The Transformation of Roman law in America during the 1930s

Tuori, Kaius

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Grandi Opere

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PREMESSA

1. In quell'affascinante luogo delle regole e degli spazi che è, *ab antiquo*, la geometria, con la nozione di segmento sono indicate parti di linee rette definite da due punti. Eppure, affermava agli inizi di III secolo a.C. il matematico alessandrino Euclide, ciascun segmento può essere prolungato indefinitamente oltre i due punti che lo definiscono.

È in questo principio di per sé evidente, noto anche come secondo postulato euclideo (ma che è sostanzialmente ammesso anche dalle geometrie non euclidee), che risiede lo spirito con cui questo libro è stato immaginato, ideato, progettato: prendere le mosse da segmenti, più o meno ampi, delle numerose linee che giacciono nel piano delle nostre scienze, isolarli e provare a prolungarli, per quanto possibile, oltre i punti che li definiscono. Scoprendo così incidenze, parallelismi, complanarità e, nondimeno, le molteplicità di piani da cui ciascuna retta, proiettata nello spazio, è attraversata.

Se vi è stato un periodo a partire dal quale la geometria delle *Altertumswissenschaften* si è svelata nella sua molteplicità di piani, è stato infatti proprio la prima metà del XX secolo, quando la raggiunta consapevolezza dello statuto epistemologico degli studi antichistici, tanto nel loro insieme quanto nella loro specificità, ha irrobustito da un lato l'identità propria delle singole discipline, dall'altro la dialettica di ciascuna di queste con un mondo agitato da profondi cambiamenti. Un'epoca non necessariamente di buon senso, nella quale studiosi perfettamente calati nelle società del proprio tempo furono sovente partecipi della vita e del dibattito politico: si pensi, a mero titolo di esempio, a figure come quelle di Vittorio Scialoja, Gaetano De Sanctis, o del fondatore dell'Istituto Italiano per la Storia Antica, Rettore della Sapienza e Ministro Guardasigilli Pietro de Francisci. Questi studiosi operarono attraverso ricerche spesso di altissimo profilo scientifico ma non necessariamente indirizzate soltanto a una ristretta cerchia di specialisti; tali lavori riuscivano infatti consonanti, e spesso armonici, con una società che era ancora in grado di intercettare il legato della cultura classica. Non era un fenomeno soltanto italiano: europeo, piuttosto, l'ultima eredità di quella *Welt von gestern* nostalgicamente tratteggiata da Stefan Zweig.

Gli anni Trenta, in particolare, ci rimandano a una dimensione in cui classicismo e modernità dialogano, si mescolano, si fanno parti coese di un insieme nuovo, in cui le radici classiche (soprattutto in Italia e in Germania) divengono

esibito fondamento del mondo che verrà. Questo dato è ben visibile in architettura: per limitarsi all'Italia (e tralasciando per esempio i progetti avveniristici di Albert Speer per la Berlino del Terzo Reich), si pensi al classicismo stentoreo del Foro Mussolini (oggi Foro Italico) di Enrico Del Debbio o, ancora, alla Minerva di Arturo Martini collocata dinanzi al razionalista Palazzo del Rettorato della città universitaria, a sua volta disegnato dall'Accademico d'Italia Marcello Piacentini.

Sempre Piacentini, che di questo linguaggio architettonico, presto denominato 'stile littorio', fu sin da subito il corifeo, sarà nel 1937 Presidente della Commissione esaminatrice del concorso per l'ideazione di un *Palazzo della Civiltà Italiana*, da collocarsi nel nascente quartiere EUR42, che avrebbe dovuto ospitare l'Esposizione Universale di Roma del 1942. Insieme con gli altri commissari, Piacentini vagliò il progetto di Giovanni Guerrini, Ernesto Lapadula e Mario Romano, noto anche come *Colosseo quadrato*. Un edificio a forma di parallelepipedo a base quadrata (originariamente dalla forma cubica) in travertino, caratterizzato da archi presenti su tutte e quattro le facciate, e che sulla testata di ciascuna di esse reca l'epigrafe, incisa in lettere capitali quadrate: «Un popolo di poeti di artisti di eroi / di santi di pensatori di scienziati / di navigatori di trasmigratori».

Si tratta, come è noto, della citazione da un discorso tenuto da Benito Mussolini il 2 ottobre 1935, in polemica con la Società delle Nazioni, per le minacciate sanzioni in conseguenza della guerra d'Etiopia.

Come ha ricordato a più riprese Emilio Gentile (per esempio nel libro *Il culto del littorio*, Roma-Bari 1998, 260), nel *Palazzo della Civiltà Italiana* «la rievocazione della grandezza del popolo italiano avrebbe conferito all'edificio un "attributo sacro"», tanto che un gruppo di architetti fascisti lo avrebbe definito «quasi tempio della Stirpe» italica.

È dunque solo in parte sorprendente la coincidenza di tempi fra la posa della prima pietra del *Colosseo quadrato* (avvenuta nel luglio del 1938) e il lugubre prologo della legislazione razziale, ossia la pubblicazione, il 14 di quello stesso mese e anno, del *Manifesto degli scienziati razzisti*. Se in un grande passato affondava le sue radici il futuro degli italiani, da questo – seguendo ormai la *rassistische Welle* tedesca – erano esclusi gli ebrei, additati adesso a nemici 'irreconciliabili' dell'Italia fascista.

La vicenda del *Colosseo quadrato* si pone insomma al crocevia del rapporto fra antichistica, classicismo e politica nell'Italia degli anni Trenta. Proprio l'iscrizione escerpita dal discorso di Mussolini dell'ottobre 1935 ci rimanda al tema dell'uso (e abuso) della storia come argomento di propaganda politica. Abusi e ricostruzioni finalistiche della memoria sono del resto strumenti retorici che storicamente sorreggono e hanno sorretto aggressioni perpetrate

ai danni di terzi, anche soggetti di pieno diritto e stati internazionalmente riconosciuti come sovrani. La retorica dell'impero di Roma raggiunse quindi la sua acme nell'Italia fascista all'indomani dell'aggressione all'Impero di Etiopia (*Mängəstä Ityop'p'ya*): la conquista di una nuova colonia e la connessa (ri) fondazione dell'Impero riaffermavano, con prepotenza, la grandezza di Roma e dei suoi 'colli fatali'. Artatamente utilizzato a fini propagandistici, il mito dell'impero intendeva tentare di legittimare una situazione palesemente illegittima sotto il profilo del diritto internazionale. Con buona pace di imperatori santi ed eroi, poeti artisti e pensatori, scienziati, navigatori e trasmigratori, esso tuttavia non impedì alla Società delle Nazioni di condannare l'Italia come Paese aggressore, irrogando pesanti sanzioni economiche, tanto che l'Italia abbandonò presto quest'organizzazione intergovernativa. L'ingloriosa fine dell'impero fascista sarebbe giunta dopo meno di un decennio, spezzando – questa volta in maniera definitiva – le pretese 'continuità di Roma' (per usare un'immagine di recente richiamata da Antonio Mantello [da ultimo in Id., *Variae*, II, Lecce 2014, 83 ss.]).

2. Il rapporto fra 'romanità' (latamente intesa) e fascismo è oggetto dell'analisi storiografica da diverso tempo, tanto che negli ultimi tre decenni si è ormai assistito a una vera e propria 'esplosione' del tema (oramai quasi predominante su altre, possibili prospettive di indagine); scopo del presente volume è, pertanto, quello di provare ad ampliare lo sguardo, abbracciando l'antichistica nelle sue diverse branche e ricomprendendo, quindi, anche ambiti come l'orientalistica, la storia delle religioni e la storia dei diritti antichi, nel tentativo di ricostruire e analizzare gli indirizzi di studio, le linee di ricerca e i frammenti di biografie intellettuali sviluppatisi nel corso degli ultimi anni Venti e, soprattutto, degli anni Trenta.

