State, Capitalism, and the Organization of Legal Counsel: Examining an Extreme Case--the Prussian Bar, 1700-1914

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LAWYERS AND THE RISE
OF WESTERN
POLITICAL LIBERALISM

Europe and North America from
the Eighteenth to Twentieth Centuries

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This is a historical sketch of the Prussian Bar spanning two centuries. Its analytic purpose is to explore how an authoritarian, modernizing state and a late-developing capitalist economy shaped the dispensation of legal counsel and how in response lawyers sought to restructure their professional organization, attempts that were part of a larger agenda of German liberalism. In a comparative perspective, Prussia is an extreme case. Yet extreme cases and their historical fate are analytically instructive.

In the early eighteenth century, lawyers in Prussia were not subject to strong regulation—be it by professional bodies, the courts, or the state. It is safe to say that they were considerably less regulated as a profession than the pre-revolutionary bar in North America.

After repeated efforts at discipline and regulation by the Prussian state and after the developments following the American Revolution, the situation was reversed. During the century that lasted from 1781 to 1878, attorneys in Prussia were a small and close-knit group of quasi-civil servants. In roughly the same period, from the American Revolution until after the Civil War, the legal profession of the United States was essentially a collection of individuals of uneven legal competence and little collective organization. In the initial stages of capitalist development, then, the Bar in Prussia, the largest of close to forty German states and sovereignties, was as different from the American bar as any profession has ever been from another.1 From the last quarter of the nineteenth century onwards, we see developments that could be described as trends towards convergence—upgrading of education

1 Both differed strongly though in different ways from the English Bar, which—as a high-status occupational group that joined autonomy from the state with a well-established collective self-organization—approximated more closely the analytic models of a profession that prevail in the social sciences than either the American or the Prussian legal profession.
and increasing professional organization in the United States, open admission and some professional autonomy in Germany; but these convergent developments never fully eliminated the contrasting patterns set in the nineteenth century.  

The very differences that set the Prussian story apart from the history of professions that are more often studied should be instructive. This essay will first sketch an outline of the history of the Bar in Prussia, focusing on the process of emancipation from government control during the nineteenth century, and then seek to draw some lessons about law as a profession, the Bar's relation to the state, the impact of late capitalist development on lawyers, the relationship between the Bar's struggle and bourgeois liberalism, and the embeddedness of universal aspects of law work in historically concrete social and political contexts.

Imposition of Discipline by the State

Around 1700, Prussia had about twelve hundred attorneys or a little more than one for every 2,000 people, a relative density of lawyers the country was not to see again for more than two hundred years. An earlier division between advocates and procurators—with only the latter, less educated group subject to admission in limited numbers to practise at a given court—had given way to a single occupation, to which admission was not numerically limited though it was contingent on proof of (some) university education and payment of a steep fee; 'the position of an advocate was in a certain sense bought', comments Weissler, the eminent historian of the Bar in Germany.  

Though not very often aristocrats themselves, many attorneys were associated with aristocratic interests—as legal advisers, agents, or administrators. Frequently they did not practise law as a full-time occupation. And their qualifications were extremely uneven.

Their reputation as a group was low, so low that a dress code, which was imposed on attorneys later in the century and designed to 'make the crooks visible from afar', was felt as a real burden. This contemporary reputation of attorneys must not, however, be taken at face value, as it often was in later retrospectives. It derived in large part from the character of the judicial system in which they served. Dominated by aristocratic interests, the administration of justice was cumbersome, slow, and incomprehensible to intelligent outsiders; it was thoroughly biased and yet ideologically insistent on a clear-cut identification of 'just' and 'unjust' causes. Attorneys were blamed for the ills and contradictions of this system of justice, a system they did not control.

Throughout the eighteenth century, the Prussian state sought to reform and regiment not only the system of justice dominated by the aristocracy but also the size, composition, and competence of the Bar. The first major move was dramatic indeed: in 1713, the Bar was purged of more than half of its members. The idea was not just to reduce the size of the Bar but to change its character. In particular, the policy aimed to exclude the less educated, the less economically successful, part-time practitioners who combined law with other pursuits, those of 'too despicable and poor background', and those of questionable character (which included, undoubtedly, also questionable political loyalties). Education, practical training, and court-administered examinations were restructured by state regulation. Fees were set by the state and pegged at a radically lower level than before. Severe penalties were put on the unauthorized practice of law.

One may have doubts about the realism and practicality of these policies: doubts that those who were excluded from the profession actually refrained from practice; doubts that a proper assessment of the various criteria of desirability was possible given the massive size of the purge; and doubts that a drastic reduction in numbers could be combined with an equally drastic reduction—rather than an increase—in the price for legal services. Such disregard for practicality was a standard feature of state 'policing' at the time.

But so was persistence: throughout the eighteenth century, with measure after measure, the Prussian state sought to secure royal control of the courts and to transform the Bar—reducing its size, imposing uniform standards of admission, suppressing unauthorized practice, supervising attorneys' work, and holding their fees down.

