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Cover Page Footnote

Louis Heilprin Pollak is a U.S. District Court Judge for the Eastern District of Pennsylvania. He was a member of the NAACP Legal Defense Fund's team of lawyers assembled by Thurgood Marshall who briefed and argued *Brown v. Board of Education*. Judge Pollak served as Dean of Yale Law School from 1965-1970 and Dean of University of Pennsylvania Law School from 1975-1978.

“PRESS PRUDENCE,” NAZI STUDENT ORDERS, AND JIM CROW

*Louis H. Pollak**

INTRODUCTION

In this year in which we in the United States take note of the fiftieth anniversary of *Brown v. Board of Education*,¹ and ponder its enduring significance, Maria Marcus requires us to look abroad, and has made a significant scholarly contribution to the commemorative conversation.² She directs our attention to the decision of the Austrian Constitutional Court, in 1931, twenty-three years before *Brown*, declaring invalid the rules promulgated by the University of Vienna's Rector and Academic Senate—rules harmonious with the rising tide of Austrian Nazism—which undertook to separate the student body into four ethnically-defined “nations.”³ The principal purpose of the enterprise was to protect Austrian “German” students from the risk of contact with other Austrian students who, notwithstanding that they might have had generations of German-speaking ancestors, were, nonetheless, said to bear the ineradicable taint of a forebear or two as to whom there was no clear demonstration of baptism, with the result that the luckless student descendants were to be classified, willy-nilly, not as “Germans” but as “Jews.”⁴

As Professor Marcus demonstrates, the University of Vienna case is strikingly similar not only to *Brown*, but to *Brown's* precursor higher

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1. 347 U.S. 483 (1954).

2. Maria L. Marcus, *Austria's Pre-War Brown v. Board of Education*, 32 FORDHAM URB. L.J. (2004)

3. Marcus, *supra* note 2, at 1, 7-8; see Sammlung der Erkenntnisse und Wichtigsten Beschlüsse des Verfassungsgerichtshofes [decision of the Austrian Constitutional Court dated June 20, 1931 and announced on June 23, 1931] VfSlg 1397/1931, AVA-VfGH, V 2/31-11, at 296 [hereinafter Decision].

4. See Marcus, *supra* note 2, at 1, 4-8.

education cases, most particularly *McLaurin v. Oklahoma State Regents for Higher Education*.⁵ In *McLaurin*, the Supreme Court unanimously struck down, on equal protection grounds, the University of Oklahoma's bizarre requirement that a black doctoral candidate sit in a "reserved for Colored" row in the lecture hall, study at a separate table in the library, and eat at a separate table in the cafeteria.⁶

As Professor Marcus also observes, however, the University of Vienna case is, in one crucially important respect, unlike *Brown* and the related American cases striking down racial segregation in public schools and public universities.⁷ The American cases invalidated legally mandated regimes of racial segregation that had been in force for half a century under the protective mantle of *Plessy v. Ferguson*,⁸ the opprobrious 1896 "separate but equal" decision (Justice Brown for the Court; Justice Harlan, dissenting; Justice Brewer not participating) that *Brown* jettisoned.⁹ In contrast, the University of Vienna case frustrated the proposed regime of racial separation at its inception.¹⁰ The government's attempt in 1932 to secure legislation overturning the Constitutional Court's decision of a year before was unsuccessful.¹¹ And so, notwithstanding the growing strength of Austrian Nazism throughout the thirties, oppression of Jews by law (as distinct from steadily escalating personal and institutional anti-Semitism, including violence) was not accomplished until the Anschluss in 1938.¹² Viewed in this light, it may be said that in 1931 the Austrian Justices did the job for law in Austria that in 1896 the seven-Justice *Plessy* majority so dismally failed to do for law in the United States.

I.

From an American perspective, an intriguing aspect of the Vienna University case is that, in striking contrast to *Brown* (and, indeed, to

5. 339 U.S. 637 (1950); see Marcus, *supra* note 2, at 50 (noting that although there is no evidence of physical segregation, the mandated separation in the University of Vienna case affected Jewish students' political rights which in turn affected their opportunities for "intellectual commingling," a central concern for the *McLaurin* court).

