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Albert A. Ehrenzweig (1906-74)

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In Memoriam Albert A. Ehrenzweig (1906-74)

Albert Ehrenzweig's death on June 4, 1974, ended an illustrious and productive life. A brilliant scholar in two legal systems, Professor Ehrenzweig wrote and published extensively on subjects which stimulated his interest. Through his writing and teaching he aroused others. Notable among his works are his *Treatise on the Conflict of Laws*,¹ *Psychoanalytic Jurisprudence*,² and two highly influential studies in tort law, *Negligence Without Fault*³ and "*Full-Aid*" *Insurance for the Traffic Victim—A Voluntary Compensation Plan*.⁴ But mentioning these four volumes hardly does him justice, for his *oeuvre* comprises more than a dozen books, and some 250 articles and book reviews. Often controversial, always perspicacious and thought-provoking, Professor Ehrenzweig's writings will continue to influence and inspire legal scholars.

The *California Law Review* published a tribute to Professor Ehrenzweig in October, 1966, on the occasion of his sixtieth birthday.⁵ It included Professor Ehrenzweig's seminal *Negligence Without Fault*, and it contained several articles by distinguished scholars on subjects to which Professor Ehrenzweig had devoted much of his own work, as well as a bibliography of Professor Ehrenzweig's published works. The time has come to update that bibliography, not to close the book on Professor Ehrenzweig's work, but to commend his completed writings

1. A. EHRENZWEIG, *TREATISE ON THE CONFLICT OF LAWS* (1962).

2. A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* (1971).

3. A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), *reprinted in* 54 CALIF. L. REV. 1422 (1966).

4. A. EHRENZWEIG, "FULL-AID" *INSURANCE FOR THE TRAFFIC VICTIM—A VOLUNTARY COMPENSATION PLAN* (1954).

5. 54 CALIF. L. REV. 1419 (1966).

to the legal community. In the pages that follow, the *California Law Review* again honors Professor Ehrenzweig and recognizes his contributions to legal scholarship and the Boalt Hall community.

Board of Editors

*Richard W. Jennings**

It is difficult to think of Boalt Hall and the Berkeley campus without Albert Ehrenzweig. Over the 26 years he was associated with these institutions, Albert left his mark on everything he encountered—his colleagues, his students, his physical surroundings—and he did this in so many different, wonderful ways that his spirit and inspiration remain, even though his actual presence is no more.

Others have written or will write of Albert's many creative and scholarly achievements which added luster to Berkeley's fame as a great world university. In 1966, on his sixtieth birthday, the board of editors of the *California Law Review* paid tribute to him in a special issue devoted to spotlighting his many achievements. In a moving and eloquent foreword, Dean Halbach summarized Albert's accomplishments that had been achieved against odds which would have crushed the spirit of a lesser person.

Although Dean Halbach touched upon it then, I would like to write something more about Albert and his impact upon Boalt Hall and Berkeley. In retrospect, it may have been sheer luck that brought Albert to Berkeley. He had arrived in this country later than many of his contemporaries in their flight from Nazi persecution. In contrast with some disciplines, the main hope for an academic career in law hinged upon reestablishing his credentials through graduation with distinction from an American law school.

Albert plunged into the study of American law while supporting Erica and his young family. Within three years he had his J.D. from Chicago and an LL.M. from Columbia. By that time, however, we were in the middle of World War II and the law schools were marking time until their students could return to the classroom. Not yet an American citizen, Albert continued graduate law study for the J.S.D. while working for the Law Revision Commission and with the Cravath firm in New York, specializing in taxation. Albert was turned toward Berkeley by Frank Newman, a fellow graduate student at Columbia. Frank returned to Berkeley in 1946; I joined the faculty in the following year.

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I first met Albert and Erica and their charming young daughters during the summer of 1947. Through Frank's good auspices, Albert had been able to take a leave from practice and teach in the 1947 summer session. At the end of the summer, the faculty met to consider his appointment—the first in which I was to participate. I then discovered how seriously the law faculty weighed a new appointment to the small body of some 15 full-time members. After due deliberation, we had the uncommon good sense to invite Albert to join us on a permanent basis. As a matter of hindsight, I wonder how there ever could have been any doubt that Albert belonged at Boalt Hall! He adored Berkeley from the start, and immediately set out to prove how wise and fortunate we were.

