

## THE LAW PROFESSOR REFUGEE

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### I. INTRODUCTION

#### A. *A New Discussion*

The fate of those European legal scholars who escaped the inferno of 1933-1945 has reached the level of academic discussion.<sup>1</sup> So far this discussion has emphasized the extent to which these jurists have had an impact on the development of legal ideas within their host countries, especially within the United States.

However, focusing on the impact of these refugees does not illuminate the full complexity of the subject. It highlights the successes abroad, while leaving the darker background in obscurity. People might come to believe that “emigration” — as it is wrongly called — was not that bad after all, especially “emigration” to America.<sup>2</sup>

#### B. *The Darker Side*

An enthusiastic picture of emigration does not show the sad reality of expatriation — of being driven out of one’s native country and into a very different geographic and cultural environment. From Vienna to Buffalo (Arthur Lenhoff), from Berlin to Ann Arbor (Ernst Rabel), from Prague to Dallas (Jan Charnatz). These moves were much more than just changes in urban environment. The average German or American lawyer today is unable to imagine the brutality of the cultural shock that accompanied these changes.<sup>3</sup>

The shock is even greater for law professors than for many other professionals. They must survive in a completely different legal system without the instrument they are best trained in, their native lan-

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1. For background materials, see HORST GÖPPINGER, *JURISTEN JÜDISCHER ABSTAMMUNG IM “DRITTEN REICH” — ENTRECHTUNG UND VERFOLGUNG* (2d ed. 1990); GUNDOLF S. FREYERMUTH, *REISEN IN DIE VERLORENVERGANGENHEIT — AUF DEN SPUREN DEUTSCHER EMIGRANTEN* (1990).

2. Ernst Stiefel, *Die deutsche juristische Emigration in den USA*, *JURISTENZEITUNG* 421 (1988).

3. M. Martinek, *Der Rechtskulturschock. Anpassungsschwierigkeiten deutscher Studenten in amerikanischen Law Schools*, 24 *J. SCHULUNG* 92 (1984).

guage. Jurists operate with, and think in, language; it is a matter of life or death for their professional activity. When their linguistic environment is changed, they lose their natural freedom of expression. They are thrown into the cage of a foreign language — a language that will seldom come as naturally as is necessary to express their creativity. The law professor refugee is forced to play on a violin of stone. He often loses his emotional and intellectual identity!

This loss of identity, however, is not only a matter of language, it is also a loss of social status — a loss the more deeply felt the higher the status at home. Leaving your home country means leaving your social status behind you; it means turning from “Somebody” into “Nobody.” A few close friends may recognize your eminent status, but it is a status of the past, and even your closer academic neighbors will often not remember or not recognize it.

The harsh reality of this situation is too often overlooked. There is the danger that only the successful are remembered — and, thus, the extent of the tragedy is increased:

*Denn die einen sind im Dunkeln  
Und die andern stehn im Licht;  
Und man siehet die im Lichte  
Die im Dunkeln sieht man nicht.*

[For there are those who stand in the dark  
and others who stand in the light;  
and one sees those who are in the light,  
but those in the dark remain unseen].<sup>4</sup>

We should not forget those who struggled to live in a foreign culture and who only found recognition and peace after returning to their native culture. We should remember the names of Jan Charmatz,<sup>5</sup> Ludwig Hamburger,<sup>6</sup> and Richard Honig.<sup>7</sup>

In this essay we seek to cast light on this loss of identity. In doing so, we hope to bring out from the shadows some of the frustrations and tribulations of the law professor refugee; and, thus, to illuminate the darker side of such an existence.

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4. BERTOLT BRECHT, DIE DREIGROSCHENOPER 109 (1955) (*Die Schlusstrophen des Dreigroschenfilms*) (The Concluding Verses of the Three Penny Movie).

5. Jan Paul Charmatz (1909 - 1984).

6. Ludwig Hamburger (1901 - 1970). See 5 WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG 20-26 (1977).

7. Richard Martin Honig (1890 - 1981). See FESTSCHRIFT FÜR RICHARD M. HONIG (1970).

## II. ARTHUR LENHOFF (1885-1965)

### A. *Success in America*

We start our story with Arthur Lenhoff. Here we encounter a real success story — at least at first glance. Arthur Lenhoff had two almost equally successful careers, the first in Austria, the second in the United States.<sup>8</sup> He was a highly successful lawyer in Austria, a judge of the Austrian Constitutional Court, and a prolific author.<sup>9</sup> He became a well-known, beloved “Distinguished Professor” at the New York State University of Buffalo and he published extensively in the leading American law reviews. His article, *The Present Status of Collective Contracts in the American Legal System*,<sup>10</sup> was even referred to by the United States Supreme Court.<sup>11</sup>

### B. *Struggle for Survival*

Compared with other refugee scholars, such as Ernst Rabel, Lenhoff had two advantages when he arrived in the United States in 1938 after a narrow escape from Austria. He was 53 years old and he came without the illusion of being able to rely on former achievements. Nevertheless, his beginnings were very hard indeed. In 1939, he started over as a librarian at the Law School in Buffalo while at the same time undertaking to study for the New York bar examination. Touster gives us a moving account:

His age, the fall from eminence, the new language, and the profession itself — an entirely different system of law — all made it more likely that Arthur Lenhoff would end as an insurance broker or clerk in an import house than as a distinguished scholar of the common law.<sup>12</sup>

Touster gives the following explanation:

To illuminate the success of a [53]-year-old student’s life, Goethe’s epigram might be read: “Everybody wants to *be* somebody: nobody wants to *grow*.” And then, as if speaking of the Dr. Lenhoff many of us knew, in words he himself might have quoted, Goethe tells us: “To measure up to all that is demanded of him, a man must overesti-

8. See Saul Touster, *Reflections on the Emigré Scholar: In Memory of Arthur Lenhoff*, 16 BUFF. L. REV. 1 (1966); Rudolf Schlesinger, *Arthur Lenhoff*, 30 RABELS ZEITSCHRIFT 201 (1966).

9. See Balfour Halévy, *Bibliography of the Writings of Arthur Lenhoff*, 16 BUFF. L. REV. 267 (1966).

10. 39 MICH. L. REV. 109 (1941).

11. Clyde W. Summers, *American and European Labor Law: The Use and Usefulness of Foreign Experience*, 16 BUFF. L. REV. 210, 210 n.3 (1966).

12. Touster, *supra* note 8, at 3.

mate his capacities.”<sup>13</sup>

This required an “extreme vitality” [*ungeheure Spannkraft*], as his Austrian colleague, Fritz Schwind, put it.<sup>14</sup> This made Lenhoff the transmitter of legal ideas across the Atlantic — a “cross-fertilizer” in the full sense of the word.<sup>15</sup> But to quote Touster again:

It would perhaps have surprised him to think, during his darker moments, that he himself would become part of that cross-current.<sup>16</sup>

### C. *The Darker Moments*

Arthur Lenhoff rarely mentions the “darker moments” of which Touster speaks. A slight indication can probably be taken from his last published work, a review of Horst Göppinger’s book, *Der Nationalsozialismus und die jüdischen Juristen* [The National Socialism and the Jewish Lawyer].<sup>17</sup> There, Lenhoff speaks of Göppinger’s book as a “description of a historical tragedy” [*die Schilderung einer historischen Tragödie*], a tragedy in which Lenhoff was a victim.

But sometimes there are places in an author’s work that give us an insight into his deeper feelings, although on the surface, he speaks of somebody or something else. We are fortunate that Lenhoff left us his *Goethe as Lawyer and Statesman*,<sup>18</sup> a masterpiece in the study of law and literature. His views about Goethe mirror his own personality, his own aspirations, and his own tribulations.

This article on Goethe is of such central importance for Lenhoff’s personality because, as Touster tells us, Goethe’s works were the “touchstone” of Lenhoff’s life and Goethe’s words “were in a continual flux with his own.”<sup>19</sup> Lenhoff characterizes himself by the quotes he selects from Goethe’s work. We give a short selection:

A vigorous advocate of a just cause and a keen mathematician searching the firmament, both are equally god-like.<sup>20</sup>

In Lenhoff’s eyes, Goethe was true to his own standard: “The first and last thing that is required of a genius is love of the truth.”<sup>21</sup> And

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13. *Id.* at 4.

14. Fritz Schwind, *Prof. Dr. Arthur Lenhoff*, 16 *BUFF. L. REV.* 6 (1966).

15. Touster, *supra* note 8, at 5.

16. *Id.* at 4 - 5.

17. 30 *RABELS ZEITSCHRIFT* 351 (1966).

18. 1951 *WASHINGTON UNIV. L.Q.* 151.

19. Touster, *supra* note 8, at 4.

20. Lenhoff, *supra* note 18, at 155 (quoting *Sprüche in Prosa in 3 GOETHE SÄMTLICHE WERKE* 300 (1850)).

21. *Id.* (quoting *MAXIMS AND REFLECTIONS* [Maximen und Reflexionen], No. 336, at 133 (B. Saunders trans., 1893)).

when describing Goethe, Lenhoff describes himself:

Fate such a bold, untrammelled spirit gave him  
As forward, onward, ever must endure.<sup>22</sup>

But what about the dark moments? We think we find them at the very end of his remarkable article. There, Lenhoff concludes:

For Faust, therefore for Goethe, freedom is an essential part of the right *Weltanschauung*, a way of looking at life and, being so, it must be lived every day and not only on some occasions. Never was this idea more clearly expressed than in the last words of the dying Faust:

The last result of wisdom stamps it true:  
He only earns his freedom and existence,  
Who daily conquers them anew.  
[*Das ist Der Weisheit letzter Schluss:*  
*Nur der verdient sich Freiheit wie das Leben,*  
*Der täglich sie erobern muss*].<sup>23</sup>

What a constant struggle for freedom and existence is the refugee law professor's fate. Neither weakness nor nostalgia is allowed; the future has to be conquered every day anew!

