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# Heinrich Kronstein and the Development of United States Antitrust Law

David J. Gerber

# Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland

Vorträge und Referate  
des Bonner Symposions  
im September 1991

herausgegeben von

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# Heinrich Kronstein and the Development of United States Antitrust Law

by

DAVID J. GERBER

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## I. Introduction

In treating *Heinrich Kronstein's* influence on United States antitrust law, we encounter a situation quite different from many other in which German émigré jurists operated. In areas such as contracts, torts or private international law, German experience was rich and varied, providing a trove of insights and analytical tools. In contrast, German experience with competition law was of recent origin and limited importance in comparison with United States antitrust law experience. This meant that few émigrés – and very few Americans – knew much about German competition law experience, and it also meant that German experience had less to teach in this area of law than in many other areas. These factors were of central importance in sculpting the roles *Heinrich Kronstein* was to play in the development of U.S. antitrust law.

Before attempting to appreciate *Kronstein's* influence on the development

of United States antitrust law, we need to know something about the man, his base of knowledge, his values and his objectives in regard to antitrust law. After reviewing some of these factors, I will briefly describe the context in which *Kronstein* was operating and then review his contributions and his influence.

I should add a word of caution regarding sources. The primary source for information concerning *Kronstein's* life is his autobiographical "Briefe an einen jungen Deutschen", most of which apparently was written in the 1960s<sup>1</sup>. Autobiographical works often reflect the projection of ordering ideas held later in life onto the interpretation of earlier experience, and I have seldom found other material against which the accuracy of *Kronstein's* own accounts could be measured. Nevertheless, where I have found such material, it has been consistent with *Kronstein's* depictions.

## II. Background, Values and Central Ideas

### 1. Education

When *Kronstein* left Germany in 1935, at the age of 38, he apparently knew very little about United States antitrust law and little about competition law generally. He did not study competition law in the university for the simple reason that it was not part of the curriculum. Indeed, there was no such thing as competition law in Germany until late 1923, when he had nearly completed his university legal education.

During his university years his primary focus seems to have been on corporate law and on private international law. He was an assistant to the famous private law specialist *Martin Wolff*, first in Bonn and then in Berlin, where he received his doctorate under *Wolff's* supervision. He reports that he had been interested in medieval guilds and in the relationship between politics, religion and the economy since his secondary school ("Gymnasium") days, and he apparently pursued these interests at the university, but that seems to have been about as close as he came to the formal study of antitrust issues<sup>2</sup>.

*Kronstein's* university years were, however, of great importance to the later development of his ideas in this area, because they forged values and perspectives about law and its roles that later structured his thinking about competition law. His attempt to come to grips with the near chaos of the

<sup>1</sup> *H. Kronstein, Briefe an einen Jungen Deutschen* (1967).

<sup>2</sup> *Id.*, at 76-81.

early Weimar years generated a strong cognitive need for values that could withstand manipulation and abuse. A passage from his "Briefe" captures the central theme that would resound throughout his life and work. Describing the situation during this period, he wrote:

"Rathenau had been assassinated. The Ruhr War had been lost. Inflation was soaring to new heights. Everything cried out for new conceptions of order. These circumstances fostered a movement in law according to which the lawyer (Jurist), especially the practitioner (Anwalt) and the juridical architect of business, were allowed to do anything with the legal forms of contracts or corporations that was not expressly prohibited by specific provisions. The dominant school of legal positivists of various shades and colors was powerless in the face of this view. Important elements of their positive law had been washed away by the economic and human catastrophes of the post-war period, and they saw no other moral or other values that could restrain the force of the destroyers of law. Nevertheless, no matter how difficult a solution to this problem might be, the collapse of this school of law fortified me in my determination never to subscribe to a concept of law that was powerless in the face of chaos."<sup>3</sup>

In studying law during this period he was confronted with examples of law's powerlessness, and he resolved to find a basis for infusing law with moral strength.

