

**Roman Legal Tradition and American Law**  
**The Riccobono Seminar of Roman law in Washington**

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“Upon completion of a course of lectures by Dr. Salvatore Riccobono at the Catholic University of America during the year 1928–1929, a seminar was organized, of which he was elected Honorary Magister ad vitam.”\* These words in the Preamble of the Constitution of the Riccobono Seminar of Roman Law in America,<sup>1</sup> describe the dedication of the new Institution to the Italian scholar. The Seminar came about as the result of a request by the Catholic University of America in Washington D.C. — founded on Pope Leone XIII’s approval in 1887 — after Riccobono taught a course there.

In 1928 Riccobono was sixty-four.<sup>2</sup> He was teaching at the University of Palermo — though soon after in 1932 he would be called to the University of Rome — and he was at the top of an extraordinary career, with about sixty publications to his credit.<sup>3</sup> Nor was he a newcomer to the Anglo–American

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\* I am grateful to Michael Hoeflich for inviting me to contribute to the first issue of *Roman Legal Tradition*. I hope this initiative may contribute to the dialogue among European and American jurists, as a foundation for comparison among legal systems, examining their differences, perhaps also steering their development, sharing individual reflections on the juridical experience in Rome. I have already debated about some of these problems with Thomas McGinn and Roger Bagnall, and I am grateful to them for this exchange of ideas just at a moment in which dramatic events have shaken, though not demolished, our resolute trust in the strength of the law. Thanks are due to Michael Peachin for his advice, accurate and effective as usual.

<sup>1</sup> *Constitution of the Riccobono Seminar of Roman Law in America*, in *BIDR*. 43 (1935) 325 ff. The text of the Constitution is reported with comments in the appendix. Thanks are due to Professor Mario Talamanca, the Review Editor, for his authorization for publication.

<sup>2</sup> He was born on 31<sup>st</sup> January 1864 in S. Giuseppe Jato, Province Palermo.

<sup>3</sup> BAVIERA, *Salvatore Riccobono e l'opera sua*, in *Studi in onore di Salvatore Riccobono* 1 (Palermo 1936) CIII ff.

academic world: in 1924 he held a lecture cycle at the Universities of London and Oxford,<sup>4</sup> and in 1925 his *Outlines of the evolution of Roman Law*<sup>5</sup> was published in the United States. This brief synthesis enjoyed wide distribution in American universities.<sup>6</sup> In nineteen densely packed pages Riccobono summarized the evolution of Roman Law from its origins to Justinian, and offered the American reader some ideas which would insinuate themselves into Anglo-Saxon jurists' technical and mental categories as problematical questions. Riccobono's "outlines" are schematically simple: from the XII Tables to Diocletian they seem to diverge, then gradually to converge again in a single line from Constantine to Justinian; in this presentation *ius civile*, *ius gentium* and *ius honorarium*, brought to life by the action of the Law, would mark the evolution of Roman Law until the coming of the fourth evolutionary element, the *ius novum*, fruit of the meeting of new laws, opinions of the Senate (*senatusconsulta*), constitutions and decrees of the Emperor and "above all of decisions on matters referred to various magistrates (*Cognitio extra ordinem*), who felt that they were not bound by the ordinary rules of law."<sup>7</sup>

According to Riccobono the seminar was to host mainly professors from American universities — with some happy exceptions, as in the case of the lecture by Leopold Wenger on the 5<sup>th</sup> October 1936<sup>8</sup> — who were concerned with themes of Roman Law which were to be informed by a common

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<sup>4</sup> Vinogradoff and de Zulueta invited Riccobono there to give a lecture about *Formulae ficticiae. A normal means of creating new law* on 24<sup>th</sup> June 1924. This was then published in RDH. 9 (1929) estr.

<sup>5</sup> *University of Pennsylvania Law Review* 74.1 (1925) 1 ff.

<sup>6</sup> See the reason, due to Pietro Bonfante, for which in 1932 Riccobono was admitted as a member of the Italian Royal Academy, in BAVIERA, Salvatore Riccobono cit. XXV note 3.