#### D. The Final Truth

The finale of Lenhoff's life shows the truth of this statement in a drastic way. The last work he completed before his death was a major treatise on jurisdiction and judgments in conflicts and international law. Touster writes:

It is to be brought out as a multi-volume publication by the Parker School of Foreign and Comparative Law of Columbia University, and may have its place with Rabel's famous work on conflicts.<sup>24</sup>

Schwind also announces the imminent publication of this last work:

*Noch in der Emeritierung vollendete er in ungebrochener Spannkraft ein dreibändiges Werk rechtsvergleichenden Inhalts, das im Rahmen der Parker School der Columbia University . . . herausgegeben wird.* [After his [Lenhoff's] retirement he completed, with his characteristic energy, a three-volume treatise on comparative law that will be published . . . with the Parker School of Columbia University].<sup>25</sup>

This multivolume treatise never appeared.

22. *Id.* at 156 (quoting *Faust*, Part I, Scene IV, lines 326 - 27 (Bayard Taylor trans.)).

23. *Id.* at 173 (quoting *Faust*, Part II, Act V, Scene VI, lines 64 - 67 (Bayard Taylor trans.)).

24. Touster, *supra* note 8, at 5 n.11.

25. Schwind, *supra* note 14, at 6.

He only earns his freedom and existence,  
Who daily conquers them anew.

As long as he *can*!

### III. ERNST RABEL (1874-1955)

#### A. *We Did Not Know Who He Was*

The contrast between apparent success and hidden frustrations marks Ernst Rabel's story in the United States even more strongly. He had a great career in Germany, culminating in a chair at the University of Berlin and the directorship of the *Kaiser Wilhelms-Institut für ausländisches und internationales Privatrecht* [Emperor Wilhelm-Institute for Foreign and International Private Law]. He arrived in the United States in September 1939, at the age of 65, and spent most of the remaining 17 years of his life in Ann Arbor, Michigan. Common opinion holds that he was happy in his position as a longtime research associate at the University of Michigan Law School. Was he not, after all, the author of the famous four-volume treatise on the conflict of laws;<sup>26</sup> the masterpiece of his very productive late period?

But how unalloyed was this success of his golden years? Did these four massive volumes influence the direction of the conflict of laws in the United States or anywhere else? Were they more praised than read or quoted? Could it be that they are just the result of an effort to show that the author was "somebody," that he was more than a research scholar relying on the support of such friends as Max Rheinstein (his former assistant in Munich and Berlin), Hessel Yntema (his colleague in Ann Arbor), William Draper Lewis (Director of the American Law Institute), and others?

In 1971, Bernhard Grossfeld, who was then a visiting professor at the University of Michigan Law School, was asked by E. Blythe Stason (1891-1972) to come into his office. Dean Stason, as he was still addressed, began the conversation by referring to Grossfeld as a *German* professor, and he expressed his intention to talk about a subject that had worried him for a long time: "I want to talk with you about Ernst Rabel." Dean Stason had been troubled for many years by the question, "Why was Ernst Rabel not happy when he was with us in Ann Arbor, even though the faculty did everything it could to make him feel at home?" Dean Stason answered his own question: "I have thought about it over and over again. Now I have found the

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26. ERNST RABEL, *THE CONFLICT OF LAWS, A COMPARATIVE STUDY* (1st ed. 1945 - 1958).

answer: We did not know who he *was!*" Had they missed the genius? This impression is partly confirmed by a letter from William Draper Lewis to Rabel:

I found him [Stason] very enthusiastic about you and also about the work[.] [B]ut I cannot say that I went away with the impression that I had been talking to a man who would translate such an interest and enthusiasm as he had into the kind of co-operation that I would need to help make Michigan the center of this work [on the conflict of laws].<sup>27</sup>

Dean Stason and the faculty at the University of Michigan Law School had certainly done everything they could, but Rabel must have felt that it was not known who he *really* was — a situation beyond the control and beyond the responsibility of his benefactors.

### B. *Who Was Ernst Rabel?*

Who was Ernst Rabel during these years in Ann Arbor? In what way would he have liked to be recognized?

The American Law Institute did everything it could to "position" Rabel in the American academic world and to provide him with funds. The Institute sponsored his entry into the United States by contracting with him to work on a comparative study of the conflict of laws. Following completion of the first volume of Rabel's study in 1941, the Institute circulated a four-page pamphlet promoting the work.<sup>28</sup> The pamphlet describes Rabel's career as follows:

Dr. Rabel has had an unusual career. Born in Austria, he studied law in his home country, in Germany and in France. He practiced law as an attorney in Vienna, taught Roman Law and modern Civil Law in Germany and Switzerland, and was active as a superior court judge in these two countries, on the German-Italian Mixed Arbitral Tribunal in Rome and on the Permanent Court of International Justice (World Court) at the Hague. He was the founder and for many years the director of the Kaiser Wilhelm Institute of Foreign and International Private Law, an institution devoted to research as well as to giving practical advice and information to the German Foreign Office, the legislative authorities, courts and lawyers of Germany and the German business firms engaged in international trade. Under Professor Rabel's direction, the Institute established the largest law

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27. Letter from William Draper Lewis to Ernst Rabel (June 7, 1940)(on file with American Law Institute Archives).

