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"Do not judge others, and you will not be judged" – Fritz Bauer on the potential and responsibilities of human justice

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I.

This homage to Fritz Bauer, the legendary chief prosecutor of the German State of Hesse, is admittedly somewhat belated. More than a year has passed since politicians and the legal profession, mainly but by no means exclusively in Germany, commemorated the 50th anniversary of Bauer's death. Notwithstanding this delay, however, it is essential that we honour the memory of this outstanding representative of our most precious European values in this journal.

On 1 July 2018 Frank-Walter Steinmeier, President of the Federal Republic of Germany, gave a speech at a ceremony marking the 50th anniversary of the passing of Fritz Bauer.[1] The event took place in the Paulskirche in Frankfurt. This is the church where the German National Assembly met for the first time in 1848, and it was also where the work to draft the first constitution for a united Germany (the *Grundgesetz* or Basic Law) was carried out. The venue for the memorial ceremony was not chosen at random. This was the appropriate place to hold the commemorative event: Germany's Basic Law was adopted in 1949, which was also the year when Fritz Bauer returned from exile. With the entry into force of the *Grundgesetz*, the Federal Republic had become a democracy; but, as the president pointed out, it needed people like Fritz Bauer to make it a "republic of democrats."

In his speech President Steinmaier described the funeral of Fritz Bauer, who passed away much too early in 1968. A few close friends were present at the service, which was held on a rainy day in July. It was a wordless funeral, without speeches, in keeping with the wishes of the deceased. Theodor W. Adorno was responsible for the music, and he requested Beethoven's late string quartets, which are said to ease pain. They did not. The president recalled that the friends were disconsolate, not only at the loss of Fritz Bauer, but also because he had experienced so little consolation during his life in Germany, a country for which only very few have done as much as the chief prosecutor of Hesse. Looking back, the president described Bauer as "one of the key figures in the young democracy that paved Germany's route back into

[1] Frank-Walter Steinmeier, President of the Federal Republic of Germany, 'Speech by Federal President Frank-Walter Steinmeier at a ceremony marking the 50th anniversary of the passing of Fritz Bauer' (Speech in Frankfurt am Main, 1 July 2018) <http://www.bundespraesident.de/SharedDocs/Downloads/DE/Reden/2018/07/180701-Fritz-Bauer-50-Todestag-Englisch.pdf;jsessionid=056890F8490AE95570EBD58A1414C556.1_cid362?__blob=publicationFile> accessed 10 April 2020.

the community of nations." President Steinmeier spoke of the Auschwitz trial, a milestone in the history of the Federal Republic which, he noted, would not have happened without Fritz Bauer. He also recalled Bauer's relentless efforts to bring the mass murderers such as Eichmann and Mengele, or the architects of the Nazi euthanasia program, to trial.

As regards the Auschwitz trial in Frankfurt, it was in fact Bauer who initiated the holding of a single, all-encompassing trial instead of bringing several prosecutions in various far-flung German cities with one or two defendants in each case. He called on the German Supreme Court to assign the cases of all suspected Auschwitz murderers to the high court (*Landgericht*) of Frankfurt. In this way, as the trial unfolded, he intended to demonstrate the operation of the death machinery. By presenting the genocidal mechanism in its entirety, Bauer's aim was to educate the German people and highlight for them the terrible consequences of their obedience, the *Untertan* mentality, to which they had been conditioned throughout the centuries.

Bauer was an educator outside the courtroom too; and he was constantly searching for the sources of Nazism. His famous lecture series was titled "The roots of Fascism and Nazism".[2] The talks were held at the invitation of youth organisations, and the hosts' originally intended to have the lectures published as teaching material for secondary school students. In 1960, however, the authority to make decisions remained in the hands of a generation infected by the Nazi epidemic who did not wish to be reminded of their disease. The students' initiative was thus rejected by the ministry in charge.[3]

In recent years, Bauer has been portrayed in films (such as "The State against Fritz Bauer" by Fritz Kraume, and "Labyrinth of Lies" by Giulio Ricciarelli) as the tireless official who went after Nazi criminals. There has been much less commentary on Bauer's criminal policy views, his ambitious project to redesign the entire penal system, although his contemporaries took the view that the fight against the Nazi past did not take centre stage in Bauer's life. Thus, commemorating Bauer, both the Hesse justice minister and Ilse Staff, a friend who conducted intensive research into the responsibility of jurists for the Nazi terror, highlighted his endeavours to humanise the administration of justice and the prison system. Perhaps they both thought that through his then unrealised criminal policy ideas, Bauer would remain with them even after his death.[4] This paper, besides evoking Bauer's exceptional achievements and reminding us of his legacy, sets out to identify the interrelationships between these streams of his life's work and also to reveal the tensions and contradictions between them, both ostensible and real. Besides identifying the interconnections between the different elements of Bauer's

[2] Fritz Bauer, *Die Wurzeln faschistischen und nationalsozialistischen Handelns*. (first published 1965, Neuausgabe, Europäische Verlagsanstalt 2016).

[3] ibid 77.

[4] Werner Renz, *Fritz Bauer und das Versagen der Justiz. Nazi-Prozesse und ihre "Tragödie"* (CEP Europäische Verlagsanstalt, 2015) 174. Günter Blau also expressed the hope that Bauer's name would not be associated exclusively with the Nazi trials, but also with his tireless fight for humanising the criminal law of the future. Günter Blau, 'Fritz Bauer' (1968) 51 Monatsschrift für Kriminologie und Strafrechtsreform, 363.

overall project I will show how, in his own perception, cracks began to show in all the components of his overarching program.

During his lifetime and for about three decades following his death, Bauer's criminal policy ideas met with almost no response outside a close circle of his intellectual associates. When commemorating Bauer, Richard Schmid considered it shameful that Bauer was not invited to the committee (*Grosse Strafrechtskommission*) set up in 1954 to work on the comprehensive reform of the German criminal code. As he wrote, "there must have been clear reasons for this, but post-war German justice certainly cannot be commended for this fact."[5]. It was not until the 1990s that his work in this area, which included treatises on such fundamental issues as the relationship between morals and law, the concept of natural law, the limits of criminal sanctions or the treatment of juvenile offenders, as well as his comprehensive reform projects, started to be intensively researched and commented upon.

