The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945–1946

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> *"There are naïve people who believe that a world war's end is like a fairy tale, the villains being punished and the good being rewarded. It does not happen that way."*
>
> —Karl Loewenstein, *Political Reconstruction* (1946)

I. Potsdam: A Transformative Occupation

In August 1945, Karl Loewenstein began work as senior expert advisor to the Legal Division of American Military Government (AMG) in Berlin. An eminent German-born and educated political scientist and jurisprudent, Loewenstein had come to assist in the "democratization" of his homeland's Nazified law and legal institutions. It was soon obvious, however, that in its crucial first phase the American legal mission in Germany was in disarray.

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The development and implementation of American law reform policy was being undercut by ill-prepared leadership, poor planning, and the scarcity of learning about German laws, lawyers, and legal history. By Loewenstein's reckoning, many American officers had been "set to work on problems of which they have not the slightest idea and very little professional qualification."[1] Critical law reform initiatives had been based upon expedient "over-simplifications" of Nazism and its eradication. By January 1946, his initial misgivings having given way to mordant despair, Loewenstein concluded that the American program for the democratization of the German legal system was irrevocably "lost," a "failure which stinks to high heaven."[2] This article sets forth the theoretical and observational bases of Loewenstein's assessment and evaluates its cogency.

The legal reconstruction of postwar Germany unfolded within a multilateral and dynamic political environment. When the European war ended with the unconditional surrender of the German armed forces on May 8, 1945, supreme military and political authority over Germany became vested in the Allied theater commanders: Eisenhower in the west, Zhukov in the east.[3] In June this arrangement was superseded by the "Four Powers Agreement," which established the "Allied Control Council" (ACC) in Berlin, a quadpartite governing body led jointly by the chief military commanders of the United States, Britain, France, and the Soviet Union. The charter of the ACC was negotiated at the Potsdam Conference of July 1945 and was set forth in the Potsdam Protocol of August 2. The Protocol gave each of the four powers broad political power within an assigned "zone" of occupation (the American zone was to consist of some 18 million Germans living in Bavaria, most of southwestern Germany, and the port of Bremen) subject only to the supreme authority of the ACC "in matters affecting Germany as a whole."[4] In exercising this centralized power the ACC was to strive for "uniformity of treatment of the German population throughout Germany."

The Potsdam Protocol called for the swift and permanent destruction of the German war machine. In this regard the Allies were to effect the

1. Karl Loewenstein, Occupation Diary (OD), August 22, 1945, Loewenstein Papers, Frost Library, Amherst College (FLAC), box 40. Loewenstein's diary entries were typed in haste, and are rife with typographical and spelling errors. In lieu of repeated use of the pedantic Latin term, "sic," all unambiguous errors in quoted material have been corrected.

2. Ibid., January 8, 1946.

3. For an overview of the evolution of the American and Allied control elements in occupied Germany, see generally, Hajo Holborn, *American Military Government: its Organization and Policies* (Washington, D.C.: Infantry Journal Press, 1947), 53–73.

4. Potsdam Protocol, II, A., 1. For the complete text, see United States Department of State, *Foreign Relations of the United States: Diplomatic Papers: the Conference of Berlin (the Potsdam Conference), 1945*, vol. II (Washington, D.C.: U.S. Government Printing Office, 1945), 1478–514.

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"complete disarmament and demilitarization of Germany and the elimination or control of all German industry that could be used for military production."[5] The Nazi party—its offices, officeholders, and affiliated institutions—were to be permanently "extirpated," and its leaders arrested and tried for war crimes. The institutions of the German state were to be broken up and decentralized, as were the great German industrial cartels. Potsdam also mandated that "[a]ll Nazi laws which provided the basis of the Hitler regime or established discrimination on grounds of race, creed, or political opinion shall be abolished. No such discriminations, whether legal, administrative or otherwise, shall be tolerated."[6] These first order tasks completed, the ACC was then to commence the institutional transformation of Germany, in particular, to undertake the "reconstruction of [German] life on a democratic and peaceful basis."[7] German local and regional self-government were to be re-established on "democratic principles". At the same time, the German legal system was to "be reorganized in accordance with the principles of democracy, of justice under law, and of equal rights for all citizens without distinction of race, nationality or religion." As Loewenstein summarized: "The basic objective of the occupation is to be the reestablishment of the rule of law in Germany."[8]

Karl Loewenstein came to Legal Division to help implement the legal provisions of the Potsdam Protocol. He was hired for his great knowledge of German law, language, and politics. Born in Munich in 1891, he was the only son of an affluent family of assimilated Bavarian Jews. After the First World War, Loewenstein became a lawyer and completed a doctorate in law, and, in 1931, secured a lectureship in international and comparative constitutional law at the University of Munich. When the Nazis came to power in 1933, Loewenstein's Jewish ancestry, liberal cast of mind, and fine English were three compelling reasons for him to leave Munich for a lectureship at Yale University. When he was recruited to Legal Division twelve years later, Loewenstein had become an American citizen (in 1939) and was the prolifically published Chair of Political Science and Jurisprudence at Amherst College. A bold theorist of contemporary law and politics, Loewenstein was also committed to the ethic of "praxis," of ideas in action. Hence in the summer of 1945, Loewenstein sought out and secured a senior appointment to the American legal mission in Berlin. He left for Germany passionately committed to the grand purpose,

5. Ibid., II, A., 3. (I)., 1502.
6. Ibid., III, A. 4., 1501.
7. Ibid., III, A. 4., 1502.
8. Karl Loewenstein, "Reconstruction of the Administration of Justice in American-Occupied Germany," *Harvard Law Review* 61 (1948): 419.

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as he put it, of "reconstructing the legal existence of a totally defeated and totally occupied country."[9]

During his thirteen-month deployment with Legal Division–Berlin and then in the subsequent two years, Loewenstein created (in the form of a detailed diary, more than sixty official memoranda, a series of scholarly articles, and a book manuscript) a singularly rich, discerning, and often unsparingly candid documentary record of the aims, intrigues, operations, and machinations of this important if little-studied department of AMG.[10] This material—almost entirely overlooked by historians[11]—is arguably the single most detailed and revealing "insider" account of *any* aspect of the American military administration in postwar Germany.[12] When read with the larger archival record of Legal Division–Berlin,[13] the Loewenstein papers provide an exceptional opportunity to reconstruct and critically evaluate this world-historical experiment in directed legal change during its crucial first year. Taken together, these documents raise a number of intriguing questions. How did Legal Division comprehend German legal

9. Karl Loewenstein, *Legal Reconstruction in Germany*, unpublished ms. (1948), 1, Loewenstein Papers, FLAC, box 24.

10. Although there is an extensive historiography of American military government in occupied Germany, the subject of directed legal change has received comparatively little attention. The best published works focus on specific regions within the American zone. See Jeffrey S. Gaab, *Justice Delayed: The Restoration of Justice in Bavaria under American Occupation, 1945–1949* (New York: Peter Lang, 1999); and Andrew Szanajda, *The Restoration of Justice in Hesse, 1945 – 1949* (New York: Lexington Books, 2007). The best work in German is Dieter Waibel, *Von der Wohlwollenden Despotie zur Herrschaft des Rechts: Entwicklungsstufen der Amerikanischen Besatzung Deutschlunds 1944–1949* (Tubingen: Mohr, 1996). Valuable as they are in their own right, these works are not based upon complete excavations of the source materials generated by Loewenstein or Legal Division–Berlin. For useful critical assessment of Waibel's book, see Kenneth F. Ledford, "Book Review," *The American Journal of Comparative Law* 46 (1998): 225–29.

11. One exception is Joseph Bendersky's essay on American policy toward the German political theorist, Carl Schmitt. In this piece, the author draws extensively on the Loewenstein Papers (FLAC) and makes reference to Loewenstein's mounting "frustration" with American policy in postwar Germany. See Bendersky, "Carl Schmitt's Path to Nuremberg: A Sixty-Year Reassessment," *Telos* 139 (Summer, 2007): 6–34. For a thorough treatment of Loewenstein's papers in relation to his work as a political theorist, see Markus Lang, *Transatlantischer Denker der Politik* (Stuttgart: Steiner Press, 2007).

12. For another important contemporary diary, one kept by an American political scientist assigned to advise AMG on governmental affairs, see James K. Pollock, *Besatzung und Staatsaufbau nach 1945: Occupation Diary and Private Correspondence 1945-1948* (Munchen: Oldenbourg Verlag, 1994).

13. Here I refer principally to two sets of documents: the extensive archive of Legal Division–Berlin (RG 260) at the National Archives and Record Administration (NARA), College Park, Maryland, and the Charles H. Fahy Papers at the Franklin Delano Roosevelt (FDR) Presidential Library, Hyde Park, New York.

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fascism and the means and content of its "democratization"? Was there internal conflict over these questions? By whom was the Division led and organized? How did they structure their work and engagement with German lawyers and officials? What use was made by the Division of intellectuals and experts? At the end of the first year of its work, to what degree had Legal Division achieved its destructive and constructive missions in Germany? Was Loewenstein correct that in the critical first year of the occupation, American efforts toward legal "democratization" in Germany were misconceived and largely ineffective?

My investigation of these questions unfolds in three parts. The first involves a concise survey of Loewenstein's extensive pre-surrender writings on law and politics in the twentieth century, including his work on the rise and consolidation of Nazism in Germany. Here the goal is to identify the basic ideas and ideals that informed Loewenstein's understanding both of law and politics and of the "Nazification" and potential "de-Nazification" of the German legal system. Part Two will focus on the aims, personnel, and organizational behavior of Legal Division–Berlin and especially on Loewenstein's detailed chronicle of the fate of the American legal reform agenda in the initial phase of the occupation. This section will focus on the crucial first steps taken toward the de-Nazification of German legal institutions in the American zone.

The third and final section of the article will examine the predicament of the intellectual in an American occupation bureaucracy. Here I develop the study's central thesis: By his lights as a trained thinker about German law and politics, Karl Loewenstein was amply justified in his severe criticism of the leadership and policies of Legal Division–Berlin. The first American efforts in the "de-Nazification" and "democratization" of the German legal system were (in fact) weakly theorized, feebly implemented, and mainly ineffective. At the end of 1946, the Nazi legal system in the American zone had been shorn only of its most overtly racist and repressive features. But for all its compelling force, Loewenstein's critique of Legal Division also had conspicuous limitations. Whereas Loewenstein the scholar told elemental truths about Germans and German authoritarianism,[14] Loewenstein the advisor was largely indifferent to their practical value to American decision-makers. In tendering opinion, and in his caustic reflections afterward, Loewenstein stubbornly clung to the illusion that AMG possessed time, will, and means enough to impose a prolonged,

14. In the "truths" he told about Germany, Loewenstein can be located among the "Other Germany" thinkers on postwar Germany. This school of thought, prominent in academic and German émigré circles, emphasized the need for the deliberate and painstaking de-Nazification and democratization of Germany during an indefinite period of military occupation; see Rebecca Boehling, *A Question of Priorities: Democratic Reforms and Economic Recovery in Postwar Germany* (New York: Berghahn Books, 1996), 20.

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stern, and, in its transformational rigor, “militant” occupation of Germany. In this way the teller of hard historical truths failed to confront the hardest truth of all: the leaders of the American occupation bureaucracy could not embrace any “historical fact” about the Nazi-era legal elite that would tend to impede the swift reactivation of German legal institutions.

II. Militant Democrat: Loewenstein as Theorist

Uniquely among American legal officials in Germany during the first phase of the occupation, Karl Loewenstein was a professional thinker and writer about German and European public affairs and history. As an undergraduate he had studied history, sociology, and classical and modern law at Munich, Heidelberg, Paris, and Berlin universities. He travelled widely in continental Europe, Britain, and the United States. With his native German, Loewenstein learned to speak fluent English and French and passably good Spanish and Italian. Although the completion of his graduate education was interrupted by military service in the First World War, Loewenstein persisted with advanced study in law and modern history. At Heidelberg, he was a student of Max Weber and a regular attendee of Weber’s salon.[15] In these years, Loewenstein came to revere the great German sociologist and the Weberian proclivity for systematic and detached observation and analysis.[16] For Loewenstein, as for Weber, candor was the scholar’s cardinal virtue, sentimentality his mortal sin.[17]

As a young man, Loewenstein’s goal was to become a professional academic at a good German university. But post-First World War era Germany offered few opportunities even for the most gifted scholars of Jewish background. To make a living, Loewenstein qualified for the bar in 1918. To improve his mind and vitae, he took a doctorate of laws in 1919. For the next fourteen years, Loewenstein practiced commercial and appellate law in Munich while continuing his scholarly work. At the same time, he published a book and numerous articles on comparative government and constitutional law.[18] His growing list of publications included admiring

15. For Loewenstein’s memoir of his relationship with Weber, see Loewenstein, *Max Weber’s Political Ideas* (Springfield: University of Massachusetts Press, 1966), 91–104.

16. As Loewenstein later wrote of his scholarship, he eschewed utopian visions for “the terra firma of established facts, historical experience, human nature in politics.” *Political Reconstruction* (New York: Macmillan Press, 1946), vii.

17. Loewenstein, *Max Weber’s Political Ideas*, 100–101.

18. For further bibliography, see Henry Steele Commager, Gunther Doeker, Ernst Frankel, Ferdinand Hermes, William C. Havard, Theodor Maunz, eds., *Festschrift fur Karl Loewenstein* (Tubingen: Mohr, 1971), 509–11.

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assessments (here Weber's influence is apparent) of British liberalism and parliamentary government.[19] In 1931, now approaching his fortieth birthday, Loewenstein finally secured a part-time appointment as a lecturer in public and international law at the law faculty of Munich University. However, the Nazi ascendancy meant the certain termination of his position at the university.[20] Although (as a veteran) he might have carried on with his law practice, Loewenstein's academic career in Germany was over.[21] When Yale offered a two-year lectureship, he emigrated to America (with his wife) in the last days of 1933.

Loewenstein began his American career in 1934 as a scholar of comparative constitutions and government as a member of Yale's law faculty. His immediate goal was to secure a tenured position. When this did not happen,[22] Loewenstein sought out permanent employment at the other leading American law faculties. When none was forthcoming, in 1936 Loewenstein accepted a chair in political science and jurisprudence at Amherst. There he remained, if often discontentedly,[23] and with countless leaves of absence, until his retirement in 1972.

19. Lang, *Transatlantischer Denker*, 67–69. In his approbation of the liberal and especially the *democratic* elements of the British constitution, Loewenstein stood apart even from the most liberal of Prussian constitutional theorists. See generally, Erich Hahn, "Rudolf Gneist and the Prussian Reichsstaat: 1862-78," *The Journal of Modern History* 49 (4) (1977): D1361–D1381.

20. In the first part of 1933, Loewenstein began to apply for academic positions in the United States and England. His first choice was to work with (his friend) Harold Laski at the London School of Economics. When no offer was forthcoming from the LSE, he focused on the great law schools of the eastern United States. See Loewenstein to Mendelssohn–Bartholdy, May 16, 1933, Ernst Stiefel Papers, Center for Jewish History, reel 5.

21. According to one of his former bosses at Justice, Loewenstein recounted how he had been "run out of Munich promptly in 1933, in large part because he had always opposed [the Nazis] rather forthrightly." Knapp to Fahy, July 5, 1945, Charles H. Fahy Papers, FDR Presidential Library, box 66.

22. A permanent position at Yale proved elusive for a number of reasons: the Depression-era budgetary crisis, general indifference to Loewenstein's scholarly work and field, his German–Jewish ancestry, and his difficult personality most prominently among them. See Markus Lang, "Juristen Unerwunscht?: Karl Loewenstein und die (nicht-) Aufnahme Deutscher Juristen in der Amerikanischen Rechtswissenschaft nach 1933," in Hrsg. von Volker Gerhrdt, Reinhard Mehring, Henning Ottmann, Martyn P. Thompson, Barbara Zehnpfennig, eds., *Politisches Denken-Jahrbuch 2003* (Steiner: Stuttgart, 2004): 68. Loewenstein was not alone among German jurists in his struggle to establish a scholarly career in America. See generally, Kyle Graham, "The Refugee Jurist and American Law Schools, 1933-1941," *American Journal of Comparative Law* 50 (2002): 777–818.