Albert had expected to teach Torts, but with the resignation of Dean Dickinson, who taught Conflict of Laws, and the appointment of Bill Prosser as Dean, that dream vanished. Thus fate decreed that Albert would become one of the world's leading authorities on Conflicts (private international law)—a subject that enabled him more fully to utilize his training in two legal systems in an attempt to reduce this chaotic subject to some kind of order. He continued his interest in Torts, however, and in 1951 published his *Negligence Without Fault*, for which Columbia awarded him a J.S.D. degree.

Under the leadership of Dean Prosser (and with a new building and enlarged student body) Boalt Hall began to develop an international legal studies and graduate program designed to attract to Berkeley some of the best legal minds from all over the world. Albert was an indispensable catalyst in this effort. Two Ford Foundation grants over a 10-year period nurtured the program. In later years other private sources were tapped. Albert encouraged his colleagues to widen their horizons, to go abroad to teach American law, and to study other legal systems. His enthusiasm was infectious, and many of us followed his advice, making Boalt Hall better known in Europe, Japan, and elsewhere.

In 1948, Boalt Hall had a student body of about 275. During the next quarter century, the student body grew in size to 900, of whom 40 to 50 were foreign graduate students. As the faculty grew apace, it was possible to attract others with rare gifts in comparative law studies. Stefan Riesefeld, a Boalt Hall graduate of the class of 1938, returned to Berkeley in 1952. When Steve joined Albert, Berkeley may have provided the best two-man team for comparative law study of any American law school. How else could it be that during one year almost half of the German graduate students coming to study law in the United States chose Berkeley? For a baseball *aficionado* (a meaningless analogy to either Albert or Steve) it was like having

Babe Ruth and Lou Gehrig or Henry Aaron and Willie Mays batting on your side back-to-back. And in the ensuing friendly rivalry between the two, Berkeley was the winner. Although Albert's and Steve's broad interests in both foreign and domestic law rubbed off on other members of the faculty, additional appointments brought special talents, notably Professors Sato (1955), Buxbaum (1961), Fleming (1962), Daube (1970), Kessler (1970), and Kuttner (1970).

Albert's impact on Berkeley, however, had other facets. He was an environmentalist before that word was rediscovered. The new law building had to be surrounded by benches on which to sit. Then there were the trees and benches for the west court and the south court, and a deck on the law school roof so that one could sit in the late afternoon and gaze out over the Golden Gate. (This project finally foundered, for no one in the Boalt Hall family, including Albert, ever seemed to have time to use the facility.) When the new plan for landscaping the Berkeley campus was being formulated, it was Albert who suggested that paths and benches be placed along Strawberry Creek, as was the custom with streams in his native Austria. There were also frequent letters or suggestions directed toward improving the quality of life at the Faculty Club. His friends know how persuasive and successful he was in these endeavors. In others, however, he was effectively stymied. There was the campaign to have the Southern Pacific stop its trains from whistling as they sped through Berkeley in the middle of the night, and the uproar when the "Environmental Design" building was erected with its incinerator facing the law building. Albert entered these contests with the same vigor with which he attacked the *Second Restatement of Conflicts of the Law*, and with about the same results.

Others will have something to say about Albert's influence on his students, a story all by itself. The *California Law Review* issue in his honor expressed gratitude to him for his many contributions to the Boalt Hall student community. Many of his former students can now be found in leadership roles in universities, government service, the legal profession, and business. Albert showed a continuing interest in their activities, and Boalt graduates often returned to Berkeley to visit with him.

As a writer on law, legal philosophy, and jurisprudence, Albert had a great deal of importance to say. He also knew he was living on borrowed time, and might never have the time in which to meet his goals. Indeed, he was working on the last stages of a book on jurisprudence when the end came.

I have tried to suggest what Albert meant to Berkeley and what he gave to all of us. Causation is a tricky concept, as Albert would

be the first to admit. Bill Prosser once put it this way: "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond." Nothing would please Albert more than to know that his impact on Berkeley will also carry forward for a very long time.

*Frank C. Newman**

To whom do we speak: Elizabeth and Joan? Students and alumni, worldwide? So markedly many colleagues and friends, even more worldwide?

When I first met Albert he knew almost nothing of Boalt Hall. But I knew absolutely nothing of Hans Kelsen, then Albert's mentor. So at once began my instruction, on several topics regarding which my Boalt Hall education, obviously to Albert, was deficient. More than thanks are due that marvelous and empathetic instructor.