I venticinque contributi confluiti nelle pagine che seguono ambiscono, naturalmente senza pretesa di esaustività, a cogliere alcuni profili e aspetti degli studi antichistici in Italia lungo un lasso di tempo che appare, a questo riguardo, periodizzante per diverse ragioni. Innanzitutto, perché questo fu il tempo del consenso al fascismo, anche da parte del mondo universitario. Un consenso forse talvolta estorto, di certo percepito come autoevidente: basti ricordare che nel 1931, a eccezione di pochi e limitati rifiuti, la quasi totalità degli accademici italiani prestò, per le più varie ragioni, giuramento al fascismo, pur essendo buona parte di quelli avversa a esso. Fra quanti, per ragioni di necessità, avevano giurato, l'espressione del non allineamento o del dissenso, a seconda dei soggetti interessati e per quanto le singole discipline lo consentissero, si sostanziò nella ricerca di temi di studio antitetici: *in primis*, la libertà (tema caro, ad esempio, anche a Gaetano De Sanctis, che fu tra i pochissimi a non giurare); *in*

secundis, qualora i temi trattati fossero espressione di quella specifica temperie politica e culturale, questi furono comunque affrontati in modo neutro e tecnico, senza alcuna enfasi propagandistica (per non fare che un paio di esempi, si pensi alla prima edizione del *Claudio* di Arnaldo Momigliano o al contributo dello studioso torinese su *I problemi delle istituzioni militari di Augusto* edito nel volume celebrativo del bimillenario augusteo).

A scandire questa periodizzazione, poi, altri due aspetti, su cui si è prima richiamata brevemente l'attenzione: in primo luogo la retorica della (ri)fondazione dell'Impero e l'esaltazione del suo fondatore – tema che si intreccia con le celebrazioni per il bimillenario augusteo – e poi ancora, l'inizio della stagione più vergognosa, quella della promulgazione della normativa razziale, che ebbe significative ricadute anche sulla comunità accademica.

Dal settembre del 1938, nel solco di quanto già era avvenuto in Germania e avverrà poi nei Paesi via via occupati e annessi dal sistema di potere nazista, si assistette anche in Italia alla marginalizzazione di studiosi di 'razza' ebraica. Scienziati giovani e meno giovani (professori, liberi docenti, assistenti e studenti) furono obbligati nel migliore dei casi all'emigrazione, divenuta talvolta definitiva anche con la fine della guerra, oppure a vivere ai margini di quel mondo in cui spesso si erano distinti; infine costretti, con l'aggravarsi della situazione bellica, dopo la firma dell'armistizio, a nascondersi oppure a finire deportati e assassinati insieme a molte altre migliaia di ebrei italiani. Un nome su tutti, nell'antichistica italiana: quello del grecista Mario Segre (su cui si veda ora F. Melotto, *Un antichista di fronte alle leggi razziali. Mario Segre*, *1904-1944*, Roma 2022). La sua scomparsa ha lasciato nei nostri studi un vuoto incolmabile, soprattutto per le prospettive di ricerca che lo studioso torinese avrebbe potuto aprire se non fosse scomparso così tragicamente. Ma di lutti negli studi storici ve ne furono molti, su scala europea: si pensi solo alla morte di Friedrich Münzer in Germania o di March Bloch in Francia.

Prima però che ciò accadesse, pur a dispetto dell'espulsione dalle università o dell'impossibilità ad accedervi, del divieto di frequentare le biblioteche pubbliche e di firmare le proprie pubblicazioni, alcuni di questi studiosi, rimasti in Italia o emigrati altrove, cercarono di proseguire, con coraggio e determinazione, la propria attività scientifica, impegnandosi su ricerche già avviate o dedicandosi ad altre pur nelle mutate condizioni di lavoro, continuando così a contribuire al progresso del dibattito culturale. E nondimeno, non fecero mancare il loro impegno civile, anche imbracciando le armi nella lotta partigiana, come ci dimostra la vicenda, a suo modo esemplare, di Edoardo Volterra.

Nell'ambito del progetto PRIN 2017 *Studiosi italiani di fronte alle leggi razziali: storici dell'antichità e giuristi (1938-1945)*, i *segmenti* qui raccolti – frutto dello sforzo comune di autori diversi per formazione, interessi e provenienza

– mirano dunque soprattutto a presentare, attraverso frammenti più o meno ampi, le coordinate tematiche e scientifiche entro cui si mossero le discipline antichistiche e giusantichistiche negli anni Trenta, sullo sfondo di una più generale riflessione circa il rapporto fra le scienze antichistiche e gli effetti della legislazione razziale. Il focus è prevalentemente orientato sulla scena italiana, senza tuttavia rinunciare ad alcuni – ineludibili – confronti con esperienze straniere, con uno sguardo sempre attento ai processi di scambio osmotico fra dibattito scientifico e temperie politica.

3. Per ragioni espositive, i contributi sono articolati intorno a quattro aree d'interesse. La ricerca filologica e letteraria, innanzitutto. Nella parte dedicata a *Filologie e filologi* si pongono accenti sulla manualistica relativa alla letteratura latina e agli studi di letteratura greca, sulla vicenda umana e professionale di Angelo Fortunato Formiggini e su una figura complessa, a tratti tormentata, come quella di Albrecht von Blumenthal. Dalle analisi proposte emergono, in filigrana, alcune questioni cruciali per la comprensione dell'*humus* storico-culturale dell'epoca: il confronto con il mondo tedesco (condizionato dal dibattito contro il presunto ipertecnicismo d'Oltralpe e dalle polemiche intorno all'originalità o meno della letteratura latina); il legame, mai perfettamente lineare, tra saperi specialistici, insegnamento scolastico e divulgazione; l'impatto di esperienze di vita spesso molto sofferte sulla produzione scientifica.

Si tratta di temi che, non a caso, ricorrono in parte anche nella sezione dedicata alle *Storie di Greci e di Romani*. Gli studi di storia greca e romana negli anni Trenta sono stati già più volte indagati con riguardo prevalentemente alla figura di Arnaldo Momigliano; qui hanno invece per maggiore protagonista Gaetano De Sanctis e il suo dissenso manifestato nei confronti del regime fascista. Un dissenso che non soltanto porterà lo studioso romano, che nel 1931 aveva perso la cattedra, a prediligere esclusivamente gli studi sui Greci, campioni di *eleutheria*, ma anche a riconsiderare, sotto luce nuova rispetto ai suoi esordi, la figura di Pericle. Nondimeno, l'attenzione in queste pagine è rivolta anche agli interessi di alcuni suoi allievi, come Mario Attilio Levi e Piero Treves, entrambi colpiti dagli effetti delle leggi razziali, eppure il primo allineato al regime fascista, il secondo invece suo fermo oppositore. Allargando inoltre lo sguardo alla grecistica tedesca, si è cercato di esaminare il progressivo mutare della rappresentazione di Sparta e Licurgo, da Weimar sino all'apice dell'esperienza nazionalsocialista.

La parte dedicata a *Religioni, oriente, archeologia* estende l'orizzonte ad altri rami delle *Altertumswissenschaften*. Vi sono innanzitutto ritratti di storici delle religioni e quadri di sintesi sulle scienze orientalistiche, questi ultimi ricostruiti alla luce delle varie dinamiche accademiche e dei rapporti con il

regime fascista; si analizzano poi gli effetti del dibattito razziale sulla ricerca etruscologica, con attenzione rivolta soprattutto alla figura di Ranuccio Bianchi Bandinelli.

Del resto, come hanno dimostrato molti e preziosi contributi apparsi in volumi, anche molto recenti, sui rapporti fra archeologia e politica nella prima metà del XX secolo, la ricerca archeologica e storico-artistica visse – forse anche più intensamente di altre discipline antichistiche – fenomeni estremi tanto di dialettica profonda (si pensi, oltre a Bianchi Bandinelli, a studiosi come Paola Zancani Montuoro e Umberto Zanotti Bianco) come pure, talvolta, di connivenza con il regime fascista. La necessità era, palesemente, quella di costruire una retorica e una mitologia del potere, mescolando – spesso in maniera ideologica – dati archeologici, storici e giuridici. Da tempo è stata richiamata dagli studiosi l'attenzione sull''invenzione' del saluto 'romano'; in questo volume l'attenzione si concentra adesso sul fascio littorio.