23. Loewenstein professed to love Amherst, and especially its liberal traditions of academic freedom and tolerance. And yet for his entire career he yearned to work at a more established university, preferably at a law school with a renowned postgraduate program.

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After an uncertain beginning, Loewenstein's career throve in America[24] and in American English. He published his first English-language piece in 1935, and in the subsequent ten years published two long books and a dozen essays in leading journals of American law and political science.[25] (In 1946 there was yet another book: one that argued for the democratic "political reconstruction" of fascist states after the Second World War.[26])

I will now briefly summarize three aspects of the mental world that Loewenstein brought to Germany in the summer of 1945:[27] his basic theoretical commitments about modern law, politics, and society including his theory of "militant democracy;" his diagnosis of why the Weimar Republic had fallen to Hitler and National Socialism; and finally, his prescription for the directed democratization of German law and society in the event of Allied victory in the Second World War.

In the later 1930s, Loewenstein's main subject was European liberal democracy and its vulnerability to subversion by fascist and authoritarian movements. His central case study was the demise of the Weimar Republic at the hands of the Nazis. Loewenstein wanted to know how an avowedly anti-democratic fringe party achieved power within a democratic system.

As he was a "liberal" in basic philosophical commitments, the touchstone of Loewenstein's politics was the sanctity of individual liberty

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For one of the many letters he wrote in pursuit of this ambition, see Loewenstein to McDougal, November 16, 1947, Loewenstein Papers, FLAC, box 29.

24. For an interesting autobiographical discussion of German emigration to the United States in the 1930s, and the decision of many to remain there after 1945, see Franz L. Neumann, "The Social Sciences," in *The Cultural Migration: The European Scholar in America* (New York: Barnes & Co., 1953), 17–19. See also, "Roundtable Discussion," in Kielmansegg, Mewes and Glaser–Schmidt, eds., *Hannah Arendt and Leo Strauss: German Emigres and American Political Thought after World War II* (Cambridge, Mass: Cambridge University Press, 1995), 171–82; and also, Hartmut Lehmann and James J. Sheehan, *An Interrupted Past: German-Speaking Historians in the United States after 1933* (Cambridge: Cambridge University Press, 1991).

25. Loewenstein published his first important article in English (in the *American Political Science Review*) in 1935. By 1950 he had published additional articles, inter alia, in the Chicago, Columbia, and Harvard law reviews. For a complete bibliography, see Commager et al., *Festschrift fur Karl Loewenstein*, 509–11.

26. Loewenstein, *Political Reconstruction.*

27. This section outlines what Loewenstein thought about law and politics generally and about Germany specifically. It does not assess its originality, coherence, or intellectual rigor. For critical assessments of Loewenstein's political science, see generally, Commager et al, *Festschrift fur Karl Loewenstein*; Lang, *Transatlantischer Denker*. For general background to Loewenstein's thought, see Peter M.R. Stirk, *Twentieth-Century German Political Thought* (Edinburgh: Edinburgh University Press, 2006).

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under the rule of law.[28] Loewenstein believed that the foundation of civilized community was an effective constitution, one "directed against the authority of the state, claiming an untouchable sphere of individual life and action."[29] For Loewenstein the twinned principles of liberty and the rule of law were the most "priceless"—if fragile—legacies of the modern European political tradition.[30] In his view, however, liberty under law was not self-sustaining, but dependent upon the robust operation of political democracy. "History records no instance," Loewenstein wrote in 1946, "of a government, not democratically elected or controlled, which, in the long run has respected men's liberties."[31] In liberal society, the first order of business was to cultivate and, when necessary, to defend, the basic institutions of democratic government.

Loewenstein's theory of democracy as prerequisite of liberty is key both to his abstract political thought and his analysis of "The German Question". To his mind, the history of Europe after the First World War was correctly viewed as a death struggle between liberal democracy and fascist dictatorship. In this fateful conflict, moreover, democratic communities were handicapped by their liberal values and complacency in defending them. In the 1920s, "liberty" had lost its resonance as a rallying cry and "fighting faith."[32] Conversely, everywhere in Europe fascists were learning how to manipulate liberal democratic institutions as a means to power.[33] Properly understood, Loewenstein argued, fascism was a set of political "techniques" in the subversion of liberal democracy.[34] The primary strategy of fascism was to "discredit the democratic order…by paralyzing its functions…"[35] The great menace of fascism was its cunning exploitation of normal politics. Fascist leaders were successful when power was "sought on the basis of studious legality." The fascist modus operandi was the ruthless but systematic exploitation of democratic legal and political space in the achievement of dictatorial power.

28. For a summary of Loewenstein's liberal convictions, see Loewenstein, "An International Bill of Human Rights," *Current History* 9 (1950): 273.

29. Ibid. In 1942, Loewenstein accepted the invitation of the American Law Institute to work with "liberal elements" from eight nations to devise and draft an International Bill of Human Rights.

30. Karl Loewenstein, *Brazil under Vargas* (New York: Macmillan Press, 1942), 4.

31. Karl Loewenstein, "Freedom is Unsafe without Self-Government," *Annals of the American Academy of Political and Social Science* 243 (1946): 47.

32. Loewenstein, *Political Reconstruction*, 131.

33. Karl Loewenstein "Militant Democracy and Fundamental Rights I," *American Political Science Review* 31 (June, 1937): 423.

34. Ibid., 423.

35. Ibid., 424.

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Loewenstein's reflections on fascism did not focus only on diagnosis; equally they were about cure. In long articles published in successive issues of the *American Political Science Review* in 1937, Loewenstein set forth his (perhaps very *German*) prescription: If democracy in Europe was to survive, it needed to become "militant" in its own defense. The fascist political technique, Loewenstein contended, could be "defeated only on its own plane and by its own devices."[36] In some cases, this would entail the unflinching use of state power to repress the enemies of open government. This might mean the implementation of a series of ostensibly undemocratic, even draconian, measures. In some instances, a democratically-elected executive branch might be compelled to suspend normal electoral laws and parliamentary rules, limit access to mass media, and/or ban all paramilitary organizations. During moments of violent civil unrest, moreover, the militantly democratic legislature would be justified in curbing rights of free speech and mass assembly.

Loewenstein recognized that militant anti-fascism contradicted the fundamental commitments of liberal democratic politics.[37] In his estimation, this was the necessary—and temporary—cost of saving a beleaguered democracy. After all, fascism presented liberal democracy with a peril tantamount to an "underground war on the inner front."[38] Such a war could not be won by leaders paralyzed by "constitutional scruples". Militancy was about *bolstering* democracy, not overturning it. When the fascist peril was diminished, the liberal democratic community was naturally self-correcting and restorative.

Loewenstein's theory of militant democracy was based upon a comparative analysis of the defeat of democracy in Spain, Italy, Portugal, and Austria, and on its (at least temporary) victories in Czechoslovakia, Belgium, and France. Once again, the main empirical basis of his theory was (what he called) "The German Illustration": the fall of the Weimar Republic to Hitler and Nazism. Although Loewenstein worked with incomplete information on these events, he was able nonetheless to express some interesting and, in the light of subsequent scholarship, highly prescient speculations on their general character and meaning.

For Loewenstein, both the most remarkable and dangerous fact about the Nazi movement was that it had gained power largely by democratic means. The Nazi disaster might have been averted, so Loewenstein argued, if leading German elected politicians had taken timely and militant steps in defense of the Republic. But instead of securing the arrest and detention

36. Ibid., 430.
37. Ibid., 431.
38. Ibid., 432.

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of Hitler and his henchmen, Weimar politicians had reacted with "legalistic self-complacency and suicidal lethargy." In the end, German democrats were undone by an inflexible fealty to democracy and the rule of law.[39] They had reposed too much faith in the undefended ballot box. Even more fatally, German democrats had relied upon the German *judiciary* as a last line of defense. Time and again, Loewenstein contended, this confidence proved misplaced. In the Weimar era, as in Imperial Germany, German judges proved staunchly antidemocratic in their politics and "hyper-legalistic" in their legal decision making.[40] The judiciary, far from being the guardians of the Weimar constitution, had actively collaborated in its demise.

Although the Nazis were contemptuous of liberal notions of legality, they were not, as Loewenstein noted, contemptuous of law and its ideological and instrumental potential. Once in power, the Nazis moved quickly to employ the German legal system as a powerful tool of social and political control and reinvention.[41] In the four years after Hitler consolidated power, the Nazis instituted *gleichschaltung*, the systematic "coordination" of German institutions and Nazi ideology.[42] In the legal sphere, this meant the "total reconstruction of [German] legal life."[43] German public law

39. Ibid., 427.

40. Loewenstein's stern criticisms of the Weimar-era judiciary were remarkably similar to those of Otto Kirchheimer and Franz L. Neumann, the leading German émigré intellectuals of the Left. For Kirchheimer's and Neumann's main writings on German law and politics in the Weimar and Nazi eras, see William E. Scheuerman, ed., *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (Berkeley: University of California Press, 1996). For further discussion of the intellectual affinities and cleavages among German émigrés before and during the Second World War, see H. Stuart Hughes, "Franz Neumann: between Marxism and Liberal Democracy," in Donald Fleming and Bernard Bailyn, eds., *The Intellectual Migration: Europe and America, 1930–1960* (Cambridge, Mass.: Harvard University Press, 1969), 446–62; and Barry M. Katz, "The Criticism of Arms: The Frankfurt School Goes to War," *The Journal of Modern History* 59 (3) (1987), 439–78.

41. Loewenstein's view on the Nazification of German law is summarized in his piece, "National Socialist Law and Administration of Justice," *Encyclopaedia Britannica* XVI (1944).

42. For more recent treatments of the "coordination" and the German legal system in the Nazi period, see Konrad H. Jarausch, *The Unfree Professions: German Teachers, Lawyers, and Engineers, 1900–1950* (New York: Oxford University Press, 1990), 116–20; Ingo Muller, *Hitler's Justice: The Courts in the Third Reich* (Cambridge: Harvard University Press, 1991), 36–45; Michael Stolleis, *Law and the Swastika: Studies on Legal History in Nazi Germany* (Chicago: The University of Chicago Press, 1998), 13–22; and Kenneth F. Ledford, "German Lawyers and the State in the Weimar Republic," *Law and History Review* 12 (1995): 317–19.

43. Karl Loewenstein, "Law in the Third Reich" *Yale Law Journal* 45 (1937): 781.

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was utterly transformed, its first "constitutional" principle[44] being the absolute authority of the Nazi party leader—of Adolph Hitler—as the human embodiment of the German race, soil, and blood.[45] The civil law was brought into line with Nazi racial and political ideology. Jewish jurists were purged from German legal life.[46] The legal space between citizen and state was eliminated. "National socialism," Loewenstein generalized, "attains its political ends by destruction of the rule of law. Separation of powers, independence of judges, judicial control of administration, impartial efficiency of the civil service, a Bill of Rights as a safeguard against executive and legislative encroachment, all these elements of the rule of law are over-ruled by the monocratic omnipotence of the Führer and the party."[47] As Loewenstein summarized in 1937, "In no other field of human activities has German tradition been more completely revolutionized."

Loewenstein believed that the rise and consolidation of Nazism in Germany presented an unprecedented threat to liberal democratic political aspirations throughout the world.[48] It was typical both of his natural pugnacity and of his conviction that Loewenstein yearned to make a more palpable contribution to the fight. Four months after Pearl Harbor, Loewenstein accepted a position with the Special War Division (SWD) of the Department of Justice. At SWD he was variously employed as an expert in German and international law and as an advisor to a counter-intelligence program[49] directed against Nazi operations in Latin America. In the winter of 1943, the SWD asked Loewenstein to prepare a detailed brief on the potential "de-Nazification" of the German legal system during

44. The Weimar constitution was neutered by the "enabling law" of 1934, but never thereafter formally abolished. The Nazi constitution was therefore de facto. Ibid., 802.

45. The Führer's legal primacy was first established negatively by the swift destruction of the main features of liberal constitutionalism. It was then established positively by the institutionalization of the unitary state under the monopoly policy and decision-making power of the Fuhrer and his Party. Ibid., 788.

46. For the Nazification of the German bar, see generally, Kenneth F. Ledford, "Lawyers and the Limits of Liberalism: the German Bar and the Weimar Republic," in Terence C. Halliday and Lucien Karpik, eds., *Lawyers and the Rise of Western Political Liberalism* (Oxford: Clarendon Press, 1997), 229–64.

47. Ibid., 802.

48. Karl Loewenstein, *Hitler's Germany: The Nazi Background to War* (New York: Macmillan Press, 1940), vii–viii.

49. More specifically, Loewenstein was sent to Montevideo as legal advisor to the Justice Department's "Emergency Advisory Committee for Political Defense of the Inter-American Treaty." The primary objective of the unit was to identify and dispel fascist propaganda in Latin America.

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a period of postwar military occupation.[50] Loewenstein's report, the first of its kind prepared in American government during the Second World War,[51] merits close explication.

The report advanced a number of theses. The first was the trite point that "law is one of the essential features of social life of any nation."[52] That was why, after the Nazis were defeated, the "task of restoring a decent legal system [in Germany] will present itself as urgent and imperative." That task would fall upon the Americans and their allies, just as it had after the First World War. In that instance, Loewenstein pointedly reminded, the Allies had failed to tame Germany because "The adjustment of then existing German law to the changed conditions of a democratic republic was left to Germany proper, with the result that most of the former laws continued to be in force." In Loewenstein's opinion, the German legal class would avoid change if given any chance to do so. After the current war, it would therefore be imperative for the Allies to *impose* transformational change from the outside. "[The] reconstruction of German law," Loewenstein emphasized, "should under no conditions be left to the discretion of the German authorities, whatever may be their political complexion." This was a job for the "civilian authorities of the Allied governments" (especially those of the United States) and as "part and parcel of the planned reconstruction of Germany as whole."

In laying down these ("very sketchily outlined") guidelines, Loewenstein underlined that legal de-Nazification would be slow, complex, and arduous. "Nazism," he explained, "has made deep inroads in the German legal life and has revolutionized practically all its aspects." There would be no way, for instance, to "decontaminate" German law

50. This was the second occasion that an arm of the American federal government had asked Loewenstein for general guidance on German affairs and social psychology. In the summer of 1942, the military intelligence section of the War Department asked Loewenstein for advice on how to diminish German morale while preparing the German people to accept an eventual Allied victory. Loewenstein thought that the destruction of Nazism would create a "tremendous spiritual gap" that would not easily be filled by "democratic slogans." Loewenstein thought that it would be imperative for the occupiers to encourage the "revival of religious desires" among Germans while they orchestrated a selective but merciless program of "retributive justice" against the Nazi elite. "Memorandum on the Methods for Lowering the Morale of the German People...," July 30, 1942, Loewenstein Papers, FLAC, box 29.

51. Soon after Loewenstein wrote this memorandum, American planning for the legal reconstruction of Germany was shifted from the Justice Department to the Civil Affairs Division of the War Department and then, in May 1944, to the Legal Branch of the Supreme Headquarters of the Allied Expeditionary Force (SHAEF) in London.

52. Karl Loewenstein to W.C. Smith, "De-contamination of German Law after the Fall of the Nazi System," April 30, 1943, Loewenstein Papers, FLAC, box 29.

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by a "sweeping blanket clause". Effective legal de-Nazification would need to be based upon the accumulation of precise knowledge about the impact of Nazi ideology on specific bodies of law. Loewenstein's central point in this regard was that the success (or not) of legal de-Nazification would pivot on the depth and quality of advanced research and planning. In the absence of intelligent preparation, Loewenstein predicted, the legal reconstruction of Germany would succumb to "expediency, opportunism, and even ignorance."