The capstone of these policies was an attempt to abolish private advocacy in court altogether. In 1781, a royal decree forbade private attorneys to appear in court. They were replaced by Assiszenzraete, junior judges paid by the courts, who were assigned as counsel to the parties. But this innovation simply was not viable. After only a few years, attorneys of the parties' choice were again allowed to argue in

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3 A. Weissler, Geschichte der Rechtsanwaltschaft (Leipzig, C. E. M. Mohr, 1905), 296.

4 The official criticisms focused mainly on four points that correspond closely to the overall character of the system of justice: 'accepting unjust cases, impeding the progress of a case, lengthy and misleading arguments, and greed for fees', ibid., 253.
most proceedings, and in 1793 private advocacy was reintroduced under a new name, that of Justizkommissar.

The figure of the Justizkommissar was, however, very different from the attorney of the pre-reform period and from advocates in neighbouring countries. It defined for the next three generations how legal advice and legal representation were offered in Prussia (even though in 1849 the name was changed to the one still used today—Rechtsanwalt). Attorneys eventually came to share the same training with judges—university studies followed by in-service training and both concluded by state examinations. Appointments to the position of Justizkommissar were made by the Ministry of Justice, and they were made sparingly. The appointees were assigned to a specific location, and they were transferred at the discretion of the Ministry, in itself a powerful tool of discipline. The Justizkommissare were under the disciplinary supervision of the courts, courts that had been wrested from aristocratic control and become institutions routinely administering a largely codified law. The fees of attorneys were set by the Ministry. Except for the clients' free choice of counsel and the variable and substantial income chances this entailed given the restrictive appointment policy, the Prussian Justizkommissare came as close to being preussische Beamte, Prussian civil servants, as an attorney can be. And legally they were considered to be members of the royal Civil Service, with all the obligations this entailed for their professional and personal conduct, including restrictions on political activity.

The Ministry's appointment policy limited the number of lawyers drastically. In the 1850s and 1860s, Prussia had only one attorney for every 12,000 people. This compares with the following figures for other countries at the same time:5

<table>
<thead>
<tr>
<th>Country</th>
<th>Number per 12,000 people</th>
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<tbody>
<tr>
<td>England</td>
<td>1 : 1,240</td>
</tr>
<tr>
<td>France</td>
<td>1 : 1,970</td>
</tr>
<tr>
<td>Belgium</td>
<td>1 : 2,700</td>
</tr>
<tr>
<td>Saxony</td>
<td>1 : 2,600</td>
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<tr>
<td>Mecklenburg-Schwerin</td>
<td>1 : 1,700</td>
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These figures, especially those for the two neighbouring German states that practised a more liberal admissions policy than Prussia, suggest that the size of the Prussian Bar was completely out of line with the demand for legal services. And that is supported by other evidence.

Max Jacobsohn reports for Berlin that speedy service required a bribe to the office manager of the attorney, and small cases were often just not taken.6 In fact, during the 1860s Berlin had three to four hundred Winkeladvokaten, admitted to the lower courts, as well as fifty-nine attorneys. Winkeladvokat is a derogatory term for persons without university training who served as legal advisers and were tolerated by police and the administration of justice since the needs of people with moderate means were just not met by the official Bar.7 Before open admission was introduced in 1879, the Bar of Berlin came close to failing its broader mission and being rather a Rechtsanwaltschaft for the upper ten thousand.8

The state's radically restrictive admissions policy had an equally dramatic effect on the bar's material situation: it made the practice of many attorneys extremely lucrative. A contemporary observer estimated in 1835 that Prussian Justizkommissare earned between 2,000 and 10,000 thaler. This compared with 500 thaler for judges in the lower courts.9 A well informed article in the Preussische Jahrbücher offered a similar estimate for the 1860s: if a county judge became an attorney he could multiply his income by a factor of five, raising it from 600 to 3,000 thaler.10

Such income differences led to a reversal of career patterns typical of common law countries: while attorneys rarely or never became judges, judges not infrequently opted to go into private practice. In fact, from the middle of the nineteenth century until the early 1870s, nearly all appointments to positions in the Bar were awarded to former judges.11 This pattern of recruitment was, of course, a powerful reinforcement of the Civil Service character of the Bar, though it must be noted that by the middle of the nineteenth century the judiciary had acquired a relatively liberal cast, distinctively set off from the administrative Civil Service.12

Max Jacobsohn, one of the first attorneys admitted to the Bar after emancipation in 1879, describes the bar of Berlin before its transformation:

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7 Gneist, Freie Advokatur, 60.
8 Jacobsohn, 'Einzug', 108.
11 Weisler, Geschichte, 530, 532.
12 A. Wagner, Der Kampf der Justiz gegen die Verwaltung in Preußen (Hamburg, Hanseatische Verlagsanstalt, 1936).
The 93 Gentlemen . . . who formed the bar of Berlin . . . were a dignified professional group of high repute . . . Among them were quite a few eminent men of great legal as well as general importance so that true merit justified the external standing of the group. Every one of them could rightly be proud to be a member of this noble body.