II.

Bauer was born in Stuttgart to a relatively affluent Jewish family in 1903. He concluded his studies in law with a dissertation on economic law, and also published in this field later on, but instead of embarking on a career as a business lawyer he opted to join the judiciary. At the age of 26, he was appointed as one of the youngest judges in Germany. At the time of his appointment he had been a long-standing member of the Social Democratic Party, and for this reason he was interned in a concentration camp after the National Socialists gained power. Following his release, he emigrated to Denmark and then, after the occupation of that country, to Sweden. Here he was editor-in-chief of the *Sozialistische Tribüne*, which he founded with others including Willy Brandt, who was later to become German Chancellor. Bauer returned to Germany in 1949 and, due in part to his close connections with the social democrat leadership, he was appointed chief prosecutor in Braunschweig and later in Frankfurt.

In documentaries and semi-documentaries, Bauer is portrayed as a zealous and relentless Nazi hunter.[6] This term is commonly associated with Simon Wiesenthal and, as we know from Bettina Stangeth's research, much of the credit for what was attributed to Wiesenthal is actually due to Bauer, as it was he who furnished essential information on Eichmann's whereabouts leading to the capture of the mass murderer. Thus, the term "Nazi hunter", as it appeared in newspapers,[7] may even seem pertinent. Bauer did not like the term, however, and President

[5] Richard Schmid, 'Fritz Bauer 1903-1968' [1968] Kritische Justiz, 61.

[6] Werner Renz mentions in his excellent essay commemorating the 50th anniversary of Bauer's death that the films present Bauer as a Nazi hunter-hero, but he was completely misunderstood. If anything, the coldness of the Federal Republic left him feeling resigned: Werner Renz, 'Staatsanwalt wider Willen' *Die Zeit* (Hamburg, 27 June 2018) 28.

[7] Per Mossin, Interview with Fritz Bauer, 'Ich vergesse den Mörder von Kaj Munk nicht' in Lena Foljanty and David Johst (Eds) *Fritz Bauer. Kleine Schriften (1921-1961 Band 1, 1962-1969 Band 2*) (Campus Verlag. Frankfurt/New York, 2018) 1425; and Hans Herman Petersen, Interview with Fritz Bauer, 'Neuer Hitler würde heute leichtes Spiel haben' in Lena Foljanty and David Johst (Eds) *Fritz Bauer. Kleine Schriften (1921-1961 Band 1, 1962-1969 Band 2*) (Campus Verlag, 2018) 1415.

Steinmeier expressed the view of all those who knew him when he stated that "Fritz Bauer was neither a Nazi hunter nor a god of vengeance".[8]

It is true that he pursued Nazi criminals, but – as he himself replied to questions from journalists – he was only doing his duty, as would any other prosecutor of the Federal Republic.[9] He was not a bloodthirsty hunter and even lacked the temperament of a prosecutor. Indeed, on the fiftieth anniversary of Bauer's death, one of the most knowledgeable scholars of his life's work wrote an article in *"Die Zeit"* with the headline "The Reluctant Prosecutor".

In fact, it must have been painful for Bauer to charge defendants under the obsolete penal provisions of his time, which were antithetic to the views expressed by him in his scholarly writings, in the media and in public appearances. He firmly rejected the then prevailing retributive criminal policy, saw little sense in locking people up in prisons, and found the penitentiary system to be completely outdated. In a letter to one of his friends, he commented that he carried the title of chief prosecutor with distaste[10]. He made this remark despite having dreamed of becoming a prosecutor since childhood. Once, he was attacked by his schoolmates after class for being the only one to correctly answer the teacher's question. "It was you and your parents who killed Jesus Christ", they screamed at him. Perhaps as a child he was not yet aware of the roots of antisemitism, the frustration of the blockheaded at their own impotence, the feeling of intellectual and moral inferiority, the envy of the stupid. Nevertheless, he resolved to become a prosecutor. Granted, he had his own image of what prosecutors are for; that is, to protect the rights and wellbeing of people against the arbitrary actions of both state and non-state actors. That is why he found the German term *Staatsanwalt* (state attorney) misleading. To Bauer, prosecutors were not guardians of the state's interests, but defenders of human rights. He saw them as the noblest caste of attorneys.[11]

That said, Bauer did make strenuous efforts to have Nazi criminals put on trial. He thought the Auschwitz trial was just the beginning, and the murderers involved in the euthanasia programme should also face justice. He resolutely investigated Eichmann's whereabouts, with the intention of having the commander responsible for the extermination of the Hungarian Jewry put on trial in Germany.[12] Like Ben Gurion, Bauer was less interested in Eichmann as a person, though their concerns differed somewhat: to the Israeli prime minister what mattered was that the Jewish people should sit in judgment over the monster,[13] while Bauer – who for a

[8] Steinmeier (n 1).

[9] Fritz Bauer, 'Das Lehrstück von Kain und Abel' in: Foljanty and Johst (n 7) 1793.

[10] Renz (n 6).

[11] Fritz Bauer, 'Im Kampf um des Menschen Rechte' in: Foljanty and Johst (n 7) 661-662. Bauer's text was originally published in 1955 in the book edited by Elga Kern. Besides Bauer other leading intellectuals including Bertrand Russell, Pablo Casals and Martin Buber also presented their views on the post-war "new world". Elga Kern (Ed) *Wegweiser in der Zeitwende. Selbstzeugnisse von Bertrand Russell* ([*inter alia*] Reinhardt, München, Basel, 1955).

[12] Fritz Bauer, 'Deutsche mit Nazi-Vergangenheit konfrontiert' in Foljanty and Johst (n 7) 1036.

[13] Tom Segev, 'Die zwei Gesichter des Eichmann Prozesses' http://www.nahost-politik.de/israel/eichmann.htm accessed 10 April 2020.

long time hoped that Germany would seek Eichmann's extradition[14] – wished to educate his nation through the trial, and demonstrate to the world that Germany was willing and able to deal with its Nazi past. He believed that through prosecuting Eichmann, the German people could learn their lesson and that Germany could find its way back into the community of nations.

