

# Tributes

## My Senior Partner

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I first met Fritz Kessler in the Spring of 1983, under somewhat unusual circumstances. When Grant Gilmore died the year before, he was at work with Fritz on a third edition of their contracts casebook. Or perhaps I should say that Fritz was at work, for as things turned out, he had nearly finished his half of the job, but Grant's was barely started. Rick Heuser, the head of the law division at Little, Brown, called and asked if I would be interested in taking over Grant's part of the project. Grant Gilmore had been my teacher and adviser and champion and friend. My feelings toward him bordered on awe. The invitation to take his place on the casebook was irresistible. But what did my coeditor think? Fritz and Grant had been close friends, and I felt like an intruder. I had never met Fritz in person. Rick Heuser assured me that he had spoken with Fritz and that Fritz welcomed my participation. Still, I thought that if Fritz and I were going to collaborate (how presumptuous that word seemed!), we ought to meet face-to-face. And so, a month later, I flew to California and spent a few days with Fritz in Berkeley. We talked, in his office and at his home, about contracts and much else besides. With a warmth and generosity that all Fritz's students will recognize as the essence of the man, my learned and distinguished coeditor invited his very junior partner into a friendship that I have cherished ever since.

In those first conversations we spoke, among other things, about Fritz's own education in Germany, about his teachers and the intellectual currents of his youth. I learned that like so many of his contemporaries, Fritz had been powerfully influenced by the work of the great Max Weber. Weber died in

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1920, and for those lawyers and social scientists who came of age during the next decade, he was still a tremendous, almost-living presence. Listening to Fritz talk about his student years, and Weber in particular, I began to understand a feature of his contracts casebook that I had long found puzzling.

In its selection of materials and editorial judgments the Kessler-Gilmore casebook joins two very different—indeed, nearly antithetical—traditions. One is the Anglo-American common law tradition, reformulated (and exaggerated) by the legal realists of the 1930's. The common law tradition emphasizes the uniqueness of cases, the limitations of abstraction, the decisive importance of facts in adjudication, and the possibility of reaching sound and even moderately predictable results on the basis of facts, within a regime of flexible rules that can be bent to achieve a broad range of ends. Arthur Corbin's treatise on contract law belongs to this tradition, as does the work of his two most devoted students, Karl Llewellyn and Grant Gilmore. The Kessler-Gilmore casebook also belongs to it in part, most obviously, perhaps, in its repeated pairing of nearly identical cases that reach opposite legal conclusions, causing students to despair of finding guidance in the rules and to comb the facts in search of clues that will help them reconcile the opposing judgments.

But there is another, Weberian, side to the casebook as well. Weber's master theme was the rationalization of the modern world. The modern epoch is defined, Weber said, by the systematic application of self-conscious thought to all departments of social life, including law—an idea first and most famously advanced by Hegel. Fritz Kessler's profound and original work on contract standardization and the problem of adhesion, and his lifelong fascination with the use of contract law as an instrument of risk distribution, belong to this same tradition of thought. Near the end of his life, Weber described the modern welfare state, with its comprehensive legal and bureaucratic apparatus, as a rationalized "shell of bondage,"<sup>1</sup> and worried about the fate of individual freedom within it. For Fritz, too, this became a deep and persistent worry, and nearly everything that he has written reveals it. The Kessler-Gilmore casebook in particular is marked by a preoccupation with the paradoxical results of the rationalization process and the tension between freedom and administration—a peculiarly German preoccupation that Fritz and Grant managed somehow to combine with a celebration of that most unrational of adjudicative methods, the fact-based, rule-skeptical Anglo-American method of common law decision. Sitting in Fritz's library in Berkeley, talking to him about his student years in Germany, surrounded by his books—the books of a European thinker—I began to understand the complex genealogy of the

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1. 3 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 1402 (Guenther Roth & Claus Wittich eds. & Ephraim Fischhoff et al. trans., Bedminster Press 1968) (4th ed. 1956).

casebook I was joining and to appreciate the magnitude of my coeditor's contribution to the study of law in this country.

Among the German legal scholars of his generation, only Fritz understood the common law well enough, and loved it deeply enough, to see its possibilities as a path away from Weber's shell of bondage. And among the American legal scholars of his generation, only Fritz saw how deeply ingrained in the common law itself is the dialectic of freedom and fate—the paradox of modernity—which has obsessed contract scholars in this country for the last quarter century. The German intellectual tradition that starts with Hegel and to which Max Weber belonged, the tradition the Frankfurt School continued and that Jürgen Habermas now represents, is today a powerful force in American legal thought. Fritz Kessler brought the riches of this tradition to us. In the process, he deepened and refined our intellectual life, and helped us to see in our own legal culture the great Weberian antinomies to which modern life everywhere gives rise. His contribution to American legal scholarship has been immense.

There is another contribution that Fritz has made, of a more personal kind, that I feel it important to mention. Fritz has always been, and remains today, a staunch defender of the ideal of academic neutrality—the ideal of the university as a place apart from the pressures of politics and the demands of partisan allegiance. In this respect as well, Fritz is a follower of Weber, who defended this ideal with great passion. Weber understood, with far more clarity than most, the role that values play in scholarly research and teaching. Fritz understands this too. But like Weber, he has fought against the argument that research and teaching are merely politics by other means. He has fought to keep the academy separate from the world. In the 1930's, he opposed the politicization of the universities in Nazi Germany. In the 1960's, with equal courage, he opposed the demand for relevance and social engagement that threatened American universities from a different direction, and insisted that professors be allowed to go their own unworldly way, free from the requirement to conform their work to any political program. Today there are once again great pressures on the university to be politically responsible or, as we now say, politically correct. For those who believe, as I do, that these pressures must be resisted, who continue to believe in the ideal of academic neutrality despite the fashionable conviction that every ideal is a form of politics in disguise and that politics at bottom is nothing but power—for us, Fritz Kessler is a personal example, a hero as well as a teacher. We are all lucky to have him, and I feel particularly lucky to be able to call him my friend.