Per parte sua, il tema del rapporto fra giusantichistica e potere politico eccede gli anni Trenta e diviene un *leitmotiv* della cultura italiana (non soltanto quella giuridica) fin dagli anni Dieci, quando un gruppo di romanisti, animati da fervori nazionalisti, si porrà a sostegno della linea interventista (si pensi, su tutti, a Pietro Bonfante) e poi percorrerà – anche ricorrendo a pratiche scientificamente incorrette, come fece per esempio Evaristo Carusi, su cui più che opportune furono le censure di Carlo Alfonso Nallino – le vie dell'epopea coloniale.

Questa fu una delle risposte alla perdita di centralità delle discipline romanistiche nel dibattito giuridico, nelle more di un processo avviatosi in Germania, e che portò da un lato agli eccessi della critica interpolazionistica (un metodo che influenzerà ancora gli esordi di uno studioso come Gabrio Lombardi, allievo del più spregiudicato fra gli interpolazionisti, Emilio Albertario), dall'altro (almeno in Italia) alla definizione di modelli atti a veicolare il riuso del diritto romano nei processi legislativi (su tutti il nuovo codice civile) e nella costruzione di branche specialistiche di nuova formazione, come per esempio il diritto agrario.

Il dibattito intorno al diritto agrario nel mondo antico, anche con le sue esplicazioni più tarde, fino cioè ad epoca bizantina, mostra tuttavia come *Dottrine, frontiere e maestri del diritto romano* (questo il nome della quarta parte dell'opera), superassero i confini strettamente nazionali, e come anzi proprio la romanistica italiana – al pari della tedesca – contribuisse a essere un faro in altre realtà nazionali: in Polonia, in Estonia, persino negli Stati Uniti di America (dove un ruolo essenziale fu giocato dal *Riccobono Seminar of Roman Law* di Washington DC, istituto fondato sotto gli auspici di Salvatore Riccobono). È per questa ragione che la prospettiva, in quest'ultima sezione, si fa più transna-

zionale, senza rinunciare allo spaccato di una realtà cosmopolita come Vienna, gloriosa sede di studi romanistici investita con tutta la sua forza dall'*Anschluss* del marzo 1938.

4. Per la complessità di temi, figure e linee di indirizzo che la caratterizzarono, sarebbe stata ferma intenzione di noi curatori presentare in questa raccolta (e i lettori non mancheranno forse di notarne l'assenza) anche una panoramica d'insieme sulla ricerca archeologica italiana negli anni Trenta. Di questo contributo si era fatto carico, con la passione e la dedizione che gli erano consuete, Marcello Barbanera. Uno studioso straordinario, entusiasta, strappato troppo presto alla vita, agli affetti, alla ricerca. Con la sua scomparsa, è sembrato doveroso, piuttosto che riassegnare il tema ad altri, lasciare in queste pagine una lacuna, quale segno di un vuoto profondo. E al ricordo del collega scomparso dedichiamo questo lavoro corale.

Macerata, Roma, Milano
estate 2022

P.B., A.G., L.M.

THE TRANSFORMATION OF ROMAN LAW IN AMERICA DURING THE 1930s*

Kaius Tuori

ABSTRACT: The purpose of this chapter is to examine the transformation of Roman law in American legal culture during the 1930s. Roman law had been a marginal subject in American legal education during the 19th and early 20th centuries, taught only at a range of elite schools. Although legal luminaries from C.C. Langdell to O.W. Holmes Jr. had advocated for its importance, its lack of contact with the mainstay of American law meant that Roman law was destined to remain a minor subject practiced by some professors on the side of major subjects such as property. During the 1930s, several developments from a new interest in the foundations of law to the arrival of exiled scholars from Europe changed this situation drastically. First, Roman law became one of the beneficiaries of the turn toward science that took over American law schools. In areas such as legal realism, comparative law, and natural law, Roman legal sources were utilized in unprecedented ways. Second, with the influx of refugee scholars from Germany and Italy, it meant that suddenly there were numerous specialists of Roman law within the US. While their integration was difficult, they nevertheless proved to be a lasting influence. As case studies, the chapter will examine central figures such as A. Arthur Schiller and his work at Columbia, the impact of Salvatore Riccobono and his seminar at Washington D.C. and the German refugees such as Ernst Levy.

1. *Introduction*

The impact of Roman law in countries with no Roman law tradition is a fascinating theme, not least because it allows a discussion of the value of Roman law as an independent feature. In most European countries, or in countries influenced by European legal systems, Roman law is an inherited hand-me-down, like a piece of furniture that has been part of the family for generations. It may not be really useful anymore, but it has sentimental value and nobody has the heart to throw it out. In contrast, legal systems with little or no Roman law background – such as the American or Scandinavian legal systems – no such weight of tradition, no centuries-long custom of teaching it, and no direct

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link with its institutions that would necessitate teaching Roman law to law students beyond a mere mention in the introductory law courses. This is not to say that there would not have been an influence of the Roman law tradition, but such influence came through another legal system, such as the German learned-law tradition or the British common law tradition. To begin studying Roman law was, to put it simply, a choice rather than convention.

The purpose of this chapter is to examine the transformation of Roman law in American legal culture during the 1930s and its subsequent resurgence. Roman law had been a marginal subject in American legal education during the 19th and early 20th centuries, taught only at a range of elite schools, but confined to a role of antiquarian repetition. Although legal luminaries from C.C. Langdell to O.W. Holmes Jr. had advocated for its importance, its lack of contact with the mainstay of American law meant that Roman law was destined to remain a minor subject practiced by some professors on the side of major subjects such as property. Its teaching and research were more often than not limited to secondhand compilations, which repeated old studies published for instance in Germany and Britain[1].

During the 1930s, several developments—from a new interest in the foundations of law to the arrival of exiled scholars from Europe—changed this situation drastically and resulted in a turn that still influences how Roman law is studied and taught in the US. First, Roman law became one of the beneficiaries of the turn to science that took over American law schools. In areas such as legal realism, comparative law, and natural law, Roman legal sources were utilized in unprecedented ways[2]. Second, with the influx of refugee scholars from Germany and Italy, it meant that there were suddenly numerous specialists of Roman law within the US. While their integration was difficult, they nevertheless proved to be a lasting influence[3]. As case studies, the chapter will examine central figures such as A. Arthur Schiller and his work at Columbia, the impact of Salvatore Riccobono and his seminar at Washington D.C., and the German refugees such as Ernst Levy; here, though, the attempt will be to draw more general conclusions about these examples.

Very little has been written about the teaching and scholarship of Roman law in America during the 1930s, in contrast to earlier periods[4]. There were

[1] For example, see McGinley 1927.

[2] On legal realism, see Fisher, Horwitz, Reed 1993, and for its relation to sciences, see Schlegel 1995. On the rise of empiricism and the role of realism in it, see Novick 1988.

[3] On legal refugee scholars, see Beatson, Zimmermann 2004; see also Kmak 2019; Graham 2002; Stiefel, Mecklenburg 1991; Lutter, Stiefel, Hoeflich 1993; Breunung, Walther 2012.

[4] For the uses of Roman law in the US supreme court, see Astorino 2002. More generally and mostly focusing on the periods before our timeframe, see the symposium published at *Tu-*

contemporary assessments, as for example those made by American scholars such as Radin and Sherman in 1933[5], while of the later works Hoeflich has written mainly about Roman law in the nineteenth century, but touches upon later developments as well[6]. Timothy Kearley has produced a large body of work on the translation of Roman law texts in America and the people involved, but has also delved on the position of Roman law in general[7]. Recently, Clifford Ando has written a general presentation on the role of Roman law in American law schools; but beyond that, there are just minor reminiscences[8]. A. Arthur Schiller himself mentioned it briefly, while others have touched upon the earlier history of the subject in America[9]. The Riccobono Seminar and its participants have been covered in a number of articles during the last few decades[10], while the arrival of Roman law refugees has been mentioned in studies on exiled legal scholars[11].