III.

None of the Nazi murderers as individuals were of interest to Bauer.[15] He remarked that any one of them was interchangeable with the other. In saying this, he contradicted the criminal-policy credo that he himself espoused throughout his career: the premise that only individualised sanctions that reflect on the causes of crime, and are adjusted to the offenders' personality, are justified. This is perhaps one of the most glaring of tensions and contradictions in his oeuvre. Right up until his death, he was one of the most radical proponents of a criminal policy based on strict determinism and focused on the offender's personality. This brought him into conflict with the predominant German doctrines of criminal guilt *(Schuldstrafrecht*) and retributive punishment (*Vergeltungsstrafrecht)*. These concepts are founded upon the free will of the individual, and see the criminal sanction as just retribution for the wrong decision of the individual, and the means of restoring the moral order. Accordingly, punishment should not pursue any expediency considerations, but should be strictly proportionate to the gravity of the wrongdoing. Bauer's proposition is that the concept of retributive justice is a dead end; it is founded on false premises, and its perception of the human being is distorted. Adherents of *Schuldstrafrecht* and *Vergeltungsstrafrecht* (also referred to as the absolute theory of criminal law) misinterpret the notion of human dignity, the central value in the German Basic Law (*Grundgesetz*), which ostensibly provides justification for the penal system they argue in favour of. Bauer's undertaking was clearly a herculean one: in order to justify his proposition, he had to refute the theological and philosophical theses elaborated by such authorities as Thomas Aquinas and the giants of German idealism, Hegel and Kant. Only by toppling the ideological pillars of the absolute/retributive theory could he prove that the dominant interpretation of human dignity is false, and consequently retributive justice founded on the assumption of individuals' free will runs counter to the German Constitution.

To substantiate his proposition, Bauer begins with passages from the Bible saying that judgment over humans is the prerogative of the divine power. The Biblical ban on "passing judgment on one another" (Romans, 14) does not of course prohibit humans from establishing the facts of the offence, and nor does it forbid the awarding of compensation to victims or the imposition of sanctions that serve the offender's resocialisation. What the Bible outlaws is "loveless judging" (*das lieblose Richten*),[16] the imposition of wrong as a punishment in retaliation for the wrong committed. Thus, the proposition of the German idealists, specifically that retributive

[14] Fritz Bauer, 'Recht oder Unrecht – mein Vaterland' in Foljanty and Johst (n 7) 293.

[15] Lena Foljanty and David Johst, 'Einleitung' (Introduction) in Foljanty and Johst (n 7) 49.

[16] On the interpretation of "loveless judging" see C. K. Martin Chung, 'Against Loveless Judging: Fritz Bauer and Transitional Justice in Post-war Germany'(2018) International Journal of Transitional Justice 12, 9-25.

criminal punishment is warranted by the transcendent moral imperative to restore the equilibrium and that retaliation is the expression of respect for the offender's human dignity, runs counter to what the Bible commands. In Bauer's view, "just retribution" is simply revenge (as expressed using the German pun "*gerecht is gerächt*"), and in refutation of Hegel and Kant he invoked the words of Nietzsche and Schopenhauer, who argue that retribution is a throwback to our pre-human existence, which should be abandoned and relegated to the animal world where it belongs.[17] Adherents of the absolutist theory may, however, argue that retributive criminal sanctions are not the same as pure revenge, since they are predicated on the voluntary choice, the free will of the individual. Here, again, Bauer invoked religious and philosophical arguments to rebut the claim of the existence of freedom of choice. Protestant credo denies the free will of individuals, as evidenced by Luther's formulation: those who preach free will deny Christianity. The commandments teach us what we should do, but do not provide us with the strength needed to follow them. They merely show us how fallible we are, and teach us to mistrust ourselves.[18]

However, many scholars who cannot produce empirical evidence for the existence of free will claim that it must be presupposed in order for criminal law to function. Bauer's counterargument is that the assumption was perhaps needed in the past, even at the end of the 19th century when the German Penal Code was drafted, in the absence of adequate knowledge on human behaviour. However, he posits that due to the immense progress in science, it had become obsolete and unnecessary. Plato and Zarathustra had no test tubes, so they speculated during their afternoon walks – what else could they have done?[19] Bauer claimed that the accumulated knowledge of the natural, medical, human and social sciences guarantee that the societal causes of crime can be identified and eliminated, and the offenders' behaviour can be altered.

But in order to bring about legislative change it was not sufficient to point out that retributive theory was outdated. Bauer had to prove that the absolute/retributive penal doctrine violated the *Grundgesetz*, and that the claim that the retributive sanction was predicated on human dignity, a core value of the Constitution, was erroneous. Under the *Grundgesetz*, the Federal Republic was duty bound to guarantee the rule of law, but also the obligation to discharge its social function (*sozialer Rechtsstaat*).[20] This is what the concept of human dignity dictates. The assumption of free will, of humans' liberty to make autonomous choices is used, Bauer maintains, to absolve the state of its social responsibility to remove the causes that induce people to commit crimes. Bauer concludes from all of this that only a penal policy which focuses on the offender (and not on the crime), and always imposes individualised sanctions, is consistent with the German Constitution. In the twentieth century, he claims, modern medical

[17] Bauer quotes from Schopenhauer's "The World as Will and Representation" and Nietzsche's "Human All Too Human". Fritz Bauer, 'Die Schuld im Strafrecht' in Joachim Perels and Irmtrud Wojak (Eds*) Fritz Bauer - Die Humanität der Rechtsordnung - Ausgewählte Schriften* (Campus Verlag, 1998), 275

[18] ibid 268.

[19] Fritz Bauer, 'Die Reformbedürftigkeit der Strafrechtsreform' in Perels and Wojak (n 17) 293.

[20] *Grundgesetz* Art. 20.1.

science, genetics, psychology and sociology amassed an immense body of knowledge that can be used to find the most expedient sanction that best fits the needs of a given offender.