28. American Law Institute, *A Treatise on Comparative Conflict of Laws* by Ernst Rabel (undated) (circulated with a cover memorandum dated Sept. 30, 1941)(on file with American Law Institute Archives).

library in Europe and trained a staff of German experts in the various legal systems of the world. When the League of Nations established its International Institute for the Unification of Private Law, Professor Rabel's position as the leading German scholar in the field was recognized by his appointment as German member of the board and by his being commissioned with the drafting of an internationally uniform act on the sale of goods.

When the National-Socialist regime took power in Germany it did at first not dare to move against a man of Professor Rabel's attainments. He is a Christian, his wife an Aryan, and a so-called 'taint' of Jewish blood was not generally known. Security for him, however, was short-lived and he was subjected to typical Nazi treatment. He was first deprived of his position as head of the Institute which he had created and made famous; his salary was reduced and finally stopped; and eventually he was forbidden to go to his Institute or to enter a public library.<sup>29</sup>

These words accurately summarize Rabel's splendid career in Germany before he came to the United States — but great men are not interested in recognition of their past careers. Those with creative minds want recognition of their creativity; this creativity is the quintessence of their personality and of their life work. Rabel surely resented the (unavoidable) lack of recognition. When Rabel was appointed as research associate at the University of Michigan Law School in 1942, Max Rheinstein wrote to William Draper Lewis: "It seems that the new turn of events will do a great deal to restore his self-confidence, which I felt was severely shaken by the complete neglect from which he was suffering so far."<sup>30</sup> With this appointment, Rabel's situation improved — but the appointment could not satisfy his expectations. How could it, when his main talents remained unspent?

### C. *Master of Sales Law*

Among Ernst Rabel's expectations was a belief that his encyclopedic knowledge of sales law would be an asset he could draw on if and when U.S. commercial law was revised. As Rabel was well aware, no other scholar had his mastery of comparative and international sales law. His book, *Das Recht des Warenkaufs* [The Law of

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29. *Id.* at 2 - 3. The latter part of this statement was confirmed by Professor Ludwig Schnorr von Carolsfeld, Erlangen, Germany, in a conversation with Bernhard Grossfeld. Von Carolsfeld's parents had been longtime neighbors of the Rabels in Munich.

30. Letter from Max Rheinstein to William Draper Lewis (Feb. 12, 1942)(on file with American Law Institute Archives).



the Sale of Goods],<sup>31</sup> was the classic text in this field. Into this book he had invested all his knowledge, experience, and energy — and all his emotions. Paul Heinrich Neuhaus, a long-time member of the Max Planck-Institut in Hamburg (successor to the Kaiser Wilhelms-Institut), used to say: “Rabel suffered through the book” [*Rabel hat das Buch durchlitten*].

Rabel also regarded himself as the mastermind behind the draft uniform international sales law — and rightly so. He had proposed in 1929 that the Rome Institute undertake the preparation of a uniform sales law, and throughout the 1930s he had actively participated in drafting the law as a member of the Institute sales committee.<sup>32</sup> The resulting text, he wrote, was a “milestone in the development of private law and of international law” [*Markstein in der Entwicklung des Privatrechts und des internationalen Rechts*].<sup>33</sup>

Surely Rabel must have thought it fortuitous when he arrived in the United States to discover that the Uniform Sales Act was to be revised.<sup>34</sup> Even more fortuitously, Karl Llewellyn — with whom Rabel had already collaborated — was to be the principal draftsman of this sales chapter of a proposed Uniform Commercial Code.

#### D. Karl Llewellyn and German Law

Karl N. Llewellyn (1893-1962) was the American law professor Ernst Rabel probably knew best when he came to the United States. That they were acquainted is not surprising given Llewellyn's close contacts with Germany and his excellent command of the German language.<sup>35</sup>

Llewellyn stands out as the promoter of the Realist movement in the United States; a movement that owes much to the German “Free Law” movement from the beginning of this century. The parallels are

31. ERNST RABEL, *DAS RECHT DES WARENKAUFS: EINE RECHTSVERGLEICHENDE DARSTELLUNG* (Vol. 1, 1936; Vol. 2, 1958).

32. INSTITUT INTERNATIONAL DE ROME POUR L'UNIFICATION DU DROIT PRIVÉ, *PROJET D'UNE LOI INTERNATIONALE SUR LA VENTE* (S.d.N. 1935 - U.D.P. - Projet I) (1935); INSTITUT INTERNATIONAL DE ROME POUR L'UNIFICATION DU DROIT PRIVÉ, *PROJET D'UNE LOI UNIFORM SUR LA VENTE INTERNATIONALE DES OBJETS MOBILIERS CORPORELS ET RAPPORT* (S.d.N. 1939 - U.D.P. - Projet I(1)) (2d ed. 1939).

33. Ernst Rabel, *Der Entwurf eines einheitlichen Kaufgesetzes* (part 1), in 9 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 1, 5 (1935).