## 2. Pre-Emigration Experience

After receiving his doctorate, he was a judge for a brief period before becoming a lawyer in Mannheim, where he remained until his emigration. His experiences there further strengthened his belief in the need for values in law. He saw the ascendancy of national socialism first confirm and then exceed his worst fears about the fate of a society in which such values were not anchored in the legal system. Although he wrote several articles during

<sup>3</sup> "Rathenau war ermordet worden. Der Ruhrkrieg war verloren. Die Inflation trieb auf ihren Höhepunkt zu. Alles schrie nach neuen Gedanken der Ordnung. Diese Zustände waren der geeignete Nährboden für eine Strömung im Recht, wonach der Jurist, insbesondere der Anwalt und der juristische Konstrukteur der Wirtschaft, alles mit den Rechtsformen von Verträgen oder juristischen Personen machen durfte, was nicht ausdrücklich durch besondere spezielle Vorschriften verboten war. Die herrschende Schule der Rechtspositivisten verschiedenster Schattierungen stand dieser Auffassung machtlos gegenüber. Wichtige ihrer positiven Rechtssätze waren durch die wirtschaftliche und menschliche Katastrophe der Nachkriegszeit hinweggespült worden, und sonst sahen sie keine moralischen oder anderen Werte, um dem Treiben der Rechtszerstörer Einhalt zu gebieten. Doch so schwierig eine Lösung dieser Problematik auch war, dieser Zusammenbruch einer Rechtsschule stärkte mich in meinem Entschluß, niemals einer Lehre zu folgen, die der Unordnung gegenüber machtlos war." *Id.*, supra (n. 1) at 93.

this period emphasizing the importance of values in law<sup>4</sup>, he later accepted partial blame for the Nazi takeover, because, he said, the entire legal profession had allowed legal positivism to destroy all values in law.

This theme repeated itself in the specific context of competition law. As a young lawyer, *Kronstein* had some contact with the then new German competition law, and he witnessed how little it did to prevent economic chaos and the destruction of the German economy<sup>5</sup>. The law was the so-called Cartel Regulation (*Kartellverordnung*)<sup>6</sup>. This legislation had been issued in 1923 by "Reichskanzler" *Gustav Stresemann* under emergency provisions of the Weimar Constitution as part of his attempt to combat the extraordinary inflation of that year. There was a widespread belief that cartels were contributing to the inflation, and *Stresemann* responded to public pressure by issuing legislation directed against such practices.

The Regulation provided, in essence, that the actions of cartels and other powerful enterprises could be invalidated if they were found to be against the public interest or welfare<sup>7</sup>. It also contained specific provisions requiring, for example, that boycotts by cartels or dominant enterprises had to be approved by a special cartel court. *Kronstein's* experience under this legislation was to play an important role in his later encounters with United States antitrust law.

### 3. *Kronstein and the Freiburg School*

Another important aspect of his experience during these years was his close association with the ideas that came to represent the so-called "Freiburg school" of legal and economic thought and with some of the founders of that school. Not only did the ideas of this school influence *Kronstein's* thought, but its role in post-war Germany had a significant impact on his own personal role during the post-war period.

In brief, the term "Freiburg School" refers to a group of legal scholars and economists that was centered in the university town of Freiburg in southwestern Germany during the Nazi period<sup>8</sup>. Due to uniquely favorable circumstances, the university in Freiburg was able to minimize national

<sup>4</sup> See, e.g., *Kronstein*, *Wirtschaftsrecht – Rechtsdisziplin und Zweig der Rechtstatsachenkunde*, *Die Justiz*, Bd. 3 (1928), S. 215.

<sup>5</sup> *H. Kronstein*, supra (note 1), at 111–25.

<sup>6</sup> *Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen von 1923*, *Reichsgesetzblatt [RGBl.] I*, 1067 (Ger.). An English translation appears in *A. Liefmann*, *Cartels, Concerns and Trusts* 351–7 (1932).

<sup>7</sup> For discussion, see generally *R. Isay* and *O. Tschierschky*, *Kartellverordnung* (2d ed. 1930).

<sup>8</sup> See generally *A. Heinemann*, *Die Freiburger Schule und ihre geistigen Wurzeln* (1989).

socialist influences until almost the end of the war. This allowed a group of scholars operating there to develop a set of ideas about the relationship between law and economics that was largely antithetical to national socialist doctrine.