Most had a very large clientele which they met with the reserved dignity of higher civil servants. The office managers mediated between these gentlemen and the clientele, and adjuncts [Hilfsarbeiter] formed the link between them and the court. These adjuncts had a rather different importance than now; the written Prussian trial procedure forced a very detailed—and unfortunately often very formalistic—treatment of the material . . . For such work many attorneys had neither the time nor the inclination and thus left it to their adjuncts . . . Since the written preparation of trial was done by the adjuncts and the [concluding] oral arguments were only in the more important trials of great significance, the attorneys themselves were much less involved in the conduct of trial than now. In most cases they were content to look through the papers, sign them, plead in important matters, and otherwise to operate their notarial practice and to hold office hours . . .

Most attorneys were too proud to accept small cases. That would indeed have been odd with the public dignity and noble character of the Berlin bar before 1879. But this dignity, this elevated position, much as it adorned the profession, eliminated the closeness with clients and was thus at the same time the weakness of the profession. The so-called little people, petty bourgeois, craftsmen, and workers did not dare to approach an attorney. Thousands and thousands of potential clients, and especially those who needed the protection of law the most, never saw an attorney’s office from the inside.13

The Prussian Bar of Justizkommissare and later of Rechtsonwoelle indeed acquired an excellent professional reputation, one in stark contrast to the vilified attorneys of the eighteenth century. Given the combination of material wealth and the status of royal civil servants, this is not astonishing.

Yet the position of Prussian lawyers in private practice was not only shaped by state regimentation. Other forces, too, contributed to the transformation of the Bar. Two developments in particular had a powerful impact: the capitalist development of the economy brought a different clientele and different legal issues to the fore. And developments in culture and education gave ‘cultural capital’ a new weight in societal stratification, professional relations as well as personal life.

Capitalist development created vast new legal problems and thus opportunities for law work. In contrast to the foundation of aristocratic


privilege in particularistic power arrangements, the overriding concern of the emerging bourgeoisie lay in predictable property and contract relations, guaranteed formally by the state but left in substance to the discretion of private parties conceived as equals. This was at the heart of the new liberal ideology. Though often pragmatically tempered by opportunities for particularist advantage, it also transformed the realities of legal work, putting a premium on efficient and competent attorneys that protected relations with customers, suppliers, and competitors from unwanted complications.

The original type of the Advokat that was the target of all the spiteful proverbs and bitter epigrams, expressions of popular dislike, nearly disappeared under the influence of economic conditions transformed into a larger scale and the growing power of ethical ideas.14

Cultural developments were another important factor. The literary and philosophical rise of neohumanism—symbolized most eminently by the idealist philosophy of Kant and the Weimar of Goethe and Schiller—came together with the restructuring and renaissance of German universities. Stiffened requirements of secondary education as a condition for university studies—the humanist Gymnasium became the mandated gate to university studies in the 1830s—and of university education as a condition for entering the higher Civil Service introduced these ideas and orientations into the bureaucracy and the professions.

The German ideal of Bildung that arose around the turn from the eighteenth to the nineteenth century had a particular character:

Bildung as conceived by the German neohumanists in the age of Lessing, Herder, Winckelmann, Goethe, Schiller, Kant, Fichte, and Humboldt, meant more than advanced school training, general and vocational. Bildung, no doubt, called for trained minds and for more and better knowledge, but no less for character and personality development . . . It invited man to seek happiness within himself by orienting his total life toward the harmonious blending of spiritual elevation, emotional refinement, and individualized mental and moral perfection.15

This conception had an impact that is of interest here in several ways. It was, first, the intellectual underpinning for the fight of bureaucratic

officials to limit autocratic royal rule. 16 Equally important for the transformation of Prussian society, educational merit became the basis on which university-trained commoners acquired parity with aristocrats in the Civil Service. Finally, the ideals of Bildung, however diluted by 'philistine' routinization and pragmatic compromise, linked personal life to professional commitment. As such they became a central element in the ideal self-image of German professionals, or Akademiker, well into the twentieth century.