34. Zipporah Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 *HARV. L. REV.* 465, 477 - 83 (1987).

35. See WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 106, 108, 479 - 87 (1973); William Hefferman, *Two Stages of Karl Llewellyn's Thought*, 11 *INT'L J. SOC. L.* 134 (1983); Siegfried Rätzer, *Abtrünnige und ein amerikanischer Held*, 35 *Täglichen Rundschau* at 1185 (Dec. 12, 1915).

striking.<sup>36</sup> The German movement was first introduced to the American legal community by Roscoe Pound,<sup>37</sup> whose "sociological jurisprudence" incorporates many ideas from these German authors.<sup>38</sup> Llewellyn, in turn, found the references in Pound and assimilated these ideas into his own jurisprudence.<sup>39</sup> In his early writings, Llewellyn acknowledged Pound's vital contribution,<sup>40</sup> although he later tried to conceal it at times.<sup>41</sup>

The German influence on Karl Llewellyn's legal thinking is particularly evident in his early writings on legal realism. His provocative article, *A Realistic Jurisprudence — The Next Step*,<sup>42</sup> shows this in quite a few places. The same is true of his next article, *Some Realism About Realism — Responding to Dean Pound*,<sup>43</sup> where he uses his famous phrase: "[I]n the beginning was not a Word, but a Doing" — a quote from Goethe's *Faust I*: "*Im Anfang war die Tat*" [In the beginning was the *Doing*].<sup>44</sup>

The influence of German law on Llewellyn is also visible in the Uniform Commercial Code, although this influence is not acknowledged.<sup>45</sup> Many hands may have participated in the drafting of the Code but Llewellyn was the acknowledged intellectual driving force. "Make no mistake," Grant Gilmore has written, "this Code was Llewellyn's Code."<sup>46</sup> And Llewellyn's knowledge of German sales

36. James E. Herget & Stephen Wallace, *The German Free Law Movement As the Source of American Legal Realism*, 73 VA. L. REV. 399, 437 (1987).

37. *Id.* at 420.

38. As to Pound's role, see N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302, 1305 (1989).

39. *Id.* at 1311; Herget & Wallace, *supra* note 36, at 440 - 52.

40. Karl N. Llewellyn, *Some Realism about Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1255 n.74 (1931)[hereinafter *Some Realism*]; Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 435 n.3 (1930)[hereinafter *Realistic Jurisprudence*]; Karl N. Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665, 665 n.1 (1925).

41. Hull, *supra* note 38, at 1306, 1317.

42. *Realistic Jurisprudence*, *supra* note 40.

43. *Some Realism*, *supra* note 40.

44. *Id.* at 1222. The quotation from Goethe's *Faust* is to Part I, Scene III, line 60 (authors' English translation).

45. See generally Shaël Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125 (1982); Stefan Riesenfeld, *The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples*, 37 AM. J. COMP. L. 1, 4 - 6 (1989); James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987); Wiseman, *supra* note 34.

46. Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962).

law he owed to some extent to his brief collaboration with Ernst Rabel in the early 1930s.

### *E. The Rabel-Llewellyn Connection*

Their common interest in sales law first brought Rabel and Llewellyn together. In April 1931, Rabel invited Llewellyn to participate as a "private expert" [*privater Sachkenner*] on the Rome Institute's sales committee.<sup>47</sup> Llewellyn promptly accepted the invitation,<sup>48</sup> and, with characteristic energy, he rapidly made himself familiar with the work of the committee. During his sabbatical in Leipzig the following year, Llewellyn also participated for a week at one of the meetings of the sales committee in Rome.

Following his return to New York, Llewellyn asked Rabel to have his book, *Präjudizienrecht und Rechtsprechung in Amerika* [Precedents and Courts in America],<sup>49</sup> reviewed in the *Zeitschrift für ausländisches und internationales Privatrecht* [Journal for Foreign and Private International Law] which Rabel edited:

I am hoping hard that your Journal will want to review it . . . . I hope you will give the review as much space as you reasonably can, and ask the reviewer to explore, not only the light the book may throw on the American system of precedent, but also what it may have to offer toward an understanding of the judicial process in Germany.<sup>50</sup>

Rabel promptly opened his *Zeitschrift* to Llewellyn. In the 1933 volume of his *Zeitschrift*,<sup>51</sup> Rabel gave Llewellyn an opportunity to present his *Cases and Materials on the Law of Sales*.<sup>52</sup> Later in the

47. Letter from Ernst Rabel to Karl N. Llewellyn (Apr. 28, 1931), in LLEWELLYN PAPERS, GERMAN MATERIALS D.IX ("Unification of Law").

48. Letter from Karl N. Llewellyn to Ernst Rabel (May 31, 1931) noted in letter from Ernst Rabel to Karl Llewellyn (June 11, 1931), in LLEWELLYN PAPERS, GERMAN MATERIALS D.IX ("Unification of Law").

49. Karl N. Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika* (1932) translated in THE CASE LAW SYSTEM IN AMERICA (Paul Gewirtz ed. & Michael Ansaldi trans., 1989).

50. Letter from Karl N. Llewellyn to Ernst Rabel (Dec. 29, 1932), in LLEWELLYN PAPERS, GERMAN MATERIALS D.IX ("Unification of Law").