In the remainder of his report, Loewenstein outlined some other prerequisites of legal de-Nazification. The Nazi Party, its privileges, and laws sustaining the German "racial myth" would need to be abolished. Just as crucially, Germany's judiciary, bar, and legal civil service would need to be purged of all persons who had been, as Loewenstein (rather inexactly) put it, "incurably contaminated" by Nazi affiliation or ideology. If the Nazi jurists were permitted to remain in their former positions, "no conversion of the German people to constitutional government is feasible."

The SWD memorandum was Loewenstein's first (and last) official wartime report on legal de-Nazification in Germany. But his scholarly work on the subject continued apace. During the last days of the war in Europe, he completed a long manuscript that theorized the political, legal, and moral reconstruction of a fascist society during a period of foreign military occupation.[53] Published in 1946, the book focused on Nazism, its roots in German political psychology, and the obstacles to its elimination. Loewenstein took the view that the Hitler regime was a by-product, not a deviation, from the pattern of modern German history. Nazism had come to the fore in Germany because Hitler and his circle had been able to exploit the historical willingness of Germans to surrender freedom for security. This habitual "submissiveness to authority regardless of legitimacy"[54] was the most pronounced trait of German political psychology, one that was likely to be exacerbated, not erased, by another crushing defeat in war. This led to the key prescription: the Hitler regime vanquished, the Allies would need at all cost to "resist the temptation of a premature enlistment of Germans willing to share in their political reconstruction." On this point Loewenstein was emphatic: "Be it repeated: No German government, and no government of any subdivision of prewar Germany, should be tolerated for a long time to come."[55] Loewenstein urged the Allies to plan for a prolonged period of unremitting "political tutelage" in the ways and means of democratic law, politics, and society.[56]

53. Loewenstein, *Political Reconstruction.*
54. Ibid., 337.
55. Ibid., 337.
56. Ibid., 348–49.

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In July 1945, the war over in Europe and his new manuscript in press, Loewenstein was among the first to apply for a position with the AMG in Germany.[57] On the strength of his credentials and on the (qualified) recommendation of Loewenstein's former boss at Justice,[58] he was hired by Charles H. Fahy,[59] (still) Solicitor General of the United States and newly appointed Director of Legal Division–Berlin. After twelve years' absence from Germany, now a distinguished scholar of modern European history, law, and politics, Loewenstein prepared to return to his homeland. Although perhaps not among the first rank of mid-twentieth century political thinkers,[60] by a wide margin Loewenstein was the most learned and sophisticated expert employed by Legal Division–Berlin in the first phase of the occupation.

III. The Militant Bureaucrat: Loewenstein as Occupier

Legal Division–Berlin was set within a bewildering network of American and Allied agencies of occupation. With the other operational subdivisions of AMG in Germany, Legal Division was established as a department of the "United States Group Control Council" (USGCC). As such, it had functional responsibilities in the American zone and with regard to the American element of the ACC. In the winter of 1946, the USGCC was reconstituted as the "Office of Military Government United States Zone"

57. In his cover letter, Loewenstein emphasized that he "probably had more knowledge of German legal matters than most American trained lawyers and twelve years in this country have enabled me to learn the spirit and system of law." Interestingly, Loewenstein did not mention that he was then finishing a book on political reconstruction. Loewenstein to Fahy, June 27, 1946, Fahy Papers, FDR Presidential Library, box 66.

58. His boss, Laurence Knapp, described Loewenstein as a "tremendously industrious" but "opinionated" and often meddlesome man, who would require "close supervision" in Germany. Knapp thought that Loewenstein would be an invaluable researcher but that he "lacked judgment on broad and important international problems." Knapp made no mention of Loewenstein's scholarship or wartime memoranda. Knapp to Fahy, July 5, 1945, Fahy Papers, FDR Presidential Library, box 66.

59. There is evidence (in the form of a curriculum vitae complete with an Office of Strategic Services telephone number) that Fahy's first choice for the post as expert advisor to Legal Division had been the German émigré lawyer and political scientist, Otto Kirchheimer. Kirchheimer, however, remained with the OSS. See Fahy Papers, FDR Presidential Library, box 66.

60. Loewenstein's body of academic writing is given relatively little attention in a leading English language book on German political thinkers in the mid-twentieth century. See Stirk, *German Political Thought*, 109–10. For an assessment of Loewenstein's intellectual legacy, see Lang, *Transatlantischer Denker*, 299–315. See also, Devin O. Pendas. Review of Lang, *Transatlantischer Denker*. H-German, H-Net Reviews. April, 2010.

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(OMGUS) and remained under the command of General Lucius Clay. An instrument of the War Department, OMGUS was supervised from Washington by the newly minted Civil Affairs Division and its ranking officer, General John Hilldring.[61] It bears emphasis that OMGUS was a creature, if an exotic one, of the American military. It was led by regular army officers but staffed almost entirely by civilians of "assimilated" or honorary military rank. From the outset, the hybridized nature of AMG was a source of internal tension. Regular army officers dominated the organization and its privileges. Their clannishness, petty tyrannies, and tragicomic administrative ineptitude were frequently noted and bitterly resented by the (more numerous) civilian element.[62] These tensions were magnified by the fact that (for the first year of the occupation) civilian experts working for AMG in Berlin had to contend with yet another American military organization, the "United States Forces European Theater" (USFET) based in Frankfurt. USFET had managed civilian affairs in American-occupied Germany since its tactical units began to take German soil early in 1945. To the enormous frustration and annoyance of Legal Division–Berlin, USFET and its "entrenched staff" continued to exert influence over legal reform policy in the American zone until the winter of 1946.

The first Director of Legal Division–Berlin was Charles Fahy, a career New Deal lawyer.[63] Fahy faced a hugely difficult mission. With a professional staff of fewer than forty persons,[64] fewer than a third conversant

61. For analysis of the planning, development, and operation of American military government in occupied Germany after the Second World War, see Holborn, *American Military Government*, 7-10; Harold Zink, *The United States in Germany* (New York: Van Nostrand, 1957), 26–42; John Gimbel, *The American Occupation of Germany: Politics and the Military* (Palo Alto: Stanford University Press, 1968); Edward N. Peterson, *The American Occupation of Germany: Retreat to Victory* (Detroit: Wayne State University Press, 1977), 54–113; and Boehling, *A Question of Priorities*, 41–71.

62. Although their assimilated rank theoretically entitled AMG's civilian employees to equal treatment with commissioned military officers, the reality, as Loewenstein soon discovered, was different. Regular military officers got the lion's share of all privileges and perquisites. In a host of ways, Loewenstein complained, civilians were "tangibly discriminated against by the very army which clamors for their services." Loewenstein, undated draft letter to the *New York Times.* Loewenstein Papers, FLAC, box 14. For a sardonic contemporary memoir of the misadventures of American military occupiers in Germany, a work greatly admired by Loewenstein, see Marshall Knappen, *And Call it Peace* (Chicago: University of Chicago Press, 1947).

63. The bulk of private papers relating to Fahy's work in Germany can be found in the Charles H. Fahy Papers of the FDR Presidential Library. Some fragmentary material from this period of his career also is available as part of the Papers of Charles Fahy, Manuscript Division, Library of Congress.

64. Roster of USGCC, Legal Division, August 22, 1945, NARA, RG 260, Legal Division (LD)-Legal Advice Branch (LAB), box 64.

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with German language and laws, Fahy was to operate, as he himself described it, a "Department of Justice" de facto for American-occupied Germany.[65] This he was to do with only three German-trained staff lawyers,[66] only one of whom had practiced law in Germany during the Nazi period.[67] The tiny handful of German jurists was bolstered by three Austrians and a dozen (inexpert) but German-literate American lawyers. As late as the end of December, 1945, moreover, this peculiar band of German legal reformers did not yet possess a complete library of German laws and treatises.[68]

The primary mission of Legal Division was to work (as a member of the four-power Legal Directorate of the ACC) to effect the "de-Nazification" and eventual "democratization" of German laws and legal personnel on a national basis.[69] But Legal Division was also responsible for a long list of other vital tasks, including the coordination of American efforts in the prosecution of Nazi war criminals and the de-Nazification of German courts and prison systems situated within the three provinces (or *Länder*) of the American zone. It also fell upon Legal Division to provide legal advice to executive officers of AMG and its eleven operational subdivisions. (The Director of Legal Division himself was also chief legal counsel to General Lucius Clay.) Subject only to the (theoretical) intervention of General Clay, the Director of Legal Division wielded final decision-making authority on all questions of legal policy in American-occupied Germany.

Even as the war in Europe ended in May 1945, American planning for the political and legal transformation of Germany had barely begun.[70]

65. Charles Fahy, "Legal Problems of the German Occupation," *Michigan Law Review* 47 (1948–1949): 16; and Charles Fahy, "The Lawyer in Military Government of Germany," *Department of State Bulletin* 15, November 10, 1946, 852–59.

66. Loewenstein was one, an expatriate Jewish Berliner named Wilhelm J. Dichmann (his name later anglicized as "William Dickman") another. In the early 1930s Max Rheinstein had been a Berlin lawyer and university lecturer in private law. The German–Jewish lawyer, Fritz E. Oppenheimer, the chief legal officer at USFET, had also been a Berlin lawyer until 1936. There were, however, at least two Austrian lawyers on Fahy's staff.

67. William Dickman was finally forced from his Berlin law practice in 1938. See Dickman obit, *Washington Post*, November 1, 1987.

68. Loewenstein, OD, November 26, 1945.

69. Fahy, "Legal Problems," 17.

70. In some part this was due to President Roosevelt's firm belief that detailed planning for the occupation should not take place until it was certain that the war had been won. In cooperation with the British, some plans had been made for securing legal records and institutions in the immediate aftermath of German defeat, but almost no work had been done on the longer term. As FDR put it to Cordell Hull in October, 1944, "Speed on these matters is not essential at this moment. I dislike making detailed plans for countries we do not yet occupy." As quoted in Boehling, *A Question of Priorities*, 28.

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When Fahy began to organize Legal Division in June 1945, he was guided by three documents of roughly equal imprecision: the functional mandate imposed by AMG, the (notoriously vague) provisions of the Potsdam Declaration, and the (similarly vague) operational orders of the Joint Chiefs of Staff (JCS 1067).[71] When newly-recruited Division personnel left for Germany in early August 1945, these documents were their entire brief. Although some relevant planning work had been done by American and British lawyers working at Eisenhower's headquarters in 1944–45, it would appear that little to none of this work had been communicated to Legal Division.[72] In developing a blueprint for the de-Nazification of German law, Fahy and his staff virtually had to start from scratch.

From August 1945 through April 1946, Fahy the director and Loewenstein the expert were virtual embodiments of the confusions, cross-purposes, and unprincipled compromises that afflicted Legal Division from its inception. Fahy personified the dominant tendency in the organization. A native-born American lawyer,[73] he was recruited from among the elite ranks of career federal government attorneys. He was a highly able and experienced litigation lawyer who had spent his career trying high-profile public law cases before federal tribunals and appellate courts.[74] In his politics, Fahy was a Roosevelt man and a fervent New Deal Democrat. He was also a devout Catholic and a proponent of natural rights and American

71. The relative imprecision of JCS 1067 gave executive officers considerable latitude for improvisation. See generally, Gimbel, *American Occupation*, 1–23.

72. In the lead up to D-Day, some American and British legal officers attached to the Legal Branch of SHAEF in London were asked to begin work on the de-Nazification of German law during the first phase of Allied military occupation. The material generated by this group [and its Special Legal Unit (SLU)], was controlled by its senior officer, the German-born lawyer and now American army officer, Fritz Oppenheimer. Oppenheimer oversaw the creation of numerous memoranda and reports on the prospective abrogation and revision of Nazi law, first at SHAEF and then, after German surrender, at USFET. The writer has found only piecemeal remnants of these documents among the papers of Fahy's Legal Division. For an overview of the history of American legal reform work relating to Germany, see "Historical Notes of Colonel John M. Raymond," March 23, 1949, RG 260, Legal Division, Administration of Justice Branch (LD-AJB), box 11.

73. Fahy was born in Rome, Georgia, in 1892, to a Catholic father (a merchant) and Jewish mother. Educated at Notre Dame and Georgetown, he was called to the bar in Washington in 1914, and won a Navy Cross in action over France in 1917.

74. But Fahy's liberalism was flexible and pragmatic. As a wartime solicitor general, in fact, it had proved flexible enough that he could advocate strenuously, in at least one instance, unethically, in favor of the prerogatives of the state over basic civil liberties. The archive concerning the habeas corpus litigation initiated by a Japanese–American detainee, Fred Korematsu, contains compelling evidence that Fahy deliberately suppressed evidence that might have led to Korematsu's exoneration. For a discussion of this incident, see Peter Irons, *Justice at War* (New York: Oxford University Press, 1983), 280–92.

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legal liberalism.[75] He was widely admired for his courtly and gentle manner.

But like most executive officers at AMG, Fahy did not know much about nation building, or about the nation he was building. He neither read nor spoke German and lacked systematic learning in German political or legal affairs. When agencies of the federal government began to recruit executive officials for the occupation of Germany, Fahy, wartime solicitor general (and director of the new "War Division" of the Justice Department), had been pleading cases before the Supreme Court. His decision to accept the post as Director of Legal Division–Berlin had nothing to do with profound ideas or opinions about Germany or German democratization. By all indications, Fahy had none. He decided to go to Germany for a number of reasons: because the job had been pressed on him by a friend (Assistant Secretary of War, John McCloy); because of his growing interest in international law;[76] because of a high sense of public duty; and, not inconsequentially, because it looked to be his best possible career move after the Truman Administration passed him over as attorney general.[77] Here was something interesting and ostensibly important to do until the Democratic patronage machine yielded something better.[78] There was yet another perquisite: As chief of a new organization, Fahy was given wide latitude in the appointment of his deputies. In exercising this prerogative, Fahy selected mainly on the basis of past personal association in the New Deal bureaucracy; he was especially keen on former cronies at the National Labor Relations Board.[79] However, not one of these

75. Sherman L. Cohn, "Charles Fahy," *Georgetown Law Journal* 68 (1979–1980): vi.

76. In the spring of 1945, Fahy had acted as a special legal advisor to the American delegation to the San Francisco Conference.

77. Philip Elman, as quoted in Norman I Silber, ed., *With All Deliberate Speed: The Life of Philip Elman: An Oral History Memoir* (Ann Arbor: University of Michigan Press, 2004), 147. Fahy's ultimate ambition was to secure an appointment to the Supreme Court. It never happened.

78. The most cogent evidence in support of this view is that Fahy accepted a job at the State Department (in April 1946) only nine months after he had begun work in Germany. By this time, Fahy had developed a close personal and professional relationship with Clay, and the general pressed him to remain in Germany for at least a full year. Clay relented when Fahy told the general that it was his "lifetime ambition" to work as legal advisor to the State Department. Jean Edward Smith, ed., *The Papers of General Lucius D. Clay: Germany 1945-1949*, vol. I (Bloomington: Indiana University Press, 1974), 171.

79. Ibid. Among other former National Labor Relations Board lawyers, Fahy hired (as an associate director) Judge J. Warren Madden (the former Chairman of the NLRB), Alvin Rockwell, and Mortimer Kollender. Fahy also hired (as second associate director) the Californian international business lawyer and sometimes government consultant, Herman Phleger. Phleger does not appear to have had any dealings with Loewenstein's section. He left Legal Division–Berlin in December 1945. For description of Fahy's work at the

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men had more than rudimentary knowledge of German law, language, or history.

With no background himself in German law or politics, Fahy's approach to legal reconstruction was always bound to be more pragmatic than programmatic. Although he was entirely inexperienced of Germany and military administration, he was a highly experienced American public servant. From his time in Washington, Fahy had learned, or thought he had, how to master a novel administrative task and improvise its structure and tools. In this sense he came to Germany prepared.