<sup>7</sup> *Outlines* cit. 3.

<sup>8</sup> *The importance of Greek Papirology in the study of Roman Law*, in BIDR. 44 (1936–1937) 421 ff. In 1936 he held other lectures at Harvard, at Yale and at Columbia University in New York. The impressions and the critical valuations coming from this American experience appeared condensed three years later in Wenger's essay about *Römisches Recht in America*, in *Studi in onore di E. Besta* I (Milano 1939) 151 ff.

denominator: “ricercare le tracce più o meno notevoli di Diritto Romano nei vari paesi dell’Unione.”<sup>9</sup> Riccobono was resolutely opposed to a tradition peculiar to “Germanists”, who beginning in the 19th century produced a series of studies affirming the supremacy of German Law, as compared to that of the Romans, in forming both the Continental and Anglo–American legal systems. He expressly intended to promote research which gathered historical evidence and legal elements so as to assert, on the contrary, that Roman Law had deeply affected the formation of modern legal systems. The consciousness of this fact would thus make the study of Roman Law useful and productive in a country like the United States as well, ruled by an extremely multiform law, about which Riccobono observes “i giuristi dell’America sentono vivamente questi problemi; e basta questo per spiegare come le loro indagini si vadano orientando verso le origini del diritto vigente nei vari Stati dell’Unione.”<sup>10</sup>

In other words, in reflecting upon the juridical experience in Rome the scholar should strive to demonstrate first of all the debt of modern legal systems, including the American one,<sup>11</sup> to that experience, and also demonstrate the practical utility of Roman Law for American jurists. This usefulness would justify its widespread diffusion in the US universities, where a translation of the *Corpus iuris* edited by Scott was circulating. Riccobono, however, could not consult it, and about its author he candidly admitted “non so se giurista o filologo.”<sup>12</sup> Riccobono

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<sup>9</sup> *Il Diritto Romano negli Stati Uniti di America*, in *BIDR*. 43 (1935) 314.

<sup>10</sup> *Ibid.* 317.

<sup>11</sup> This is not to impune HOWARD MILTON COLVIN, one of the most committed members of the work group in the sphere of the Riccobono Seminar, who carried out one of the most complete investigations of this aspect: *Roman and Civil law elements in sources of the Law of the United States*, in *Studi in memoria di A. Albertoni III* (Padova 1938) 113 ff. Unfortunately the on–line catalogue of the Law School of the Catholic University of America in Washington fails to include this research by Colvin, who was a teacher at that university.

<sup>12</sup> Riccobono referred to SAMUEL PARSONS SCOTT (1846–1929) and to his *The Civil Law, including the Twelve tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitution of Leo* (Cincinnati 1932). Scott’s work in 17 volumes — unfortunately criticizable in many aspects — of whose scarce distribution Riccobono complained (*Il Diritto Romano negli Stati*

noted that such a usefulness seemed more and more evident to those jurists who had to operate in a non-codified legal system based on strong customs, with a wide leeway for the normative value of jurisprudential praxis; a system in which, confronted with anomalous or new situations, the jurist could be enlightened by the wisdom of Roman Law which, “con la tecnica di una scienza esatta,”<sup>13</sup> offered broad case histories from which he could derive the solution of the individual case.

With these strong scientific and “ideological” premises Riccobono launched his Seminar in Washington, entrusting to the pages of *Bullettino dell'Istituto di Diritto Romano* the chronicle of the work<sup>14</sup> to reach its statutory aim (art. II), to foster “the study and dissemination of the knowledge of Roman Law.”<sup>15</sup> At the first meeting of the “Committee on Research with reference to Roman Canon and Civil Elements in the American Legal System,”<sup>16</sup> held on 11<sup>th</sup> November 1934, besides the debate on organizational aspects and concerning the creation of a library and support for the scholars who wanted to

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*Uniti* cit. 318), is now easily consulted, as it is found in the catalogues of the libraries of the Law Schools of many American universities, including Yale, Harvard, Vanderbilt, the University of Pennsylvania, Fordham, Boston, Brooklyn, Columbia and New York University. Yet another translation of interest to the scholar of Roman Law: *The Visigothic code. Forum juridicum* (Boston 1910, repr. Littleton, Colo. 1982) is due to Scott, who also was a scholar and translator of medieval juridical sources (especially Spanish, *History of Moorish Empire in Europe* [Philadelphia–London 1904] and a translation and a comment of the *Siete Partidas*, an important codification of the Castilian King Alfonso X ‘El sabio’, a work strongly inspired by Justinian’s Law: *Las Siete partidas* [Chicago–New York 1931]).

