Ernst Freund

by Francis A. Allen

Ernst Freund is one of the great and distinctive figures in the history of American legal scholarship. The high regard of his contemporaries is perhaps sufficiently suggested by Mr. Justice Frankfurter's tribute: "I don't think I ever met anybody in the academic world who more justly merited the characterization of a scholar and a gentleman than did Ernst Freund." A more particular recognition of Freund's unique contribution was expressed by an English legal periodical at the time of his death: "All of Freund's treatises have a very peculiar quality of their own, unlike anything else in the whole range of English and American legal literature. The author's Teutonic education produced an inexhaustible industry, a remarkable capacity for inventive classification, and a power of subtle and penetrating analysis."

Ernst Freund was born in New York on January 30, 1864, while his German parents were paying a brief visit to the United States. His early education was almost wholly German. He was a student at the Kreuzschule in Dresden and the Gymnasium at Frankfort am Main, and later attended the University of Berlin and the University of Heidelberg. He received the degree of J.U.D. from the last-named institution in 1884. Shortly thereafter Freund migrated to the United States, and practiced law in New York City from 1886 until 1894. He began his teaching career at Columbia College in 1892, when he joined the faculty as acting professor of administrative law. He was granted a Ph.D. in political science from Columbia in 1897.

In 1894, Freund began his thirty-eight years of association with the University of Chicago when he accepted an appointment to the political science faculty of the new university as instructor of Roman law and jurisprudence. He quickly gained an enviable reputation as a teacher and a scholar; and when, in 1902, the Law School of the University of Chicago was established, Freund was appointed to the original faculty as professor of law. Within two years Freund had published The Police Power, and in the three decades that followed he produced a steady stream of articles, books, teaching materials, and reports, including his best known writing: Cases on Administrative Law (1911, 2d ed., 1928), Standards of American Legislation (1917), Administrative Powers over Persons and Property (1928), and Legislative Regulation (1932). In 1929, he was appointed the first John P. Wilson Professor of Law.

The life of Ernst Freund spans the years between the Civil War and the New Deal. Throughout the Western world, the forces of change produced a new age of legislation. In the United States, the Interstate Commerce Act of 1890 and its subsequent amendments inaugurated an era of federal regulation and established many of the characteristic features of American administrative law. The Sherman Act was only the most conspicuous of the numerous legislative enactments directed against the trusts. Factory legislation, laws regulating the hours of labor and other aspects of the labor contract, workman's compensation, public utility regulation, and agitation for schemes of social insurance—all became prominent features of American life at or near the turn of the century. This remarkable outburst of legislative innovation brought with it judicial reaction and restraint. Cases like Lochner v. New York and Ives v. So. Buffalo R. Co. were among the most widely discussed public events of the day.

Throughout his professional life, Freund viewed these occurrences with interest and concern. He brought to his analysis an unmatched knowledge of comparable legislative developments in the industrialized societies of Western Europe. He was one of the first American scholars to give detailed attention to the problems of achieving efficient and effective government while preserving individual rights.

1Frankfurter, Some Observations on Supreme Court Litigation and Legal Education 1 (The Ernst Freund Lecture, The Law School, University of Chicago, February 11, 1953).

2Note, 49 Law Quarterly Review 177 (April, 1933).

3198 U.S. 45 (1905).

4201 N.Y. 271, 94 N.E. 431 (1911).
and volition in an age of widespread legislative regulation.

All Freund's major volumes are concerned with the new problems created by legislative law making. Indeed, they may be viewed collectively as a single work, since each of the volumes deals with particular aspects of the larger theme. "The Police Power," published by Freund early in his career as a law professor, seeks to define the constitutional scope and limits of legislative powers of regulation. The first paragraph of his Preface exposes the fundamental tension between freedom and restraint inherent in all regulative endeavors. The "police power," he says, should be defined as the "power of promoting the public welfare by restraining and regulating the use of liberty and property." In Standards of American Legislation and Legislative Regulation, the latter published in the final years of his life, he turned directly to the problems of law making by legislatures and undertook to identify the basic principles of sound legislation and the distinctive techniques of statutory law. But an age of legislation is almost inevitably an age of administration, and Freund's pioneering works on American administrative law are a natural expression of his general concerns. Cases on Administrative Law, which for more than two decades dominated American law school instruction in the field, and Administrative Powers over Persons and Property, perhaps Freund's best known work, complete the list of his major productions.