The group began to form during the early 1930s when the lawyer *Franz Böhm*, the economist *Walter Eucken*, *Kronstein* and others recognized similarities in their respective analysis of the problems of the period. For each, the core of the problem was the inability of the legal system to prevent abuses of power and of legal rights that were undermining both the free market and the democratic order. For example, *Kronstein* published a book in 1931 that dealt with the relationship between parent and subsidiary corporations, and his central argument was that managers were using the right of incorporation to evade corporate laws<sup>9</sup>.

The basic ideas of the Freiburg school combined classical liberalism with the duty of the state to maintain the conditions of competition. The Freiburgers believed that the free market was essential to both economic and political freedom, but they also believed that the market could only remain free and effective where law protected the process of competition. Having experienced the fragility of the competitive system during the 1920s, they sought to create a legal framework (*Verfassung*) of competition that would protect competition from elimination or distortion, whether through agreement, concentration or the abuse of private economic power. *Kronstein* did not refer to himself as part of the Freiburg school (or any other "school" for that matter), but he was a close friend of *Franz Böhm*, and he was part of the intellectual circle from which the Freiburg school evolved. More importantly, he shared many of the basic ideas of this group and continued his contacts with *Böhm* and others during the postwar period.

#### 4. *America, War and the Justice Department*

Soon after his arrival in the United States in 1935, *Kronstein* enrolled in Columbia Law School, where he graduated in 1939. Even as a student at Columbia, however, he had begun to consult with the U.S. Justice Department regarding the legal aspects of the approaching war, and after his graduation he began full-time employment with the Justice Department. He spent much of his time there in the Antitrust division, where he became closely associated with leading figures in court antitrust law such as

<sup>9</sup> *H. Kronstein, Die abhängige juristische Person* (1931).



Thurman Arnold, then head of the Antitrust Division, and these contacts were to be of major importance to him during the postwar period.

Kronstein took one other important personal step shortly after his arrival in the United States. He converted from Judaism to Roman Catholicism. His mother apparently had brought him into contact with Catholic thought as a child, and apparently he had considered conversion prior to leaving Germany<sup>10</sup>. Catholic natural rights doctrine resonated with his deep conviction that immutable values had to be the foundation stone of a sound legal system and a just society, and he repeatedly emphasizes in his autobiographical work the importance of this conversion.

### 5. Characteristics of Kronstein's Thought

What then were the basic characteristics of Kronstein's thought in the area of antitrust law in the early 1940s, as he began to influence U.S. antitrust law? Perhaps the basic message was that the Europeans, particularly the Germans (and he is careful here to accept some of the blame himself) had erred in the 1920s in failing to control the growth and abuse of private power. That failure, he believed, had undermined the political and economic system of Germany and eventually led to the tragedies of the Nazi period.

One conclusion he drew from this experience was that in order to preserve economic and political freedom, the legal system had to be based on firm and clear moral principles. Law had to be "wertgebunden" (value-bound) in order to protect freedom. Here he drew heavily on natural rights theory. His *bête noire* was legal positivism, which he repeatedly excoriated.

A second basic conclusion was that private individuals and organizations can all too easily acquire sufficient power to threaten the stability of a legal and/or economic system and that one of the primary objectives of law must be to prevent this from happening. He shared this conception with the Freiburg school, and it remained an important theme in his thought.

## III. Post-War Situation: The Context of Influence

Kronstein's influence on United States antitrust law was linked to the interplay of his German and American activities during the postwar period. In 1946 he began full-time teaching at Georgetown Law School, and soon thereafter he began teaching at the University of Frankfurt, and thus for

<sup>10</sup> Kronstein, *supra* (note 1) at 163-66.

much of the rest of his professional life he "commuted" between Washington and Frankfurt. This allowed *Kronstein* to maintain his close ties to those in Germany who were attempting to pass a German antitrust or competition law, and it meant that he necessarily saw the problems of American antitrust law in the light of German experience and the problems of German antitrust law in the light of American experience.

### 1. The Situation in Germany

When the Occupation began, members of the Freiburg school quickly assumed leadership positions in the reconstruction of German economic policy. They were able to present a clear and coherent plan for achieving the goals that the allied authorities sought to achieve, and they were not tainted by Nazi activities. Many had, in fact, been arrested and/or fired because of their unwillingness to cooperate with the regime.