51. Karl N. Llewellyn, Book Review, 7 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 168 (1933). A footnote to the review explains why Rabel asked Llewellyn to write this "self-notice":

Books of authors who are close to the Institute and books published by the Institute, will normally not be reviewed. To inform the reader of the *Zeitschrift* about the content and the intentions of such books, the editor asks the authors to present the book themselves.

*Id.* at 168 n.1 (authors' translation).

52. KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930).

same volume<sup>53</sup> Rabel published a review of the *Präjudizienrecht und Rechtsprechung in Amerika* [Precedents and Courts in America], for which Llewellyn had asked. The review must have satisfied Llewellyn's hopes. The reviewer was Hans Wüstendorfer, who taught at the University of Hamburg and was at the time the leading German commercial law professor. His extensive review of Llewellyn's book provides a brilliant overview and a discussion from the German point of view. He presented the book as "an extremely meritorious and successful undertaking" [*höchst dankenswerter und wohlgelungener Versuch!*] and its author as "already very well known" [*bereits rühmlichst bekannt*].<sup>54</sup>

Wüstendorfer's superlatives were matched by Llewellyn's own superlatives in praise of Rabel's Institute. In his December 1932 letter to Rabel asking for a review of his book, Llewellyn had concluded, "I feel increasingly, as my own thinking about comparative law gains perspective, that the monographs your Institut [sic] is putting out represent one of the most significant approaches we have yet run into."<sup>55</sup>

Both Rabel and Llewellyn recognized the importance of this collaboration. In 1940 Rabel wrote:

I have much regretted that the funds were not enough to have American experts come across the ocean several times. Only once, I had the good fortune to meet Professor Llewellyn in Germany and to bring him with me to Rome for a committee meeting in Rome about the Sales Act.<sup>56</sup>

Llewellyn also acknowledged — at least formally — the importance of this contact. Writing Rabel at the end of his sabbatical leave, Llewellyn expressed his high esteem for Rabel and thanked him for having made it possible to learn more about European sales law, "*möchte Ihnen meine Anerkennung dafür aussprechen, dass Sie es mir ermöglichen haben, das europäische Kaufrecht näher kennen zu lernen*" [I should like to acknowledge that you made it possible for me to get to know European law of sales in more detail].<sup>57</sup>

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53. Hans Wüstendorfer, Book Review, 7 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 739 (1933).

54. *Id.* at 739.

55. Letter from Karl N. Llewellyn to Ernst Rabel (Dec. 29, 1932), in LLEWELLYN PAPERS, GERMAN MATERIALS D.IX ("Unification of Law").

56. Ernst Rabel (1874-1955): *Schriften aus dem Nachlass "Vorträge — Unprinted Lectures,"* 50 RABELS ZEITSCHRIFT 251, 301 - 02 (1986). Cf. Ernst Rabel, *Der Entwurf eines einheitlichen Kaufgesetzes* (part 1), 9 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1, 4 (1935).

57. Letter from Karl N. Llewellyn to Ernst Rabel (Mar. 31, 1932)(authors' English translation), in LLEWELLYN PAPERS, GERMAN MATERIALS D.IX ("Unification of Law").

As a result of their collaboration, Rabel believed that he had a close personal relationship with Llewellyn and that the latter held him in high esteem. Would it not be reasonable for Rabel to expect the drafters of the Uniform Commercial Code to receive him with open arms?

*F. The Rome Institute's International Sales Law and the Uniform Commercial Code*

When Ernst Rabel came to the United States he brought with him the revised text of the Rome Institute's draft on international sales law. During the following decade, Rabel tried to persuade Llewellyn and the sponsors of the Uniform Commercial Code to coordinate their draft with that of the Rome Institute.

Even before his arrival, Rabel had laid the groundwork for coordinating the drafts. In an article published in the 1938 volume of the *University of Chicago Law Review*, Rabel wrote:

The purpose of this article is to introduce to the American legal world the Draft of an International Sale of Goods Act elaborately prepared by a special committee of the International Institute at Rome for the Unification of Private Law . . . . In the United States until now, this work seems to be hardly known, although the committee on one occasion had the privilege of the presence of Professor Karl N. Llewellyn . . . .<sup>58</sup>

Within months after his arrival, Rabel was writing Llewellyn with detailed advice on the proposed amendments to the Uniform Sales Act. In the following January 1940 letter, Rabel wrote:

In our recent International Draft we have endeavored to express the fundamental notions in accordance with the ordinary course of commercial sales operations. So long as the American Act [of 1906] is based upon principles which are contrary to commercial notions, no amendment can be useful.<sup>59</sup>

While Llewellyn's subsequent drafts conformed more closely to "commercial notions," Rabel continued to criticize the drafts for retaining too many concepts from the past. "[R]epeatedly the [1944 "Proposed Final Draft No.1"] Draft seems to have accomplished unhappy compromises between the accustomed and the desirable ways of asking and answering questions."<sup>60</sup> When the solutions of the

58. Ernst Rabel, *A Draft of an International Law of Sales*, 5 U. CHI. L. REV. 543 (1938).

59. Letter from Ernst Rabel to Karl N. Llewellyn (Jan. 4, 1939 [sic 1940]), in LLEWELLYN PAPERS, UNIFORM COMMERCIAL CODE J.XXV.3 (Correspondence: 1939).