Yet if developments in the state, the economy as well as culture and education shaped the Prussian bar in ways that were in many respects complementary, there were also powerful tensions. True, autocratic domination had been transformed into rule by competent bureaucrats, and the old occupation- and birth-based status order had been modified by significant if limited infusions of educational merit and competition. But both the dominant role of the state and the remnants of a traditional status order stood in tension with capitalist economic development, which came late to Prussia and the rest of Germany. In contrast to Britain and the United States, the bureaucratic rationalization of rule preceded in the larger German states, and especially in Prussia, the capitalist rationalization of economic life. The rule of a modernized authoritarian state came into conflict with the political aspirations of the emerging bourgeoisie and with many of its economic goals. The figure of the Justizkommissar, which was the product of rationalizing state action, was not well suited to the new demands of capitalist development. If attorneys had found a place in the occupational system that gave them honour and material security in a Staendestaat modernized and dominated by government bureaucracy, this system was buffeted by the forces of capitalist transformation; economic efficiency and functional considerations now rivalled the concerns for the public honour of a profession. And a Bar of quasi-civil servants closely tied to the state was at odds with the political aspirations of the bourgeoisie, which became dominant in the clientele of attorneys.

16 'Before 1800, the doctrines of German idealism acquired political significance only in the Prussian bureaucracy... To the bureaucratic disciples of Kant, individual freedom to think was the gateway to professional happiness, to self-disciplined discretionary action, to their own political liberation, and to the replacement of erratic dynamic autocracy by a more magnanimous and more effective form of despotic government, by humanized bureaucratic absolutism, "which will find it advantageous to itself to treat man, who thenceforth is more than a machine, in accord with his dignity." (Rosenberg, Bureaucracy, 189; the concluding quote is from I. Kant, Sämtliche Werke, Groscherzog Wilhlm Ernst edn., vol. I, 171).

These shifts and tensions arising from late capitalist development powered the variegated demands of German liberals in the economy and in politics. Embedded in these liberal demands—reinforcing them as well as nurturing them—were the more specific goals of lawyers who sought to reform the administration of justice and the role of lawyers in court as well as in economic, social, and political life. Eventually, these demands and the tensions that fuelled them led to a radical transformation of the Prussian Rechtsanwältschaft.

Emancipation: Early Demands and Late Realization

It was in the 1840s, in context of developments preceding the attempted German revolution of 1848, that the Prussian (and Bavarian) construction of legal counsel delivered by a closed profession of civil servants was first explicitly attacked. 17 This is significant because it symbolizes that the debate on the shape of the legal profession was as much a political debate as it was a discussion of professional concerns.

At the third Anwaltsstaug, all-German meetings of attorneys that had begun in 1846, a speaker discussing the public role of the attorney argued that the Bar's obligation of keeping the judiciary in check also entailed the obligation to participate in political movements supporting the rule of law. Therefore, the profession had to be independent, free of civil service privileges and obligations, open to all qualified applicants, and subject to its own discipline through state-mandated Anwaltskammern, associations with compulsory membership.

Opening admission to the Bar ran straight against the material interests of lawyers in those German states—Prussia and Bavaria among them—that imposed tight limitations on the size of the Bar and in the process created gold mines for many of its members. Thus it is not surprising that the proposal found immediate opposition (the size of which we do not know because no vote was taken). But the demand for a free Bar, open to all who are qualified, was from the beginning a political demand rather than one inspired by professional group interest. It was part of a broader programme to secure the rule of law. This broader

A free bar was a significant part of the overall liberal programme? Advancing towards a unified law across the thirty-odd sovereignties, large and small, that made up Germany was one goal, inspired by economic developments as well as by the work of the law faculties in the various state universities that prepared such unification in their scholarly work, and served students who often studied at different universities and outside their own state. For the administration of justice, the demands included above all the independence of the judiciary, which was achieved—in a long drawn-out process—by 1848. Other demands were public court proceedings with more room for oral argument rather than a concentration of written submissions, lay participation in adjudication (Schweningerichte), a greater role in trial for initiatives of the parties, state attorneys representing the state as other attorneys represented private parties, and a self-employed, open Bar administering its own professional discipline. While many of these demands were at least partially met by mid-century, a ‘free Bar’ was found only in some states, many had complex intermediate arrangements, and two of the largest, Prussia and Bavaria, held on to a closed profession of civil servants. That other German states had a largely self-governing Bar free of Civil Service privileges and obligations was, in conjunction with the aspirations towards unification, a major support for similar developments in Prussia.

A free bar was, then, part of the liberal demands for a Rechtsstaat, and it was the part on which Prussia had conceded least. This idea of a Rechtsstaat can reasonably be translated as ‘a state in which the rule of law prevails’, that is, in which the actions of the state apparatus especially are subjected to law, secured by an independent administration of justice. Yet it must also be noted that in nineteenth-century Germany this conception was often not only seen as compatible with a quite autocratic pursuit of the common good by a competent Civil Service but also as in tension with, and in a sense a substitute for, democratic demands for popular control of the state.

Why was a free bar a significant part of the overall liberal programme? The closed Bar, first of all, offered insufficient legal protection to the population. It was not only that people of limited means were ill served. Many lawyers were also rather removed from the concerns of business. ‘Ask our businessmen how few Rechtsanwälte there are who are able to draft the statutes of a business corporation, a bank or a loan association.’