At the end of the Second World War the allies, particularly the United States, were convinced that the high levels of cartelization of German industry had contributed to *Hitler's* political success and to Germany's incentives and ability to wage war. An important item on their economic policy agenda was, therefore, to eliminate cartels and introduce laws that would prevent them from re-emerging. De-cartelization laws were issued for the purpose, and the treaty that returned full sovereign rights to Germany called for Germany to enact an antitrust-type law<sup>11</sup>.

Opinion in Germany was divided, however, on the content of such a statute, and the controversy raged for almost a decade before, in 1956, a competition statute could be enacted<sup>12</sup>. Members of the Freiburg school, then increasingly known as *ordo-liberals*, were at the center of the controversy, arguing for a prohibition of cartels and a generally "tough" antitrust law<sup>13</sup>. German industries opposed any such legislation, however, arguing instead for a return to the basic framework of the 1923 Cartel Regulation. In Frankfurt, *Kronstein* was enmeshed in this battle.

<sup>11</sup> For discussion, see *Bock and Korsch*, Decartelization and Deconcentration in the West German Economy since 1945 in *Antitrust Laws: A Symposium* 138-53 (W. Friedmann ed. 1953).

<sup>12</sup> Gesetz gegen Wettbewerbsbeschränkungen [GWB] von 1957, Bundesgesetzblatt [BGBl.] I, 1081 (Ger.).

<sup>13</sup> The first draft of a new competition statute was presented in 1949 by a group of lawyers and economists, many of whom, including *Franz Böhm*, were either members of the Freiburg group or closely associated with it. It called for the prohibition of cartels and strict controls on the conduct of monopolies. Entwurf zu einem Gesetz zur Sicherung des Leistungswettbewerbs und zu einem Gesetz über das Monopolamt (Bundewirtschaftsminister pub. 1949).

## 2. The Situation in the United States

In 1945, U.S. antitrust law stood at something of a crossroads. The basic U.S. antitrust statute, the *Sherman Act*, had been in effect since 1890 and had become an important part of United States law. Yet for most of the decade and a half preceding 1945 there had been little enforcement of these laws, first because of New Deal efforts to organize the economy and to raise price levels and then because of the exigencies of the war economy. There were many, particularly those in exporting industries, who felt that resumed enforcement of those laws might impair the ability of United States industry to compete in the post-war world, and they saw the post-war situation as providing a unique opportunity to weaken United States antitrust law. They argued that U.S. antitrust law should be more like the pre-war European statutes, which merely controlled some of the conduct of cartels and monopolies<sup>14</sup>.

## IV. Kronstein's Immediate Post-War Influence

*Kronstein's* most direct and identifiable impact on United States antitrust law was a result of his strenuous opposition to these efforts to weaken United States antitrust law. Given his belief in the need for fixed principles in law, the idea of weakening U.S. laws was anathema to *Kronstein*, particularly in light of the difficult fight being waged in Germany in order to introduce an effective competition law opposing such plans.

### 1. Central Arguments

*Kronstein* attacked proposal to introduce a "control" form of antitrust law in the United States by demonstrating that such systems had produced disastrous results in the one place they had been tried, namely, Europe. Supporters of these proposals had pointed to European experience and claimed that this type of system had worked reasonably well there. These references often were based on limited knowledge of the European legal situation, however, and, taking advantage of his own more extensive knowledge of European experience, *Kronstein* sought to demonstrate that European experience with

<sup>14</sup> See, e.g., *Perkins, Cartels: What Shall We Do About Them?*, 189 Harper's 570 (1944) and Hearings before the Temp. Nat'l Econ. Comm. on Investigation of Concentration of Economic Power, 76th Cong., 3rd Sess. (1940) pt. 25, 13347, 13353 (Statement of *Rudolf Callmann*).

this type of law had not only not produced positive results, but instead had led to disaster. In two long and detailed articles *Kronstein* presented his version of the development of cartels in Germany, their relationship to the rise of *Hitler*, and the role of law in this development.