The system of sanctions built upon Bauer's radical determinism is not profoundly original; he follows Franz von Liszt and Gustav Radbruch's programme, and has borrowed much from Marc Ancel's *nouvelle défence sociale*.[21] Accordingly, reformatory sanctions serve offenders' reintegration, security measures protect society from those who prove to be incurable, and the so called punitive measures are meant to reinforce the legal order (*Bestätigung der Rechtsordnung*). Though Bauer fails to give a clear explanation it appears reasonable to assume that punitive measures serve the function of retribution. In contrast to reformatory and security sanctions punitive measures do not target the perpetrator; the addressee is the community, which has to be made aware that the norm remains in effect despite having been violated. Punitive measures, however, run counter to Bauer's creed that prohibits the imposition and aggravation of sanctions for the purpose of deterring others.

One could of course argue that compliance with norms might be furthered by means other than deterrence and intimidation. It may suffice to demonstrate the wrong and the community will draw the appropriate conclusion, not out of fear but by being persuaded of the correctness of the norm and the impropriety of its violation. However, can the community learn its lesson from the violation of a norm if the perpetrator, as Bauer asserts, lacking free will, simply has no other option than to break the law? For the criminal justice system to accomplish its socio-pedagogic function, it does not suffice to expose the wrong; the perpetrator also has to be penalised. The violation of the penal norm that has to be shown to be valid must, by definition, invoke some kind of sanction. The wrong is translated into a legally relevant crime by having criminal sanctions attached to it. Therefore, the question is this: Can we impose criminal sanctions to reinforce the norms, without acknowledging individuals' free will?

Bauer was dramatically confronted with this dilemma during the Nazi trials. The punishment of Nazi criminals could not be justified with the need to reform them, or with the objective of protecting society. His friends had no explanation as to why Bauer, who held that only preventive, forward-looking sanctions are warranted, insisted on trying law-abiding, docile men, whom the community had no reason to fear and who were not in need of resocialisation. Bauer's argument was that the Nazi trials also served prevention: by being confronted with the horrors presented at the trials, the audience would learn "how to behave". Recalling the genocide in the courtroom would serve as a valuable historical, legal and moral lesson for the future.[22] However Bauer had to concede that the community would only be educated if the trials also revealed that the defendants had another option, and that they were guilty because they freely chose to be part of the genocidal machinery.[23]

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[21] On the *nouvelle défence sociale* see Marc Ancel, *Social Defence - A Modern Approach to Criminal Problems* (Routledge & Kegan Paul, 1965) 2.

[22] Ronen Steinke, *Fritz Bauer oder Auschwitz vor Gericht* (Piper, 2016) 155-156.

[23] Foljanty and Johst, (n 7) 30.

Bauer's radical determinist theory is flawed. Without accepting individuals' free choice and culpability (*Schuld*), punishing Nazi criminals simply makes no sense. Therefore, a criminal policy approach that focuses exclusively on the offender turns out to be unworkable: although Bauer proclaims the need for individualised sanctions, thereby renouncing the prevalent *Tatstrafrecht,* the personalities of Nazi criminals were of no concern for him. After all, the matter of whose example is used to teach the audience their lesson is completely irrelevant. The twenty-two defendants of the Auschwitz trial, Bauer admits, simply serve as instruments for accomplishing the given objective.[24] Adorno rightly observes that there is a kind of philosophical incongruence here,[25] and Bauer himself concedes that this is the schizophrenia he has to live with.[26]

Bauer's texts on how to deal with offenders under ordinary conditions (when disregarding others' rights constitutes deviance) and those who commit crimes on the orders of an infernal political system (where violation of human rights *is the norm*), reveal the clue to Bauer's disinterest in the Nazi criminals' personalities. He rightly made a distinction between the extermination of Jews, the systematic, well-organized production of corpses, and "ordinary" murder. The Holocaust is not the sum of individual incidents, he opined. Splitting it into standalone criminal acts would distort its true nature. As he wrote, the Auschwitz trial could have been one of the shortest trials in Germany; there was no need to prove the individual crimes committed by the defendants. The facts of the case and the legal assessment were simple: There was an order to liquidate the Jews, and whoever acted as part of the infernal machinery was liable for murder. For Bauer, members of the Nazi criminal organisation were faceless cogs within the genocidal apparatus; for him it was irrelevant what role they played within the machinery, and nor were their personal motives of any interest. The simple fact that they took part in the murderous operation of the machinery, provided of course that they knew about its aim, the liquidation of Jews, made them liable as principals for murder.[27]

Bauer's position was in stark contrast to the judicial practice of German courts. For the courts, there were only two groups of principal perpetrators (*Täter*): firstly, Hitler, Heydrich and other leaders of the Nazi regime, and secondly, the so called excess-perpetrators, those driven to kill by hideous personal motives or serious perversions or deficiencies such as sadism or psychopathy; in other words, those who took part for the reasons why people may also kill under "normal conditions", when murder is deviance and does not constitute the norm. All the others running the infernal machinery were only convicted of being accessories to murder.[28] For Bauer, the personal motives of those participating in the bureaucratically organised and

[24] Steinke (n 22) 157.

[25] ibid 155.

[26] Blau, 'Fritz Bauer' (n 4) 365.

[27] Bauer, 'Im Namen des Volkes. Die strafrechtliche Bewältigung der Vergangenheit' (1965), in Perels and Wojak (n 17) 83-84.

[28] For details see Werner Renz, *Auschwitz vor Gericht. Fritz Bauers Vermächtnis und seine Missachtung* (Europäische Verlagsanstalt, 2018) 145-154.

state-directed" mass murders[29] were irrelevant. In contrast, the courts tried to determine whether the perpetrators identified themselves with the killings, conceiving the murders as their own act, or whether they were simply the executors of an alien will. The German courts' focus on individual motives, whereby only a small group of sadistic torturers were convicted as principals while the contribution of the rest was classified as being an accessory to murder, absolved huge masses of the population. They were presented as misled and manipulated individuals who did not identify with the killing they took part in. The members of the judiciary, including the Auschwitz judge Hofmeyer, who were doing their job by implementing the objectives of the National Socialist state, were similarly absolved: they, too, were simply implementing objectives that were allegedly not their own.[30]

IV.