In stark contrast to Fahy, Loewenstein arrived at Legal Division bristling with ideas about Germany, its political and legal pathology, and the means of its cure. Eager to apply this thinking, Loewenstein had actively sought out his placement with Legal Division and had pressed his case with characteristic intensity. In fact, by nature and disposition, Loewenstein was almost comically unsuited to a subordinate position at Legal Division. Although highly intelligent and compulsively hard working, he was also an extremely intense and impatient man who, in an organizational setting, was often meddlesome, lecturing, and abrasive. These traits were exacerbated by the irony of Legal Division's command structure: Loewenstein, the German-born and trained intellect and lawyer was a minion—*in Germany*—of men who knew little about the country and could not speak its language.[80] Although he had high regard for Fahy's personal character and integrity, Loewenstein did not think that he was remotely well qualified to direct the American legal mission in Germany.[81] Here were the ingredients of serious interpersonal conflict and acute organizational failure.

Loewenstein came to Berlin in early August 1945, about three weeks after Fahy. As the primary expert consultant to the Division, he was immediately and variously employed. Assigned to the Administration of Justice Branch, Loewenstein researched and wrote memoranda on German law and legal institutions and advised on law reform initiatives emanating both from Legal Division and the Legal Directorate of the

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NLRB, see Peter Irons, *New Deal Lawyers* (Princeton: Princeton University Press, 1982), 234–48.

80. The subordination of experts to neophytes was the norm in the American occupation bureaucracy in Germany. See Boehling, *A Question of Priorities*, 45.

81. Loewenstein was not alone in this assessment. The chief of the British legal mission in Germany (after his first meeting with his American counterpart) diarized that Fahy seemed "very ignorant" of German affairs. Furthermore, Fahy and his lieutenants seemed to be content to exist "in a vacuum of their own without consulting in any way the well-informed people…they have." See Richard Wilberforce, *Reflections on my Life* (Durham: Roundtuit Publishing, 2003), Diary entry: August, 21, 1945, Appendix 3, 164.

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ACC. He prepared briefing papers ahead of meetings. As one of the Division's handful of fluent German speakers, Loewenstein also was dispatched to interview German lawyers, judges, and bureaucrats. In this way he became, de facto, one of the Division's chief intelligence officers, gathering information on the operation of the Nazi legal system, and, pressingly, on the disposition, attitude, and responses of German jurists to the first phase of American legal de-Nazification.

In Loewenstein's opinion, the de-Nazification issue was "easily the most important single aspect of the occupation of Germany,"[82] an issue fraught with political, legal, and moral complexity.[83] His operative assumption, confirmed by his first trips to the Americans zone, was that Germans, German jurists especially, would not own up to their complicity with Nazism.[84] Although in 1933 the great majority of German legal professionals had not been members of the Nazi party, by the same large majority they were imbued with nationalistic and conservative political ideology. When the Nazi party seized control of the legal professions in 1933, only scant resistance had been offered against the ensuing "coordination."[85] The purge of Jewish and anti-Nazi jurists had been quickly and widely accepted, even abetted. By the late 1930s, the Weimar-era legal professions had been thoroughly compromised by Nazi ideology, programs, and legalized repression.[86] When confronted by the American occupiers and their tough and inclusive de-Nazification policy, most German jurists adopted a strategy of solidarity and blanket denial.

This stance was strongly in evidence when Loewenstein met with a group of some twenty German lawyers in Bremen in early September 1945. The prevailing opinion among the group was that neither they, nor the German bar more generally defined, bore any special responsibility for the Hitler regime. In this view, Nazism and its crimes had been the work of a tiny clique of zealots and criminals. "Not a single one of the anti-Nazi lawyers I talked to," Loewenstein wrote in his diary, "seemed

82. Loewenstein, *Legal Reconstruction in Germany*, 62.

83. For the development and implementation of American de-Nazification policy, see generally, John H. Herz, "The Fiasco of Denazification in Germany," *Political Science Quarterly* LXII (1948): 569; Lutz Niethammer, *Entnazifizierung in Bayern* (Frankfurt: Fischer Press, 1972), 244–50; Clemens Vollnhals, ed., *Entnazifizierung: Politische Sauberung und Rehabilitierung in den vier Besatzungszonon* (Munich: Deutscher Taschenbuch Verlag, 1991); Gimbel, *American Occupation*, 101–10; Peterson, *Retreat to Victory*, 138–66.

84. Loewenstein, OD, August 29, 1945.

85. See generally, Ledford, "German Lawyers and the State in the Weimar Republic," 317–49; Jarausch, *The Unfree Professions*, 115–20.

86. See generally, Muller, *Hitler's Justice*, 6–26; and Stolleis, *Law under the Swastika*, 14–21.

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to be aware that the Nazis were a majority of the German people."[87] Although great anxiety was expressed at the prospect of losing careers to an indiscriminate purge,[88] "the problem of German guilt is wholly absent." The common perception among the Bremen lawyers—by German standards, a comparatively *liberal* bar—was not that "the [Nazi regime] was wrong, only. . .that it did not succeed."[89] Loewenstein came away from the Bremen meeting with increased conviction that authentic de-Nazification would be the product only of "constant control."[90]

By the same token, Loewenstein did not think that the Germans could simply be compelled to become good liberal democrats. Nor did he subscribe, even as an ethnic Jew whose German family and career had been shattered by Nazism, to the collective punishment of the German people. Once the worst Nazis criminals had been dealt with, the way forward in Germany was in the careful design and relentless implementation of an "educational campaign"[91] based on "instruments of political tutelage," not repression. In Loewenstein's view, "Democracy is as much a technique which has to be learned as an ideology which can be acquired. . .Under these conditions it cannot be expected that democratic reconstruction will grow organically out of the living conscience of the German people by a wave of the magic wand."[92] In their habitual submissiveness and passivity, the German masses were too "mentally sick" to respond to a program of rapid democratization.[93] If democracy would grow at all, it would be as a result of careful and intensive cultivation of a new German legal and political elite operating within a thoroughly de-Nazified legal and political system.

For Loewenstein "legal de-Nazification" implied the deliberate reconstitution both of Nazi-era legal personnel and statute books.[94] Both tasks, he underlined in an early memorandum to Fahy, would present extremely difficult theoretical and administrative challenges. On the personnel side, the core problem was the broad and deep distribution of Nazi party

87. Loewenstein, OD, September 14, 1945.

88. In the first months of the occupation, the American de-Nazification directive was enforced with particular harshness in Bremen. See "Military Government of Germany—Legal and Judicial Affairs," *Monthly Report of Governor US Zone*, October, 1945, 2.

89. Loewenstein, OD, August 31, 1945. For an excellent study of how German jurists rationalized their work for the Third Reich, see Eli Nathans, "Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice," *Law and History Review* 18 (2000): 281–304.

90. Loewenstein, OD, August 22, 1945.

91. Loewenstein, *Political Reconstruction*, 337.

92. Loewenstein to Litchfield, June 5, 1946, Loewenstein Papers, FLAC, box 40.

93. Loewenstein, *Political Reconstruction*, 337.

94. Loewenstein to Fahy, September 14, 1945, NARA, RG 260, LD-AJB, box 52.

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membership in German society generally,[95] the German legal professions particularly. By 1945, at least 80 percent of all serving German judges, prosecutors, and legal bureaucrats, on their own initiative or by rule, had become party members.[96] (Among private lawyers, rates of membership were lower and varied substantially by region, from less than 20 percent in northern cities such as Bremen, to more than half in some Bavarian cities such as Munich.[97]) The problem had been made worse by the fact that the de-Nazification program in the American zone had gotten off to a dreadful start.[98] Before the surrender, the de-Nazification directives had been applied haphazardly. After the surrender, they were sometimes enforced with dogmatic strictness, especially in regard to office-holding members of the legal profession.[99] By the time Legal Division was activated in July 1945, the American de-Nazification program, in Loewenstein's view, was an "unbelievable chaos."[100]

Loewenstein's first memorandum to Fahy on de-Nazification canvassed the moral and political complexities of the issue. It was probable, he advised, that a program of "indiscriminate removal" of jurists based solely upon membership in the Nazi Party, even if right in principle, would prove impractical (it would leave too few experienced judges and legal technocrats to operate a revamped system of justice[101]) and impolitic (too many influential Germans, including most *anti*-Nazis, saw such policy as unjust). German jurists were themselves imploring AMG to adopt more

95. For a general account of the penetration of the Nazi party in German civil society after 1933, see Richard J. Evans, *The Third Reich in Power 1933-1939* (New York: Penguin Press, 2005), 14. By 1945, some 8.5 million Germans were members of the Nazi party, 90 percent having joined after 1933. See also, Michael H. Kater, *The Nazi Party: A Social Profile of its Members and Leaders 1933–1945* (Cambridge, Mass.: Harvard University Press, 1983).

96. According to the figures gathered by the Americans themselves, "Approximately 80 percent of all the judges at the time of Germany's surrender have disqualified themselves by their past actions and party memberships, thereby falling into removal categories." See "Military Government of Germany—Legal and Judicial Affairs," *Monthly Report of Governor US Zone*, October, 1945, 1. In some regions of the American zone, the rate of Nazi party membership among judges and prosecutors (in 1945) may have exceeded 90 per cent. See Szanajda, *Restoration of Justice*, 28.

97. Loewenstein estimated that by 1945 about 60 percent of the bar in Bremen had joined the Nazi party. The rate was similar in Berlin. Loewenstein to Fahy, September 14, 1945, NARA, RG 260, LD-AJB, box 52. See Gaab, *Justice Delayed*, 73.

98. Boehling, *A Question of Priorities*, 52–60.

99. Loewenstein, OD, August 23, 1945.

100. Loewenstein, "Reconstruction of Justice," 447. A judgment confirmed by subsequent historians. See generally, Gimbel, *American Occupation*, 101–10; Peterson, *Retreat to Victory*, 138–66.

101. Exit interview with Loewenstein, July 10, 1946, NARA, RG 260, LD, box 40.

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individualized and discriminating criteria for disqualification. After all, so they argued, many jurists were only "nominal" members of the Nazi Party, and had joined only when refusal was certain to mean loss of jobs or pensions. By the same token, many ardent supporters of National Socialism never joined (or had been denied membership in) the Party. To punish everyone in the first category, but few or none in the second, was to offend justice. An argument could be made, was *being* made by German jurists, that the blanket enforcement of the de-Nazification policy was likely to damage American prestige and render Germany more difficult to govern and reform.[102]

Loewenstein's memorandum acknowledged these arguments, but it also probed their weaknesses. He noted, for instance, that the outcry of German lawyers against the indiscriminate injustice was blatantly hypocritical, being "conspicuously at variance with the [attitude] adopted by the legal profession when the Jewish lawyers. . .were dismissed. At that time neither the bench nor the bar raised a hand to save their fellow members." When the Nazis came to power, the individual merit or demerit of *Jewish* lawyers had counted for nothing. Nor was Loewenstein persuaded that there was a coherent moral distinction between the "nominal" and "real" Nazi. Although it had taken great courage for judges and prosecutors to choose not to serve the Nazi state, some had done so (and had not been persecuted[103]). As for Germany's private lawyers, Loewenstein had not heard of a single case in which "pressure was brought to bear on members of the bar to join the party." Some of the Nazi lawyers undoubtedly were otherwise honorable men. But the question of motive for joining the Party, whether ideological conviction or naked self-interest, seemed secondary to what had been in its name. In Loewenstein's estimation, the true believers and opportunists were equally culpable for having "trampled underfoot the rule of law and justice under law." Both kinds of men were equally unfit for the practice of law in a democracy.

As he labored to develop a rational and morally defensible policy on legal de-Nazification in the American zone, Loewenstein held fast to two basic precepts. The first was that the purge of Nazi jurists, if it could not be comprehensive, had to be extensive.[104] Certainly all Nazi Party activists and policy makers had to be expelled. His second precept was that this goal was achievable only by an *American-controlled* program of identification

102. Loewenstein to Fahy, September 14, 1945, Loewenstein Papers, FLAC, box 14.

103. Loewenstein, "Reconstruction of Justice," 444.

104. Loewenstein was not alone among German émigré scholars in advocating for a "militant" program of postwar institutional de-Nazification. In helping to plan the American occupation for the OSS, Franz Neumann, John Herz, and Otto Kirchheimer had advocated a similar policy. See Katz, "Frankfurt School Goes to War," 459–65.

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and expulsion. "It cannot be too strongly emphasized," he informed Fahy, "that [de-Nazification] committees composed of Germans alone would utterly fail."[105] Such committees, even if operated by anti-Nazi lawyers of unimpeachable credentials, would swiftly be undermined by the "solidarity of the legal profession, the pressure of [German] public opinion, the effort to mitigate the rigors of the denazification policy, [and] the understandable desire to let as many fellow-citizens as possible escape from the consequences of party membership and the lost war." For the German lawyers, the fight against de-Nazification was not only about jobs, but about the reassertion of power and prestige in their home communities. In resisting the American program, they sought "to appear before their fellow countrymen as the defenders and protectors of the community against the retribution to be meted out against it as a whole." In causing the Americans to make nice distinctions between "nominal" and "real" Nazis, the jurists wanted to demonstrate their political value to the German community. For these reasons Loewenstein's advice was unequivocal: "Under no circumstances should the de-Nazification of the legal profession be entrusted to the Germans themselves, and not even to recognized anti-Nazis among them."

But just as Loewenstein rendered this advice, the chief decision makers at AMG headquarters began to move de-Nazification policy in the opposite direction. In October 1945, General Clay, now convinced that an American-administered program of de-Nazification could not succeed, accepted Fahy's advice to strike a high-level committee (the "Denazification Policy Board"[106]) to undertake a thorough review of available options for the American zone.[107] With Fahy himself at the helm, the Board's mandate was to devise viable means of turning de-Nazification over to Germans, even at risk of far more lenient treatment of tens of thousands of "nominal" members of the Nazi Party.[108] As the work of the Policy Board unfolded in November 1945, the senior legal officer at USFET (the German-born lawyer and now American army officer, Major Fritz Oppenheimer[109]) was brought in to work with German officials

105. Loewenstein to Fahy, September 14, 1945, Loewenstein Papers, FLAC, box 14.

106. The Committee consisted of six men, including Fahy and the chiefs of AMG intelligence and economic affairs, along with the senior "Political Advisor" to AMG, Robert Murphy. For background, see Gimbel, *American Occupation*, 101–3.

107. Peterson, *Retreat to Victory*, 147.

108. Ibid.

109. Oppenheimer, a decorated veteran of the German army in the First World War, practiced corporate and international law in Berlin from 1922 until he emigrated to England in 1936. After becoming a barrister in London, he emigrated to the United States in 1940, enlisting in the United States army as a private soldier in 1942. In the final months of the

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in the development of a plan. Strongly in favor of the swift "Germanification" of de-Nazification,[110] Oppenheimer focused on a Bavarian proposal calling for a system of local de-Nazification tribunals (or *spruchkammer*) to be staffed by dependably anti-Nazi Germans. In early December, Clay requested that the minister–presidents of the German Länder meet to draft a "uniform regulation of de-Nazification"[111] based upon the Bavarian initiative. By late December, the Ministers' draft was in the hands of Fahy's Policy Board.

Meanwhile, and in the wake of many more meetings with German jurists, Loewenstein's views on de-Nazification were hardening in the opposite direction. On November 30 he reported to Fahy that, "There is not the slightest trace or sense of collective guilt among the Germans. Former membership in the party is not considered a stigma."[112] The main source of the Nazi party's strength was that it had "derived its power from the mass of its supporters," drawing members from all regions and walks of life. Individual autonomy and responsibility had been subsumed within the overarching purposes of the Party. That was why "the notion of a 'nominal' party member is unintelligible," just as it was unintelligible to excuse nominal (or late[113]) membership because it was motivated by private advantage. If "nominal" party membership, Loewenstein wrote, "means that a person has abstained from torturing prisoners or that he has not burned people in the stoves at Auschwitz it is hardly serviceable, because it merely draws a line between the activists and the rest."[114] After all, the contributions of "the rest" had been vital to the realization of the Nazi program. For this reason Loewenstein now recommended that, with regard to public professions such as law, "no former member of the Nazi Party,

war in Europe, Oppenheimer was a major assigned to Eisenhower's general staff, helping to coordinate the first American efforts in taking control of the Nazi legal system. After the surrender, he was promoted to lieutenant–colonel and assigned to General Clay's staff as a general advisor of German affairs. See generally, Oppenheimer obituary, *New York Times*, February 6, 1968.