6. 339 U.S. at 640, 642.

7. Marcus, *supra* note 2, at 51.

8. 163 U.S. 537 (1896).

9. To be precise, *Brown* did not formally overrule *Plessy*, which had sustained a Louisiana statute mandating racial segregation on (intrastate) railways—"separate but equal" cars for whites and blacks. Rather, the Court in *Brown* held that "in the field of public education the doctrine of 'separate but equal' has no place." 347 U.S. at 495. A series of later decisions, many of them *per curiam*, eviscerated "separate but equal" in settings other than public education.

10. Marcus, *supra* note 2, at 17.

11. *Id.* at 30.

12. *Id.* at 23-42.

Plessy), the litigant challenging the separate-but-assertedly-equal Nazi Student Orders was not within the class of persons whose conduct was to be governed by the Orders.¹³ Ernst Klebinder was not a student, Jewish or otherwise. He was the editor of the *Wiener Sonn-und-Montags Zeitung*, and he wrote and, on May 19, 1930, published in his newspaper the article—*Seine Magnifizenz der Rektor: Der Wiener Universitaets Skandal*—which precipitated the litigation.¹⁴ The litigation was a prosecution in a District Criminal Court. The presiding judge was a Justice for Press Affairs. Journalist Klebinder was accused of a failure to exercise “press prudence”¹⁵ in publishing an article stating that the enactment by the Rector and Academic Senate of the Nazi Student Orders was unlawful—a “scandal.”¹⁶ As Professor Marcus points out, Klebinder’s charge that the Orders had no proper legal basis drew upon a legal opinion to that effect—“Die Studenten Ordnung der Universitat Wien”¹⁷—authored by Dr. Joseph Hupka,¹⁸ a former Dean of Vienna Law School.¹⁹ It is noteworthy that, notwithstanding that Dean Hupka’s memorandum appeared in the public press—the *Neue Freie Presse*—on April 23, 1930, some three weeks earlier than Klebinder’s article, Professor Marcus’s narrative does not suggest that either Hupka or the editor of the *Neue Freie Presse* was prosecuted for failing to observe “press prudence.”²⁰

Was Klebinder an object of selective prosecution? Did the Viennese political/academic establishment regard Klebinder (perhaps because he used non-lawyerly words like “scandal,” or perhaps because his newspaper commanded a large and/or influential audience) with particular distaste? We do not know.

If the prosecution of Klebinder had been characterized by the Justice for Press Affairs, or by the Constitutional Court, as a case addressing the scope of press freedom, the most analogous American case might not thought to be *Brown v. Board of Education*,²¹ but *Near v. State of Minnesota ex rel. Olson*.²² There, *The Saturday Press*, a Minneapolis newspaper which in its very brief career thrived on causing discomfort to those in power, ran stories

13. See Decision, *supra* note 3.

14. *Id.*

15. Marcus, *supra* note 2, at 1.

16. Decision, *supra* note 3.

17. Dr. Joseph Hupka, *Die Studenten Ordnung der Universität Wien*, [The Student Regulations of the University of Vienna] NEUE FREIE PRESSE (Vienna), April 23, 1930.

18. *Id.*

19. Marcus, *supra* note 2, at 2.

20. Marcus, *supra* note 2, at 1.

21. 347 U.S. 483 (1954).

22. 283 U.S. 697 (1931).

charging that the leading political and law enforcement officials of Minneapolis were turning a blind eye to, or in some instances were actively fostering, the criminal cabals of local lawbreakers characterized as Jewish gangsters.²³ Acting under a 1925 Minnesota statute that authorized the abatement as a public nuisance of any “malicious, scandalous and defamatory newspaper, magazine or other periodical,” a Minnesota court, at the instance of the Hennepin County Attorney, enjoined publisher Jay Near and his associates from “publishing . . . any publication whatsoever which is a malicious, scandalous or defamatory newspaper”²⁴ The Minnesota Supreme Court sustained the injunction.²⁵ The United States Supreme Court, divided five to four, reversed.²⁶ Chief Justice Hughes, writing for the majority, ruled that the state court injunction constituted a “prior restraint” barred by the First Amendment, whose constraints were binding on states via the Fourteenth Amendment.²⁷ In explaining the importance of freedom of the press, the Chief Justice quoted at some length from Madison’s *Report on the Virginia Resolutions*.²⁸ An excerpt from Madison merits quotation here:

Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their

23. *Id.* at 703-05.