In a 1942 University of Chicago Law Review article, *Kronstein* described how high levels of cartelization in Germany had undermined the German political and economic system and led to the rise of national socialism<sup>15</sup>. By concentrating power in the hands of a relatively small number of industrialists and bankers, he argued, the cartel movement had significantly reduced the costs and risks of securing control of German industry. Moreover, cartels necessarily regulated economic activity and thus accustomed managers to accepting such regulation, and this allowed the Nazis merely to transfer the locus of authority and change the goals of regulation. In effect, it facilitated the Nazi success in economic manipulation. Finally, he saw cartels as private regulatory bodies that had been allowed to avoid public responsibility through the use of arbitration agreements and thus had undermined the influence of the basic values of the German legal system and of German business conduct, making German business an easier prey for national socialist domination.

This view of the role of cartels in Germany came to be widely-held by U.S. policymakers at the end of the war, and it shaped Allied economic policy. As one of the few people in Washington who knew the German experience in detail, *Kronstein* is likely to have had a significant influence on the breadth and depth of this view among relevant policymakers.

In a 1946 article in the Yale Law Journal *Kronstein* then examined the role of law in this ominous development<sup>16</sup>. He reviewed the European experience with laws to protect competition, focusing particularly on the German experience. The first element in his analysis was to classify Europe's competition law as variations on a "control" model. This was important in that it planted the idea that experiences with competition law in European countries were interrelated and similar. *Kronstein* did not define the term "control model", but he used it to refer to legal regimes in which administrators and sometimes courts were authorized to protect the competitive process by controlling the conduct of firms or groups of firms with economic power.

*Kronstein* then claimed that this European model differed fundamentally from the U.S. system, in which cartels were generally prohibited. This distinction between an "abuse" or "control" model and the U.S. antitrust

<sup>15</sup> *Kronstein*, The Dynamics of German Cartels and Patents, pt. I, 9 U. Chi. L. Rev. 643 (1942), and pt. II, 10 U. Chi. L. Rev. 49 (1942).

<sup>16</sup> *Kronstein and Leighton*, Cartel Control - A Record of Failure, 55 Yale L. J. 297 (1946).

system had been common in German antitrust literature since the turn of the century, but it does not appear to have been commonly recognized in the United States at the time.

Having developed the concept of a European model and having distinguished it from United States experience, *Kronstein* proceeded to analyze European experience with this model, and he concluded that it had contributed to the chaos that had undermined European, and particularly German, society in the 1920s and 1930s. *Kronstein* demonstrated that in the countries in which such a control system had been tried, it had been ineffective in preventing the accumulation of massive economic power on the part of cartels. He concluded from this review that such a system could not effectively protect economic freedom and competition.

The basic problem, according to *Kronstein*, was that the system depended on administrators, but did not make it possible for them to achieve the goals that they were supposed to achieve. He claimed that administrators could not effectively apply the vague standards of "public welfare" contained in those legal regimes. The task, he said, was simply too complex. In his view,

"once the automatic protection of public interest through the preservation of contractual equality was removed, agencies of control became engulfed in a task of enormous intricacy, a task involving niceties of distinction which an agency could hardly hope to resolve without vigorous legislative assistance."<sup>17</sup>

A major culprit, therefore, was the lack of more specific legislative guidance concerning conduct that the administrators were to seek to prevent or at least more specific criteria for administrative intervention. Without this, those who were to control the abuse of economic power had no guidance or support in applying the law.

This weakness of the control model exacerbated other problems. *Kronstein* claimed that the administrative agencies charged with applying the cartel controls had been unable to remain sufficiently independent to apply the law effectively. The firms and cartels they were supposed to regulate were simply too powerful. Moreover, he argued that this was inevitable. One could not expect administrators to withstand the political and economic pressures generated by the powerful economic organizations they were supposed to regulate, at least without far more support from the legislature in the form of more detailed legislation.

Finally, *Kronstein* claimed that where courts had been used to apply "control" legislation, they had also been ineffective. Again, the central

<sup>17</sup> H. *Kronstein*, *supra* (note 1) at 121.

reason was that they had no legislative guidance and could not effectively apply standards as vague as that of the "public welfare". Moreover, courts often had had little opportunity to apply the law, because cartels generally could use arbitration agreements to avoid judicial jurisdiction.