As indicated above, Fritz Bauer's publications provoked little academic response during his lifetime, and he was not given the opportunity to shape post-war German criminal law. He remained an "outsider", and most of his contemporaries viewed him as an alien. The reasons for Bauer's exclusion from the elite of German criminal lawyers, the *Strafrechtler,* are manifold. Firstly, he himself contributed to the outsider image by consciously disregarding the established conventions. From time to time he published in law journals, mainly commenting on court decisions. However, he wished to address a wider audience, so most of his writings appeared in daily newspapers, in political science journals and publications of the trade unions or of the Social Democratic party; and he made himself accessible to journalists, giving interviews for magazines and even tabloids. His intention was to educate his people, which is why he adopted an engaging and comprehensible style, frequently invoking parables from the Bible and making reference to religious authorities, grand philosophers and men of letters. He cared little for academic conventions and ignoring what was (and perhaps remains) a basic prerequisite for being taken seriously by the research community, he did not litter his writings with citations. To the 'professionals', he must have come across as not serious, not sufficiently 'scientific'. At the same time his erudition, the broadness of his knowledge, and the literary style of his texts would certainly have been a source of envy.

Another reason for Bauer's lack of popularity within the academic community was his disdain for his contemporaries' research agenda.[31] What is more, he called into question the competency of the criminal lawyers' elite, the *Strafrechtler,* to play a significant role in legislation. Law-making for him was essentially a policy matter, and he argued that disputed issues should be resolved by politicians and parliament.[32]

[29] Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (Cambridge University Press, 2006) 2.

[30] 'The Frankfurt Auschwitz Trial' in Michael J. Bazyler and Frank M. Tuerkheimer, *Forgotten Trials of the Holocaust* (New York University Press, 2014) 244.

[31] Fritz Bauer, 'Die modernen Aufgaben einer Strafrechtsreform' in: Foljanty and Johst (n 7) 580.

[32] 'Strafrechtsreform und Bundestag' in Foljanty and Johst (n 7) 1094.

Bauer's ostracization was also due to his criminal policy agenda, which was decades ahead of that of his contemporaries. As early as the 1950s he was calling for the humanisation of the prison system, then some twenty years later some of his proposals found their way into the law on corrections adopted in 1976[33]. In 1961, ten years before discussions started in Germany on the pros and cons of the bifurcated common law-type trial, Bauer proposed splitting the trial into two phases and inviting experts in the second stage to help judges determine the optimal sentence.[34] While the victims' movement achieved its first victories in the early 1980's – the UN adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985 – Bauer was already urging the strengthening of victims' rights in the 1950's.[35] Long before the issue became a topic of public discussion, he proposed the adoption of the day fine system in Germany, and the setting up of restorative mechanisms.[36] Immediately after World War II, Bauer vehemently urged the reform of the outdated regulation of sexual offences, which reflected the hypocrisy of Victorian morality; in the name of artistic freedom and respect for private life, he pressed for the abolition of obsolete prohibitions. His efforts failed, however, as the *Zeitgeist* favoured strict prudishness. Rigid purity was thought to stem the advance of 'threatening modernity', Americanisation and democracy forced on Germans from the outside. Bigoted Christian morality seemed to be justified response to the National Socialists' godlessness and anti-clericalism. Accordingly, adultery was a criminal offence until 1969, and it was only in 1994 that consensual sexual relationships between adult males were legalised in Germany.

Bauer was one of the few to properly conceptualise the Holocaust as the bureaucratically organised, state-directed liquidation of an entire group of people that cannot be properly apprehended by concepts courts employ when trying ordinary murder committed by individuals for personal motives. German courts were prevented from addressing the systematic annihilation of Jews as crime against humanity or genocide, but had to try Nazi criminals under the Penal Code that was in effect at the time. However, Bauer showed that the provisions of the 1871 Penal Code could be also be applied, using the traditional judicial methodology, in a manner that reflected the systematic nature of the Holocaust as a feature that distinguished it from 'ordinary' murder. Auschwitz, he argued, was a single complex and the annihilation of Jews constituted a single offence.[37] There was one order to exterminate the Jews, and Auschwitz, Treblinka, etc. were the murder weapons. Anyone who knew that and contributed to the operation of the extermination machinery was liable for murder. To obtain a conviction,

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[33] Werner Päckert, 'Fritz Bauer und die Reform des Strafvollzugs' in Katherina Rauschenberger (Ed.) *Rückkehr in Feindesland? Fritz Bauer in der deutsch-jüdischen Nachkriegsgeschichte* (Campus Verlag, 2013) 209.

[34] Fritz Bauer, 'Hauptverhandlung in zwei Etappen? Sollen Strafe und Massnahmen erst in einer zweiten Verhandlung-eventuell durch ein sachverständiges Gremium-bestimmt werden?' in: Foljanty and Johst (n 7) 1103-1139.

[35] See e.g. Fritz Bauer, 'Zum Begriff des Verletzten in der StPO' (1953) 10 Juristenzeitung Jg. 8, 298-300.

[36] Fritz Bauer, 'Ein neues Strafrecht' *Frankfurter Rundschau* (Frankfurt am Main, 23 October 1954).

[37] For details see Fritz Bauer, 'Ideal-oder Realkonkurrenz bei nationalsozialistischen Verbrechen?' (1967) 20 Juristenzeitung 22, 625-628.

there was no need to prove individual participation in specific offences.[38] His position was not shared by the Frankfurt court. It took half a decade for the German judiciary to recognise that it was Bauer's 'one single offence' concept that truly expressed the criminal liability of individuals for crimes committed within the extermination machinery.