With Covey Oliver we shared basement offices at 116th and Amsterdam in Manhattan. With Harriet Geary Kirby, David Riesman, and other graduate fellows we were dazzled by Llewellyn in Jurisprudence, dominated and yet guided by Patterson in Legal Philosophy, charmed by Cheatham in Seminar on How to Be a Good Law Professor Maybe. How incongruous, in retrospect, that on the eve of Sunday's terrible shock, December 7, 1941, several of us joined the Columbia third-year students at a grand Waldorf-Astoria ball. Three weeks later, during the post-Pearl Harbor Christmas week, we celebrated with all Ehrenzweigs their first holiday season in Manhattan.

In many respects his initial Boalt Hall visit (Summer of 1947) and the early years of tenure (from 1948) were the most memorable. Albert became an astute and incorrigible crusader for Comparative Law. Who else, for instance, would have parlayed a hot, frustrating climb to Pyramid Peak (10,000 feet only, but—inconceivably to a Tyrolean—with no *gasthaus* or trails en route) into a brilliant lecture on how, notwithstanding their different "climbing techniques," Americans and Europeans nobly attain some of the summits that do help effect Justice?

Then, with gradually diminished personal participation, I attended his prophetic work on *Negligence Without Fault*, the also prophetic quarrel with the railway on noise pollution, the phantasmagoric competition with Dean Prosser on who could intrude more thousands of cases into his writings, the psychoanalyses not only of us but also of The Law, the greening of Boalt Hall's courtyards, the years of accelerating recognition, repute, and grandeur.

* Professor of Law, University of California, Berkeley.

Albert A. Ehrenzweig exemplified few doubts on "Role of Me, Professor of Law." Students, colleagues, and unidentifiable others were the beneficiaries—especially during the years from 1964 when, for some of us, so many related prides burst or went awry. Boalt Hall was honored and fortunate that he made his decision to enlist here, Continental become Californian.

When we get awesome news, how pitifully some of us clutch straws. Hit by grief on June 5, 1974, I was thankful for an event so very small. During the evening of June 3 he had called me. We had a great visit, in many ways reminiscent of those buoyant first talks in October, 1941.

*David W. Louisell**

On Tuesday, June 4, 1974, my wife and I were having dinner in Carmel. Remembering that I had not seen Albert since before my departure in mid-May for the American Law Institute meeting in Washington, she said suddenly: "You should call Albert." I immediately did so and was delighted to find him able to answer the telephone himself. He was working on a book review in his new study, recently arranged by his wife Erica. He explained that a telephone and intercommunications system had been installed there, somehow symbolic for me of a tolerant acquiescence in a technological era he could never truly welcome. He never drove a car.

We had a happy talk. I told him about the A.L.I. meeting and how in my judgment the discussion there concerning the law of defamation tended to confirm his skepticism expressed over the years about the value of Restatement, as contrasted with Codification. Time had been spent discussing the extent to which new Supreme Court doctrine had preempted the common law of defamation, when it seemed to me the discussion more profitably might have concerned the significance of the law of defamation in modern society. But as is usual when the true scholar senses something of vindication, he immediately interjected the counterpoints. Albert emphasized the significant progress of the A.L.I. with the Codification projects already undertaken. We closed with his invitation, put with the never-failing courtesy he extended to all, that I come to see him soon again, and I eagerly promised to do so.

But within an hour, he was gone.

There is much that should assuage the sadness of losing him. This master of two legal cultures lived to see the promise of *Negligence*

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*Without Fault*¹ and *Full-Aid Insurance*,² once the subject of jocular condescension, almost a *fait accompli*. His zeal for preeminence in his chosen specialty must have been fulfilled in the widespread judicial acceptance of *Conflict of Laws*.³ The joy he experienced over his students' vital interest in his Comparative Law class was apparent; it cannot be recaptured in words.

There is comfort, too, in remembering him as a colleague. These recollections have much of camaraderie, good conversation, and good humor about them, but his generosity predominates. Did ever a colleague more willingly, even joyously, read and criticize the manuscripts of others? He was never too busy to be interrupted, whether with a simple request to check one's Latin or Greek or for a lengthy conference on some abstruse problem of German (or Austrian) law.

Most importantly, there was always Erica. When I think of them together, I am reminded of the skeptical smiles that come to modern students' faces when an evidence teacher, in explaining the evolution of the doctrine of marital privilege, goes back into history to point out that neither spouse could testify for or against the other because the common law idealized them as one flesh. If ever there were a union to illustrate the ideal, it was this.