Equally important politically, supervision by the state bureaucracy kept lawyers from engaging in political activity, especially from associating with liberal movements aimed at limiting the power of the state. In 1844, the Prussian Minister of Justice decreed that Prussian Justizkommissare were not to participate in the first German Bar meetings that were then planned, because to participate in discussions of unifying German law would exceed the bounds of their role as Prussian civil servants; in fact, it would constitute a criminal offence since all societies and associations aiming to change the constitution or administration of the state were outlawed since 1798. As late as 1861, to cite another example, the Prussian Minister of Justice took the occasion of forthcoming elections to remind the officers of the court that they were not to give any support to parties seeking to weaken the powers of the king. Five attorneys who objected with indignation, but moderate liberal arguments were indicted for insulting the Minister and the Court President. Overall, the insistence of the state on abstention from politics seems to have been effective; Prussian lawyers were said to participate less in politics than their colleagues in other states, and Weissler’s explanation—that Prussia was a well-administered state—is plausible only if one takes it on its (probably unintended and at first glance hidden) double meaning.

Rudolf Gneist, a conservative liberal law professor who became a leader of the movement for a free bar in Prussia and whose father had been first a Prussian Justizkommissar and later a judge, broadened this political rationale. He saw an independent Bar as the backbone of an autonomous civil society, which he considered a requisite for political freedom. His larger project was to recreate intermediary bodies in Prussia where they had been systematically suppressed since the eighteenth century; and for this project free lawyers would be a critical ingredient — local notables with independence, influence, and an interest in public affairs.

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10 Wagner, Der Kampf. 19 Weissler, Geschichte, 528.
Calling the emancipation of the Bar from its Civil Service status and open admission 'the first demand of all reform of the administration of justice in Prussia', Gneist made yet another rationale central: the closed Bar of Prussia endangered the independence of the judiciary. The 2,000 or so Prussian judges in the lower courts were not well paid. Promotion to higher judicial positions (all in all about 650) was in the hands of the Ministry of Justice. If this promotion was already a potential instrument of a discipline not necessarily related to merit, the assignment of judges to the 1,350 lucrative positions of attorneys was bound to evolve into a dangerous pattern of patronage since it was absurd to transfer the best judges to the Bar. 'Since neither age, nor merit, nor number of children could constitute the basis for the decision, nothing was left but purely personal discretion, favour or disfavour, personal intervention, and probably also political merits.'

Gneist built on earlier calls for a free Bar that had been voiced in more liberal parts of Germany, and he buttressed his arguments with systematic comparisons across Europe. This went far beyond a few comparative statistics. 'Through extensive travels in Italy, France, England and the United States he gained profound insight into the structure of foreign legal institutions. This was particularly true of England, to whose constitutional history and government he devoted most of his chief works. Indeed, he practically rediscovered English political institutions for the European continent.' Comparative law was for him at once a central intellectual project and an instrument for advancing his political pursuits and arguments. Thus English institutions implicitly became a model for his goals in reforming Prussian political institutions, including the Bar.

The emancipation of the Prussian Bar from state supervision, Civil Service status, and limited admission was grounded in the movement for self-government and self-organization of the bar. Here again, developments in other German states preceded those in Prussia, and they represented a supportive precedent for them.


Gneist, Free Advocate.


The first association of attorneys was the Lyceum fuer Jurisprudenz in Jena, which was founded in 1801 and met weekly to discuss problems of law and legislation. The 1830s and especially the 1840s saw the creation of many more local and regional associations, which often, however, were only fleeting phenomena. They were viewed with suspicion by most state governments, and often they were outlawed.

Attorneys were among the leaders of the attempted revolution of 1848, when legislation and regulations restricting associations of any political relevance were openly flouted by the courageous few until the victorious political reaction prevailed. 'We see everywhere attorneys as leaders of the liberal movement ... In the first German Parliament this single profession alone accounts for one sixth of the members ... Rechtsanwaeltle are the leaders of the parties ... There was no city which did not see an attorney in the vanguard of the movement.' This involvement strengthened the linkage between political liberalism and professional reform, even though it was an elite phenomenon, not representative of the rank and file of the profession, and Prussian lawyers were less involved than colleagues from other states.

Bar organizations declined after 1848, partly because of renewed repression, partly because Prussia and other states introduced elected honours councils with limited jurisdiction over professional self-discipline, satisfying to some extent one major demand of the bar's activists. Renewed associational activity is evident in the 1860s, when state-wide associations were founded in both Prussia and Bavaria.

The initiative for the creation of the Prussian bar association in 1860 grew out of a critique of the dependent Civil Service status of the profession. In the following seven years, state-wide meetings of the Prussian Bar—poorly attended but nevertheless representing the Bar in public—at first responded with reserve, but then voted repeatedly to demand full emancipation with open admission. Opposition to open admission was stronger in local bar associations, but the organizational elite opted for the by now firmly established liberal programme of reform rather than for the material self-interest of the profession.