It is highly likely that Bauer's Jewishness also contributed to his being an alien in the eyes of most of his contemporaries. The marginalisation of Jews, and later their expulsion from the legal sphere, had already started in the first decades of the twentieth century. After Hitler took power, the 'crown jurist of the Third Reich', *Reichgruppenwalter* Carl Schmitt, proclaimed in 1936 that it is not enough to simply reject "some flagrantly intrusive and unpleasant Jewish phenomena. Instead, we need epistemological proof on the inferiority of Jewish jurisprudence."[39] Epistemological, scientific evidence indeed! But there is no reason to suspect a joke: in the same year, Philipp Lenard published his textbook of German Physics laying down the principles that distinguished Arian physics from Jewish physics. In the foreword Lenard commented that he could have used the terms "Arian Physics or the "Physics of the Northern Race" because science, just like any other phenomenon created by humans, was determined by the blood of the race.

Scholars of the "scientifically-proven-to-be-inferior Jewish legal theory" who did not manage to escape in time ended up in concentration camps. And Germany's capitulation did not stem the tide: Jewish returnees were not well received, and antisemitism survived. In an interview, Bauer explained that hatred of Jews prevailed: "The difference is that they do not yell 'Jewish sow', but 'what a shame you escaped the gas chamber.'"[40] Antisemitism did not disappear, while the former *Reichsgruppenwalter,* the proponent of the superior German legal theory, had been elevated to the status of 'outstanding representative of European public law' – this being the title that the community of German jurists bestowed on Carl Schmitt at his 70th birthday in the late 1950s.[41]

V.

[38] Fritz Bauer, 'Im Namen des Volkes. Die strafrechtliche Bewältigung der Vergangenheit (1965)' in Perels and Wojak (n 17) 83.

[39] Deutscher Rechts-Verlag (ed), 'Das Judentum in der Rechtswissenschaft, Heft 1. 14.o.' cited by Christian Busse in '"Eine Maske is gefallen" - Die Berliner Tagung "Das Judentum und die Rechtswissenschaft" vom 3./4. October 1936' (2000) Kritische Justiz 4, 584. For a summary of Schmitt's gruesome speech see Hans Ulrich Wehler, *Der Nationalsozialismus*: *Bewegung, Führerschaft,Verbrechen, 1919-1945* (C.H. Beck, 2009) 139-140.

[40] Hans Herman Petersen, Interview with Fritz Bauer, 'Neuer Hitler würde heute leichtes Spiel haben' in Foljanty and Johst (n 7) 1416-1417.

[41] Hans Barion, Ernst Forsthoff and Werner Weber (Eds), *Festschrift für Carl Schmitt zum 70. Geburtstag dargebracht von Freunden und Schülern*, (Duncker & Humblot, 1959). See also Hans Barion, Ernst Wolfgang Böckenförde, Ernst Forsthoff and Werner Weber (Eds) *Epirrhosis, Festgabe für Carl Schmitt zum 80. Geburtstag* (Duncker & Humblot, 1968).

But another reason why his contemporaries perceived Bauer as an alien was that, in a sense, he was one. He had spent thirteen years in exile, and the Germany to which he returned was an unknown country for him. As if awakening from a decade-long coma, he might have thought that he had returned to the Weimar Republic of the 1920s. He believed that the grand project started by his idol, Gustav Radbruch, could now be brought to fruition. When asked why he had returned to Germany he replied: "I thought I could bring with me the optimism and faith of the young democrats of the Weimar Republic."[42] Indeed, unlike many of the left-wing intellectuals who – believing that the Shoah was not an unfortunate slip – gave up their optimistic *Weltanschaung* or faith in the inexorability of progress[43], Bauer retained the hope that the values of Weimar, namely humanism and democracy, would prevail.

His optimism was due to his faith in young Germans. Speaking about the Nazi trials, he asserted that it was the "new generation, eager to know what had happened, that made us go ahead."[44] Bauer's conviction that the new generation, the '68ers, had inherited nothing of their fathers' Nazism is best illustrated by the fact that one of his closest confidantes was Thomas Harlan, the son of Goebbels' protégé Veit Harlan, who had directed *Jud Süß*, the antisemitic propaganda film that all guards in Auschwitz were required to watch. Veit Harlan was prosecuted several times after the war, but never convicted. When asked about the reason for his father's acquittal Thomas Harlan replied bluntly: "Because the judge, too, was a murderer." [45]

It was partly Weimar as an ideal, and partly his frustration over its fall, that made Bauer a radical advocate of offender-centred criminal law (*Täterstrafrecht*), and of the supremacy of natural law over positive law. He believed that the reform of the penal system launched by Gustav Radbruch, which set out to use the achievements of science to explore and eliminate the determinants of crime, could be completed in the new Germany. He also believed that jurists' unconditional obedience to positive law was a reflection of the Germans' subservient attitude, which in turn had been the source of Nazism. He was hoping that the Nazi horrors had taught the Germans that there were higher values that took precedence over positive law; and he claimed that this natural law not only permits, but mandates resistance to inhuman statutory provisions. Bauer's radical determinism and focus on the offender, as well as his enthusiasm for supra-positive natural law, also contributed to the German legal community's perception of Bauer as an alien, and his concepts as disquieting. They had first-hand experience of Nazi legal ideology, and knew only too well that prominent representatives of National Socialist

[42] Unsere Weihnachtsumfrage, 'Warum sind Sie zurückgekehrt?' in Foljanty and Johst (n 7) 1274.

[43] Raphael Gross and Sybille Steinbacher, 'Vorwort' (Foreword) in Foljanty and Johst (n 7) 27.

[44] Unbewältigte Vergangenheit, Interview with Fritz Bauer, 'Ein Jurist nimmt Stellung' in Foljanty and Johst (n 7) 1047.

[45] Edo Reents, 'Besuch bei Thomas Harlan - Wie es war, als mir Goebbels eine Märklin kaufte' *Frankfurter Allgemeine Zeitung*, (Frankfurt,15 January 2007), available at < https://www.faz.net/aktuell/feuilleton/buecher/besuch-bei-thomas-harlan-wie-es-war-als-mir-goebbels-eine-maerklin-kaufte-1407439-p4.html> accessed 12 April 2020.

jurisprudence were also proponents of *Täterstrafrecht,* albeit in its perverted form. They were also aware that the Nazis too had condemned legal positivism.

