scientific device in order to come to terms with the past as well as finding a solid base for the legal culture of the future, remained. Such conceptualization had to be in touch with tradition, meaning both legal historical examples and modern elaborations on past examples. It also had to address wider questions on the role of scientific work in society and the responsibility of a scholar within historical development. Wieacker's solution was a more precise definition of the old concept of *Rechtsgewissen*.

In defining *Rechtsgewissen* Wieacker again called upon his scholarly knowledge accumulated during the preceding decade. Although he used the same terms as some other scholars, his concept was in essence existential. The resemblance between Wieacker's *Rechtsgewissen* and, for example, Hans-Georg Gadamer's *sensus communis* is evident. Very important in constructing the concept were, however, Wieacker's personal experiences during the 'legal renewal.' Wieacker was confident that within a community of scholars, sharing the same set of virtues and bound by a common purpose, it was possible to find a "basic thought" from which to derive "truthful" decisions and through which the sustainability of other claims could be evaluated. That had been his experience from the *Dozentenakademie* of Frankfurt and the *Kieler Schule* as well as the faculty of law at the University of Leipzig. Moreover, it was an enduring principle that such communities of the learned could conduct "elastic creativity" in their thinking. It enabled legal scholars to unchain themselves from restrictive dogmatism and shift their thinking towards legal wisdom. By means of these axioms in his historical vision, achieved through personal experience, Wieacker had already elaborated the exceptional legal culture of the Late Roman Republic in 'Vom römischen Juristen.' Furthermore, that historical example of Late Republic jurisprudence legitimated the distinct nature of *Rechtsgewissen* as a morally unflinching way of legal thinking in modern society. When I describe here Wieacker's historical reflection, which took the shape of a circle, my attempt is not to prove his claim inaccurate, nor devaluate the idea of *Rechtsgewissen* as a jurisprudential tool. Rather I intend to elaborate how Wieacker, like all historians, researched the past from the premises of his own context and through writing intended to have an effect on the present day

To Wieacker, Roman law never lost its place as a superior "historical example." The "conscientious" use of law by the "great lawyers" was due to their "creative" ability and awareness of the tradition of law. "Tradition," both in Rome and in twentieth-century Germany signified both an understanding of the historical development of law, but also of its historicity; every epoch had its distinct manner of applying and conceptualizing legal matters. In his pedagogical articles Wieacker argued that the "great jurisprudence" of Late Republican lawyers was not only the starting point of the European legal science, but that the Roman *Stand* of jurists had mastered and developed the law in a way which could serve as a perfect example for contemporary

European legal scholars and lawyers. Being one with their tradition, the Roman lawyers had been able to further develop their legal culture to meet the challenges of a developing society and technological change. Their legal “art” had been “creative,” *schöpferische*, in the true meaning of the concept. Moreover, the legal art of Roman lawyers stemmed from an absolute awareness of their existence. Roman lawyers were not only able to carry out exceptional legal thinking, they were firmly rooted in the mentality of their society, and had assimilated the social values which defined the cultural horizon of the Romans. To translate this into Wieacker’s own concepts, the *Rechtsgewissen* of Roman lawyers was in touch with the Roman *Rechtsbewusstsein*. Thus, Roman law and Roman lawyers represented a consistent paragon for modern lawyers in their task to keep up with the “modernization” process as well as find again the untainted core of jurisprudence after the “collapse.”

In *Privatrechtsgeschichte* Wieacker also defined *Rechtsgewissen* in elaborating what it was not. It was not based on religious conviction or on dogmatic interpretation in the context of previous theoretical constructions. Thus, as a legal form of *Gewissen* (legal conscience), phronesis or atemporal wisdom was constituted on the temporal, common understanding of the rule of law, but it managed to avoid the ideological and psychological caveats which haunted the legal consciousness. Thus in *Privatrechtsgeschichte* the two concepts of *Rechtsgewissen* and *Rechtsbewusstsein* were related, but the distance between them was a feature which defined the moral quality of a given legal culture. Such a conceptual change in Wieacker’s historical vision was a result of decades of scholarly work, learnedness, and dramatic personal experiences.

The most drastic change with respect to Wieacker’s understanding of conscientious scholarship, however, took place after the second edition of *Privatrechtsgeschichte* had been published. Following the student riots of 1968, he had to reevaluate his scholarly identity with respect to the morals and meaning of scholarly work. As a result, he reviewed his old article ‘Wandlungen der Eigentumsverfassung’ and admitted that the original text was not at all in line with what he, and the society in which he lived in 1976, considered to be ethical. One is compelled to ask why did his scholarly identity, and along with it his historical vision, change so slowly? One reason was the wider social context. In general, German legal scholars did not publicly reflect upon their involvement in the “legal havoc” of the Third Reich. Wieacker was one of the first of the few who did so. The other aspect relates to the sustaining premises through which Wieacker perceived the law, the world and history. Wieacker believed in the distinct and to a degree separate dimension of the academic world, whose culture changed according to its own rules and schedules. Only when the past intruded into the universities in the form of the student revolt, did the principles of scholarly work have to be reevaluated. The third explanation is elaborated in the theoretical framework of this study.¹⁰¹⁰ It is fundamentally human to avoid any drastic

¹⁰¹⁰ Cf. section 1.3 The cognitive bases of historical vision.

reevaluation of an explanation one has earlier given about the world and previous experiences. This is one of the reasons why historical writing is so important in modern cultures. The certainty of both a personal life script as well as a culturally upheld “significance” in history, the sense of continuity, are essential in order to gain individual meaningfulness for one’s story, the “I” among others. Thus in some sense to criticize historians for their lack of interest in rewriting their narratives is unfair. That is not how historiography or historical vision works.

To conclude, and to summarize my response to the research questions raised at the beginning of this thesis: Franz Wieacker was first and foremost a scholar. His view on social change and society was deeply influenced by his belief in the values of learnedness and higher education. He firmly believed in the necessity of the distinct social position of the legally skilled, and maintained that the work conducted by that “estate” was vital for achieving social justice in a given society. He shared that conviction with his closest colleagues, whom he met in the *Dozentenakademie* of the University of Frankfurt and in the *Kieler Schule*. In their culture, within a network of colleagues, social changes were evaluated against an ideal type of social order. The network cultivated their culture in practice in the form of working communities, since in 1933 the National Socialist *Machtergreifung* provided the network with a possibility to enrich their ideas as models for education and jurisprudence. The collaborative method and the resulting academic works of the young scholars represented, for a short period of time, a revolutionary stance against the allegedly dogmatic academic culture. The end of the war and the consequent denazification process was a drastic disappointment to both Wieacker and his network of colleagues. Wieacker, however, found a new, reconstructive direction from the “collapse” and by means of his personal experiences – of communality as the context of legal scholarship and elastic creativity as the aim of legal science – and accumulated, multifaceted scientific capital, established himself as a leading Romanist and legal historian in Europe. Wieacker explained the diverse social breaches and recent crises through a vast narrative of European legal culture, which he constructed by means of concepts. After the war the concepts of *Rechtsbewusstsein* and *Rechtsgewissen* were of great importance, but they were only one dimension of his production. Nevertheless, and despite the radical changes that the *Machtergreifung* and 1945 brought about, the core of his scholarly identity remained untouched. So it is not entirely accurate to analyze to what extent Wieacker’s texts in the latter part of the twentieth century are the results of either the National Socialist era or the post-war atmosphere. The continuing aspects in his works lead back to the Weimar Republic.

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