*Kronstein* concluded that any legal regime based on "control" principles was doomed to failure, because such systems could not restrain the economic power that was endemic to modern industrial economies. He warned that any attempt to replace the U.S. "prohibition" system with a control-type system might well have the same dire consequences in the United States that it had had in Germany.

## 2. Personal Influence

It is important to remember that *Kronstein's* influence was not limited to his writings. He had come to work closely with leaders in U.S. antitrust law as well as important political leaders. Moreover, he was one of the few people in the United States during this period who knew anything about European competition law. He thus was in an exceptionally favorable position to influence U.S. thought in this area, and he undoubtedly used his personal contacts to propagate his views on the dangers of following European examples in the antitrust area.

## 3. Antitrust Law is "Saved"

*Kronstein* and his allies were successful in combatting efforts in the 1940s to remodel U.S. antitrust laws along European lines or otherwise significantly to weaken existing antitrust laws. By the end of the decade such efforts generally had been abandoned, and there was renewed confidence in the future of antitrust law in America.

As one of the leading interpreters of European competition law experience in the United States, *Kronstein* played a significant role in this victory. His articles seemed to demonstrate that in the only contexts in which they had been tried control systems of antitrust law had had disastrous results. Moreover, he argued that those results could recur if such a system were to be tried in the United States.

In addition to the strength of *Kronstein's* analysis, other factors probably contributed to his influence. His language, for example, was often passionate and morally-based, and this appealed to American attitudes during the postwar period. In addition, he urged Americans not to abandon something that was considered particularly American (i.e., antitrust law), thereby

appealing to postwar American self-assuredness. In any event, there can be little doubt that *Kronstein* helped to "save" U.S. antitrust law.

#### 4. Comments

One can take issue with aspects of *Kronstein's* comparative scholarship. For example, he tended to generalize from German experience as if it were representative of European experience generally. In fact, however, other major European countries had had virtually no experience with a control system of competition law, and the countries that had had such experience, such as Norway and Czechoslovakia, arguably were too small and too marginal to provide useful comparisons. He also made little effort to explain the contexts in which the laws operated or the objectives they were intended to achieve, and to this extent he violated a cardinal principle of comparative law analysis. Finally, his description of the German system focused on those elements that clearly had not been successful, while ignoring other areas from which more differentiated conclusions might have been drawn. He focused, for example, on the lack of enforcement of the general provision of the German Cartel Regulation relating to conduct "contrary to the public interest", but he did not discuss enforcement experience under other provisions of that regulation dealing with specific conducts such as boycotts<sup>18</sup>.

*Kronstein's* scholarship in this area was the product not only of analysis, but also of conviction. He believed that he and other Germans had made catastrophic mistakes in the 1920s, and he considered it part of his "mission" to save the United States from similar mistakes. Moreover, he had long believed in the need to anchor law in firmly-held basic principles, and his passionate stand against weakening U.S. antitrust law derived from this deeply-held set of beliefs.

#### V. *Kronstein's Longer-Term Influence*

*Kronstein's* longer-term influence on U.S. antitrust law is more difficult to assess, but it seems to have had two components – one relating to the basic methodology of U.S. antitrust law and the other to perceptions of foreign experience among U.S. antitrust professionals.

By the early 1950s *Kronstein* had become an important figure in U.S.

<sup>18</sup> For discussion, see *R. Isay and O. Tschierschky*, *supra* (note 7) at 287–321.

antitrust law, and he maintained that position well into the 1960s. In 1953 he wrote a case/textbook on U.S. antitrust law that was reviewed in leading periodicals and was sometimes cited in academic literature<sup>19</sup>. His treatise on U.S. antitrust law saw two editions (1958 and 1965), and both editions were widely reviewed<sup>20</sup>. He also wrote a number of law review articles on aspects of U.S. antitrust law, particularly those involving international issues<sup>21</sup>. He was thus in a position to influence the development of U.S. antitrust thought<sup>22</sup>.