110. In his support of this policy, Oppenheimer was in direct and sometimes acrimonious conflict with Loewenstein. The two men clashed on the issue during their time with AMG in Germany and afterward. For an account of their policy differences on de-Nazification, see Oppenheimer, "Denazifying Germany," *New York Times*, January 12, 1947.

111. See ibid; and "Minutes of the Meeting at Stuttgart of the Ministers of Justice of the South-German Länder," December 18, 1945, Loewenstein Papers, FLAC, box 28.

112. Loewenstein to Fahy, November 30, 1945, Loewenstein Papers, FLAC, box 28.

113. As Loewenstein later wrote, "I admit that it is a fundamental right of man not to be a hero. But the fact that a person of integrity loaned his name, for selfish and opportunistic reasons, to a party which he now professes to have despised" was no basis either of respect or trust. Loewenstein, "Comment on Denazification," *Social Research* 14 (1947): 367.

114. Loewenstein to Fahy, November 30, 1945, Loewenstein Papers, FLAC, box 28.

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whether activist or merely nominal [or as an active supporter without membership]...should be tolerated except as [an] ordinary worker." The Nazis, just as the Nuremberg prosecutors alleged, had been a criminal organization, and "Guilt by association," Loewenstein concluded (now in his diary), "is the only way of getting rid of subversive associations."[115] If democratization was to achieve permanent reform in the legal field, there was no scope for compromise on this point. The rapid restoration of former Nazis to important offices in the legal system would "constitute a serious danger to the future of the democratization of Germany as a whole."[116]

Before the debate over de-Nazification policy came to a head in the late fall of 1945, Loewenstein perceived that leading officials at AMG were going soft on the Germans. If indeed the American leadership had come to Germany with an appropriate fear and loathing of Nazism and Nazi jurists (and here there was room for doubt), these convictions now were being eroded "by the fraternization between the American Military Detachment and the German legal profession."[117] In their various engagements with the American occupiers, German legal officials–educated, urbane, white-skinned–were apt to tell convincing tales of how they themselves had not been Nazis, had never supported the Nazis, and fully approved of the purge of the few *genuine* Nazis who had survived the war.[118] Loewenstein was alarmed that his bosses at Legal Division were lending credence to such claims. More alarmingly, however, two of the most prominent German-Jewish émigrés with AMG, Fritz Oppenheimer and Max Rheinstein, also began to endorse a lenient policy on "nominal" Nazi lawyers and judges.[119] A full-scale retreat from a stern and American-controlled policy of de-Nazification now seemed imminent.

And so it was. When leading American legal officials met with the German ministers of justice of the three south German Länder on December 18, 1945, the main topic of discussion was not *if* there would be German-operated de-Nazification tribunals, but their composition and

115. Loewenstein, OD, January 31, 1946.

116. Loewenstein, OD, November 30, 1945.

117. Loewenstein, OD, August 29, 1945.

118. This Loewenstein called the "glib and persuasive technique of the Germans in absolving themselves." Loewenstein, "Comment on Denazification," 367.

119. In key meetings with German officials in December 1945, Loewenstein alleged, Oppenheimer "was less rigorous than the Germans themselves. He seemed to protect the Germans against their own proposals." Loewenstein, OD, December 18, 1945. "Rheinstein and Oppenheimer," he diarized on January 31, 1946, "are leaning back to get as many 'nominal' Nazis [as possible] back into the fold."

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procedures.[120] Two days later, Fahy's Policy Board issued a preliminary report reaffirming the purge from public life all Germans who had "held positions of leadership and authority in Nazi regime". But the Board also recommended that de-Nazification be reconfigured as a "popular program," one which relied mainly on *German* judgment about the culpability of ex-Nazis.[121] In early January 1946, Loewenstein was afforded a final opportunity to advise Fahy on this policy.[122] He did not withhold himself. Although conceding that any wholesale or indiscriminate program of de-Nazification was impractical, Loewenstein was unyielding in his conviction that it would be a grave error to cede control of the process even to "congenitally anti-Nazi" Germans.[123] As his brief explained, "even the anti-Nazis…are good Germans and they have to live with their people." In applying the new law, even steadfast anti-Nazis would be inclined to "protect the German people" against foreign occupiers. Their decisions would be guided by the general "climate of misery" in Germany, not by "abstract principles of justice."[124] In the result, the American de-Nazification program would be reduced to a "superficial gesture."[125]

In the final report, dated January 15, 1946, Fahy's Policy Board recommended that General Clay adopt the German de-Nazification plan as the basic framework of reform. After further consultation with the land ministers of justice, the plan was to be fine-tuned and sent back to Clay for final approval. The Policy Board offered one caveat: the new de-Nazification law would require "effective supervision and policing by Military Government."[126] Clay activated the directive on March 5, 1946, informing the minister–presidents that they would be held "strictly accountable for the effective and just enforcement of the law."[127] Loewenstein's

120. "Summary of discussion of denazification laws," December 18, 1945, NARA, RG 260, LD-Legal Advice Branch (LD-LAB), box 52. For Oppenheimer's similar account of these meetings, see "Denazifying Germany".

121. "Preliminary Report by Working Committee to Denazification Policy Board," December 20, 1945, Fahy Papers, FDR Presidential Library, box 59.

122. Loewenstein to Fahy, January 5, 1946, Loewenstein Papers, FLAC, box 28.

123. Loewenstein, OD, January 3, 1946.

124. Having offered these "basic objections," Loewenstein proceeded ("with resignation") to provide a "section-by-section analysis" of the German proposal, suggesting amendments that might render it at least "serviceable." Loewenstein (through Elman) to Fahy, January 5, 1946, Loewenstein Papers, FLAC, box 28.

125. Loewenstein, OD, January 3, 1946; Loewenstein, "Reconstruction of Justice," 450–52.

126. "Report of the Denazification Policy Board," January 15, 1946, Loewenstein Papers, FLAC, box 28.

127. Clay to Minister–Presidents, March 5, 1946, Fahy Papers, FDR Presidential Library, box 60.

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objections, if they had not been ignored, had been decisively overruled. The decision had come down to pragmatic judgment about what was possible. As Clay informed the War Department in March 1946, he had turned de-Nazification over to Germans for the uncomplicated reason that AMG was incapable of doing the job.[128] At the end of the day, the ensuing risks *had* to be taken, even over the strenuous protest of "experts" such as Loewenstein and, more consequentially, over the weight of public opinion in America.[129]

Loewenstein was never reconciled to Clay's decision. Its upshot (as he explained to Fahy) was that any prospect of exerting firm control over the pace and durability of German democratization now had "slipped out of our hands, and…we had better admit the failure."[130] The new program, he glumly predicted, would ensure that "95% of the Nazis will slip through the meshes of the tribunals…and be reinstated." Equally predictable was the dire impact of the decision on Loewenstein's personal prestige and morale. He was coming to realize about Legal Division and about AMG as a whole, that key policy decisions would be the product, not of open-ended debate informed by experts, but of the fiat of executive officials. Going forward, what troubled Loewenstein was not merely that his advice had been overruled, but that it had been marginalized even as a factor of debate. In presiding over the de-Nazification policy review, Fahy's purpose had been to provide the legal structure for a decision that had already been made by General Clay. Any person or idea that threatened to impede the process was cast aside. "This is the way Military Government is conducted," Loewenstein lamented in January 1946, "the experts advise against something and the General does what he pleases."[131]

In the six months since he arrived in Berlin, Loewenstein had travelled widely in the American zone, and had conferred with scores of German and American officials. He had rendered reports on a myriad of subjects, ranging from the organization and methodology of the Division, to the reform of German substantive law and agenda for forthcoming conferences on the reconstruction of the German judiciary and bar.[132] Although the

128. In a telephone conversation with his superior at Civil Affairs Division, General Hilldring, on March 1, 1946, Clay stated that, "Actually, if you gave me 10,000 people over here, I couldn't do that job [of de-Nazification]. It's got to be done by the Germans." Smith, ed., *The Papers of General Lucius D. Clay*, 172.

129. Clay was aware that in the United States news of the new de-Nazification policy would garner a "tremendous amount of abuse". Ibid.

130. Loewenstein, OD, January 31, 1946.

131. Ibid., January 18, 1946.

132. In his first two months alone Loewenstein had also written thirty-nine memoranda on at least two dozen different topics, including agricultural, criminal, tax, real property, and

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dramatic shift in de-Nazification policy was the primary reason that he had wasted his time in Germany, by no means was it the only source. In the winter of 1946, Legal Division still had barely begun to plan, still less to activate, key programs of German law reform.

As we have seen, the Potsdam Protocol mandated the abolition of "all Nazis laws." The comprehensive elimination of Nazi influences in German law was (as Loewenstein advised Fahy) a "gigantic undertaking."[133] One reason was that from 1933 until the end of the war, the Nazis had been insinuating their ideology "into every legislative nook and cranny, and into legal fields of seemingly neutral character politically. . ."[134] Whereas it had been relatively uncomplicated to identify and eliminate the most flagrantly racist and repressive Nazi laws,[135] in many other instances the influence of the "Nazi world outlook" on law and procedure was likely to be subtle and ambiguous. In undertaking a careful survey of Nazi-era laws, Loewenstein reckoned, Allied legal staffs would be taxed "to capacity."[136] As matters stood at Legal Division in the late autumn of 1945, however, there was no detailed plan for the comprehensive assessment and reform of Nazi-era German laws[137] and no realistic capacity to execute one, once made. Nor had any work been done on the complex theoretical issues raised by legal de-Nazification:[138] On what criteria were German laws, or parts of laws, to be considered "Nazified"? How was one to deal with the legal vacuum and lacunae created by the abrogation of Nazi law? Once made, how was American policy to be

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family law. Loewenstein, "Record of Written Work, 15 August–18 October 1945," Loewenstein Papers, FLAC, box 28.

133. Loewenstein to Fahy, August 21, 1945, NARA RG 260, LD-AJB, box 4. See also, Loewenstein's summary of these problems in *Legal Reconstruction in Germany*, 88–93, Loewenstein Papers, FLAC, box 24.

134. Karl Loewenstein, "Law and Legislative Process in Occupied Germany: I," *Yale Law Journal* 57 (March, 1948): 734–35. For an overview of the problems raised by the general reform of German law, See Szanajda, *Restoration of Justice*, 78.

135. On August 30, 1945, the ACC's Law No. 1 (effective September 20, 1945) repealed a long list of Nazi laws "of a political or discriminatory nature upon which the Nazi regime rested." See *Official Gazette of the Control Council for Germany*, 29.10.1945, no. 1, 6–8.

136. This was because of the paucity in the Division of German-literate and trained legal specialists, and the absence even of a comprehensive library of Nazi-era laws. Loewenstein to Fahy, August 21, 1945, NARA RG 260, LD-AJB, box 74.

137. By war's end Oppenheimer's SLU had produced more than a score of analytical surveys of various aspects of Nazi-era German substantive and procedural law. Some of these reports were in circulation at Legal Division–Berlin in 1945. However, Loewenstein thought that the reports were generally "inaccurate and not intelligible." See Loewenstein, OD, November 26, 1945.

138. Loewenstein later revisited these issues in greater depth in his article, "Law and Legislative Process in Occupied Germany," 734–39.

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reconciled with the policies of three Allies? What was to be the main goal of American law reform policy: to reset German legal clocks to the last day of the Weimar Republic, or to move forward to some different "liberal democratic" setting?

In Loewenstein's judgment, there were good reasons why there was no going back to January 30, 1933.[139] The Nazis had made irreversible changes to German political economy. After 1933, "state control" of the new national conglomerates and cartels had become pervasive and, in Loewenstein's view, altogether necessary. Their removal would greatly hamper Germany's socio-economic recovery and impede, perhaps derail, its political democratization. In this regard Loewenstein's second claim was even more striking: "Not a few of the laws enacted under the Nazi regime," he informed Fahy, "contain genuine progress in legal evolution, partly in fulfillment of legislative demands of long standing." In a number of instances, moreover, Nazi lawmakers had completed legal reforms that had been previously proposed during Weimar.[140] These reforms, though promulgated by the Nazis, had been undertaken with the "full concurrence of legal science and public opinion." In a number of instances, Loewenstein summarized, Hitler-era legislation, "even though outwardly based on Nazi ideology [was] progressive and, on the whole, beneficial." For these reasons, any Allied policy that aimed to simply restore the German legal status quo (of 1932) would be misguided, anachronistic and, in some instances, retrograde.

Loewenstein recommended a phased course of action on German law reform. In the first phase, Legal Division lawyers would prioritize the amendment (or abrogation) of the German statute book. Priority was to be given to laws that "affect the most people directly," such as marriage, succession and criminal laws.[141] In the second phase "considerable sections" of German law would be redrafted. During both phases of the project, Loewenstein emphasized, it would be essential to enlist a large number of German lawyers. Not only did German experts know their own laws better, but their active participation was more likely to garner

139. Loewenstein to Fahy, August 21, 1945, NARA, RG 260, LD-AJB, box 74.

140. For discussion of the paradoxical notion of "progress" in legal science during the Nazi regime, see Stolleis, *The Law under the Swastika*, 48–63. This theme is revisited by Stolleis in his essay, "Prologue: Reluctance to Glance in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945," in Christian Joerges and Navraj Singh Ghaleigh, eds., *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Traditions* (Oxford: Hart Publishing, 2003), 1–18, *passim*.

141. Ibid.

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"at least a modicum of German consent."[142] In Loewenstein's opinion, the appropriate role for the Americans in this process was one of general supervision and direction.

Loewenstein also believed that the reform of many German laws would need to be undertaken on a national basis and therefore by consent of all four members of the ACC.[143] Consequently, the Americans needed both a general policy on German law reform and a diplomatic strategy for its realization. Early in 1946, Legal Division still had neither. Although in September 1945, some staff (including Loewenstein himself) had begun to work on the revision of (among other areas) German criminal law and procedure, marriage, succession, and administrative law, the problems here were manifold. Reform initiatives were started without adequate information about what other Allied lawyers were doing on the same issues.[144] At Legal Division, complex problems had been assigned to lawyers lacking expertise in the relevant German law.[145] When the Legal Directorate of the ACC first convened in September 1945,[146] it soon had become obvious that there was no basis of consensus either on the methodology or substance of a nationwide law reform program.[147] For lack of a better option, the Directorate proceeded to examine Nazi-era legislation on a more or less random basis. Finally, in February 1946, the ACC intervened to create the "German Law Revision Committee" to tackle the problem more

142. But Loewenstein objected to a British proposal, made in November 1945, for the Allies to establish a committee of German lawyers to undertake a "global de-Nazification of the entire German statute book since 1933." His reason was that a German committee would be disinclined to "ferret out" the more subtle presence of fascist, militaristic, and nationalist influences on German law. Loewenstein to Madden, November 20, 1945, NARA, RG 260, LD-AJB, box 74.

143. Loewenstein later revisited these issues in greater depth in his article, "Law and Legislative Process in Occupied Germany," 734–39.

144. Legal Division did however have a series of meetings with a British team of lawyers about the potential coordination of law reform programs. Loewenstein, OD, September 5, 1945.

145. Loewenstein often complained that Legal Division was too reluctant to hire qualified German experts. The prevailing view at the Division was that a "Kraut is a Kraut." OD, December 12, 1945.

146. The quadpartite "Working Party on German Law" met six times in September 1945. NARA, RG 260, ACC-DLEG, Chairman's report, October 12, 1945.

147. Loewenstein, "Law and Legislative Process," 738–39. Whereas the British and American positions were broadly compatible, the Soviets operated on entirely illiberal assumptions about what was entailed by the "democratization" of a legal system. The French, although liberal in their basic approach, obstructed any policy that might tend to reconstitute a centralized German state. For an overview of the complicated diplomacy of the ACC, see generally, Gimbel, *American Occupation*, 16–18; Smith, *The Papers of General Lucius D. Clay*, 233–34.