In his writings chastising the dominant retributivist *Tatstrafrecht,* Bauer regularly invokes Schiller: "The thought matters far more than the act, and much more important than the effects of the act is the source of the thought."[46] Schiller formulates the humanistic idea that we must reveal the human behind the deed. For representatives of the aborted Nazi *Gesinnungsstrafrecht*, the action as it is manifested in the outside world is completely irrelevant. What counts is the individual's disposition, their attitude. According to the doctrine of the normative criminal type, developed by a prominent National Socialist criminal lawyer, thieves are not those who steal, but only those who by their disposition, their 'inner substance', belong to the species of thieves.[47] The National Socialist concept of *Täterstrafrecht* made its way into the German Criminal Code when, in 1935, the National Socialists abandoned the principle of *nullum crimen sine lege*. Consequently, courts could convict individuals even in the absence of a criminal provision in the Special Part of the Code, if they found that the individual had acted contrary to the spirit of the law or to the "healthy sentiment" of the people ("*gesundes Volksempfinden"*). This is how National Socialism perverted the noble idea of focusing on the personality of the offender. Hitler's 'blood judge', Roland Freisler, expressed the essence of this rule with brutal simplicity: "The legislator does not construe the criminal through the constituent elements of the crime. It bluntly presents him to the judge, who examines him and proclaims: he deserves the rope".[48] It is comprehensible, therefore, that Bauer's concept of focusing on the offender and not the gravity of the deed was met with silence at best. His colleagues had experienced Nazi madness first hand, and many of them had been infected by the epidemic themselves. They did not wish to be reminded of their prior selves.

This was one of the reasons why German jurists returned to legal positivism, following the brief natural law revolution, after World War II. Bauer, for his part, kept on arguing for a higher law that is superior to statutory provisions. He saw the German jurists' unconditional subordination to any statute, irrespective of its substance, as a sign of unqualified obedience, which in turn he considered to be the source of Nazism. One of the symptoms of the Germans' abandonment of personal autonomy and freedom, he argued, was the dereliction of ancient German law that had been consistent with the community's religious and moral values. This ancestral law was replaced by Roman law "with its merciless logic and brilliant system of definitions, which, diverging from the higher values, has acquired an autonomous existence in the form of man-made statutes."[49] Bauer posited that legal positivism, the fetishization of statutory law by jurists, was one of the causes of the Weimar Republic's failure. But National Socialist legal scholarship

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[46] Friedrich Schiller, *Verbrecher aus verlorener Ehre* (1786).

[47] Georg Dahm developed his doctrine in the monograph titled "Der Tätertyp im Strafrecht" published in 1940. Cited by Hans-Heinrich Jescheck and Thomas Weigend, in *Lehrbuch des Strafrechts: Allgemeiner Teil* (Duncker & Humblot, 1988) 48.

[48] Cited by Thomas Fischer, in 'Völkisches Recht' *Die Zeit* (Hamburg, 12 December 2013) 51, available at <https://www.zeit.de/2013/51/mord-paragraph-nationalsozialismus> accessed 12 May 2019.

[49] Fritz Bauer, 'Die ungesühnte Nazi-Justiz' in Foljanty and Johst (n 7) 960; Bauer (n 2) 39-41.

had also proclaimed the war against "degenerate legal positivism, which has replaced the ancient German law with soulless formalism and legal processes rooted in Roman law".[50] They, too, had called for a return to a higher authority, and for the Nazis this superior instance was the racially determined conscience of the German blood community.

Throughout his life, Bauer maintained that it was the Germans' *Untertan* mentality that had developed over the centuries that allowed the Nazis to come to power, their unconditional subordination to authority which for them was identical with brutal power. This authority induced fear, but this was exactly why it could be respected.

As to the role played by legal positivism in Nazis' rising to power, Bauer subsequently revised his position shortly before his death. He realised that the practice of the conservative judiciary, which hated the new democracy and persistently laboured to restore the pre-republican political regime, had nothing to do with the positivist interpretation of laws. On the contrary, under the gown of judicial independence and a particular variant of natural law they favoured the right-wing political forces and deliberately obstructed the republic, which they abhorred since it was tolerant instead of brutality and its principal value was freedom as opposed to uncritical obedience and order.[51]

VI.

Fritz Bauer's resolute struggle to expose the source of Nazism and lay the foundations of democracy in Germany started with "restoring, through the legal process, the integrity of those who stood up against Hitler's infernal regime."[52] In the early 1950s Otto Ernst Remer, a candidate for the neo-Nazi *Sozialistische Reichspartei,* libelled Graf Stauffenberg and the other participants in the attempted assassination of Hitler as traitors during an election campaign. In the defamation trial, Bauer personally represented the prosecution. As a matter of fact the trial was not about Remer; his person was irrelevant to Bauer, who did not even put forward a motion on the sanction to be imposed on the defendant.[53] Rather, the trial provided the opportunity for presenting the troubled German people with a behavioural pattern for the future. For this, exemplars were needed and Stauffenberg, the chivalrous German aristocrat who for years had been loyal to Hitler, seemed ideal to demonstrate that the Nazi regime was in fact the negation of all that was truly German. The trial was to prove that the revolt against Hitler's regime was consistent with the Germans' ancient right to resist tyranny, and that Stauffenberg and his co-conspirators were patriots. They followed Christian ethics and possessed all the virtues consecrated by German culture. Bauer first quotes Stauffacher from Schiller's William Tell: When oppression becomes unbearable, one "makes appeal to Heaven / And thence brings down

[50] Joachim C. Fest, 'Hans Frank – Kopie eines Gewaltmenschen' in Joachim C. Fest, *Das Gesicht des Dritten Reiches* (Piper, 1997) 289.

[51] Fritz Bauer, 'Justiz als Symptom' in Foljanty and Johst (n 7) 1326.

[52] 'Einleitung der Herausgeber' in Perels and Wojak (n 17) 15.