The aim of this small study is to explore not only the history of the people, the lawyers and historians who were the Roman law scholars of the 1930s in America, but the underlying motivations that led them to study Roman law the way that they did. Many were interested in Roman law simply because it existed, its historical role in the European legal tradition and the intellectual history of law, but others used Roman law as a way to ask questions that would otherwise be difficult to ask. For legal realists and comparative lawyers, Roman law provided an alternative way of looking at law and a toolbox for approaching different legal cultures. For others, ranging from legal theorists to philosophers and Catholic conservatives, Roman law offered a law beyond the nation state, a measure outside the national system of law, legislation, and jurisdiction.

2. *The turn to science: legal realism, formalism, and the advent of refugee scholars*

One of the major changes within both legal education and research in the US was the rise of legal realism after the turn of the century. Realism was one of the functionalist social-science movements that advocated for the incorporation of social reality—the scientifically verifiable facts—into legal argumentation. What realists wanted was not simply the joining of law with economics,

lane Law Review 66.6, 1991-1992, and the articles therein, especially Hoeflich 1991-1992.

[5] Sherman 1935; Radin 1935; Riccobono 1935; Wenger 1939. Another interesting contemporary assessment is Cassidy 1931, from the very start of our research period.

[6] Hoeflich 1984.

[7] Kearley 2016; Kearley 2018a.

[8] Ando 2018.

[9] Schiller 1978, 21-27.

[10] Randazzo 2002; Kearley 2018b.

[11] Of refugee scholars working on Roman law, see Tuori 2020; Tuori, Björklund 2019.

sociology, statistics or other fields that offered a more scientific approach, but also the deeper understanding of human behavior and thought, which prompted their interest in fields such as legal anthropology, history, and philosophy[12].

For many legal realists, Roman law was a continuing interest, but as with many of their interests in legal otherness, that interest was mainly conditioned by their main aim, the reform of American law and legal education. Thus, if we look at how Roman law was written about in the works of Holmes, Pound or Llewellyn, they are mainly seen as examples of legal otherness that could serve as correctives to the internal limitations of American legal thought. In that, it is clear that many of them were inspired by the work of Henry Sumner Maine and the early legal anthropology[13]. Oliver Wendell Holmes Jr was, among other things, interested in Roman law and wrote about it at length[14]. For instance, Karl Llewellyn (1893-1962) referred to Roman law throughout his works as an example of a legal system based on experts[15]. Roscoe Pound's famous *Readings in Roman Law* (1906) was long used as a textbook in law schools[16]. Renowned legal realist Max Radin from Berkeley would also produce a textbook as well as numerous general articles on Roman law[17]. As a Roman-law scholar, Radin was one of the few who had active connections with the European legal history circles, as is evident in his correspondence[18].

Similar to the German debates between formalism and antiformalism, even in the American discussion Roman law was utilized on both sides. While Holmes's main enemy had been Langdell's formalism, during the 1920s and '30s the restatement movement had taken up the formalistic agenda. Driven by the new American Law Institute, the most radical proponents of the restatement movement saw codification as the ultimate aim of American legal development, while the production of restatements became one of the most lasting result. The producers of the restatements used Roman law as a model

[12] Schlegel 1989; Schlegel 1995. The iconic disputes about realism and its future were mostly between Llewellyn and Pound, see Pound 1930-1931; Hull 1997. However, see Kantorowicz 1934 on the limitations of realism in comparison to European movements.

[13] Much of the early legal anthropology was influenced by Roman law, see Maine 1986; Morgan 1964 [1877]; Tuori 2015.

[14] Holmes had been taught by legal historian James Bradley Thayer (1831-1902) at Harvard. On Holmes's idea of history, see Parker 2003. On Holmes's Roman law expertise, see now Hoeflich, Davies 2021. It's editors are adamant that Holmes's skills as a Roman law scholar have been gravely underestimated.

[15] Llewellyn, Hoebel 1941, 312-313; Conley, O'Barr 2004.

[16] Pound 1906.

[17] Radin 1927; Radin 1931.

[18] See Radin 2001.

for legal development, referring to the primary role of legal science in striving for the advancement of law[19].

In contrast, for legal historians Roman law represented a legal culture in its own right, but one that was interesting because of its formative impact in the development of Western law. During the 1920s, there were signs of a new kind of legal history being prepared, but for the history of Roman law, the field was very narrow, basically made up of only A. Arthur Schiller at Columbia. Others who showed interest in Roman law were Hessel E. Yntema[20], also of Columbia, Charles P. Sherman (1874-1962) of Yale and a number of other places[21], James Brown Scott (1866-1943) at Georgetown and James Bradley Thayer (1899-1976), who taught Roman law at Harvard[22]. Others were Charles Sumner Lobingier (1866-1956), a civil, Roman and comparative law scholar at National University in Washington D.C., Brendan Francis Brown, a natural law scholar at Catholic University, Francesco Lardone (1887-1980), Catholic priest, papal nuntius, Professor at the CUA, Cold Warrior and a Roman law scholar with several books, Frederick de Sloovere (1886-1945), a legal historian from New York University School of Law, Franklin F. Russel, Professor of Roman Law at the Brooklyn Law School, among others[23]. From the people outside legal academia one should mention classicist Clyde Pharr (1883-1972), who produced many translations of Roman legal texts, or Justice Fred Blume (1875-1971), who translated the Codex of Justinian[24]. Many of them had studied in Germany, were of German origins such as Blume, or who were otherwise intimately familiar with continental law and legal scholarship.

Should we say that prior to the 1930s there were no proper Romanists, Roman-law scholars, in the US? In 1931, Roman law as a subject was taught in twenty major law schools in the US[25]. There were many wide-ranging and highly learned legal scholars, who had read Roman law and understood its

[19] On Roman law and restatements, see Kearley 2016, 66-68; Herget, Wallace 1987; Horwitz 1992.

[20] Yntema was also a leading legal realist, see Yntema 1931. On his Roman-law works, see Yntema 1949.

[21] Hoeflich 1984, 731-733; Kearley 2018a, 43-45, 93-107. Sherman published an autobiography: Sherman 1944.

[22] Not to be confused with the aforementioned James Bradley Thayer at Harvard. Finding the younger Thayer's works is difficult. He has a number of purely Roman law publications, for example Thayer 1944-1945.

[23] On Lobingier and several others, see Kearley 2018a, 81-93. This list is incomplete and biased towards the persons who attended the Riccobono seminar during the 1930s. See Randazzo 2002, 134-136.

[24] On Pharr and Blume, see now Kearley 2018a, Kearley 2016; Hall 2012; Kearley 2007.

[25] Cassidy 1931, 302-305.

principles, but their main interests were elsewhere, mainly in American law and jurisprudence. In the Ivy League law schools, Roman law was taught mainly as part of a formal introduction to law, in ways that were pioneered by C.C. Langdell's law school education model. In addition to law schools, practical lawyers and judges such as Blume had an interest in Roman law as classics, as ways to link the study of classics and the ancient world with the legal world. This deeply classical world of generalists should not be underestimated. There were numerous learned and influential authors, such as legal historian Charles McIlwain, whose *Constitutionalism Ancient and Modern* shaped a whole generation[26]. However, this is not to say that there would not have been Roman law, as law journals, especially the *Tulane Law Review*, published articles on Roman law regularly, by both American and foreign authors[27].

The battles over the direction of legal education in American law schools paled in comparison to those in Germany. The Nazi takeover of power in January 1933 resulted in a mass exodus of scientists from Germany, fleeing from anti-Semitic attacks and the systematic firing of Jewish professors. In total, a third of university professors in Germany left their positions, being replaced by young Nazi scholars intent on a reform of German law according to Nazi principles[28]. Exiles or refugee scholars begin arriving in the US, some directly, others by way of France or Britain. Among them were famous Roman law professors and researchers, such as Fritz Schulz (1879-1957)[29] or Ernst Levy (1881-1968)[30]. The arrival of refugees posed enormous problems for American universities, but their reception varied greatly, based on the fields where they worked and the needs of universities. Thus in many surprising fields such as art history there was a great demand for German talent, while in others there was next to none. Roman law was one of the latter[31].