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systematically.[148] However, the new Committee did not meet until March 21, and then took many more weeks to agree on how to divide labor. By the time its work was begun in earnest late in 1946, the ACC, never an effective means of German government, already had begun to unravel.

By this time, Loewenstein's professional (and personal) relationships with his superiors at Legal Division–Berlin had all but broken down. He now had been either overruled or ignored with regard to a number of important issues. Another blow came in December 1945, when Fahy shelved one of Loewenstein's pet projects (the organization in the American zone of a new German-operated Ministry of Justice staffed by leading anti-Nazi lawyers[149]) and with it (as Loewenstein saw it) the "only constructive proposal" mounted by Legal Division in the first five months of its existence. In the same month Fahy also had failed to endorse Loewenstein's bid to become the Division's chief representative at the first general meeting of the Länder ministers of justice.[150] Just as these issues came to a head, it was revealed that a panel of German judges in Bremen, men who only weeks before had been restored to the bench by Legal Division, had applied Nazi-era military law in sentencing a German army deserter to a long sentence of hard labor.[151] For Loewenstein this incident confirmed his view that the Division was moving too quickly, even recklessly, on judicial de-Nazification. If the judges of the Third Reich were to be returned to their former offices, if this was to happen in a manner not wholly inconsistent with the liberal democratization of German society, Legal Division would need to devise and implement a program of intensive reeducation and vigilant supervision. When the draft of his memo (to Fahy) to this effect was intercepted and pulled by his immediate superior, Loewenstein threatened to resign.[152] Then, in early January 1946, when final consideration of another of Loewenstein's projects (German bar reform) was delayed by the objections of other staff, Loewenstein, in his own words, twice "exploded" with

148. Having achieved little of substance by the time Germany was partitioned in 1947, the projects and deliberations of the "German Law Revision Committee" of the ACC has not received scholarly attention.

149. Loewenstein, OD, December 6, 1945.

150. Ibid., December 11, 1945.

151. In Loewenstein's opinion, the "ominous feature of the case" was that the "allegedly democratic judges whom the American military government recently has appointed, are so far removed from…the new concept of administering law according to democratic justice that they did not feel compelled to acquit the defendant or quash the case altogether…". Loewenstein to Fahy, December 27, 1945, Loewenstein Papers, FLAC, box 40.

152. Loewenstein would resign unless he was transferred out of the Administration of Justice Branch operated by his despised boss, Norman Shepard. Nothing came of this incident. OD, December 28, 1945.

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rage.[153] Demoralized, on the brink of nervous exhaustion, Loewenstein now feared that he had entirely "washed out" as an expert consultant.[154] On January 13 he met with Fahy to discuss the terms of his resignation.[155] As a result, Loewenstein was persuaded to stay on. He might not influence the shape of world events from his office at Legal Division. He surely would not influence them from his office at Amherst. If nothing else he had an ideal vantage point from which to observe one of the great (if failed) experiments of modern history. For the student of politics, Loewenstein consoled himself, there could be no better place: "Why not just stand by, observe, [and] get as much out of this as possible?"[156] It was also rumored that Fahy was soon to resign. Maybe, under new management, Loewenstein's prospects for an effective role would improve.

This optimism was misplaced. In the winter of 1946, Loewenstein detected no improvement either in the operations of Legal Division or in his own predicament. Then, in early April 1946, Fahy disclosed that he would resign from Legal Division (for a place with the State Department) by the end of May. Loewenstein's hopes were dashed when it became known that Fahy's successor would be Judge J. Warren Madden, his deputy director and longtime friend. Madden was an experienced American jurist and legal administrator. Like Fahy, he was a former New Deal lawyer who had come to Berlin without special expertise in German law or culture.[157] Like Fahy, too, Madden came without deep convictions about either German legal Nazism or the means of its eradication. Madden was another administrative pragmatist, ready to adjust American law reform policy as his circumstances required. By May 1946, compromise was the order of the day. By now it was clear to all the executive officers of AMG that the ACC was not, and would not, become a viable instrument of government. If German law and politics were to be reconstituted, it would not be on national basis or by quadpartite action.[158] Although the ACC and its subcommittees continued to meet, the main focus of AMG now was on the American zone, more particularly on preparing America's Germans for their first provincial or "land" elections

153. Ibid., January 5, 1946.

154. Ibid., January 13, 1946.

155. Ibid.

156. Ibid., January 8, 1946.

157. Unlike Fahy, however, Madden arrived in Germany with a career position as a federal judge, and returned to the same bench immediately following his year with Legal Division.

158. For the political and diplomatic background to these developments, see generally, Carolyn Woods Eisenberg, *Drawing the Line: The American Decision to Divide Germany, 1944-1949* (Cambridge: Cambridge University Press, 1996).

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under occupation.[159] To this end, the (appointed) minister–presidents of the Länder were granted broad authority to govern their regions under American supervision.[160] In order to streamline the creation and supervision of German policy within the zone, a general council or "Länderrat" of minister–presidents was established in Stuttgart in October 1945. Within a year of the surrender, the Americans already had begun to reinvent themselves as the *indirect* governors of their zone.

One important facet of the new policy was the restoration of German trial and appellate courts systems in the Länder of the American zone. A few German local courts (of severely restricted jurisdiction) had been opened by USFET in the summer of 1945.[161] Then, in October 1945, the ACC proclaimed its intention to "establish a new democratic judicial system" in Germany, one founded on the independence of judges from "executive control".[162] Two weeks later, the Council also agreed to permit the military governor in each zone to re-establish the pre-Nazi system of German local and regional courts.[163] In the American zone, initial responsibility for the program was delegated to the land ministers of justice. This was a momentous step, and, as we have seen, one for which (so Loewenstein thought) Legal Division was demonstrably unprepared.[164] There were no answers to three pivotal questions: How were the German justice ministers to overcome the chronic shortage of qualified non-Nazi judges and prosecutors? Were the Americans prepared to tolerate the appointment of jurists who had been categorized (now by *German*-operated de-Nazification tribunals) as "nominal" Nazis? Finally, and most crucially, by what criteria and mechanism would German judges and prosecutors be supervised and, if necessary, controlled? With de-Nazification now in the hands of Germans, Loewenstein contended, a quick and sure answer to the last question had become "all the more necessary".[165]

159. Gimbel, *American Occupation*, 44, 92–93.

160. Karl Loewenstein, "Law and the Legislative Process in Occupied Germany II," *Yale Law Journal* 57 (1947–1948): 996.

161. Staffed by judges who had not been members of the Nazi Party, these courts were permitted to try petty criminal and divorce cases involving German citizens. Szanajda, *Restoration of Justice*, 59–60.

162. ACC, Proclamation No. 3: "Fundamental Principles of Judicial Reform". See generally, Loewenstein, "Reconstruction of Justice," 421.

163. Although the courts would not exercise jurisdiction over cases involving Allied personnel, policies or actions, they would enjoy broad authority in the interpretation and application of German civil and criminal law in cases involving German citizens. ACC, Law No. 4: "Reorganization of the German Judicial System". Ibid.

164. Loewenstein, "Reconstruction of Justice," 430.

165. Loewenstein, OD, February 8, 1946.

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But a quick and sure answer was not found. The reopened courts immediately created serious problems for Legal Division.[166] The first round of judicial appointments included a great many elderly or otherwise poorly qualified applicants. The second round included many former members of the Nazi party, now freshly "cleansed" by German-operated de-Nazification tribunals. In the absence of close supervision, Loewenstein warned in January 1946, AMG bore significant risk that the courts would "relapse into the antidemocratic habits as occurred after 1918."[167] As matters stood in early March 1946, there still was "no way of checking on German courts, and things are sliding out of our hands."[168] In a detailed memorandum submitted to Fahy, Loewenstein explained why the Division needed to monitor and control reopened German courts and prosecutorial offices. Whereas few of the reappointed judges had been ardent Nazis, it was equally true that "Few of them were active *anti*-Nazis, that is, persons who actually opposed the regime" [emphasis added].[169] Most German judges and prosecutors, whether or not they had been members of the Nazi party, were instinctively illiberal and nationalistic. As members of an elite segment of the powerful German civil service, they had been selected, trained, and indoctrinated in an especially anti-democratic ethos.[170] "Democratic conviction as it is understood in the Anglo–Saxon countries," Loewenstein advised, "cannot be assumed to be deep-rooted in this group."[171]

Nor had German judges ever been politically neutral. During the Weimar Republic, they had consistently defended the prerogatives of the state at the expense of liberty and democracy.[172] During the Hitler regime, most had been willing to implement the most viciously racist and repressive articles of Nazi law. In their basic ethic of judicial decision making,

166. For a summary of American reports on the reopened courts, see Loewenstein *Legal Reconstruction in Germany*, 17.

167. Loewenstein, OD, January 28, 1946.

168. Ibid., March 5, 1946.

169. Loewenstein to Fahy (through McLendon), March 25, 1946, NARA, RG 260, LD-AJ, box 74.

170. Loewenstein's contention is broadly supported in the historical literature. See generally, Ledford, "German Lawyers and the State in the Weimar Republic," 317–49; Nathans, "Legal Order as Motive and Mask," 281–304.

171. Loewenstein to Fahy (through McLendon), March 25, 1946, NARA, RG 260, LD-AJB, box 74.

172. The judges of the Nazi period fully vindicated the earlier observation of Karl Kraus that Germany was not only a land of "dichter und denker" (poets and thinkers) but also of "richter und henker" (judges and executioners). My thanks to Carl Landauer for bringing this remark to my attention. For a general discussion of the operation of criminal justice in the Nazi era, see generally, Evans, *Third Reich in Power*, 71–80.

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Loewenstein contended, German judges were "legalists and positivists and will apply the law even if it is bad law. Without supervision, the courts sooner or later will become "the instruments of reaction..."[173] At present, he reminded Fahy, "the only guarantee of justice in accordance with democratic law is the personality of the individual judge and the supervisory capacity of the [German] land government and its minister of justice." Although the current group of German Ministers could be counted on to prevent obvious abuses, the forthcoming elections in the Länder seemed certain to return power to men whose "obedience to Military Government and devotion to democratic principles may [not] be taken for granted." This was why the close supervision of the German courts by AMG "must be made a reality." If supervision came at the price of complete judicial independence, this was the justifiable cost of an appropriately "militant" policy of democratization.[174]

Loewenstein proposed that Legal Division work with American legal officers at the land level to set up a system of "continuous inspections on circuit".[175] The inspections, a series of "spot checks," would be undertaken by "persons fully conversant with German language and German law...[by officers] with the fullest possible grasp of the existing German legislation." In addition, the court inspectors would closely review decisions in cases bearing obvious "political implications." Toward this end, Legal Division needed to recruit and train a cadre of German lawyers to observe court proceedings, gather intelligence on judicial and prosecutorial actions, and read and evaluate legal decisions.[176] Equally imperative was the need for Legal Division to devise a program for the instruction of German judges and prosecutors in liberal democratic legal and political norms.

In the wake of Fahy's resignation, the final decision on these issues fell to Warren Madden. Madden found Loewenstein's advice wanting in a number of important respects. The systematic supervision and control of judges, he believed, contradicted the fundamental democratic precept of judicial independence.[177] Madden believed that no judge fit for his position would accept the potentially intrusive oversight of an outside agency. Further to the point, Legal Division had neither the time nor the money to train a staff of German court inspectors. In Madden's view, the only practicable way forward was for the Division to develop a system of

173. Loewenstein, OD, March 20, 1946.

174. Loewenstein later revisited this point in a scholarly article. Loewenstein, "Reconstruction of Justice," 431–33.

175. Ibid.

176. Loewenstein, OD, March 18, 1946.

177. Ibid., April 20, 1946.

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internal supervision by the ministers of justice of the Länder. In short, Madden thought it would suffice for rehabilitated Germans to police their own courts. Aware of Loewenstein's intransigence, Madden invited other staff at Legal Division, men he knew to be more sanguine about German dependability in such matters,[178] to come up with a plan.

When the plan reached Loewenstein for comment in late May 1946,[179] once again he found himself fighting a rear-guard action against (what he saw as) a profoundly flawed and misguided policy. Although he now conceded that direct American control of German courts was not feasible, Loewenstein did not retract his central point: "The generation of judges and public prosecutors now in office," Loewenstein cautioned, "is basically and intrinsically not democratically-minded; at best they are indifferent to democratic values." In Loewenstein's view there were telltale signs that the "the attitude of the German people towards the occupation authorities has stiffened," and that inadequately supervised German legal officials would be emboldened in their resistance to democratic reforms. Privately, Loewenstein thought that Legal Division's current courts supervision initiative "had been watered down to such an extent that it became almost meaningless."[180] (He also privately believed that the Americans in charge of the German courts program at Legal Division, the career army lawyer, Colonel Ernest McLendon, and the civilian lawyer, Norman Shepard, were hopelessly ill equipped for the courts assignment.[181]) But in his official

178. Madden's pick was the German–Jewish émigré lawyer, Max Rheinstein. Loewenstein was contemptuous of (what he viewed as) Rheinstein's strange, even neurotic desire to exonerate former Nazi jurists. As Loewenstein bitterly diarized on April 25, 1946, "Rheinstein is a true fifth columnist and doesn't wish to touch the pure and nice Germans. . . . They will be alright after what they have suffered, look at their wantonly destroyed cities, etc. He does not remember that after 1919 the courts sabotaged deliberately the young republic, to the delight of the entire bourgeoisie. . . . I try and hold him back so at least the internal controls which the Germans themselves wish to institute will get into our final draft."

179. The draft plan called for the use of "former referendars [graduates of law who had not yet qualified for the German bar] who left Germany after Hitler" as court supervisors. In Loewenstein's opinion, referendars had far too little experience and prestige "to be capable of exercising the function of control" over judges. Loewenstein to McLendon, April 29, 1946, Loewenstein Papers, FLAC, box 28.

180. Loewenstein, OD, May 27, 1946.

181. McLendon and Shepard, too, had come to Germany without specialized expertise in German law, history, or language. In his diary, Loewenstein was caustically critical of both men. After working for many months with Shepard, Loewenstein flatly concluded that he was too "stupid" for such a challenging job. OD, January 28 and March 13, 1946. Of the chief of the section, Colonel McLendon, Loewenstein saw him as "a charming Southern gentleman" who had been put in a position far beyond his intellectual depth and training. OD, July 2, 1946.

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memorandum to Madden, Loewenstein suggested a compromise. If a German-operated system of internal controls was unavoidable, so be it. But it was vital in this case to insist that the land ministers of justice be insulated from outside political interference. Effective mechanisms also had to be created to permit citizens to complain about (and find redress for) judicial and prosecutorial abuses. If introduced quickly, these mechanisms might be "acceptable to the German authorities." But, should AMG hesitate, the obstacles to reform were likely to become "insurmountable".[182]

Loewenstein's advice was again overruled. German courts were reactivated and restaffed with virtually no American supervision.[183] By the late spring of 1946, AMG was now fully committed to the rapid reactivation of the German institutions and economy in the western zones,[184] including the reactivation of the German legal system. For those (such as Madden) in charge of subdivisions of AMG, any expert advice that was likely to inhibit this policy, no matter how well-informed, was no longer acceptable. It can be readily understood, therefore, that when asked to provide counsel on the reform of the German bar, Loewenstein was not optimistic that his input would matter.

For Loewenstein, himself once a German lawyer and law professor, the question of how to reform the organization, ethics, and education of legal professionals was close to mind and heart. The Nazis had prematurely ended his legal career in Germany. And, as German lawyers watched (or assisted), the Nazis had ended the careers—and lives—of many professional friends and colleagues. With regard to the reform of the bar, Loewenstein found slight encouragement in the fact that most of Germany's private lawyers had not joined the Nazi Party and otherwise "had stood the moral test of the Nazi period much better than the court personnel (judicial and public prosecutors)."[185] This was something to build upon. Unfortunately, however, in the first six months of the occupation, the recertification of lawyers in the American zone had been undertaken by USFET officers in charge of local detachments of AMG. Inadequately briefed and supervised, the officers produced a "chaos" of ad hoc decisions about the practice of law in the American zone.[186] Some former Nazi party members—no one knew how many—had secured permission to resume

182. For a summary of the deficiencies of the court supervision program, see Loewenstein, *Legal Reconstruction in Germany*, 47–57.