The realization of these demands came much later, in 1879. The timing of considerable political significance: the demand for emancipation emerges with the attempt at a liberal revolution; it is renewed and becomes significant within Prussia at the time of constitutional conflicts between liberalism and the Prussian state; the unification of
Germany under Prussian leadership in 1870–1, while it followed a victory of Bismarck's state over its liberal critics in Prussia, engendered a period of institutional restructuring, of 'internal unification', in which liberals wielded strong influence until 1878.

The emancipation of the Prussian Bar cognizes about as part of the introduction of uniform court procedures in the German empire. If we leave technical details aside, the new Rechtsanwaltsordnung met most of the old demands; it provided for self-government and (largely) for self-discipline in compulsory bar associations as well as open admission of all educationally qualified applicants, though admission remained limited to one specific court.

Victory on this plank of the liberal programme was not, however, due simply to a temporary political dominance of liberal forces. It was also the result of a conjuncture of other factors and considerations. Foremost among these was the very need for a unified German institutional pattern. The Prussian system of attorney as quasi-civil servants would not have been easily accepted across Germany. Furthermore, it was at odds with the liberalizing, free trade thrust of much of the other unifying developments in the legal order. The reform received support from political groups other than the liberals, such as the Catholic Centre Party, who saw itself fighting a defensive battle against a hostile Protestant-dominated state and favoured areas of professional work not controlled by the government. Open admission to the Bar also served the needs of bourgeois families whose sons had trouble finding legal employment after lengthy studies and the obligatory training period.29

What, then, of the Bar itself? Even though other forces were important for the final realization of the call for a 'free bar', its support for reform was critical. After initial opposition from the rank and file, Prussian and more generally German lawyers supported the liberal reform programme of their leaders, even though this ran against the material interests of the bar. Their support may at many points have been lacking in depth and enthusiasm, but it was decisive: calls for a recomposition of limited admission were again and again rejected for political reasons, until the Great Depression in the late 1920s undercut this commitment.30

Emancipation: Consequences

What were the consequences of emancipation and open admission? There was, first, a rapid growth in numbers; in Berlin, the Bar grew from ninety-three members in 1879 to 675 in 1896 and more than 1,000 in 1906.31 The number of attorneys in all of Germany grew from 4,112 in 1880 to 12,324 in 1913, with the per capita figures increasing from 1:10,970 to 1:5,436 respectively.

The character of the Bar changed radically, as one might expect. An increase in numbers of this magnitude makes institutional and subcultural continuity precarious.32 But there were also astounding continuities. There was, for one thing, no significant increase in disciplinary activity, and it is unlikely that contemporary observers were mistaken in interpreting this as evidence of continued adherence of a much changed bar to established standards of professional conduct.33

The average income of Prussian attorneys declined, even though they expanded their activities into new areas. Part of this expansion was an extension of services to a less well-to-do clientele. There was also an expansion into business law and related activities, but this remained relatively weak, perhaps not even keeping up with the expansion of economic activity in the thirty-five years before the First World War. In addition, it seems that only parts of the enlarged Bar succeeded in entering the field of corporate and other business law. For others, the hold of a more traditional pattern of legal work was stronger. As a consequence, different segments of the Bar increasingly represented different patterns of professional experience and orientation.

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29 A good discussion of this conjuncture of factors is given in the paper by H. Siegrist, 'Autonomy and Heteronomy. National Unification, Legislation, and Professional Policies in Germany in the Late Nineteenth Century', presented to Conference on Lawyers and Political Liberalism, Oñati, Spain, 1993.

30 See K. F. Ledford, 'Lawyers and the Limits of Liberalism', chap. 7 infra.


32 A parallel distant in time and location can illustrate that: after the American Revolution, many old-time lawyers retired or emigrated to England or the Canadian provinces, while in the following few years large numbers of newcomers entered the profession—in New York City, the numbers changed from 40 in 1785 to 290 in 1818. See C. Warren, A History of the American Bar (Boston, Little, Brown, 1911), 212–13, 214, 295, and 301. This radical discontinuity of personnel—even more radical than the changes in Berlin and Prussia a hundred years later because here the old elite did not disappear—holds the key to understanding the rapid change in the character of the profession, from a quite effective autonomous professional self-control based on informal local organization before the Revolution to a loose aggregation of unorganized practitioners of very uneven competence and equally uneven adherence to professional standards only a short time later. See R. Pound, The Lawyer from Antiquity to Modern Times (St. Paul, Minn., West Publishing Co., 1953); Rueschemeyer, Lawyers.