Making a definite list of Roman law refugee scholars in the US involves a definitional task, deciding who should be counted as a Romanist, as opposed to a comparativist or simply a legal historian. This is complicated also by the fact that many changed their lines of inquiry in the US to suit the needs of American law schools and universities. However, a rudimentary list should in-

[26] McIlwain 1940.

[27] The volume remained fairly small, even in the *Tulane Law Review* during the 1930s and '40s there appeared perhaps one article in every other volume.

[28] See von Lösch 1999 on the development of legal academia. Breunung, Walther 2012, 6-7; Zimmermann 2004, 45-54.

[29] On Schulz's exile, which ended with him settling in Oxford, see Ernst 2004; Giltaij 2019; Giltaij 2016. I have written on Schulz earlier, in Tuori 2020.

[30] Kunkel 1969; Simon 1985; Simon 1989; Stiefel, Mecklenburg 1991, 51-52; Epstein 1993, 190-195.

[31] Panofsky 1954.

clude the names of Ernst Levy, Adolf Berger (1882-1962), Ernst Rabel (1874-1955)[32], Hans Julius Wolff, (1902-1983), Eberhard Bruck (1877-1960)[33], Stephan Kuttner (1907-1996)[34] and Gerhart Husserl (1893-1973)[35].

Roman lawyers who arrived in the US came searching for jobs in law schools which had little or no Roman law, but even more significantly had no need for the kind of conceptually oriented and formalistic legal skills that the refugees had. American law schools at the time focused on practice, the knowledge of common law and its evolution in the courts[36]. The practical links with Roman law came either from the connection with the Roman law tradition in Louisiana, the need to understand the practice of, say, the British Admiralty courts, or the nascent comparative law field.

The incorporation and employment of German and other refugees was comparably easier when the arrivals were young and could be retrained successfully. Even in other fields of law, people of superstar status such as Hans Kelsen were unable to secure employment in law schools, finding refuge in political science instead[37].

In the archives of A. Arthur Schiller, there are innumerable letters that were sent by his European colleagues, seeking employment either for their promising students or for themselves. The letters, especially those of Jewish scholars, were full of desperation as opportunities were limited due to anti-Semitic statutes in place and a premonition of worse things to come[38]. Ernst Levy first sent his daughter Brigitte and son-in-law Edgar Bodenheimer, who enrolled at Columbia law school and prepared for a new beginning[39]. Hans Julius Wolff was sent to American Panama by a German NGO specializing in helping exiled scholars and became Professor of Roman and Civil Law at the University of Panama[40]. In all of their cases, such measures were desperate and disruptive of their work. Not a single one could be said to have enjoyed the same kind of treatment that was accorded to scientific superstars such as

[32] On Rabel's influence, see Clark 1993 and Kegel 1993.

[33] Bruck, the forcibly retired former professor and dean of Frankfurt law school was hired as lecturer of Roman law in Harvard in 1939. Epstein 1993, 40.

[34] Nörr 1993.

[35] Noted legal historian and son of philosopher Edmund Husserl.

[36] Schiller 1978, 25, expanding on this peculiarity of the American law-school education. Hoeflich 1984, 721, on its marginal status.

[37] Telman 2016.

[38] Rare Book and Manuscript Archive, Columbia University, New York, Arthur Schiller Papers, Boxes 1-6, MS#1125. There were letters from Adolf Berger, Edoardo Volterra, Egon Weiss and Walter Ullman. See also Hoeflich 1993.

[39] Bodenheimer 2016.

[40] This was the *Notgemeinschaft deutscher Wissenschaftler im Ausland*.

Albert Einstein, which meant that their influence was slow to come through in the American legal discourse.

A case in point is the fate of Fritz Schulz, who came to America in 1936, giving a lecture tour ranging from Louisiana, Washington D.C., to Harvard. The aim of the tour was to find a new position for Schulz, who at this point had been forcibly retired from his professorship in Berlin. Unfortunately, despite the best efforts of Pound, no satisfactory offer emerged and Schulz continued searching for a way out in the Netherlands and finally in Britain[41]. What this disappointing outcome illustrated was that the need for expertise in Roman law was seriously lacking and those who came ended up disappointed. In addition to Ernst, another more successful incoming refugee scholar was Kuttner, a Roman and Canon law scholar, whose expertise in history allowed for easier inclusion into American academia, first at the Catholic University in Washington D.C., then Yale and finally at Berkeley.

In the works of refugees there appears a similar kind of generalizing tendency as is noticeable in the publications of American authors on Roman law, namely that of introducing matters for the first time. This meant that published scholarship was not cumulative in the same sense that in the continental publications, but on the other hand authors could take up topics without the weight of tradition steering them in a certain direction. However, some certainly felt that they were explaining the basics, for instance Levy wrote in his collected works that «the texts and lectures meant for the American readers have somewhat more elementary content than the rest»[42].

What was then the impact of refugee scholars in the US? On the face of it, the estimate may be harsh: they had difficulties in getting hired, they had no students to speak of and no continuity. However, at the same time they were neither isolated from each other nor from the American scholarly community. They produced new works and contributed to discussions, by their very presence signaling the existence of a wider world of Roman law scholarship. This is clearly evident in the lists of speakers and participants at the Riccobono Seminar in Washington D.C., where exiles such as Ernst Levy or Hans Julius Wolff were present. In this sense, the impact on Roman law was somewhat similar to that on comparative law, often involving the same persons. Thus immigrants such as Max Rheinstein had a long and successful career in American legal ac-

[41] The story of the tour in America has been told most recently by Giltaij 2019. During the same year, Hans Kelsen was also embarking on a similar tour of job searching. Not all such tours were linked with job searches, Leopold Wenger was also on a tour in 1936, giving lectures at Harvard, Yale, and Columbia. Randazzo 2002, 124.

[42] Levy 1963, viii: «Die für amerikanishe Leser bestimmt gewesenen Aufsätze (oder Vorträge) sind bisweilen etwas elementarer gehalten als die übrigen.».

ademia, but the arrival of famous scholars in America such as Rabel promoted the new field considerably.

The transformation brought about in the 1930s revolved around two main changes: the adoption of a different, more inclusive concept of law, and the arrival of refugee scholars from Germany. However, neither of these were easy nor readily accepted intrusions. Legal realism remained throughout its span a marginal pursuit, its impact limited to elite institutions because it was not as relevant for black letter lawyers as it was for scholars. In a similar way, the arrival of exiled scholars was a troublesome event because they did not serve a need in a similar way as other refugees did, existing more as needy and desperate individuals in search of a life. Nevertheless, both had a crucial impact on Roman law in America.

3. *Roman law and comparative law: A. Arthur Schiller*

The emergence of a new kind of Roman law in America cannot be discussed without exploring the impact of A. Arthur Schiller (1902-1977). Schiller was an original, a scholar of Roman law, military law, African and Indonesian law, but known mostly as a legal papyrologist. He studied humanities and law at UC Berkeley, but he is rarely if ever talked about as a student of someone. Rather, he studied independently at Berkeley, Columbia, and Munich, becoming first and foremost a legal scholar with an unprecedented familiarity with ancient sources. His thesis (1932) was on Coptic legal texts and he continued working with papyrological material his entire life[43].

His interest in legal papyrology was perhaps not as surprising as it might seem, because the field since Heinrich Mitteis had seen exponential growth. The exact content of Schiller's studies in Munich are sadly beyond our reach as archival visits are impossible, but the influence of the dynamic field, dominated by the institute run by Leopold Wenger is perhaps one of the reasons why he continued to work in this particular area[44]. Schiller's own studies in legal papyrology were focused on the legal analysis of documents and the influence of Roman law and local law.