24. *Id.* at 706.

25. *State ex rel. Olson v. Guilford*, 228 N.W. 326 (Minn. 1929).

26. *Near*, 283 U.S. 697.

27. *Id.* at 713-14. In 1931, when *Near v. Minnesota* was decided, the principle that the Fourteenth Amendment’s “liberty” encompassed the First Amendment’s free press and free speech guarantees was a relatively new doctrine, commencing six years before, in *Gitlow v. New York*, 268 U.S. 652 (1927), as a proposition to be assumed *arguendo*. In *Near*, Chief Justice Hughes cited *Gitlow*, *Whitney v. California*, 274 U.S. 357 (1927), *Fiske v. Kansas*, 274 U.S. 380 (1927), and *Stromberg v. California*, 283 U.S. 359 (1931), in support of the pronouncement that “[i]t is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.” 283 U.S. at 707.

28. *Near*, 283 U.S. at 718.

happiness?²⁹

Madison's pragmatic exposition, endorsed by Chief Justice Hughes, of why it makes good sense to refrain from cutting away "noxious branches," has within it the seeds of *New York Times Co. v. Sullivan*,³⁰ which was three decades in the future.

Jay Near's *Saturday Press* may well have been a "noxious branch."³¹ By contrast, Ernst Klebinder's newspaper would appear to have been one "of those yielding the proper fruits." The Supreme Court's decision in *Near v. Minnesota* was announced on June 1, 1931, while the Constitutional Court's decision in the University of Vienna case was announced on June 23, 1931. There is little reason to suppose that any justice sitting on either court was, in the summer of 1931, aware of the other court's decision.

II.

But of course neither the Justice for Press Affairs nor the Constitutional Court treated the prosecution of Ernst Klebinder as a freedom of the press case. The Justice for Press Affairs evidently saw the question of whether Klebinder had observed "press prudence" as turning on the correctness *vel non* of Klebinder's contention that the Nazi Student Orders were not permitted by Austrian law.³² Addressing that question, the Justice for Press Affairs concluded, after an evidentiary hearing, that the Orders were doubly flawed: (1) The student "nations" contemplated by the Orders were "associations" which, under Austria's closely woven associations statutes, the Academic Senate, not being a governmental legislative body, lacked authority to establish.³³ (2) Assuming *arguendo* that the Academic Senate did have authority to establish entities of this sort, the "nations" transgressed constitutional principles of equality³⁴ because their defining

29. *Id.* (quoting Report on the Virginia Resolutions, Madison's Works, vol. iv, 544).

30. 376 U.S. 254 (1964).

31. That certainly was the view of Justice Butler and the three Justices—Van Devanter, McReynolds, and Sutherland—who joined in his dissent: "The record shows, and it is conceded, that defendants' regular business was the publication of malicious, scandalous, and defamatory articles concerning the principal public officers' leading newspapers of the city, many private persons, and the Jewish race." 283 U.S. at 724. But from another perspective the *Saturday Press* has been perceived to be a "reformist newspaper." Ralph Frasca, *The Helderberg Advocate: A Public-Nuisance Prosecution a Century Before Near v. Minnesota*, 26 J. SUP. CT. HIST. 215 (2001).

32. Marcus, *supra* note 2, at 8.

33. *Id.* at 9.