60. Ernst Rabel, *Observations On the Revised Uniform Sales Act, Final Draft No. 1*, at 3

American draft and the Institute text did conform with the expectations of merchants, the two laws almost always agreed (*concordent*).<sup>61</sup>

*La relation fondamentale des deux projets est évidente, tandis que le choix des problèmes, leur présentation et les décisions de portée secondaire, diffèrent. Dans notre Projet, après une comparaison consciencieuse des lois existant dans le monde, on a choisi un minimum de règles caractérisant la structure moderne de la vente, qui formerait une base juridique solide, commercialement saine et acceptable dans tous les pays. Le Draft américain a été prévue en partie pour trancher des centaines de doutes d'interprétation qui se sont accumulés au cours d'une jurisprudence immense. Mais le fait qu'aux États-Unis on a pensé presque exclusivement au marché interne n'est pas d'une importance considérable.*

[The fundamental relation of the two drafts is evident, even though the choice of problems, their presentation and their solution of second-level issues may differ. In our draft, we chose, after a conscientious comparison of existing laws, to include the minimum number of rules that characterize the modern sale; rules that provide a solid juridical basis, that are commercially reasonable and that are acceptable in all countries. The American draft is influenced by the desire to resolve the hundreds of doubtful questions of interpretation that have arisen in a vast body of case law. That the United States has thought almost exclusively of its internal market is of little importance].<sup>62</sup>

Rabel urged a bolder break with the past by creation of a fresh body of rules.<sup>63</sup> If the Code drafters would only undertake extensive comparative research Rabel was confident that they would adopt solutions similar to those found in the Rome Institute's draft.<sup>64</sup>

At the very least, a common comparative legislative research, on the basis of this impressive draft, would provide fruitful lessons for each nation involved, an effort so far never sufficiently supported from the American side . . . . The Draft is such an accomplishment as to deserve perfection by every conceivable effort. In the mutual inspiration of some international collaboration, American legislation would achieve its own growth and exercise a mighty influence on the

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(June 25, 1946), in LLEWELLYN PAPERS, UNIFORM COMMERCIAL CODE J.VIII.2.d (1946: Sales).

61. ACTES DE LA CONFÉRENCE CONVOQUÉE PAR LE GOUVERNEMENT ROYAL DES PAYS-BAS SUR UN PROJET DE CONVENTION RELATIF À UNE LOI UNIFORME SUR LA VENTE D'OBJETS MOBILIERS CORPORELS (LA HAYE, 1ER-10 NOVEMBRE 1951) 110 (1952).

62. *Id.* at 110 - 11.

63. Ernst Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 429 (1950).

64. *Id.* at 440.

world.<sup>65</sup>

Rabel's comments, however, had little visible effect.<sup>66</sup>

Llewellyn's reaction was ambivalent. His December 1941 report states that the Rome Institute draft is "an interesting and significant Project . . . which deserves consideration especially in regard to any foreign-commerce provisions."<sup>67</sup> Nevertheless, the accompanying draft sales act contained no specific reference to the Institute text, and his later reports drop all references to it. Reacting to later comments by Rabel, Llewellyn speculated again that special rules for international trade might be inserted in the Code, but he resisted Rabel's suggestion that the sales provisions should be redrafted.<sup>68</sup>

While Llewellyn, ever curious, might have hesitated, the new Director of the American Law Institute did not hesitate at all.

We are not going into a revision of our revision of the Sales Act. We are going to finish a Code on schedule. I hope that we are not shocking "the lawyer trained abroad" as much as Rabel thinks. But even if we are, we shall have to live with our mistakes.<sup>69</sup>

Llewellyn did not protest. Whatever their merit, Rabel's comments had come too late.

### G. *A Clash of Personalities*

Why did Llewellyn not respond more favorably to Rabel? Why, in the voluminous correspondence files that survive in the Llewellyn papers kept at the University of Chicago, is there no correspondence between Rabel and Llewellyn after January 1940?

Similar questions have already been raised by Herget and Wallace with regard to the Realist movement. Why did the Realist writers not refer to the Germans, "who had first advanced most, if not all, of these ideas"? Why was the "German paternity" not acknowledged? Herget and Wallace offer the following explanation: "Perhaps anti-German feeling generated by World War I had an effect on the fashionability of German scholarship. There is evidence of anti-German attitudes even in the academic community."<sup>70</sup> But this does not

65. *Id.*

66. TWINING, *supra* note 35, at 312 - 13, 465 n.36.

67. THE REVISED UNIFORM SALES ACT: REPORT AND SECOND DRAFT 4 (Dec. 1941).

68. Letters from Karl N. Llewellyn to Herbert F. Goodrich (Jan. 14, 1947) and (Oct. 1, 1947)(on file with American Law Institute Archives).