[43] Stein 1986; Hellawell, Seidman, Salacuse 1977. The thesis was Schiller 1932.

[44] Stein 1986, xv, notes that he studied Roman law and Egyptology in Berlin and Munich, where he was together with Erwin Seidl a student of Egyptologist Wilhelm Spiegelberg. As many professors, who stayed in the same institutions for their whole lives, Schiller's career is easy to track. A. Arthur Schiller folder, Historical Biographical Files Collection, Box 282, Folder 3, University Archives, Rare Book & Manuscript Library, Columbia University in New York City; NY Times obituaries, July 12, 1977.

The work on the Egyptian material and the pluralistic legal system which incorporated Roman law and local law (or Mitteis's *Reichsrecht and Volksrecht*[45]), led to another enduring interest, that of legal pluralism and comparative law. Schiller's work on Roman sources led to an interest on their reception in Ethiopia, which soon involved even the study of traditional legal systems there. The connection with Ethiopian law led to a larger involvement in African law in general, resulting in the founding of the African Law Center and a journal to accompany it. This was not the first such spin-off to get a life of its own, Schiller's earlier interest in Indonesia, another Roman law recipient with a strong indigenous law tradition, prompted a book on Indonesian law[46]. While these jumps from Ethiopia to Indonesia may appear strange, there are two major components in all of them, first the coexistence of customary law and written law and, second, the presence of a Roman law component in Ethiopia through the ancient Ethiopian compilations, and in Indonesia through the Dutch influence.

With regards to customary law and tradition, this was a theme that Schiller explored in Roman law in several articles, but at the same time he collaborated with legal anthropologists and comparative lawyers in exploring customary law in contemporary and historical legal cultures[47]. At Columbia, Schiller was also a colleague of Karl Llewellyn, with whom he shared a deep knowledge of German legal culture and academic life. They participated in the same seminars, but it appears that their relationship was mostly collegial. In 1932, when Schiller had just joined the Columbia faculty, he received a postcard from Llewellyn who was in Germany at the time, reading «Dear Art, greetings from Koschaker + me, the former of whom has been plaguing the latter with a [undecipherable scribbles] How goes? Karl». The person Llewellyn referred to was Paul Koschaker, a leading German Roman-law scholar[48].

Based on his correspondence, it appears that in addition to local papyrologists and legal scholars, Schiller's frequent discussion partner in Roman law was Hans Julius Wolff, the legal papyrologist who emigrated first to Panama and then to the US (not to be confused with the administrative lawyer with the same name). Wolff was initially appointed Professor of Roman and Civil Law at

[45] Mitteis 1891.

[46] Schiller 1936, 261-263; Schiller 1942, 31; Hoebel, Schiller 1948; Schiller 1955.

[47] Schiller 1937-1938. On these, I have written earlier in Tuori 2015, 161-162 and Tuori 2017.

[48] A. Arthur Schiller Papers 1897-1977, MS#1125 Rare Book & Manuscript Library, Columbia University in the City of New York, box 4, Llewellyn, Karl, postcard from Leipzig, August 16, 1932. On seminars, see Schiller papers, box 31, African Law, file Lips, Seminar in Primitive law.

the University of Panama, but moved to the US in 1939, when he first appears at the Riccobono seminar. He first signed up to do a MA at Vanderbilt University with Pharr, but then entered law school to improve his job prospects, graduating from Michigan. From there, he led an itinerant life in search of a more permanent position, working in different midwestern universities, ending up in 1952 as a law librarian at the University of Oklahoma. He returned to Germany in 1955 to a professorship. His years in the US produced a number of scholarly works, but also a well-used textbook on Roman law[49]. Wolff and Schiller were born in the same year and it is possible that they would have met already in Germany, but their correspondence became more intensive during Wolff's years in America.

While earlier Roman law scholars in the US had been American lawyers with a classical background and an interest in both the early history of law and Rome, Schiller was from the start an international scholar with wide networks and excellent language skills. Schiller participated in conferences and traveled widely, connecting with the global Roman law community in ways that nobody before him had done. In the US, he participated in the work of the Riccobono seminar at Washington D.C. and directed it during the academic year 1937-8.

Although Schiller was a scholar of exceptional range, in many ways he was also a scholar between two worlds, as is visible in his writings about the Roman law tradition. On one hand, he worked in the cutting-edge world of papyrology, work which involves close textual analysis of primary materials and even today remains somewhat aloof from the rest of the Roman law community. On the other, his depiction of the importance of Roman law and its significance in the American tradition were quite traditional, resorting to calls about civilization and ancient roots. This may have been necessary due to the precarious position of Roman law in American law schools, where it continued to exist in the margins of larger disciplines. Thus appeals to elements such as culture and tradition would have been necessary to prop up the dignity of the field where practical significance may have been lacking. In his obituary, Peter Stein wrote that while Schiller had hoped to dispel the image of America as a wasteland with regards to Roman law, that was something of an exaggeration: «But in truth Schiller was the only native American lawyer of his generation to make a serious contribution to Roman law scholarship»[50].

This may be true, should one focus exclusively on the word «lawyer» in that statement. However, if one takes into account the scientific ecosystem in which he worked, the result is markedly different. Schiller collaborated with

[49] Wolff 1939; Wolff 1951; Hall 2012, 11-12.
[50] Stein 1986, xviii.

numerous people within the tri-state area, from papyrologists such as Columbia's William Linn Westermann with whom he published the *Apokrimata,* to students of Roman history, and was in contact with ancient historians such as Napthali Lewis or Moses I. Finley, to whom Schiller continued to refer as Finkelstein even after his emigration to Britain. Finley had also studied law and both he and Lewis had been students at Columbia at the same time as Schiller[51]. In New York, there was also the noted expert of legal papyrology Adolf Berger, an Austrian exile who taught at the University in Exile during the war and stayed in New York. His collaboration with Schiller extended not only to Schiller arranging for him to use Columbia's excellent Roman law library, but even lending him his personal office[52].

Schiller's approach to legal cultures through the lens of comparison and transmission was shared by other scholars of ancient law in America. Roscoe Pound, possibly the most famous of them, spent his entire career as a comparativist. However, his attention moved from Roman law towards Chinese law already in the 1940s, when he was commissioned by the Chinese Nationalist government to prepare work for an upcoming codification. However, Pound's work in Chinese law was colored by his knowledge of Roman law, making him one of the first to make that presently quite fashionable combination[53].

The combination of Roman law and comparative law has emerged as one of the more typical ways in which Roman law scholars have made themselves relevant for the American law school curriculum. Thus, for instance scholars such as Kuttner or Alan Watson were active in fostering the connection and many other Romanistically trained people have since continued that tradition. That connection between Roman law and comparative law is noticeable for instance in the *Tulane Law Review* number (1944-5) dedicated to Ernst Rabel, which brought together both fields. This new comparative law approach should nevertheless be separated from the nineteenth century universalistic writings of earlier scholars such as Charles Sherman, who made sweeping generalizations with Victorian confidence[54].

4. *Natural law and legal method: Ernst Levy and Salvatore Riccobono*

If scholars such as A. Arthur Schiller or Hans Julius Wolff advanced a research agenda that sought to uncover the historical reality of the ancient Roman world and its plural legal cultures, others sought to use Roman law as

[51] Lewis would continue writing about legal papyrological texts throughout his career.
[52] Fryde 1962, 12.
[53] Kroncke 2016.
[54] Hoeflich 1984, 732.

a corrective to modern law. These aims may be described as twofold, either to use ancient law as a repository of sorts to provide innovative solutions to pressing issues of contemporary law, or as a kind of natural law, to illustrate the boundaries of the acceptable for judges and legislators.

I will take two examples to exemplify these uses; for the first, Salvatore Riccobono, an esteemed Italian professor of Roman law and, for the second, Ernst Levy, a German refugee scholar and a former professor of law at Heidelberg.

