



SOME MEMORIES AND SOME IDEAS LEO KATZ

Leo Katz is the Frank Carano Professor of Law at the University of Pennsylvania. He holds a B.A., an M.A. and a J.D. from the University of Chicago. After practicing corporate law for several years, he began his teaching career at the University of Michigan in 1987. Since 1991 he has been a professor at the University of Pennsylvania. His work concentrates on criminal law and legal theory. His special interest is in exploring the logic of the building block concepts of the law, such as consent, coercion, form-versus-substance, and harm. He is the author of *Bad Acts and Guilty Minds* and of *Ill-gotten Gains: Evasion, Black-mail, Fraud and Kindred Puzzles of the Law*. – Address: Law School, University of Pennsylvania, 3400 Chestnut Street, Philadelphia, PA 19104-6204, USA.

I. Memories

This year in Berlin was for me a kind of homecoming. I left the city in 1970, then thirteen years old, from the Eastern side of the Wall, and have lived in the United States ever since. I had visited Berlin briefly, a few days at a time, both before and after the Wall came down, but this was my first sustained re-encounter. It was remarkable both for what had changed and what hadn't. More really for what hadn't.

I naturally paid a visit to my old neighborhood, Prenzlauer Berg. At the Plattenbau complex on Prenzlauer Allee, I peered at the names of the nine families with whom we had shared our particular “bank” of apartments. Four of the nine names were still the same – this after thirty-seven years. These people had moved in shortly before the Wall went up and now, twenty years after the Wall was down, were still there. Also still there was my

old school, the Karl-Friedrich-Schinkel-Schule, the building at least outwardly in even shabbier, sadder shape than it was then, but with bolder and more colorful graffiti. The building's custodian now, I learned, is our old Phys. Ed. teacher. The barber at the corner of Erich-Weinert-Straße and Prenzlauer Allee was still there as well, presumably under different management. The grocery store at that same corner, once a HO, is now a Kaiser's. And the street name itself has not been changed back from its Communist baptism of Erich Weinert, the communist poet and songwriter.

To be sure, there also were plenty of changes, but that was entirely in keeping with expectations. Helmut Kohl was once ridiculed for his boastful prediction of "blühende Landschaften" for a new East Germany. Well, in my particular Plattenbau that quite literally came true. Once-scrawny lawns have been replaced by lush shrubberies and trees of vaguely South American grandeur. A modestly luxurious Holiday Inn sits kitty-corner. There no longer are any flags or banners telling us that "To Fight On the Side of the Soviet Union Is to Be on the Side of the Victors", or exhorting us with Lenin's memorable slogan "Lernen, lernen und nochmals lernen", or announcing the local liquor store's promise to up its sale of spirits by some set percentage in honor of the latest Party congress. Prenzlauer Berg as a whole has acquired a hipness it never had when I lived there and become a children's paradise with fertility rates unmatched anywhere else in Europe, I have been told.

Alas, trying to get some work done as well, not to mention tending to two young daughters with predictable and unpredictable health problems precluded the kind of scrutinizing walk down memory lane I had vaguely dreamed about when coming to the Wiko.

My plans for the year had been to do two things: complete a book-in-progress and start another long-term project. I did the former, did something on the latter, though less than in my maximalist dreams. By Luca Giuliani's terms this may not have been quite a success: Wiko only truly succeeds, he said at the outset, if it deflects us from our plans, as we encounter new inspiration from fellow Fellows. Inspiration there was plenty at the daily *Mittagsmahl*, and the colloquia and occasional lectures, starting with Horst Bredekamp's ingenious presentation on self-reference and the meaning of art and concluding with Dietrich Niethammer's moving account of his research into the psychology and ethics of telling terminally-ill children about their prognosis.

Wiko's staff is legendary for the lengths to which they go to provide for the Fellows' comfort, to relieve us of the practical anxieties that come with living in a new environment, and to ferret out for us whatever books or papers we may need from far-flung and inaccessible repositories. That legend turned out to be no mere legend.

II. Ideas

Finally, then, some words about the project I completed while here.