### 1. Values and Methods

For *Kronstein*, values were the central issue, and throughout his U.S. antitrust materials he emphasized the need for firm principles and clear values as a basis for antitrust analysis, thereby drawing directly on his interpretation of German experience. His main theme was that economic regulation had to serve the public welfare and that the public welfare included the maximum of personal freedom consistent with social harmony. His message was that this could be achieved only where human values came first and established the framework that should guide the application of laws. He thus decried the positivistic and increasingly unprincipled developments in U.S. antitrust law.

*Kronstein* could not prevent the positivist developments in U.S. antitrust law that he opposed, and his methodological concerns were seldom referred to after the 1950s. Nevertheless, his powerful voice for values in antitrust law obviously was heard for almost two decades.

### 2. Discrediting European Experience

*Kronstein* had a second influence on United States antitrust law that followed from his postwar efforts to discredit European competition law experience in order to protect U.S. antitrust law. During the 1950s, his 1946 Yale article emphasizing the dangers of emulating European experience became the standard reference on European competition law experience, and it came to represent the generally accepted view of that experience. It was frequently

<sup>19</sup> H. *Kronstein* and J. *Miller*, *Regulation of Trade: A Case and Textbook* (1953).

<sup>20</sup> H. *Kronstein* and J. *Miller*, *Modern American Antitrust Law* (1958) and H. *Kronstein* and J. *Miller*, *Major American Antitrust Laws* (1965).

<sup>21</sup> See, e.g., *Kronstein*, *Extraterritorial Application of American Antitrust Legislation*, *The Journal of Business Law* 205 (1959).

<sup>22</sup> It should be noted here that *Kronstein's* works in the antitrust area were seldom cited by the courts. A computer search revealed only six cases in which his antitrust works were cited.



cited throughout the decade in scholarly works and in government analyses, often as the sole citation on the subject<sup>23</sup>.

He reinforced this unfavorable account of European experience in his response to the enactment in 1957 of the German Competition Law, which was the most developed competition law in Europe. In that year he published an article in the *Vanderbilt Law Review* analyzing the new statute, and in it he emphasized the tentativeness of the statute and its compromise character<sup>24</sup>. He expressed his doubts about the effectiveness of the statute, and thus his message continued to be that European antitrust experience had little to offer by way of useful comparison for United States observers.

Perhaps as important as what he said was what he did not say. Despite his preeminence in the United States as an expert on German competition law experience, he wrote very little on the subject, except in the context of international cartels. Competition law developed rapidly in Europe during the 1950s and 1960s, as more and more countries took competition law increasingly seriously. Yet comparative references are conspicuously absent from his treatise and his text/casebooks. His lack of attention to the subject implied that there was little value for Americans in studying European competition law.

Ironically, therefore, it seems that *Kronstein* helped to turn U.S. eyes away from Europe in the area of competition law. Except with respect to European Community competition law, there has been little study of foreign antitrust laws in the United States in recent decades. Moreover, the work that exists seldom involves serious comparative analysis. It tends to be descriptive, with little attempt to understand the underlying historical, linguistic and cultural factors influencing the development of the law. There simply is no tradition in the United States of analyzing antitrust from a comparative perspective. In this area, therefore, *Kronstein's* immediate post-war successes in protecting U.S. antitrust law led to what I suspect he might have considered something of a long-term failure.

## VI. Concluding Comments

For more than three decades after his arrival in the United States *Heinrich Kronstein* was an important interpreter of European cartel experience in the

<sup>23</sup> See, e.g., Foreign Legislation Concerning Monopoly and Cartel Practices, Rept. of the Dept. of State to the Sen. Comm. on Monopoly of the Select Committee on Small Business, U.S. Sen. 33 (1952).

<sup>24</sup> *Kronstein*, Cartels under the new German Cartel Statute, 11 *Vanderbilt L. Rev.* 271 (1958).

United States and a powerful voice in United States antitrust law. He believed that in Germany he had learned vitally important lessons about the need for values in law, and particularly in the regulation of economic processes. Moreover, he believed passionately that these lessons were critical for the future course of American law, and he saw as his mission the protection of U.S. law from European mistakes. This approach does not always lead to the most balanced comparative analysis, but for *Kronstein* there seems to have been little doubt that the mission – the moral mission – came first.