[53] Steinke (n 22) 151.

his everlasting rights, / Which there abide, inalienably his, / And indestructible as are the stars." (Act 2, Scene 2). The appeal to a 'higher authority' is the substance of natural law and Bauer, the advocate thereof, might even have stopped at this point. But he had to convince the legal positivists, the judges, so he provided a detailed analysis concluding that the National Socialist regime had no valid legal grounds for its existence. Hitler came to power through a violation of the Weimar Constitution, as the merging of the functions of the head of state and of the chancellor was unlawful and therefore invalid. Civil servants and the military had not been relieved of their oath of allegiance to the Weimar Republic before they swore loyalty to Hitler. A dual oath is null and void and thus it co be breached. In summary, *de jure,* the Nazi state simply did not exist, and a non-existent state is by definition incapable of being betrayed (*ist hochverratsunfähig*).[54]

Bauer's agenda throughout his life was to prevent the fate of the Weimar Republic from reoccurring. It was this overarching objective that connected the elements of his program, his activity as educator, prosecutor and legal scholar. He sensed that the new republic was fragile, and its breakdown could only be averted if Germans were to shed their servile obedience and the accompanying brutality committed against the weak if ordered by those in authority. He returned from exile full of optimism, convinced that when confronted with the Nazi hell the new generation would opt for freedom instead of servitude; for reason, tolerance and empathy instead of brute force. To present inhumanity, the trial of the Nazi murderers was needed. At the same time, it had to be shown that there was an alternative to inhumanity. The Remer trial served this purpose, with Stauffenberg as the main protagonist – the embodiment of the best German tradition, who revolted against tyranny at the cost of his life.

Bauer was a radical determinist, who believed that people can be reformed. He was confident that the social conditions that induce people to commit crime can be altered, and that human personality can be shaped through education and psychotherapy and, if needs be, through medical intervention. It is the young people who are open to education and can be reformed. The older generation who have been trained throughout their life to servility and have slavishly served any regime, Bauer rightly thought, are so unreceptive as to be hopeless.

Shortly before his death, he was plagued by doubts regarding the success of his project as its individual elements started to falter. It was at that time that he became aware of the destructive consequences of his extremist determinism and fanatic faith in the potential of science. He realized that modern science, which he thought would guarantee the victory of the *Täterstrafrecht,* may also be abused to manipulate the human personality and destroy human dignity.[55] In 1961, he declared in an interview that the majority of the population, and the younger generations in particular, believe that it is essential to try Nazi criminals. The reaction

[54] Fritz Bauer, 'Eine Grenze der Tyrannenmacht. Plädoyer im Remer-Prozeβ [1952]' in Perels and Wojak (n 17) 169-179.

[55] Blau, 'Fritz Bauer' (n 4) 364.

to the Auschwitz trial shattered his illusions: only 60 per cent of Germans had even heard of the trial, and two thirds opined that it was time to end the prosecution of the Nazi criminals. "The educative impact of the trials is minimal", he noted in an Israeli newspaper after the verdict was announced.[56] He was also disappointed by the German youth. He had sided with the generation of '68, sharing many of their ideas and being eager to maintain contact with the young. But when the revolt against the "fathers' generation" turned into violence, he was alarmed. It was a serious strategic mistake, he argued, when "the protesters thought they could bring about changes by teaching society to feel dread".[57] Bauer also felt betrayed by young colleagues whom he had seen as his fellow combatants. One of the young prosecutors in the Auschwitz trial left the organization and made good use of the knowledge acquired under Bauer's mentorship as the defence counsel of Nazi murderers, in exchange for handsome remuneration.[58] Bauer's relationship with his closest young friend, Thomas Harlan, was also fraught with tension.

Bauer died at the age of sixty-five, disillusioned, lonely and under curious circumstances. It has been rumoured that he might have committed suicide, and a recent expert opinion rekindled a suspicion that he was murdered. According to the official expertise handed down right after his death it was cardiac insufficiency that put an end to his life. As noted in the obituary published in the *Frankfurter Allgemeine Zeitung* "those who were close to him knew that he was burning inside and the flames had consumed him."[59] Perhaps it was the desperate vision of the new republic collapsing just like Weimar that sapped his vitality. But he was wrong. The Auschwitz trial marked a new era in the history of the new republic. "The facts documented in the 900-page judgment cannot be denied anymore. The depressing silence of the young *Bundesrepublik* has been broken and the 'awakening 60s' have started".[60]

In 1995, the institute named after Bauer was established at Goethe University in Frankfurt, where scholars research the history of the Holocaust and its effects. One decade after Bauer's passing, the German Parliament abolished the statute of limitations for murder. Starting from the 1990s, Bauer's position on how to apply the 1871 Penal Code to crimes committed in the frame of the terroristic Nazi regime, which had been rejected by the judges of the Auschwitz trial, was adopted by the German judiciary. The courts ruled that desk murderers are also liable as principals (and not just as abettors), just the same as the actual executioners. In the Demjanjuk case, the Munich court held in 2011 that "those who were serving in the death camps knew that they were part of a murderous machinery, and are liable for all the murders committed

[56] Steinke (n 22) 254.

[57] ibid 265.

[58] ibid 273.

[59] Cited in Steinke (n 22) 273

[60] Ronen Steinke, 'Fritz Bauer-ein deutscher Held' *Süddeutsche Zeitung* (Munich, 20 December 2013). Available at <https://www.sueddeutsche.de/politik/jahre-frankfurter-auschwitz-prozess-fritz-bauer-ein-deutscher-held-1.1848015> accessed 12 April 2020.

in the camp".[61] Following this principle, the SS corporal Oskar Gröning – who performed services at the platforms where victims were selected to be killed in the gas chambers – was found guilty in 2015 for the murder of three hundred thousand Hungarian Jews.[62] The judgments were handed down by members of the new generation. They had clearly learned the lesson.

[61] *LG München II*, Urt. v. 12.5.2011 – 1 Ks 115 Js 12496/08 – Demjanjuk.

[62] *LG Lüneburg,* 15.07.2015 – 27 Ks 9/14, 27 Ks 1191 Js 98402/13 – Gröning.

LG Lüneburg, 15.07.2015 - 27 Ks 9/14, 27 Ks 1191 Js 98402/13