183. Ibid.

184. See generally, Peterson, *Retreat to Victory*, 347–52; Boehling, *A Question of Priorities*, 210–67.

185. Loewenstein, *Legal Reconstruction in Germany*, 59–60.

186. Ibid., 57–58.

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their law practices within the "voluntary bar associations" that had been hastily organized by the German justice ministers in the American Länder. At Legal Division, little was known about their charters or activities.[187] In early December 1945, and as USFET was about to turn over all legal work to Berlin, Fahy invited Loewenstein to prepare draft legislation governing all aspects of German legal–professional life in the American zone, including the crucial question of criteria for initial qualification and readmission to the postwar German bar.

Loewenstein's first draft (sent to Madden[188]) focused on the question of the training and qualification of new lawyers. His main recommendation was for the general restoration of the Weimar system of legal education and bar admission.[189] This would involve the reintroduction of national standards of legal education, but regional standards of preparatory training and (qualifying) examination. After further internal (and, from Loewenstein's viewpoint, "amateurish"[190]) consultation, a second draft of the bar reform proposal was prepared and sent to the land ministers of justice in February 1946. Meanwhile, in the Legal Directorate of the ACC, the Soviets called for the uniform regulation of legal education and bar admission on a quadpartite basis. The idea quickly garnered opposition from the ministers of justice in the American Länder.[191] It also stimulated Legal Division to step up the pace of work on bar reform.

When asked (by new Director Madden) to comment on the Soviet plan, Loewenstein urged caution.[192] He agreed (with the justice ministers of the German Länder) that in imposing national uniformity in bar admission the Allies would contradict the decentralizing aims both of the Potsdam Protocol and the (commendable) German tradition of regional autonomy

187. Ibid.

188. Loewenstein to Madden, December 14, 1945, Loewenstein Papers, FLAC, box 28.

189. Loewenstein, OD, December 5, 1945. According to Loewenstein, the Nazis had taken a relatively decentralized system of bar regulation and had subjected it to "Prussian" central controls by the Justice Ministry in Berlin. Loewenstein to Madden, May 4, 1946, Loewenstein Papers, FLAC, box 28. For a general description of the German system of bar organization and admission, see Ledford, "German Lawyers and the State," 325–28; and Jarausch, *Unfree Professions*, 9–10, 131–34.

190. Loewenstein lamented that only two colleagues provided comments on the (crucial) German language version of the proposal, and then only on technical points of drafting. OD, January 5, 1946.

191. The ministers opposed the plan on the ostensible basis that it ran contrary to the Allied commitment at Potsdam to decentralize German government and to promote democratically-elected regional government. The ministers were also concerned by the prospect of a large and rapid influx of German lawyers (deportees and economic refugees) who had no connection or affinity for their home regions. Loewenstein to Madden, May 27, 1946, Loewenstein Papers, FLAC, box 24.

192. Loewenstein to Madden, May 4, 1946, Loewenstein Papers, FLAC, box 28.

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in this field. Loewenstein was opposed to the sweeping and "top down" character of the program. If the main goal of the Allies was to democratize the German bar, the better option was to focus on the "theoretical education" of new lawyers.[193] There were good reasons, moreover, to inhibit the easy movement of German lawyers to places where they had "no roots in the community." In a period of social and economic dislocation, excessive freedom of this kind would "necessarily encourage the sharp practices of unfettered competition which in the past contributed much to the lowering of professional standards." On this basis, the best course for Legal Division was to oppose the Soviet initiative as it continued to work on a comprehensive program of legal education and bar reform in the American zone.

In early June, and after consultation with the ministers of justice, Loewenstein submitted a final draft of the bar reform law.[194] The scheme called for substantial regional autonomy in bar admission and governance, subject to a set of compulsory requirements.[195] Each land would be obliged to establish a new bar association on a particular constitutional model. Consistent with the German custom of an integrated bar, membership-in-good-standing was to be a condition both of law practice and the judiciary. A "governing board" (elected by secret ballot of members only) would oversee each association's administrative and budgetary functions, as well as the admission and discipline of members. Provision was also made for the orderly absorption of de-Nazified and refugee lawyers. Most crucially, however, in discharging their basic administrative functions, the governing boards of the land bar associations were to enjoy legal independence from the oversight of politicians and civil servants.

In his closing memorandum to Madden on bar reform, Loewenstein described his draft law as so "urgently needed" by the land ministers of justice (particularly as they struggled with admission of de-Nazified and immigrant lawyers) that it "should no longer be subjected to the scrutiny of other experts in Legal Division."[196] He further recommended that AMG permit the Länder to legislate the reforms into law as their own bills, greatly enhancing their legitimacy in the eyes of Germans. Finally, Loewenstein entreated Madden to press the ACC to adopt his draft as a basis of bar reform in the entire German territory. In a rare victory for Loewenstein, both proposals were accepted. In November 1946 (four

193. Ibid.

194. Loewenstein to Madden, June 10, 1946, Loewenstein Papers, FLAC, box 28.

195. Loewenstein, *Legal Reconstruction in Germany*, 60–62.

196. Loewenstein to Madden, June 10, 1946, Loewenstein Papers, FLAC, box 28.

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months after Loewenstein returned to the United States), the three south German Länder passed bar reform bills modeled largely on Loewenstein's final draft.[197]

While he worked on bar reform, Loewenstein also remained heavily involved in the issue of university-based legal education in Germany. In his many communications with Fahy (then Madden[198]) on the subject, Loewenstein invariably emphasized the "paramount importance" of academic legal education as a "key-stone of a democratically-rebuilt Hall of Justice in Germany."[199] Swift reform in this field was particularly urgent because the great majority of postwar German law students had been reared in the "militaristic atmosphere of the German army." Making matters still more difficult was the fact (so Loewenstein contended) that, "No other branch of academic life [in south Germany] had been so thoroughly Nazified as the law faculties." In Loewenstein's estimation, most German law faculty who had survived the purges of 1933–34, or were appointed in their wake, were either ardent ideological Nazis or conservative nationalists aligned with the Nazis. In both guises, law professors were certain to prove one of most "democracy-resistant groups" in American-occupied Germany.[200]

In April 1946, Loewenstein undertook a fact-finding mission to the recently reopened law schools of Bavaria. He was to find out what was being taught, by and to whom. Before making his report, Loewenstein consulted with American-appointed German officials in the land ministries of law and education, and with university officials, professors and students at several institutions, most extensively at the law school at the University of Munich, Loewenstein's alma mater and former employer.

In the preface to his long report (to Fahy) on the mission, Loewenstein informed his chief that "the situation in the Bavarian law schools appears deplorable from the viewpoint of legal education as well as from that of creating the basis of a democratization of German cultural life."[201] The problems were many and serious. At Munich, only two members of the faculty had not been Nazis and could be immediately reappointed. Of these two, one was a nonentity, the other an Austrian-born Nazi fellow traveler. Munich's (acting) dean, Professor Mueller–Erzbach, had been "dug out from oblivion" because no qualified person had been available. Mueller–Erzbach, in Loewenstein's opinion, was an unreconstructed

197. Loewenstein, *Legal Reconstruction in Germany*, 60–62.

198. In late May1946, Madden asked Loewenstein to work on a "comprehensive law on the legal career and education" in answer to the Soviet proposals. OD, May 29, 1946.

199. Loewenstein to Fahy, April 23, 1946, Loewenstein Papers, FLAC, box 28.

200. Ibid.

201. Ibid.

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German nationalist who, during his interview, had ranted about the "injustices of the Treaty of Versailles, the spoliation of German colonies [and German] rights to *lebensraum*." With regard to faculty renewal, the acting dean's policy was to hold open the positions of ex-Nazis, even those who had published pro-Nazi legal treatises,[202] until they could be exonerated by (reliably forgiving) Bavarian de-Nazification tribunals. Further to this policy, no effort was being made to identify and reappoint faculty who had been purged by the Nazis. According to Loewenstein's investigation, moreover, Mueller–Erzbach was being supported in these policies by a network of former Nazis still embedded in Land–Bavaria's Ministry of Education. In the result, the University of Munich continued, even under American auspices, to be a safe haven for "more than forty active Nazis, many among them in influential teaching positions."[203]

When he reported these findings to Fahy, Loewenstein recorded in his diary that his boss did not seem to take them seriously. Instead, he was actually "reproached" for pressing for action that was more properly the responsibility of the Education Branch of the Internal Affairs Division.[204] Preoccupied with these bureaucratic niceties, Fahy (so Loewenstein perceived) seemed oblivious to a far more crucial point: that "without good law teachers in the place of the present bastards, there is not the slightest hope of a democratic new deal." Loewenstein filed his written report on April 23, 1946, the same day the *New York Times* published an article under the title, "Munich University: Hotbed of Nazism".[205] The *Times* reported that even in the face of the occupation, "Munich University still is a center of German nationalism and militarism." The piece also alleged that the acting dean of the law school was impeding the faculty appointment of Jews and other persons persecuted by the Nazis. Both in tone and chief revelations, the story bore an uncanny resemblance to Loewenstein's memorandum to Fahy.

Predictably enough, the *Times*' report greatly embarrassed General Clay and the Directors of the two AMG departments—John Taylor at Internal Affairs, Fahy at Legal Division—who had signed off on the reopening of Munich University.[206] In the wake of the story, there was an

202. Ibid.

203. Ibid. The reassertion of influence by the Nazis was so brazen that when the University opened its doors for the first postwar session in January 1946, its Nazi-appointed chair in "Racial Science" (the Professor Prinz Ysenburg) had offered a full course of lectures.

204. Loewenstein, OD, April 8, 1946.

205. *New York Times*, April 23, 1946, 8.

206. According to Loewenstein, Taylor "had to do a lot of explaining" to his bosses in the wake of the story. OD, May 11, 1946. For the decision to reopen the law school at Munich, see Fahy to Internal Affairs, March 30, 1946, NARA, RG 260, LD-AJ, box 89.

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investigation concerning its origins and veracity. On the first score, it was widely believed at AMG that Karl Loewenstein had been the story's main (anonymous) source. This Loewenstein vehemently denied, both to his boss, and more credibly, in an entry in his private diary.[207] Unlike his bosses, however, he did not regret that the story had been published. To begin with, the story led to the dismissal of Mueller–Erzbach.[208] More importantly, Fahy soon ordered Loewenstein to get to work on a general initiative on the reform of legal education in the American zone, and to keep his bosses "constantly advised of what is being done."[209]

In carrying out this order Loewenstein faced the usual obstacles. There was no preliminary plan for any aspect of academic legal education. Only one other legal officer was assigned to share the workload. Making matters worse, nothing could actually be done without the assent of Internal Affairs, that is, without the approval of American officials who knew nothing of law or legal education. This was one very good reason, the near nervous collapse of Loewenstein being another, why so little was achieved in the area of German university education. As Loewenstein later summarized,[210] AMG continued to tolerate the operation of law schools in which ex-Nazi military officers were instructed by ex-Nazi professors in a Nazi-inspired curriculum. In his grim estimation, the bureaucratic squabbling between Legal Division and Internal Affairs had "resulted in the triumphant comeback of practically all the Nazis who were ousted in the early period of the occupation."[211]

When Legal Division's momentary enthusiasm for the reform of legal education fizzled out in late spring 1946, Loewenstein was, by his own account, completely at odds with most of his bosses and colleagues and "approaching the point of mental collapse."[212] Although his passion for the work had not ebbed ("my fire is still burning fiercely"[213]), he had lost respect for the Division as "rational agency" of policy formation

207. Loewenstein, OD, May 11, 1946. Loewenstein recorded that there had been an unfortunate "coincidence" of timing and sources but that he had neither met nor communicated with the *Times*' reporter.

208. Loewenstein to Fahy, May 10, 1946, Loewenstein Papers, FLAC, box 28.

209. Fahy to Loewenstein, April 29, 1946, Loewenstein Papers, FLAC, box 28.

210. Loewenstein, *Legal Reconstruction in Germany*,76–81.

211. Loewenstein to Knappen, December 20, 1947, Loewenstein Papers, FLAC, box 29. Loewenstein's pessimistic assessment of the de-Nazification of Munich University has been largely borne out by subsequent scholarly study. For a detailed study of similar problems at the University of Heidelberg, see Steven P. Remy, *The Heidelberg Myth: The Nazification and Denazification of a German University* (Cambridge: Harvard University Press, 2002).

212. Loewenstein, OD, April 16, 1946.

213. Ibid., April 10, 1946.

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and implementation.[214] Fahy's decision to leave for the State Department had briefly buoyed Loewenstein's spirits; but his initial optimism about a change in leadership was soon dissipated. Madden was no innovator. More to the point, it was now inescapable that AMG was firmly committed to German restoration, not to its reform. Before they had been properly crafted and honed, the instruments of transformative occupation were being set aside.

Even in the final weeks of his contract, exhausted and demoralized, Loewenstein continued to work tirelessly on the development of supervisory mechanisms for the German courts and legislation ("If I succeed in getting these two things across. . .I will not have come over in vain."[215]) but with no expectation that his superiors would act on his recommendations. On the contrary, in every field of German legal activity—the courts, civil service, the legal academy—the indications were that "all the Nazis with the exception of a few socially unacceptable gangsters will all be in office again,"[216] and in the absence of any meaningful oversight by the American authorities. The premature retreat on de-Nazification had made it possible for the Germans, quietly but determinedly, to regain control of their institutions. Only one year after V-E Day, Loewenstein glumly observed, the Nazis were "well-organizing themselves for the moment when we withdraw."[217]

But for all the conflict, alienation, and even humiliation he experienced in his first ten months at Legal Division–Berlin, in June 1946 Loewenstein still was entertaining (fantasizing about is perhaps more apt) the idea of renewing his contract. Madden had now returned to the United States. His replacement, Alvin Rockwell, although himself another former New Deal (National Labor Relations Board) lawyer with no previous experience in German affairs, was more to Loewenstein's liking. Rockwell seemed better informed than his predecessors and (seemingly) more willing to defer to specialized expertise in policy making.[218] In an hour-long meeting in late June 1946, Loewenstein briefed Rockwell on what he saw as the chronic failings of the Division, most particularly that the "administration of justice branch [in charge of the reform and supervision of German courts] is not in working order, and never has been."[219] He also warned that Legal Division had not done enough to watch, coordinate, or superintend the activities of the German Länderrat. As Loewenstein diarized the

214. Ibid., April 12, 1946.
215. Ibid., April 20, 1946.
216. Ibid., April 29, 1946.
217. Ibid., May 7, 1946.
218. Ibid., July 14, 1946.
219. Ibid., June 28, 1946.

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meeting, Rockwell suggested that Loewenstein return to the Division for an additional six-month term after a brief furlough in the United States. Loewenstein offered to come back if reassigned (from the German courts group) to oversee the legal reform program of the Länderrat. Nothing came of this conversation. Loewenstein returned to the United States in late August. His brief career in German legal reconstruction was over.[220]

IV. The Alchemy of Occupation

For the executive officials of Legal Division–Berlin, Karl Loewenstein was the man who knew too much. A renowned scholar of modern European law, history, and politics, Loewenstein had returned to Germany to participate in a grand experiment in directed legal change. Uniquely among senior staff in his department, he brought not only deep and relevant learning to his assignment, but also the linguistic and analytical tools needed to enrich his perspective while "in country." But Legal Division was an inhospitable place for an opinionated German-trained thinker.[221] Indeed, it was a defining irony of the American legal mission in Germany that Loewenstein's genuine expertise quickly proved an impediment to his successful integration and deployment. Although the discord had a personal dimension—Loewenstein undoubtedly was an arrogant and often truculent man—mainly it was the result of his unquiet dissent from the drift of American reform policy in Germany. By nature and training Loewenstein was an intellectual idealist who had come to Berlin (eagerly) to help forge a moment of radical discontinuity in the legal and political history of his native country. By *their* natures and training, conversely, the executive officials of Legal Division were managerial pragmatists who had come to Germany (reluctantly) to provide legal and operational support to the American mission to a foreign country. By their reckoning, deep learning and rigid convictions were among the least valuable assets of an effective occupation bureaucracy.