<sup>13</sup> *Il Diritto Romano negli Stati Uniti* cit. 324.

<sup>14</sup> Riccobono became ‘perpetual Secretary’ of the Roman Law Institute of La Sapienza University in Rome, and assumed the editorship of the *Bullettino* after Vittorio Scialoja’s death on 19<sup>th</sup> November 1933. On the complex vicissitudes of this prestigious review and on those of the Roman Institute, closely linked with them, see the condensed reconstruction by MARIO TALAMANCA, *Un secolo di ‘Bullettino’*, in *BIDR.* 91 (1988) IX ff. and especially LXXIX ff.

<sup>15</sup> See *infra* the reproduction of the Statute.

<sup>16</sup> Among those present were Colvin, Dorsey, Lardone, Lobingier, McGuire, Roelker, Wheatley and Brown.

contribute to the Seminar, a preliminary question seemed to emerge, on which they could not reach a unitary position. In the minutes of that meeting<sup>17</sup> one can read as a matter of record “there was a division of opinion among the members as to the scope of the work of the Committee. Some thought that the classical Roman Law should be emphasized, while others believed that it would be better to include comparative law, from the modern angle. But no decision was made on this point.”

In some measure this difficulty reflected a wider scientific debate, but it also reflected a normative policy debate which ever more urgently affected the US jurists. In those years a renewed sensibility towards the study of Roman Law was already spreading in the American universities,<sup>18</sup> where the teachings of Roman Law were not new in any event: already in the 18<sup>th</sup> century at Yale a course on “*Jus civile or Ancient Roman Law, Pandects, and Ecclesiastical or canon law*” (1792) was introduced, in 1863 Yale again offered a course of Roman Law given by James Hadley<sup>19</sup> not only at Yale College but also, as a natural outgrowth, at the Law School of that University; Hadley himself then also repeated this course at Harvard Law School.<sup>20</sup> It seemed that Yale always offered important courses of Roman Law, held by scholars of great scientific prominence such as Simeon E. Baldwin,<sup>21</sup> Albert S. Wheeler,<sup>22</sup> Charles P.

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<sup>17</sup> *BIDR*. 43 (1935) 327 f.

<sup>18</sup> On this point SHERMAN, *Roman law in the United States of America: the present revival of Roman Law study its effects of the American Common Law and on American law schools and legal education*, in *Atti del Congresso Internazionale di Diritto Romano. Bologna e Roma 1933*, II (Pavia 1935) 321 ff. This meeting in Rome was considered by the Seminar in the session of 11<sup>th</sup> April 1935, in which Shaaf, Dean of the School of Canon Law of CUA related about its work to the members of the Institute; the draft of this session is held in the Library of the University of Michigan Law School.

<sup>19</sup> See his *Introduction to Roman Law* (New York, published in several editions, of which I consulted those from 1873 to 1890 – therefore all posthumous, of course, as the author died in 1872).

<sup>20</sup> SHERMAN, *Roman Law*, cit. 327 ff. and BALDWIN, *Study of Roman Law in American Law Schools*, in *Am. Law School Review* (1911) 28.

Sherman,<sup>23</sup> and from there the teaching of Roman Law would spread to the other US universities.

But in those years the intense scientific and academic activity of American scholars of Roman Law targeted an ambitious plan: US Law was *congestum* in a multiplicity of state systems of Common Law (about 46) — a system whose English ancestors<sup>24</sup> and whose tendential contraposition to the civil

<sup>21</sup> Baldwin (1840–1927) would also use his scientific and teaching experience in his functions as Chief Justice and Governor of the State of Connecticut.