34. *See id.* at 11. According to Professor Marcus, under the Austrian Constitution of 1929, "[a]ll Austrian nationals were equal before the law, enjoying the same rights without distinction as to language, religion, or race. The Constitution guaranteed that differences in religion 'shall not prejudice any Austrian national in the exercise of civil rights,' and that

characteristic was “the principle of ethnic origin rather than the principle of citizenship.”³⁵ The Justices of the Constitutional Court were able to agree with the Justice for Press Affairs that the Academic Senate had no authority to create what were perceived to be “associations,” and for that reason the Nazi Student Orders were rescinded—and in consequence, the charges against Klebinder were dismissed.³⁶ But, as Professor Marcus shows with penetrating precision, the Justices were not able either to accept, or flatly to reject, the alternative ruling—the ruling of constitutional dimension—proposed by the Justice for Press Affairs.³⁷ What the Justices were able to do, after extended debate, was to agree that dividing a university’s student body “according to specified common points of view” would be unobjectionable “if . . . [this] classification . . . accords with constitutional principles”³⁸—a proviso crafted by Justice Arthur Lenhoff (a professor at Vienna Law School) at an earlier stage of the debate to trammel a proposal by Justice Ludwig Adamovich (a professor at Graz) that “ethnic origin” be affirmatively recognized by the Court as a permissible “common point of view.”³⁹ As the Justices’ debate went on, “ethnic origin” was disapproved, to be replaced by “nationality” as a potentially acceptable “common point of view”—but still subject to the delphic “if . . . [this] classification accords with constitutional principles.”⁴⁰

From the perspective of an American lawyer, it may seem odd that a court which had quickly agreed upon a statutory ground on which the case was to be decided would then labor on to opine upon constitutional issues. Avoidance of unnecessary constitutional opining about legislative or executive conduct, actual or potential, is a hallmark of American judicial review as that authority has been exercised by Article III courts ever since *Marbury v. Madison*.⁴¹ Viewed as an aspect of the federal judiciary’s

Austrians who belonged to racial, religious, or other minorities ‘shall enjoy the same treatment and security in law and in fact as the other Austrian nationals.’” *Id.*

35. *Id.* at 8-9.

36. *See id.* at 9, 12-13.

37. *See id.* at 10, 14-17.

38. *Id.* at 16.

39. *Id.* at 15-16.

40. *Id.* at 16. Professor Marcus notes, with respect to the dropping of “ethnic origin” in favor of “nationality,” that “[i]t is significant that this term [‘nationality’] could fit an Austrian citizen who happened to be Jewish in a way that ‘ethnic origin’ might not. For example, the Saint-Germain Treaty stated that Austrian nationals belonging to religious or racial minorities must receive the same treatment ‘as the other Austrian nationals.’” *Id.* at 17.

41. 5 U.S. (1 Cranch) 137 (1803). *Marbury*, however, is open to the criticism that the Court did some unnecessary constitutional opining. A closer reading of Section 13 of the 1789 Judiciary Act could have led the Court to dismiss for lack of jurisdiction on statutory grounds without reaching issues of constitutional dimension.

incapacity to render advisory opinions, such avoidance has jurisdictional status. But avoidance of advisory opinions is an element of judicial restraint that bulks even larger than the formalities, vital as they are, of jurisdiction. It is an ingredient of adjudication that goes to the separation of powers. To tell another entity of government what it may or may not do in advance of a “case” or “controversy” requiring judicial resolution is to intrude upon that entity’s coequal independence (or, if the entity is a state, that state’s sovereignty).

But an explanation for the Austrian Constitutional Court’s mode of adjudication suggests itself: The readiness of Austrian judges to venture into constitutional waters (and very tricky waters at that) where most American judges would have remained safely on the beach may, paradoxically, flow from the very fact that decisions of the Austrian Constitutional Court were not expected to have controlling future authority. As Professor Marcus observes: “The Justices were operating under a Roman-law-based civil code, a statutory system with little space for customary law and no recognition of judge-made law as formal precedent for future cases and parties.”⁴²

Although the Austrian Justices opined when it was unnecessary to do so, what they actually said was at once narrow and obscure. The Court could not announce larger, or clearer, principles because the Justices were, in Professor Marcus’s splendid phrase, “[t]rapped in the tradition of unanimity”⁴³—so all they could do, following argument, was confer for two days, arrive at a few opaque lowest common denominators, and announce their decision.⁴⁴ The importance of the Constitutional Court’s decision was twofold: First: The Court blocked the Nazi Student Orders. Second: To the extent that the Court ventured into the Austrian Constitution, the Court, in the face of very grave pressures, and due primarily to the expert defensive lawyering of Justice Lenhoff, did no clear damage to the Constitution’s equality principles.