69. Letter from Herbert F. Goodrich to Karl N. Llewellyn (Oct. 6, 1947)(on file with American Law Institute Archives).

70. Herget & Wallace, *supra* note 36, at 432. For examples of those feelings, these authors cite Robert Ludlow Fowler, *The New Philosophies of Law*, 27 HARV. L. REV. 718, 731

appear to explain Llewellyn's attitude towards Rabel. Llewellyn continued to keep close contact with Germany and with German colleagues — never hiding them.<sup>71</sup>

A more plausible explanation lies in Llewellyn's assessment of Rabel's scholarship. On March 31, 1932, the same day he wrote Rabel to thank him for having made it possible to learn more about European sales law, Llewellyn wrote Dr. John Wolff, then at the Columbia Law School:

*Eine Woche lang war ich in Rom mit ihm zusammen und arbeitete an dem Entwurf zur Vereinheitlichung des Rechts des internationalen Kaufs. Interessant, anstrengend, unpraktisch. Soweit ich sehen kann, ohne grosse Bedeutung. Wissenschaftlich kommt aber Tadelloses dabei heraus.*

[I was with [Rabel] in Rome for a week and worked on the Draft for the Unification of the International Law of Sales. Interesting, strenuous, impractical. As far as I can see, the project is without practical importance. The scientific result, however, will be flawless].<sup>72</sup>

Llewellyn prided himself in bringing the Uniform Sales Act into conformity with actual mercantile usage.<sup>73</sup> Apparently he was not persuaded that the international sales law had done likewise — despite Rabel's own assessment to the contrary.

Yet even this explanation does not fully capture the relationship between the two men. In the same letter to Dr. Wolff, Llewellyn wrote that he had met Rabel and found him much friendlier and kinder than he had expected, but that he could not imagine working with him.<sup>74</sup> He could not accept Rabel as a role model or as a partner. Llewellyn's reaction was, in other words, a parallel to his relationship with Pound: the creative maverick needed freedom from the distinguished "older scholar."<sup>75</sup>

It is no small wonder that these two great jurists were incompatible. On the one hand, we have Rabel, the civilian scholar trained in

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(1914)(containing critical annotation of Roscoe Pound); John M. Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287 (1918); *contra* Edwin M. Borchard, *Jurisprudence in Germany*, 12 COLUM. L. REV. 301 (1912).

71. See William Twining, *The Case Law System in America*, 100 YALE L.J. 1093 (1991)(reviewing KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (Paul Gewirtz ed. & Michael Ansaldi trans., 1989)).

72. Letter from Karl N. Llewellyn to Dr. John Wolff (Mar. 31, 1932) in LLEWELLYN PAPERS, GERMAN MATERIALS D.IX ("Unification of Law")(authors' English translation).

73. See Wiseman, *supra* note 34, at 492 - 95.

74. Letter to Dr. John Wolff, *supra* note 72.

75. N.E.H. Hull, *Some Realism About the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Correspondence, 1927 - 1931*, 1987 WIS. L. REV. 921 (1987).



the Roman Law, at the height of a German professor's career; on the other hand, we have the maverick Llewellyn, trained in the Common Law, who delighted in breaking new ground against old authorities.

#### *IV. Conclusion*

The lives of Arthur Lenhoff and Ernst Rabel show us different, but analogous aspects of the difficulties refugee scholars encounter in another cultural environment. Both Lenhoff and Rabel continued to play violins. Their violins, however, had become violins of stone, and the old notes no longer sufficed. Their violins played the melody and the rhythm roughly, without the natural overtones necessary for lasting success. We can evaluate the claims of success only when we explore the shadows and discover their darker moments, their frustrations, and their tribulations. The glitter of outward success should never be allowed to obscure the darker side — lest we forget, lest we forget!

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To flesh out the study of Ernst Rabel, the authors carried out research in the archives of the American Law Institute and in the Llewellyn Papers at the University of Chicago School of Law. At the Institute, we owe special thanks to Paul Wolkin, who arranged for one of us to examine its archival materials. Materials related to the Rabel's connection with the Institute are collected together in the Institute's library. Papers related to the Uniform Commercial Code are housed in the Institute's archives. Harry Kyriakodis, the Institute's archivist, gave valuable assistance in uncovering relevant material. At

the University of Chicago, thanks are due especially to Judith Wright and Charles Ten Brink who not only arranged for one of us to have access to the Llewellyn Papers, but also supplied copies of relevant materials. We also thank the institutions for permission to quote from, cite, and reproduce material from the Llewellyn Papers, the Rabel collection, and the Institute's archives. More precise locations of the sources cited may be obtained from the authors.

Dr. John Wolff, who knew both Rabel and Llewellyn, provided useful background and has permitted us to use the cited letter addressed by Llewellyn to him. Dr. Wolff continues to teach as an adjunct professor of law at Georgetown University Law Center.

Our studies of Lenhoff and Rabel are part of on-going research. Dr. Abbo Junker, the assistant to Professor Grossfeld, plans to carry out further research into Lenhoff's career. Professor Winship is tracing in more detail the relation between the international sales convention and the American Uniform Commercial Code, a study that will necessarily elaborate on Rabel's views.