33 Jacobsohn, 'Einzug'.

6 The Prussian Bar 1700–1914 221
Politically it was important that the open admission of the new Rechtsanwaltsordnung coincided with a turn to the right in the politics of the Prussian-German state in the years 1878–9. A major turning-point in the development of Bismarck’s Germany, the new policies radically diminished the political influence of liberalism, they sought to end the fight against—and to co-opt—political Catholicism, and they initiated the repression of the Social Democratic movement. This turn of Bismarck’s politics had reverberations in the administration of justice, involving official discrimination against liberal civil servants. The newly opened Bar offered a convenient dumping ground for these unwanted lawyers. While this strengthened the liberal forces within the Bar, the political environment of the Bar had decisively turned against liberal ideas.34

In conjunction with an increasing official anti-Semitism in the 1880s, the opening of the Bar led also to a dramatic increase of the number and proportion of Jewish attorneys—from virtually none in the 1870s to half of the bar in Berlin, a quarter in Prussia and 15 per cent in Germany as a whole by the beginning of the twentieth century. Anti-Semitism at the bar was said to be weak in the 1880s,35 while from the 1890s onwards a more generally increasing anti-Semitism took hold among attorneys, too, and became associated with complaints about overcrowding, ruthless competition, and commercialization of the profession. ‘The bar was in this period liberal against the wishes of its non-Jewish majority,’ said one knowledgeable observer in retrospect.36

By the years preceding the First World War, then, the Prussian Bar had acquired a structure that was more similar to the legal professions in other advanced capitalist countries than it had ever been in the hundred years between 1781 and 1878. It experienced a radical change which had been advocated for more than a generation by liberal politicians and Bar leaders. Yet the old patterns of a Civil Service orientation persisted in parts of the bar. Furthermore, together with a weakening of the liberal forces in German politics, the Bar exhibited internal fissures and antagonisms that we may see as indications of the difficulty of adjusting to the transformation of the old order. The weakening of liberalism, splintered internally and unable to come to terms with the rising socialist movement, as well as the rising anti-Semitism inside the Bar and outside foreshadowed the catastrophic developments in Germany another long generation later, though there is nothing in the politics of Imperial Germany nor in its legal profession that made that outcome inevitable.

Reflections and Comments

Why should anybody be interested in the Prussian Bar and its development over a period of two centuries? Even the effort of reading a brief essay must be justified by broader concerns. What, then, are some of the wider implications of the story told—for our understanding of the law as a profession, of the role of the state in structuring law work, of the impact of capitalist development, of the relation between law work and a liberalization of politics, and of the historically specific contexts in which these developments take place?

1. The failed experiment of 1781—of excluding attorneys chosen by the parties from court proceedings—shows that removing legal counsel from the choice and trust of the parties simply does not work. The episode has a parallel in the failed attempts to abolish the self-employed Bar in the Soviet Union. The fact that attorneys mediate between parties and the authoritative system of adjudication gives them a basis of independence and autonomy that is separate from the explanations of professional autonomy in the various available theories of the professions as expert occupations.

2. That the Prussian Bar was for more than a century a body of quasi-civil servants is an illustration of the provincialism of much (Anglo-American) theorizing about the professions, be it of the structural-functional or the more conflict- and market-oriented variety. State control is an important alternative to collective self-organization and to control by customers and the market.37 To point to the drawbacks and tensions of this structure, particularly evident in the case of legal counsel, does not diminish the point; rather, such arguments typically betray a mistaken simplistic functionalism by presupposing that a tension-ridden arrangement must be unstable.


32 Jacobsohn, ‘Einzug’.

33 Jacobsohn, ‘Einzug’.

3. The tensions between bourgeois interests and the ideals of liberalism as well as the professional tasks of lawyers in the emerging capitalist society on the one hand and authoritarian state control on the other did eventually—beginning in the middle of the nineteenth century—lead to the movement for a 'free Bar'. Yet while the leadership of the Bar, together with other liberal political elites, demanded the change, emancipation was not granted in direct response to these demands. It came about as part of the restructuring of the German state after unification. Even aside from that, we must note that the Bar's leadership and its allies acted out of political motivations and for state-structural reasons. That means that even the emancipation of the Prussian Bar, the major development in the history of the German legal profession that could be interpreted as a convergence towards professional self-control in response to capitalist development, was in significant part the result of relatively autonomous state action as well as political movements.

4. The emancipation from state control coupled with open admission did, however, have increasing support within the profession, even though it obviously went against the financial self-interest of the profession. That the Prussian Bar followed its leadership in demanding the abolition of its privileged status puts into question the validity of market-oriented theories of the professions which see 'professional projects' as singularly motivated by material self-interest.

This actually has an echo in the history of the American bar: access to night schools was defended for long because law work was seen as politically significant and relatively open access to it was considered essential in a democratic society.

5. The movement for the emancipation of the Bar has an interesting international dimension. Gneist especially, the most important leader of the movement in Prussia, had strong English orientations. Such an openness for, and orientation towards, foreign models is remarkable and must not be taken for granted. Law is, after all, a field closely tied to the particularities of state organization, and there were powerful movements in the nineteenth century, powerful both intellectually and politically, that viewed law and political structure as expressions of an organically grown national character and considered 'alien' imports and impositions with hostility.