But this is not the time for tribute. Even recollection is hard enough now. I remember most vividly not the conferences in our offices, but our encounters on the beach. My wife and I would see them approaching from a great distance, his vigorous carriage belying two severe coronaries. First there would be some jovial or flippant challenge, such as who had worked the latest the night before, or been up the earliest. Then things might get serious; he was bound to have the latest illustration of the rigidity of *Klaxon*⁴ or the temporality of *Denckla*.⁵ If I taunted him with the latest headline of some heinous crime, and asked him if that sort of thing were only oedipal,⁶ I had better be prepared! The judicious and impartial scholar could quickly become the scathing advocate.

I think I shall never walk a beach again without hoping, and somehow expecting, that somewhere, sometime there will be another beach confrontation with Albert.

1. A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951), reprinted in 54 CALIF. L. REV. 1422 (1966).

2. A. EHRENZWEIG, "FULL-AID" INSURANCE FOR THE TRAFFIC VICTIM—A VOLUNTARY COMPENSATION PLAN (1954).

3. A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS (1962). (*Part One, Jurisdiction and Judgments*, originally had been published in 1958.)

4. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

5. *Hanson v. Denckla*, 357 U.S. 235 (1958).

6. See A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE (1971).

Now that his eager, turbulent, and passionate, yet tolerant, tranquil, and compassionate mind has been allowed to lay down the burden of being human,

Requiescat in pace!

*Stefan A. Riesenfeld**

Albert Ehrenzweig's death has occasioned a great loss to legal scholarship in the United States and abroad, causing deep sorrow to his friends all over the world, his students, and, most of all, his colleagues. Some consolation might be found in the thought that his many great contributions to juristic literature will endure and that we, who were associated with him in many ways, have fond memories to cherish.

My affiliation and friendship with Albert reaches back to 1952, when I joined the Boalt Hall law faculty, returning to the place where I had been a student. Actually our close relation antedated by a few months the assumption of my duties, for it commenced at the Congress of Comparative Law held in 1952 at Cambridge. There, in the enchanting surroundings of Trinity College, Albert greeted me warmly and reassuringly as his new colleague. Both of us were aware of the fact that Dean Prosser was initially quite apprehensive about the presence on his faculty of two members with backgrounds such as ours and the possibility of strained relations. He had expressed his fears to other law teachers as well as to his friends in Minneapolis, and his letters were leaked to me, as we would say today. Albert and I agreed in Cambridge that we would never quarrel in public. It was the easiest promise to keep because he and I always agreed on matters of principle or issues of significance.

The geography of law school buildings exerts a tremendous effect on interfaculty relations. I was lucky that Albert's office for 22 years was only four doors from mine and I saw him almost daily when coming to my place of work. I was fortunate to find in Albert a person who truly became a dear friend of mine, whom I not only respected but genuinely liked and admired. Those who knew him well could not close their minds or hearts to the warmth and concern for others which permeated all his actions and utterances.

His impact on the school's curriculum was enormous. At a time when skills-orientation was almost a fetish, he convinced his colleagues that historical perspective and social insights formed an essential of true

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legal education. For years he and I gave a joint course aimed at a comparative historical and jurisprudential introduction to law, and I found his views always fascinating and original. His broad humanistic culture and outlook manifested themselves both in his teaching and writings, which did not confine themselves to legal or philosophical matters but included translations of the Austrian poet Wildgans and poems of his own. Not infrequently Albert would show me a poem he had written to express his thoughts and reactions to problems which occupied him.

To me the friendship with Albert was a source of delight and, in tight situations, comfort. I shall miss him sorely and I could not phrase my sentiments in better words than those chosen by the Latin poet Catullus when he suffered a similar loss: "*Atque in perpetuum, frater, ave atque vale.*"

We knew Albert Ehrenzweig not as a colleague, nor as a legal scholar. He was our teacher, and he was our friend.

He taught us in Conflict of Laws, in Jurisprudence, and in Comparative Jurisprudence, a small seminar which he held in the living room of his home. We learned much from him as a law professor. He lectured with an ease and grace that tended to calm spirits more tense in other classrooms. His humor and sense of irony were engaging. Often he would catch his students up in his delight at being considered, and in considering himself, an *enfant terrible* of the worlds of Conflicts and Jurisprudence. Indeed we, his students, often felt that his lost battles with the authors of the *Second Restatement* were to him more a source of entertainment than of disappointment.