42. Marcus, *supra* note 2, at 21.

43. *Id.* at 17.

44. The chronology was as follows: The Court heard argument on June 18, 1931; conferred on June 19 and June 20; wrote its opinion deciding the case on June 20; and announced its decision on June 23. *See* Decision, *supra* note 3. (June 20 was a Saturday, and one presumes that the Court then delayed public announcement of the decision until after the weekend; but just why the Court did not announce the decision on Monday, June 22, is not immediately apparent—unless June 22 was a holiday). *See id.*

Deciding big cases with this celerity has not been a characteristic of American constitutional adjudication. A notable recent exception was *Bush v. Gore*, 531 U.S. 98 (2000).

III.

The University of Vienna litigation had two heroes:⁴⁵

One was Joseph Hupka, the former Dean of Vienna Law School who did the initial, courageous, lawyerly job of demonstrating that the Nazi Student Orders were unlawful. Tragically, as Professor Marcus reports, following the Anschluss Dean Hupka was to die in a concentration camp.⁴⁶ As we honor Dean Hupka we may also honor another dean, Charles Hamilton Houston of Howard Law School, who in the early thirties laid the groundwork for the campaign (in which he enlisted two younger colleagues: William H. Hastie and Thurgood Marshall) that ultimately was to bear fruit in *Brown v. Board of Education*.⁴⁷

The other hero of the University of Vienna litigation was Arthur Lenhoff. The professor/judge did important service in piloting his fellow Justices to a proper conclusion. Happily, Arthur Lenhoff and his wife and daughter were able to escape from Austria at the time of the Anschluss. The Lenhoffs came to the United States, where he soon was appointed to the law faculty of the University of Buffalo. As Professor Saul, a Buffalo colleague of Arthur Lenhoff's, wrote in a memorial tribute, "[w]hat this country did in receiving Dr. Lenhoff, and the [other refugee scholars] was in a sense repaid by what he, and they, contributed to intellectual and scholarly life here."⁴⁸ Professor Clyde Summers, the dean of American labor law scholars, who was also a Buffalo colleague of Lenhoff's, notes that Lenhoff made labor law one of his principal areas of expertise and, in particular, that his friend was the first American academic to undertake serious comparative scholarship in labor law.⁴⁹ It is a good thing for American law that Arthur Lenhoff's daughter has followed in her father's scholarly footsteps. Professor/Justice Lenhoff would have reason to be very gratified that Professor Marcus has dedicated her fine article to him.

CONCLUSION

In 1931, the Austrian Constitutional Court declined to give the Austrian Constitution's imprimatur to the version of "separate but equal" promoted

45. Perhaps Ernst Klebinder merits hero status, but this writer lacks information about him other than the fact that he wrote a newspaper story that got him in trouble but was rescued by the Austrian courts.

46. Marcus, *supra* note 2, at 41-42.

47. 347 U.S. 483 (1954). Sadly, Dean Houston did not live to see the Promised Land. He died in 1950, four years before *Brown v. Board of Education*.

48. Saul Touster, *Arthur Lenhoff*, ASS'N OF AM. LAW SCHS., 1965 Proceedings Pt. 1-10, at 144.

49. Telephone Interview with Clyde Summers (Aug. 23, 2004).

2004]

NAZIS ORDERS AND JIM CROW

109

by Austrian Nazis, and thereby helped to hold at bay for seven years, until the Anschluss, the translation of Nazi race doctrine into law. In 1954, the United States Supreme Court stripped from the United States Constitution the Jim Crow version of "separate but equal," thereby reinstating America's promise of democracy.

"It may truly be said" that the judiciary has "neither FORCE nor WILL, but merely judgment."⁵⁰ Nonetheless, it has authority.

50. THE FEDERALIST No. 78 (Alexander Hamilton).