Among the likely factors that supported taking foreign institutions as positive reference points, the following seem especially important:

(1) Due to the contrast between the political splintering of the German territories and the development of large-scale economic exchange, there was a sense among German intellectuals that a new legal-political order had to be prepared; this rendered the status quo less legitimate and its future peculiarly open.

(2) The opportunity for comparison inherent in the contrasts between different German states was equally important. It was enhanced by a university system that served all German territories and saw considerable circulation of students. Such intra-German comparisons could be extended to other states in Europe.

(3) Higher levels of wealth gave the institutions of England and France the prestige that goes with success and—in a historicist intellectual world—with being 'ahead' in social development.

(4) The universalism inherent in the ideas of liberalism made liberals more open to international comparison than conservatives emphasizing the organic growth of particular traditions.

6. The fact that the movement for a 'free Bar' was embedded in the much broader liberal demand for a Rechtsstaat and that both were influenced by the international context suggests that most theories of the professions seek to explain professional projects in too narrow a fashion. Professions and professional politics must be seen in contexts that are both wider, more complex, and more variegated than the conditions and factors considered by the dominant positions in the analysis of the professions. The Prussian story suggests that the changing shape of the bar cannot be understood in isolation from the emergence of the bourgeoisie in the course of late capitalist development and its struggle to define its position vis-à-vis a powerful state ready to repress the political self-organization of society.

7. The timing and sequence of historical developments matters. It was of critical importance for liberalism as well as for the Bar that bureaucratic rationalization of the state preceded general capitalist rationalization of the economy in Prussia and Germany. It is this difference in sequence that seems to hold the key for the explanation of most contrasts between Anglo-American and continental European patterns in the organization of legal counsel as well as of other professional work. It explains why in the critical initial stages of capitalist development in Prussia legal counsel took a form seemingly at odds with the requirements of these developments in the economy.
That during the very constitutive phases of German capitalism the Prussian Bar was accused of a peculiar incompetence in business matters should give also pause to those who are inclined to make too simple functionalist inferences on what is needed for capitalist development.

8. A related lesson concerns historical persistence. Once an institutional pattern is settled, it often persists beyond the conditions that brought it about and it may continue to shape attitudes and behaviour even after it has formally been abolished. 38

The relative separation of Prussian (and German) lawyers in private practice from business involvement persisted beyond open admission and the attendant pressures to open new fields of practice. Patterns of practice forged in the years of the closed Civil Service Bar continued to shape later developments in spite of some changes (that are not as yet very well understood). The German Bar stayed much more closely to court-related work than the American Bar, and it retained significant traces of its civil service orientation. 39

9. The peculiar sequencing of different transformations in state, economy, and society probably also holds the key for explaining the development of German liberalism, a subject that is of central importance for understanding the changing shape of the Prussian legal profession but that clearly exceeded the space limitation of this brief essay. 40

Aside from the fact that the bourgeoisie that emerged with late capitalist development had to face a strong and highly rationalized state bureaucracy, two other developments seem critical. First, the goal of overcoming the particularism of thirty-odd German states and sovereignties had to be pursued at the same time as the liberalization of political life. That probably accounts for a good deal of the failures, compromises, and splits which the liberal movement experienced in 1848, 1867, and in the 1880s and 1890s. Second, late and fast capitalist development as well as compromises with the ruling elites of the state made it more difficult for Prussian and German liberalism to come to terms with the rising power of the working class. German liberalism never made the transition that in the United States gives the 'L-word' its progressive character detested by the right. This is also reflected in the orientations of the Prussian and, more generally, the German Bar. 10

The story of the Prussian Bar has perhaps also implications for the discussion about the German 'Sonderweg', that is, about the question to what extent German nineteenth-century history already prefigured the later catastrophe of National Socialism. In the nineteenth century, many lawyers in Prussia and other German states, and especially many leaders of the Bar, showed an impressive commitment to liberal ideas. At the same time, the aftermath of open admission in a Bar accustomed to protection, a Civil Service ethos, and the attendant high standing led to developments in the Bar that fed eventually into the rejection of democracy and anti-Semitic Nazi policies. Yet one must be careful to resist a retrospective determinism that forgets the difficulty of predicting the future. In 1847, in 1867, in 1878, and even in 1918, the future was experienced as open, much as it is today, and more open than it may appear in retrospect. Bismarck's defeat of the liberal opposition in Prussia in 1867 was, after all, followed by ten years of impressive liberal achievements in the institutional construction of unified Germany.

39 Rueschemeyer, Lawyers.
40 Jarausch and Jones offer an excellent overview of the changing historiography of German liberalism and its relation to conceptions of the historical roots of National Socialist Germany. See K. H. Jarausch & L. E. Jones, 'German Liberalism Reconsidered: Inevitable Decline, Bourgeois Hegemony, or Partial Achievement?' in Jarausch & Jones (eds.), In Search of a Liberal Germany.