Salvatore Riccobono (1864-1958) was an unusual figure in an era of unusual scholarly characters: a Sicilian Catholic conservative who jumped on the fascist bandwagon but still gained a considerable following in both Britain and the US. Riccobono had trained in Germany with Windscheid and kept a fairly conservative profile throughout his career. Like many of his generation, Riccobono's involvement in fascism was mainly opportunistic and conditional to the advancement of a conservative Catholic agenda[55]. He had published in English-language journals, but his main impact followed from his coming to teach in America at the Catholic University in Washington D.C. for the semester 1928-9. This prompted a long-standing connection between him and the university and the creation of a dedicated Roman law seminar that continued until 1956, under the title *The Riccobono Seminar*. Riccobono, whose own position was at the University of Rome, continued publishing a summary of the activities of the seminar in his journal, the *Bullettino dell'Istituto di diritto romano*, every year[56].

Most of Riccobono's publications in American or British journals were not scientifically very novel or interesting, but that was beside the point. It is quite clear that they were meant mainly as advertisement about the value of Roman law, both in modern society and for the contemporary legal system[57]. It may be said that this agenda was in line with the future direction of Catholic conservatives with regards to law, namely of the idea of the existence of law beyond the nation state. It took the form of promoting various forms of natural law theories, from Christian legal theories to Roman law and, in the post-war era, taking up the cause of human rights[58].

One of the main reasons behind this tendency was naturally the resistance to modernism and those other -isms that came with it, from socialism to liberalism, as opposed to the traditional way of life. Roman law as unchanging and,

[55] On Riccobono, see Sanfilippo 1958; Orestano 1978; Marrone 1997; Mantello 2002; Ortu 2004; Bartocci 2012; Varvaro 2013.

[56] For Riccobono's influence in America, see Randazzo 2002; Kearley 2018b. For the aims of the seminar, see *Constitution of the Riccobono Seminar of Roman Law in America* 1935, 325.

[57] See for example Riccobono 1925, 1.

[58] Duranti 2017.

thus, inherently conservative was an integral part of this agenda. However, whether this was a matter that someone like Riccobono would have consciously deliberated is unclear and perhaps unlikely. The most probable explanation was that he sought to promote Roman law as a value in itself, insofar as it was compatible with his general agenda. For Riccobono and others, Roman law served a function that was similar to that of natural law, a toolbox for new solutions and a guideline for law that was not bound to the caprice or the legislator. This was naturally a way that Roman law had been used for centuries, since late antiquity to be exact. It provided both concepts and method, a way to structure and formulate legal problems and even presented solutions to the problems thus identified and put into words. Of course, this reliance on tradition had a side effect, one that was perhaps unintended but certainly not unwelcome, which was to move law outside the realm of politics. The most famous and influential formulations of this movement of law towards tradition was the work of Paul Koschaker, which ostensibly presented a solution to the so-called crisis of Roman law, but equally outlined a European legal tradition that would be suitable to protect law against the influence of both totalitarian movements such as Nazism or Communism, as well as the modernizing tendencies of legislators[59].

Riccobono's involvement in the teaching of Roman law in America was apparently prompted by interest in the American side and there the interests of the Catholic University, and Francesco Lardone, as well as Charles Sherman, then appointed at the National University at Washington D.C., were probably decisive. One should remember that Riccobono himself was not a young man at the time; he was 65 and at the height of his career when he came to America. The motivations regarding his invitation were not obvious, but such eminent scholars were regularly invited as guest lecturers and other eminent Romanists such as Leopold Wenger were invited as well. Within the European debates, mainly that of the great interpolationist debate, Riccobono's position was one of conservatism and he argued consistently against the possible influence of Greek or Byzantine interpolations in the sources of Roman law[60]. In the US, Riccobono was invited to give talks and seminars on two major topics that were consistent with the Catholic University's interests, first on the historical

[59] Koschaker 1966 [1947]; Koschaker 1938. Koschaker's book was dedicated to Riccobono. See also Riccobono 1954.

[60] On the workings of the Riccobono seminar and the visit of Wenger, see Randazzo 2002; Kearley 2018a, 72-77. The interpolationist debate was not without racial bias, where the discussions on possible "Eastern" or "Semitic" influences were from the nineteenth century onwards also codewords for anti-Semitic insinuations. Avenarius, Baldus, Lamberti, Varvaro 2018. On the anti-Semitic tropes in Roman law scholarship, see Gamauf 1995.

evolution of Roman law and second on the impact of Christianity on the development of Roman law[61].

The Riccobono seminar was a powerful promotor of the study of Roman law, but whether one may say that it advocated a certain style or approach towards the study of Roman law is not as straightforward. There was a wide-ranging effort to get presenters and discussants to participate and while there were discussions about the kind of papers that should be included, one does not really see that certain people were excluded. For example, during the semester 1937-8, under the direction of Schiller, the program included visiting American professors such as Schiller and James Bradley Thayer, as well as Francis de Zulueta, the Oxford professor of Roman law known for his strict adherence to Catholic conservatism, Ernst Levy from among the refugees, judge Fred Blume among the translators and Lobingier from the locals, as well as a few others. From the correspondence, it appears that Riccobono's main concern was that the seminar would continue to be active, not necessarily that it should follow a programmatic line. The seminar was also the main impetus for the journal *Seminar*, which appeared as an annual supplement to the journal *The Jurist* 1943-55[62].

In addition to his fame and impeccable pedigree as a student of many of the founding fathers of modern Roman-law studies, Riccobono's career contained another element that may have attracted the attention of his hosts. During the late 19th and early 20th centuries, there had been a veritable avalanche of new discoveries illuminating and transforming the history of Roman law. Instead of simply the compilation of Justinian, legal scholars now had the immense range of inscriptions (now easily available both with Mommsen's *CIL*-series, the *Corpus inscriptionum Latinarum*, and Dessau's *ILS*, the *Inscriptiones Latinae Selectae*), huge discoveries of legal papyri and so forth. In order to make this mass available and to curate the new sources that would be centered in the «law in action instead of law in books» style of research on Roman law and its impact in the Roman world, Riccobono and his colleagues had edited the series *Fontes Iuris Romani Antejustiniani* (*FIRA*)[63], which contained sources of classical Roman law, both texts of laws and other official material but also contracts and other applications of the law in practice. This helped to revitalize

[61] See Kearley 2018b, 3, for links to archival sources.

[62] Randazzo 2002, 138, 141; Kearley 2018a, 71-77 about the impact of the seminar. It appears that even Edgar Bodenheimer was recruited as the director of the Riccobono seminar. Kearley 2018b, 5-8 notes how Pound was repeatedly invited, being nominally a member but never actually presenting anything.

[63] On this topic see now Buongiorno 2020.

the field and made it more appealing for scholars interested in the impact of the law in daily life.

A crucial element of the fight to keep Roman law alive and make it relevant had been precisely this accessibility. *FIRA* was published in Latin, containing also Latin translations of Greek texts, but its main virtue was to make rare sources easily available to student and researchers. In the US, one of the big challenges was the declining interest in classical languages and the resulting situation where one needed to teach Roman law to students who did not know Latin. This challenge prompted a series of sizable translation efforts, from compilations such as the Theodosian Code by Clyde Pharr to other legal sources[64]. The biggest and most comprehensive of these efforts was Samuel Parsons Scott's (1846-1929) massive *The Civil Law,* the work of a wealthy banker in Hillsboro, Ohio, published posthumously in 1932[65]. It contained not only the complete Justinianic compilation, but also the earlier texts of the Twelve Tables and the Institutes of Gaius. Many of these projects were begun during the 1930s, but they only bore fruit sometime much later, such as Blume's translation of the Codex of Justinian, which was the starting point of the recent publication by a team led by Bruce Frier recently[66]. While many of these projects were of excellent quality, some had issues. For example, Scott's translation of Justinian's Digest was based not on the standard Mommsen-Krueger edition but on an older Kriegel edition of the text, while the text of the XII Tables was based on an eighteenth-century paraphrase of the text. Because it has since been made available online, Scott's work or rather its modern use continues to pose problems for research[67].