There are ideas that are preposterous on their face and yet one is hard-pressed to say why. My book *Why the Law Is So Perverse* is about such ideas.

Here is an example. Let us imagine a maverick legislator who advances a proposal for reforming our penal system, which he says will cut prison costs by ninety-nine percent. What he would like to introduce, he says, is a system he refers to as “voluntary torture, but with the emphasis on voluntary”. “The point of punishment is pain,” he begins the speech in which he unveils his idea. “Without pain, there is neither deterrence nor retribution.” Then he gets to the point: “If you think about it, prison is just one of many possible pain-delivery systems and unfortunately one of the most expensive. We could accomplish the same thing much more cheaply if instead of making a prisoner’s life moderately painful for a prolonged period of time, which is what prison does, we made it intensely painful for a very short period of time. A lot of pain, but for a short duration – that should give us as much retribution and deterrence as before, but at a fraction of the cost.”

Seeing the expression on your face, he adds: “I know, I know, you’re going to say this is hardly new, and civilized countries have gotten beyond it. But my system is really very different from what we had in the Middle Ages: It is entirely voluntary. No one will be tortured unless he asks to be and unless we are sure that he is of sound mind and knows what he is doing. In other words, everyone will continue to have the option of serving his regular prison term, but whoever doesn’t want to, can opt for the torture alternative instead. And if you are wondering why anyone would opt for torture, my idea is that we make the torture alternative just slightly more attractive than the prison sentence. We will make it not quite long enough and not quite severe enough to be judged by most prisoners the exact equivalent of a long sentence. What we are offering them is a ‘torture discount’, a little like the prepayment discount you get for paying your real estate taxes by a certain date. Although the discount is slight, prisoners will come to view torture much like a very painful medical procedure for curing paralysis – the paralysis of jail. The amount of deterrence and retribution we get out of the new system is virtually the same as before, but it will come so much more cheaply. Torture doesn’t cost much; that’s why they could afford it in the Middle Ages. As you can see, it’s a win-win situation.”

Is there anything wrong with this proposal? If there is, it isn’t easy to say what. The system is voluntary. Society is a lot better off because it costs so little, and the prisoner is

slightly better off because he gets the torture discount. That's why the legislator sees this as a win-win transaction. Despite all of that, we would not dream of adopting it. Nor am I suggesting that we should. But there is something perverse here that requires explanation. We have the possibility of an all-round beneficial reform but are adamantly refusing to avail ourselves of it. Why?

My book seeks to explain why the law is full of perversities of this kind: strange and counterintuitive features that one cannot justify but that one would not want to eliminate either. They all have, as I try to show, a common cause.

The cause turns out not to be, as one might have thought, historical, or political, or psychological, but rather logical in nature. Creating laws that do not suffer from such problems turns out to be logically impossible. Oliver Wendell Holmes famously said that the life of the law is experience, not logic. He was more wrong than right. For sure, the historical experience counts. But some of the most fundamental as well as fundamentally strange features of the law are rooted in logic rather than experience.

What are those fundamentally strange features? Here are a few more examples:

- 1) The law is replete with loopholes. No one seems to like them, but somehow they cannot be made to disappear. Why?
- 2) The law answers almost every question in an either/or fashion: Guilty or not guilty; liable or not liable. Either it's a contract or it's not. But reality is rarely that clear-cut. Why aren't there any in-between verdicts?
- 3) There is a lot of conduct we intensely dislike – ingratitude, for instance – but refuse to make illegal. Why not? There are ingrates who strike us as much worse than, say, a petty thief. We have no compunction about punishing petty thefts. Why not also ingratitude?

What one finds, I try to show in the course of the book, is that all of the problems I just listed, as well as many others I did not, closely resemble problems in another area that are much better understood and that are known to be essentially logical in character. That area is the theory of voting. Voting rules are notorious for exhibiting innumerable logical paradoxes. What I shall be trying to show is that many of the things that vex us about law are presentations of those same paradoxes in a different garb.

I look forward to the day in which a copy of the book will take its place alongside those of other Fellows' in the prominently displayed bookcases at Wallotstraße 19.