It is true that sometimes he would appear brusque or impatient in answering questions, particularly in Jurisprudence about which he felt more strongly. Some interpreted this as an arrogance of mind. What it reflected, however, was more a sense of fleeting time, of having a whole field of human investigation to understand, to communicate, and hopefully to enrich with a contribution, before his life ended.

Indeed, despite his achievements and preeminence, Albert Ehrenzweig was not an arrogant man. To us, he had a profound humility which translated into an ever-growing fascination about fields he had never studied or taught as a younger man. Rather than rest on his laurels earned in Conflicts, he began reading voraciously in ethology, anthropology, aesthetics, and child psychology, in an attempt to integrate law and the discoveries of modern social science. The last time we saw him, two days before he died, he spoke with excited anticipation about a seminar he hoped to hold at his house the following year on Comparative Anthropology and Law. He said he knew nothing about the topic but felt an understanding of it was essential to the broad-

er view he thought so necessary to make law responsive to mens' needs. Some would find it particularly sad that his life ended when he had more plans to learn and to teach, but these plans would not have ended at any time during his life.

One way to illustrate his sense of humility was the fact that he chose to teach in the only lecture room at Boalt Hall with windows. These windows served to remind him (and us as well) that there was a world larger than the classroom in which he taught. It was to this world that the law owed a responsibility. It was a world peopled by "the common man" he regarded as all too often ignored by the law and its practitioners and scholars. It was also a world that offered nature and poetry and feelings—offerings that we, he felt, as human beings and not as lawyers, had a responsibility to experience and wonder about.

Albert Ehrenzweig cared deeply about his students, even those he did not know. For example, he called on one woman several times in class, and each time she was absent. He then called her to his office; she arrived with understandable trepidation. She soon discovered, however, that his concern was not so much that she had missed his class, but that some personal problems might have been preventing her attendance. If so, he continued, he might be able to help out in some way or at least arrange tutorial sessions for her, as he had for others. He never purposely embarrassed anyone when he or she could not respond to his questions. Any awkwardness that did result in class he sought to relieve. He encouraged his students to visit him in his office, to discuss his classes, to talk about their lives and ideas—and he respected those lives and ideas.

This, perhaps, is where the line between being a teacher and being a friend becomes blurred. When he was hospitalized in April, and when it was brought home to him that he could no longer teach, his greatest fear was losing contact with his students. It was young people, he often said, who made him grow and ask questions. In a note of singular dignity and grace which he wrote to his Conflicts class from the hospital, he apologized for his absence and his inability to finish the year with his students. He asked that his students not lose contact with him should he be confined to his home. He asked that they come visit him so that he might come to know them as more than students, but as friends. We know he meant what he wrote.

Ann Blyberg
Jim Lobe

Members of the Class of 1974
Boalt Hall School of Law

TO A YOUNG JUDGE (On Being Sworn In)

You are so young—did not your hand retain
 raised to the cross the solemn oath to bind,
 the quiver that you felt when, moved and vain,
 a whispering voice proved stronger than your mind:
 “Oh, overnight has power come to me
 much power—!”?

Scarce weaned from books, you child,
 of life and sorrow but a gleam,
 you, like a sapling, young and strong and wild
 and supple still, you child. Above the dream
 of pride and power rule forever both
 justice and law, upon whose scarlet seam
 you laid your fingers when you took your oath.

Do not forget: you, too, are human seed
 and are like us who for your judgment wait.
 This life is like a garden disarrayed,
 wherein the flower vies with rampant weed
 And scarce survives. Do love it tenderly
 and seek it everywhere. For it may be
 you find it among thorns. And if you punish
 because the law so wills, do so in calm
 and not in vengeance, so that there be balm
 abiding in necessity.

And trust not those who grimly eye for eye
 and tooth for tooth demand. Those are the wages
 of errors left to us from darker ages.
 Serve you your *own* time. Heed its urgent cry
 for its own law. This is your duty now.
 And do not bow,
 a slave and hangman, to the written word.
 For what is written needs must wilt and die
 if thoughtless tended by dull-witted slaves.
 The written law a loving gardener craves,
 who, wise and selfless, with his body's blood
 the vineyard feeds. For, has the gardener sinned,
 law will be mock, and law and justice both
 a helpless groping for the wind.
 So give of your warm blood, you too, you child,
 and of your heart—for such demands your oath.¹

1. A. WILDGANS, *To a Young Judge (On Being Sworn In)*, in . . . AND HAVE NOT CHARITY, A CYCLE OF NEW POEMS BY ANTON WILDGANS (A. Ehrenzweig transl. 1974.)