220. However, on the invitation of the cultural affairs and educational departments of AMG, Loewenstein returned to the American zone in the summers of 1947 and 1948 to deliver a series of public lectures (in German to German audiences) on the meaning and practice of political democracy.

221. This inhospitality does not appear to have stemmed mainly, or even substantially, from the fact that Loewenstein was a Jew. In fact, in his diary Loewenstein frequently noted that other Jewish advisors (Fritz Oppenheimer, most prominently) exerted *too much* influence at AMG. For a discussion of the intensification of anti-Semitic prejudice at AMG after 1946, see Joseph W. Bendersky, *The "Jewish Threat": Anti-Semitic Policies of the US Army* (Perseus Books: New York, 2000), 366–67.

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Loewenstein arrived in Berlin with many—arguably, too many—ideas about Germany and its reconstruction; ideas which, on renewed contact with German jurists, he felt no need to amend. To his mind, the success of legal democratization hinged on the willingness of American leaders squarely to confront some inconvenient historical facts about German legal professionals.[222] The first was that Germany's reactionary judges and legal bureaucrats were deeply implicated in the decline and fall of the Weimar republic. In the Hitler era, too, most German jurists had been amenable to the Nazi legal program (including the purge of Jewish jurists) and many had contributed significantly to the Nazi terror state. The second was the remarkable solidarity of German jurists in their collective denial even of partial responsibility for the legalized crimes of the Hitler regime.[223] For this reason alone, Loewenstein contended, the strongest imperative of AMG was to sustain a tough-minded purge of Nazi legal civil servants and judges.[224] On this point the Americans could make no mistake. The imprint of Nazis and Nazism on Germany's legal system was pervasive and profound. Even in the face of catastrophic defeat and foreign occupation, the Germans remained "mentally sick" and unready for responsible self-governance. The only safe way forward was by recourse to a protracted and unwaveringly "militant" program of de-Nazification.

When Loewenstein took up his work in August 1945, these propositions were the uncontroversial bedrock of American policy. But, as the leaders of AMG became more acutely aware of the enormous scale, expense, and complexity of the American mission in Germany, that bedrock began to shift. By the late autumn of 1945, General Clay harbored grave doubts about both the practicality and the political wisdom of a comprehensive program of de-Nazification in the American zone. Before the end of the year, Clay decided that AMG had no feasible option but to delegate de-Nazification to "reliable" (i.e. non-Nazi) Germans on the optimistic assumption that such men would be plentiful, discerning, and courageous enough to remove tens of thousands of formerly important fellow citizens from positions of authority and influence.[225] On this reasoning, the

222. For his summary of these points, see Loewenstein's letter to the *New York Times*, December 8, 1946.

223. As Loewenstein later summarized the point, "The Germans have never, and do not now, consider Nazism as evidence of social or moral turpitude. Nazism cannot be held a crime now because under the regime Party membership was legal and desirable." Ibid.

224. As Loewenstein generalized the point, "Professions which are instrumental in the formation of public opinion should be thoroughly and ruthlessly purged of even nominal Nazis." Ibid.

225. As Loewenstein recorded in his diary, "The most distressing and amazing development I found here was the distinction between the bad Nazis and the good German

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disagreeable facts about Nazism were subordinated to more pertinent facts about American power and its limits. Before any transformative project in Germany could be devised and implemented, the idea gained currency that the overriding goal of the American occupation to was to reconstruct the western zones (as Loewenstein put it) as a "sort of ramrod or buffer against the East."[226] In the formation of key policies, then, historical acumen had been obliged to yield to unhistorical hopefulness, skeptical expertise to political expedience.

We have seen that as the political ground began to shift under Legal Division, Loewenstein remained steadfast. From his perspective, the premature retreat from a stringent (and American-controlled) program of de-Nazification was an "unmitigated defeat" for AMG in Germany, its "gravest mistake."[227] In the vitally important field of law reform particularly, AMG had surrendered the field before fully taking up the fight. Although the most blatantly illiberal elements of the south German legal system had been removed, most of the hardest work remained to be done. If it was to be done at all, it would be done by Germans. "By the middle of 1946," Loewenstein later observed, "practically the entire administration of justice in the technical sense of the term was turned over to the Germans and Military Government maintained only a marginal supervision of legal matters."[228] All but the most notorious Nazi jurists in the American zone soon would be restored to former positions in the judiciary, legal education, and the civil service,[229] the majority of them

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people. . .Not a single one of the anti-Nazi lawyers I talked to seemed to be aware that the Nazis were the majority of the German people." OD, August 29, 1945.

226. Or so Loewenstein summed up this manner of thinking. Soon after he returned to the United States in the late summer of 1946, Loewenstein expressed concern (to an important official at AMG) that in American circles "Russophobia has reached dangerous proportions," and that the Germans would skillfully exploit this fear in blunting the edge of American reform programs. Loewenstein to Edward Litchfield, October 18, 1946. NARA, RG 260, Civil Affairs Division, box 75.

227. Loewenstein, OD, May 4, 1946. See also, Loewenstein, Letter to the *New York Times*, December 8, 1946. Interestingly, Fritz Oppenheimer, having returned to his law practice in the United States, published an attempted rebuttal of Loewenstein's views. See Oppenheimer, Letter to the *New York Times*, January 12, 1947.

228. Loewenstein, *Legal Reconstruction in Germany*,41.

229. As Loewenstein stated (prophetically) in January, 1946, "And we are turning over the government to the 'good' Germans so rapidly that within a year from now all the Nazis will be back and those who were excluded now will be the heroes and even compensated by the state for their martyrdom." OD, January 7, 1946. For confirmation of his prediction in the modern historiography, see generally, Michael Stolleis, "Prologue: Reluctance to Glance in the Mirror," in *Darker Legacies of Law in Europe*, ed. Joerges and Ghaleigh,1–19; Gaab, *Justice Delayed*, 64–70; and Szanajda, *Postwar Hesse*, 125–39.

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"unregenerate" in their reactionary politics.[230] When back in office, Loewenstein confidently predicted, many erstwhile Nazi jurists would move, quietly but determinedly, to undermine legal democratization.[231] The Americans had made no provision to check them. In effect, only six months after the inception of Legal Division, its definitive law reform projects already had been reduced to a bureaucratic alchemy, methodical and significant in appearance, improvised and spurious in reality. Having devolved control to Germans, the Division no longer had any authentic capacity to reconstitute the metals of Germany's juristic life.

It was Loewenstein's undoing at Legal Division that he saw no room for pragmatic compromise on de-Nazification and was harshly, sometimes unfairly, scornful of the men above him who did. In Loewenstein's estimation, the first two directors of Legal Division—Charles Fahy and Warren Madden—personified the stark deficiencies of the American mission in Germany. Although intelligent and politically adroit American jurists,[232] neither had come to Europe with any genuine knowledge or conviction about German law, language, or history.[233] Nor did they bring a relevant theoretical training or sensibility. When pressed to decide key issues of policy, their reflex was to draw exclusively from American frames of reference. "The basic defect," Loewenstein recorded in his diary in January 1946, "is not only the ignorance of the people here concerning German affairs, but the lofty superciliousness in which they apply

230. Loewenstein summarized these views in his letter to the *New York Times*, Dec. 8, 1946.

231. Although Loewenstein probably overestimated this threat, it was not inconsequential. For the growing body of work on the impact of Nazism on the postwar German legal system, see generally, Stolleis, "Prologue: Reluctance to Glance in the Mirror". The Nazi legacy was especially acute in the context of postwar German prosecutions of crimes during the Third Reich. See generally, John P. Teschke, *Hitler's Legacy: Germany Confronts the Aftermath of the Third Reich* (New York: Peter Lang, 1999), 61–104; Marc von Miquel, "Explanation, Disassociation, Apologia: The Debate over the Criminal Prosecution of Nazi Crimes," in *Coping with the Nazi Past: West German Debates on Nazism*, ed. Phillip Gassert and Alan E. Steinweis (New York: Berghahn Books, 2006), 50–63.

232. Loewenstein once observed of Fahy that he was "a considerable politician, but not exactly what is needed for this job. The Legal Division of AMG cannot be run like a Department of Justice. It must have some dynamism of its own." OD, March 22, 1946.

233. Loewenstein was not alone in decrying this fact. Early in 1946, Howard Becker, an expert in German sociology who had worked with the OSS, and then briefly with AMG in Bavaria, expressed a similar opinion in a letter to the War Department: "I feel our policy of choosing administrators for civilian affairs in Germany is basically wrong..". In his experience, none of the top men at AMG "spoke any German, knew anything about Germany, or, indeed, had ever manifested any interest in the continent of Europe before being thrust into their difficult tasks. The results are deplorable. . .". Becker to General Hilldring, February 19, 1946, NARA, RG 165, Civil Affairs Division, box 173.

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the principles of a pioneer country to an old legal civilization."[234] Neither Fahy nor Madden seemed able to grasp the systemic differences between German and American jurisprudence, or the still more consequential differences in the elemental political spirit—the gestalt—of German and American jurists.[235] The authoritarian "otherness" of the German legal system was disregarded on the facile premise that, "What is good for the American people must be good for the German people. A law or institution which a reconstructor has not used in his home environment was basically distrusted, and an institution which had proved its value at home was basically considered valuable for the Germans."[236] The incapacity (or unwillingness) of American officials to recognize German *difference*, Loewenstein contended, "runs through the entire US occupation policy and practice." For the transformative aims of the occupation, this was a costly habit of thought. It impaired AMG in its ability to evaluate and govern former Nazis with an appropriately illiberal forcefulness.[237] At the moment of German surrender, in Loewenstein's view, the American leadership class lacked both the intellectual flexibility and the political will needed for the quasi-imperial suzerainty over foreign lands and peoples, still less *German* lands and peoples.

For Loewenstein, the upshot was plain. Little more than a year after Auschwitz had been overrun, Germans once again were being made "the judges of their own past."[238] In recasting postwar German legal professionals as mainly good and well-meaning men (who themselves had been victimized by Hitler and Nazism), it had become possible for the American leaders to discount that the same men had been party to mass murder. Having watched his leaders retreat on de-Nazification and then hesitate even to superintend former Nazi lawyers, judges, and law professors, Loewenstein was moved to wonder, "[W]hy, then, have we fought this war?"[239]

The answer to this rhetorical (and, for Loewenstein, unusually emotive) question, provides a useful window to the salient limitations of

234. Loewenstein, OD, January 7, 1946.

235. As Loewenstein later wrote, "Few of the legal staff realized in advance the degree of moral erosion to which Germany had been subjected by the Nazi regime, nor were they educated for the even more exacting assignment of rediscovering under the Nazi rubble the Gestalt of the German social and legal order." Loewenstein, "Law and the Legislative Process II," 996.

236. Loewenstein, *Legal Reconstruction in Germany*, 32.

237. As Loewenstein once put the point in his diary: "Why not admit that democracy doesn't have force for former Nazis. This is my idea of militant democracy. . .Why not say openly that we confine democracy to the non-Nazis." OD, January 17, 1946.

238. Ibid., 41.

239. Ibid., February 8, 1946.

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Loewenstein's critical assessment of AMG and its Legal Division. The short answer was that the Allies had fought to destroy the Nazi movement and war machine, and had done so. But in his passionate commitment to the war's *transformative* aims, Loewenstein discounted these fundamental achievements, just as he downplayed the enormous challenge faced by AMG in Germany after the war's end. In his voluminous writings on the occupation, Loewenstein only occasionally acknowledged that the postwar mission in Germany was one of "terrific" complexity and difficulty,[240] and that it was not a simple matter, not even for the richest country in the world, to remake the legal and political system of a great nation–state.[241] A gifted thinker about politics, Loewenstein was oddly indifferent to the politics impinging on the decision-makers of AMG. Indeed, underlying Loewenstein's censure was the rather innocent assumption that the transformative mission in Germany might have been of radically *different* character and effect. But for the lack of more informed and deliberate planning, of more expert and dedicated leadership, of more militant and exacting policy, Loewenstein implied, the Americans might have induced the more rapid and deep-seated democratization of their Germans.[242] It must weigh against Loewenstein's stature as a political thinker that he never carefully evaluated this premise. Intellectuals, in the end, are better engineers of abstractions than of the unruly disorder of real politics.

Postscript

In the late 1940s, after two return trips to Germany as a lecturer (in the American "Reorientation Program"[243]), Loewenstein wrote a series of short pieces on the American mission in Germany. These meditations on the "balance sheet of the occupation"[244] display a detectable inner tension,

240. Ibid., May 4, 1946.

241. Ibid., May 4, 1946.

242. The chief of the British legal mission in Germany, Richard Wilberforce, also observed Loewenstein argue as if "perfect plans" might be made for the democratization of the German legal system. In his belief that "if you work long and hard enough you can be right about everything," Loewenstein seemed almost stereotypically "German," and completely out of sympathy with his pragmatic American colleagues. Wilberforce, *Reflections on my Life*, Diary entry: September 5, 1945, Appendix 3, 167.

243. For Loewenstein's report on his activities in Germany in the summer of 1948, see Civil Affairs Administration–Democratization Branch to Legal Division, February 25, 1949, NARA, RG 260, LD, Box 6.

244. Karl Loewenstein, "The Political Balance Sheet of the Occupation," Paper delivered before the American Political Science Association Meeting, December 28, 1949, Loewenstein Papers, FLAC, box 28.

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even self-contradiction, not present in his earlier work. On one hand, Loewenstein continued to assert (as late as 1950) that the authoritarian predisposition of the Germans had changed very little during four years of Allied military occupation.[245] In his opinion, even the West Germans still were merely "going through the motions of democracy."[246] He also clung to his belief that if American leadership in Germany had risen above its habitual "intellectual nationalism,"[247] democracy might have taken tighter hold of the German psyche. On the other hand, Loewenstein finally began to distance himself, if only tentatively, from the idea of military occupation as an effective instrument of political transformation. At the annual meeting of the American Political Science Association in December, 1949, Lowenstein told the assembly that sights had been set "too high" in Germany.[248] He now contended that it was "impossible, really, to reconvert a nation to democracy…for no nation can be forced to change from the outside, particularly the Germans." But, having made this point, he quickly reverted to a more familiar theme. For the foreseeable future, the western Allies would need to remain vigilant of any sign of "extreme nationalistic reaction" in the German body politic, and, if necessary, act decisively in its suppression.[249] Even now, Loewenstein maintained, it was not too late for the militant supervision and control of Germany's dark spirits.[250]

245. In his briefing of Roger Nash Baldwin (president of the American Civil Liberties Union) in September, 1950, Loewenstein presented a "very discouraging picture" of German democratization. In Loewenstein's view, the best way of preventing Germany from reverting to its "autocratic patterns" was in "bringing [it] into a larger unity in an organized Europe." Nash briefing notes, September 15, 1950, Roger Nash Baldwin Papers, Princeton University, box 17.

246. Loewenstein interview, *Springfield Daily News*, January 19, 1949, Loewenstein Papers, FLAC, box 28.

247. Loewenstein, "Law and the Legislative Process in Occupied Germany II," 997.

248. Ibid.

249. Ibid.

250. Loewenstein observed that the Occupation Statute (of April, 1949) "however badly drafted," still provided the western Allies with means to impose "external controls" on the West Germans. According to Norbert Frei, such intervention was in fact "inestimably important to the young West German state." In its absence, Frei argued, "the risk of an organizational merging of nationalist and Nazi political currents would have been far greater." See Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration* (New York: Columbia University Press, 2002), 306.

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