Freund brought to his work a high intelligence and an erudition that have rarely been matched in the history of American legal scholarship. It was an erudition of many dimensions. First, it should be noted that Freund possessed unusual command of the various divisions of Anglo-American law and that his knowledge encompassed the law in its historical as well as in its modern manifestations. Freund's interests were by no means confined to the public-law subjects. He wrote and taught in the law of real property (including wills and future interests). His articles range over such diverse areas as domestic relations, corporations, torts, municipal corporations, criminal law, jurisprudence, and international law. Second, because of his German education and subsequent studies, Freund possessed a thorough grasp of Continental legal systems. It is accurate to regard Freund as one of the first and most important American comparative-law scholars. His administrative powers over persons and property bears the subtitle A Comparative Survey; and readers of Standards of American Legislation will be impressed by his skillful use of German, French, and English legislative materials. Freund at no time made a fetish of the comparative technique, but employed it as a natural and necessary device for the comprehensive consideration of the subjects he treated.

Standards of American Legislation provides an admirable introduction to Freund's work and thought. Written originally as a series of lectures for delivery at Johns Hopkins University in 1915, it is the most graceful and engaging of Freund's books. It is perhaps just to say that the Standards deals with matters of "technical" interest, for it is concerned with problems of social technique. But the matters are not technical in any narrow or trivial sense of the term. Freund is concerned with the new problems of law making confronting the industrialized democracies of the Western world. These are the problems of effective implementation of legislative policy within a framework of values that accord high priority to individual rights and individual freedom.

No serious examination of American legislation can avoid discussion of the relations of legislative and judicial power. This was even more clearly true in Freund's day than it is in ours. It is significant that the opening paragraph of his Standards adverts to these problems. He does not hide his conviction that many of the then recent decisions invalidating legislative acts on constitutional grounds were mistaken. If Freund's position is not to be misapprehended, however, it should be clearly understood that although he believed that many judicial applications of constitutional standards were mistaken and much constitutional doctrine ill-conceived, he never challenged the legitimacy of judicial review or doubted its necessity in the American system.

Freund's comments on the relations of legislative and judicial power lead naturally to the primary theme of the Standards: the search for adequate principles to guide modern legislative law making. As has been observed, he regarded the judicial function as vital and could assert that "our main reliance for the perpetuation of ideals of individual liberty must be in the continued exercise of the judicial

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prerogative." 1 But equally important is Freund's strongly expressed conviction that constitutional law is incapable of serving as an adequate source of legislative principles. This theme recurs throughout Freund's major works. It seems not too much to say that one of his principal scholarly objectives was the freeing of American public law from what he conceived to be the crippling dominance of constitutional law. 2

Freund identifies a number of considerations which, in his view, render constitutional law an insufficient guide for modern legislation. In one of his articles, he argues that the adversary process in constitutional litigation is incapable of unearthing the range of facts required for sound judgments on the wisdom of legislative measures. 3 At other times, he emphasizes the inevitable vagueness of constitutional standards. Even when the legislation under attack suffers from serious deficiencies, judicial condemnations expressed in the language of due process or liberty of contract rarely expose the vice with necessary precision. 4 Of perhaps particular relevance to the modern reader is his argument that because constitutional adjudication is primarily concerned with the limits of power, it provides poor guidance for the wise uses of conceded power. Reliance on constitutional standards may therefore result in lesser rather than greater protections of individual rights. "[T]he extreme of power tends to become the norm of legislation. For unfortunately the only utterances upon the constitutional justice of legislation that carry any authority are those from the courts; from this lawyers are likely to conclude that there are no non-judicial principles applicable to constitutional rights; and legislators (many of whom are lawyers) seem to believe that the principles enforced by the courts are the true and only principles of legislation." 5 On another occasion, he wrote: "[W]e have become so accustomed to rely upon written constitutions for legislative restraint, that we have lost to a considerable degree the habit of voluntary restraint which is politically so much more valuable." 6 We are in danger of "confusing what is sustainable with what is right." 7 These points have been made frequently since Freund wrote, and undoubtedly, had been expressed before; but they have rarely been made as effectively.

