

IN MEMORIAM

Hans

Cass R. Sunstein[†]

My first real glimpse into Hans Zeisel's spirit came about eleven years ago, during my initial weeks of teaching. The faculty had finished its Monday lunch at the Quadrangle Club, and it was time to go back to the law school. But a torrential rain was in progress. Hans and I—the oldest and the youngest—were the only faculty members left without cars or umbrellas. I turned to Hans and asked, "What shall we do?" Hans looked at me with a combination of bemusement, mischief, and resolve. He answered in his mild Austrian accent: "Only one thing to do. Run." I was in my twenties, Hans in his seventies, but we both ran, at an extremely rapid clip, all the way back to the law school. By the time we got there, I was winded. So far as I could tell, Hans was not. In an odd

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way, I think, the event inaugurated and even came to symbolize our friendship.

Hans was an enormously productive and influential scholar. He pioneered a still-growing field, the empirical study of law. One of his most valuable characteristics was his skepticism about the many claims and arguments ventured by lawyers and law professors. To the view that the death penalty deterred crime, he would ask, "How do you know that's true? What is the size of the effect? What is the evidence?" The same questions would be posed to those who insisted that judicial review of administrative action would improve administrative decisions, that the law of libel imposed a "chilling effect" on speech, or that strict liability increased the number of tort suits. When the economic analysis of law bothered him, it was in part because of what he saw as its crude, undefended, and inadequately human conception of value, but above all because of what Hans regarded as its decisive defect as social science: the reluctance of too many of its proponents to investigate whether their many empirical claims were really true in the world. As an academic and a thinker, Hans was a scientist, an anticonceptualist, a positivist, self-consciously following Carnap and Popper; his real concern was how claims about the effects of law could be tested and found to be correct or not. But he was anything but dispassionate. Hans' interest in finding facts was animated by a desire to understand exactly how the legal system might contribute to the relief of human suffering.

One of his favorite puzzles involved the criteria by which lawyers evaluated decisions and proclaimed them right or wrong. For decades, Hans said, he had observed his colleagues confidently pronounce on the merits of some or other judicial outcome; but usually the criteria behind the judgments were confusing and unspecified. Someone, he urged, should write on this topic, and separate the empirical, analogical, and philosophical components of legal judgment. Otherwise things would be a simple muddle; this, Hans suggested, was unacceptable.

Hans' extraordinary academic contributions, his studies of the jury and of the criminal justice system, his ingenuity with statistics—all this will receive attention in the future. What I want to emphasize here is that to a rare degree, his academic and personal lives were absolutely seamless. His academic preoccupation, evident on nearly every page of his writings, was how the law affected particular human lives, especially those of people who suffered. This gives a clue to his character as well, for Hans' greatest gift was his joy in and his capacity for human friendship, his concern

for the particular lives of those he knew and loved. I recall so many scenes and impressions from my walks with Hans, as he stopped for emphasis: his irrepressible, infectious reverence for Franklin Delano Roosevelt, who “saved the country twice”; his fierce reaction to the view that poverty and racial injustice were inevitable or a product of “human nature”; his genuine distress with my interest in a social thinker that Hans thought faddish and superficial (“I dislike that this should come between us,” said Hans gently at my office door; it never did, and a year later it was clear to me that on the merits he was right); his love for sports, especially tennis, his high hopes for my backhand, and his own agility and quickness on the court (continuing well into his eighties); his capacity for empathy, for really seeing his friends, for understanding so much after just a sentence or two; his refusal to flinch from confronting ideas or behavior that were wrong, selfish, or cruel (even—especially!—if these came from his colleagues); his unfailing curiosity about and interest in new developments and new ideas (also continuing to the end of his life). Above all, perhaps, I remember his tender concern during my wife’s difficult pregnancy, concern that was unaffected by Hans’s own health problems—and his great joy at our daughter’s birth.

Hans was completely fearless. This trait served him well, not least because to my knowledge, Hans was my only colleague who was subject to a genuine threat of criminal violence. About seven years ago two teenagers approached him and asked for money. One of them apparently had a knife. The event occurred while Hans was in the midst of writing his book on the criminal justice system; he responded with an impassioned lecture on how young his assailants were, and on what a criminal conviction could do to their lives. Both of them gave up—in part, I speculate, because of Hans’s combination of undauntedness and absolutely genuine concern about what they were doing with their lives. I remember too that when my car needed repair work, Hans insisted that we go see his friends in what must have been the most dangerous area I have ever visited, where Hans was greeted as a neighbor, and permitted to shepherd his bewildered young colleague through the repair shop. (I must add that Hans’s fearlessness extended to his somewhat irregular driving methods, and that driving with him was not entirely unlike a *Star Wars* movie. The people at the repair shop had occasion to get to know Hans very well.)

Very little really fazed Hans. The day-to-day troubles of the law professor seemed to him trivial, almost nothing at all. Hans was truly concerned, I think, about only three things: getting the

facts straight, reducing social injustice and human suffering, and improving the welfare of the people he knew and loved. In my last visit with Hans, a week before he died, he wanted to talk not about his illness or future, but about the law school he treasured, about Eastern Europe, and most of all about my daughter. Hans was a rare and great friend. He was a profound teacher. To him life was a joy and an adventure, made up of delights and challenges and surprises. His work will endure; it exerts a continuing pull on legal scholarship and the law. But Hans's friends and colleagues will remember above all his optimistic, joyous, determined, brave, and loving spirit.