When the Nazis came to power, Ernst Levy was a professor of Roman law in Heidelberg, one of the top jobs for a German Romanist. Due to his Jewish heritage, he was forced out of the position by 1935 and emigrated to America early the following year. His daughter Brigitte and his son in law Edgar Bodenheimer had already earlier enrolled to study law at Columbia university. There, they encountered Karl Llewellyn, one of the best-known legal scholars of the time and one of the leaders of the legal realist movement. Llewellyn had a soft spot for Germany, having studied there as a teenager and even enrolled, in a fairly bizarre episode, to fight in the Imperial German Army during

[64] On the long and contentious history of the translation project of the Theodosian Code led by Pharr, see Hall 2012.

[65] Scott 1973 [1932]; Kearley 2014. The issues regarding the translation stemmed from the fact that Scott remained outside scholarly circles and did not know Roman law enough to translate it properly.

[66] Frier 2016.

[67] A review of Scott's translation, Buckland 1932-1933.

WWI in order to impress a German girl. This and other connections meant that Llewellyn was in a unique position to understand the level of talent that was available and helped Levy in his job search. His primary focus had been on the Bodenheimers, who were his students. Edgar Bodenheimer had detested New York and Llewellyn had suggested that they should try out Seattle, which had also a thriving German community and a good law school, leading them to move there and enroll to University of Washington School of Law in Seattle[68].

Again, the lack of interest in Roman law meant that, even for a Heidelberg professor, the position that could be secured was one at University of Washington, far from the Ivy League schools, but the place where his daughter was. Levy's position was a peculiar one, Professor of European History and Roman Law, a further testament to the limited use that Roman law in itself was. However, Levy's position was relatively good, as he had received a Guggenheim fellowship for 1937-8 and would continue to teach and do research without interruption, earning more research grants from the American Philosophical Association[69].

Levy continued to publish widely in America, maintaining his connections to Germany[70]. However, as is obvious from his collected works, there is a sizable hole in his list of publications from the mid-1930s when his last works in Germany were published and the appearance of his first works in America. Levy's main interest had been in the late antique and early medieval vulgar law, namely the use and reception of Roman law after the collapse of the Roman empire in the West, but he had published extensively on many aspects of Roman law, from criminal law to process and law of obligations. On vulgar law, he published his main work in the US, the *West Roman Vulgar Law* (1951)[71]. However, it is noticeable that on the side of his more technical works, there is a strand of publication that connects Roman law with natural law, but in this case making explicit references to the need to limit state power and especially sovereign, or even tyrannical power. In such instances, state law was of no con-

[68] For Levy's emigration, see Bodenheimer 2016, 68-71, 75-79 and the impressions in his correspondence with his student Wolfgang Kunkel (Mussgnug 2005). On Llewellyn's life, manifold interests and works, see Hoebel 1963-1964; Twining 1973; Whitman 1987; Ansaldi 1992-1993; Hull 1997; Dinunzio, Kim, Whitman 2007.

[69] Bodenheimer 2016, 75-79.

[70] His correspondence with Kunkel offers a rare glimpse of this development and Levy's struggles to adapt to the American system of teaching and research, for example letters from May 23, 1936 and February 22, 1937 (Mussgnug 2005, 77-80).

[71] Levy's first publication in the US was published already in 1938: Levy 1938. It was followed by a number of articles in both American journals such as the *Seminar* and international publications. However, only a few were included in his collected works: Levy 1942; Levy 1945; Levy 1944.

sequence because it could easily be changed by state power. For example, in a text on natural law, published after the war, he begins to discuss that in Rome, even Caligula, Nero, Domitian, and Commodus would not have imagined mass extermination, deportation, or expropriation of citizens. He goes on to refer to «some country in particular» where a cataclysm threatens to destroy fundamental liberties and how court procedures and law in general are futile, except for natural law[72].

Despite his stature in Europe, Levy did not begin a school or have academically successful students while in Seattle. He continued to be one of the leading scholars of Roman law, but it did not translate into a following at a local level. He was, of course, close to sixty when he began to teach at University of Washington, but the main reason for this was the lack of interest in Roman law itself. The law school and the university were, at the time, not of the same stature as they are now and, correspondingly, had little academically interested students.

In both cases, that of Riccobono and that of Levy, the main contribution of Roman law was its independence and advanced character. It was a legal system that went beyond the nation state, at the same time useful for the advancement of legal science but also illustrating the boundaries of the powers of the nation state if it wished to maintain the rule of law. Roman law existed on a continuum of the two thousand years of unbroken tradition and gained its legitimacy from that tradition.

The work of raising awareness of a tradition and giving it legitimacy for reasons that had to do with culture, religion, and a number of other features, was not in any way rare in American law at the time. Professor of international law and Roman law James Brown Scott would with similar intentions produced a veritable stream of translations of the classic texts of international law under the aegis and funding of the Carnegie Endowment for International Peace. Most of those texts, such as the works of Scott's hero Vitoria, were written in Latin and getting them translated was a crucial task should one wish to argue for a tradition to exist[73]. One should also recall that publishing translations was an expensive enterprise as they were not really expected to turn a profit. Thus the translators recruited by James Brown Scott were much like Samuel Parsons Scott, professional men with a classical background. Translations they produced were then bankrolled by wealthy institutions such as the Carnegie Endowment or, in the case of S.P. Scott, his sizable estate.

[72] Levy 1949, 19, now in Levy 1963. Already in Levy 1938, he discusses the issue of rights.
[73] Amorosa 2019, 127-85.

This theme of the value of Roman law and the exalted tradition that it represented is of course something that carries over from the nineteenth century and even earlier discussions about the classical past and its value.

5. *Conclusions*

The nature and position of Roman law underwent a thoroughgoing transformation as a result of the changes that took place during the 1930s. However, while there were novel developments such as the beginning of a new kind of research in the legal life of the Roman world, many of the fundamental traits continued and were even strengthened.

While the famous crisis of Roman law that encompassed the European Roman-law scholarship at the same time involved mainly the perceived reduction of the hours devoted to Roman law in the law curriculum, the American situation was markedly different. In the European legal education, there was a noticeable fall in the status of Roman law with the rise of codifications and legal modernization, but this took place from a position of strength. Roman law remained an essential part of the law school curriculum. In contrast, in American law schools Roman law was a marginal subject taught only at major law schools. The reason for this was that the American legal system was not based on Roman law in the same way as even British law was, let alone law in continental Europe. This meant that it was a luxury, not a necessity.

For the new methodological innovations coming to Roman law, there were both homegrown elements as well as imports from Europe. A. Arthur Schiller was an example of the new kind of research that looked at law as part of society and which focused on primary sources to ask new questions. Many of the exiles who came to America, such as Hans Julius Wolff, were trained in similar ways to the analysis of new sources that exciting new finds in the deserts of Egypt were constantly revealing. This novel line of research was a part of a wider international trend and intimately connected to it. Considering the current research taking place in America on Roman law, it was also the beginnings of the current main approach towards ancient law, that of law as part of ancient society and culture.

At the same time, the traditional line of thought regarding the time-honored role of Roman law as the origin of the Western legal tradition continued unabated. Articles and books discussing this position of Roman law with regard to modern law were published and they still formed the backbone of the teaching of Roman law at American universities. The history and institutions of Roman law were discussed and elaborated as methodological and theoretical developments, but behind this was also an ideological tendency to use Roman law in the same way as natural law, a law beyond the state.

This notion of Roman law and European tradition as having normative value was especially marked in Catholic universities and schools, where it was put on a similar footing as for instance Canon law. However, all of these ideological agendas were mainly unstated and hypothetical, confirmed mostly by the very fact that the political opinions of their proponents were more often than not Catholic conservative. Thus for instance the invitation of Salvatore Riccobono and formation of his seminar should not be seen as an insidious plot to spread papist disinformation, but rather as an appreciation of Roman law and its role in the Western legal tradition that was informed by the cultural background of the main figures organizing it.

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