Ultimately, Freund concludes that valid principles of legislation can be discovered only by a study of legislation itself; and he visualizes a science of jurisprudence which would make the statutory law the object of intensive analysis and historical investigation. "It is indeed from the combined legislative, administrative, and judicial experiences that we gather the problems of legislation and their solution, but the solution does not proceed from or rest upon judicial authority, but must be worked out upon the basis of a discipline hardly recognized either in England or in this country—an independent science of jurisprudence." 8

Freund made no secret of his dissatisfaction with the state of legal scholarship in his time. In the Standards he remarks: "Unfortunately, hardly any systematic thought has been given to problems of jurisprudence in their constructive aspect. . . . In America the critical treatment of technical legislative problems is . . . meager and unsystematic." 9 It is apparent that the preoccupations of legal scholarship have substantially changed since Freund's day and, from Freund's point of view, for the better. It would not be accurate to suggest that Freund's influence was primarily responsible for these changes. The logic of events made it inevitable that the law schools could not forever confine themselves to the elaboration and rationalization of common-law doctrine, important as that undertaking undoubtedly is. But Freund foresaw the path that much modern legal scholarship would be required to follow, and he is entitled to recognition for his vision and his constructive example.

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1Freund, Standards of American Legislation 212-213 (1917). Hereinafter cited as "S.A.L."
2Freund, "Jurisprudence and Legislation" 11-12 (Vol. VII, Congress of Arts and Sciences, Universal Exposition, St. Louis, 1904).
3S.A.L. at 211-212, 220.
4Id. at 284-285.
5Id. at 214.
6S.A.L. at 214.
7Id. at 251-252.
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Max Rheinstein
by Gerhard Casper

Chapter Seven of Max Weber's *Economy and Society* is entitled "Sociology of Law." Its data are taken from almost anywhere and any age. Its range is formidable, its German impenetrable at times even for the German reader. My first attempt to work through it was made in a deck chair on a boat from Bremerhaven to New York. I struggled for eight days, but, on arrival in New York, had to admit defeat. A few weeks later, however, while a student at Yale, I discovered the key to *Finnegan's Wake*—an annotated American edition of Weber's writings on the sociology of law. In its preface the editor stated his hope to have produced an English text "which is not only accurate but also more readable than the German original." This was obviously the book I needed. It was also my first encounter with Max Rheinstein.

In the preface, Max identified himself as having had "the privilege of attending classes of Max Weber's at the University of Munich." When he undertook *Max Weber on Law in Economy and Society*, Max Rheinstein was in his fifties, a scholar of world renown. The commitment to scholarship, and the generosity and loyalty expressed in his shouldering the burden of editing, introducing, annotating, and, jointly with his distinguished Chicago colleague Edward Shils, translating Weber were typical of Max. So was the splendor of the accomplishment.

In order to make the text fully intelligible and useful, Max wrote, it had to be commented upon. "As the readers will observe, the range of Weber's knowledge was phenomenal... Weber draws upon Hindu, Chinese, Islamic or primitive Polynesian law just as well as on the legal systems of Rome, England, medieval Europe, or modern Germany, America, or France. In many, if not in most cases, he hints at the phenomena referred to rather than explain them." It was Max who did the explaining for us. Who else could have? The range of Max's knowledge was equally phenomenal. And it was available to his colleagues and students, without the slightest diminution, until his death at age seventy-nine.

In the preface to *Max Weber on Law in Economy and Society*, Max also queried how the reader can know whether Weber is correct in all those statements which he uses as the basis of his generalizations and conclusions. "They had to be checked and their sources had to be found... Not even Max Weber could be expected to be infallible, but the number of serious mistakes turned out to be unbelievably small." Max checked Weber. But even Max Rheinstein cannot be expected to be infallible. Who will check Max's sources? Only Max could.

The Max Rheinstein bibliography includes some 350 titles covering his major substantive fields—family law, decedents' estates, and the conflicts of laws—as well as comparative law and legal theory. The bibliography attests not only to the universality of his knowledge and learning about substantive law, but also to his empiricist attitude towards legal scholarship. The latter is perhaps best expressed in his book *Marriage Stability, Divorce and the Law* (1972). The work is concerned with how divorce law works, or rather does not work, in industrial societies of the twentieth century. The data are drawn from various countries and include almost everything of empirical importance, from legislation and statistics to complex cultural data not amenable to quantitative analysis.

In the world of the American law school which precariously pursues both "is" and "ought," Max was committed to being, in Weber's words, a teacher, not a leader. At what happened to universities the world over in the wake of the sixties, he looked with bemusement. Teaching did not, for Max, include politics. And a splendid teacher Max was, as can be measured by the admiration, friendship, and warmth