<sup>22</sup> The *Yale Collection of Roman Law*, named after Wheeler (1832–1905), was also set up thanks to his testamentary legacy.

<sup>23</sup> Professor at Yale from 1905 to 1917.

<sup>24</sup> It is, however, appropriate to consider here some aspects of the penetration of Roman Law in England. This process developed in England from 1066 when, as consequence of the Norman conquest, the new legal system was inserted into the Roman one, pre-existing since the 7<sup>th</sup> century AD, when England was converted to Christianity. The political unity imposed on that land (except Scotland, on whose independent legal reality see WATSON, *The Rise of modern Scots Law*, in *La formazione storica del diritto moderno in Europa. Atti del terzo congresso internazionale della Società italiana di Storia del diritto* [Firenze 1977] 1167 ff.) by William the Conqueror therefore resulted in the creation of a composite ‘common law’ which took the place of the old particular laws; on this point see MILSOM, *Historical Foundations of the Common Law* (London 1969) *passim* and KIRALFY, *Law and Right in English Legal History*, in *La formazione storica* cit. 1069 ff. In this way a very particular system of consuetudinary evolution of law developed, not of popular, but of jurisdictional, foundation. The judicial decisions which came from the work of the Inns of Court, the four organizations of the jurists of *curia regis* (that is: Inner Temple; Middle Temple; Gray’s Inn and Lincoln’s Inn) determined the consolidation of an homogeneous jurisprudential system jealously linked to its own peculiarity, which was defended to the utmost against above all the Tudors’ and Stuarts’ attempts to insert typically Roman rules. So the corporative homogeneity of English jurists had as a consequence that the Common Law was enforced in actual use by the law-courts as the *longa manus* of *curia regis* ‘of Common Pleas’; this law was enforced successfully upon English subjects in contrast to the law-courts which tried to enforce the Roman Law. Mario Losano observed with some irony (*I grandi sistemi giuridici* [Torino 1978] how, paradoxically, in these nationalistic Courts Latin was used — and, especially in trials, French. The English jurists of the 18<sup>th</sup> century found justification for this fact in the circumstance that English would not be fit to express legal technicalities; but in my modest opinion, the true reason for this singularity is to be found in

law<sup>25</sup> began to conflict with the different way of thinking and with the need of finding normative supports fit to sustain the

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jurists' eternal inclination to make of their own language an obscure and inaccessible language, as a useful support to maintain a corporative power — guaranteed by a language apt to consolidate juridical knowledge which had to remain accessible only to few. To show how ancient is this inclination it suffices to consider the attitude of the College of pontifices, the first jurists in Rome; in fact they made juridical knowledge oracular, oral, and extremely formal: see BREYER, *Storia del diritto romano* (Bari 1987) 107 ff. and, recently, RANDAZZO, *Leges mancipii*, cit. especially 135 ff.

After 1100 A.D. the country was ruled totally through the common law, except in Scotland, where the Roman Law continued in force. However, the itinerant judges used a recognizably Roman procedural model in enforcing the common law. So, to render justice, they had to request and obtain a written order (writ) from the King, which commanded the defendant to appear before the Court. But such a writ had to correspond exactly to the case alleged by the plaintiff; thus, 'no writ no remedy'. With the Provisions of Oxford in 1258, Henry III restricted and froze the types of writs available (in some sense what Hadrian had done in codifying the praetorial edict). After a time, in 1285, Edward I re-opened the possibility of providing new writs, though in a more limited sense, and with this decision, emblematically defined '*in consimili casu*' he opened the way for the common law, though giving it a more 'equitable' aspect; better-balanced between conservation and evolution, made just in the logic of the jurisprudential precedent, with an ever-growing consideration for contract law and extracontractual responsibility arising from licit acts (tort): ARMANNO, *Formazione e cultura giuridica nella tradizione del common law dall'aequitas all'equity*, in *Scritti in onore di Guido Capozzi* [Milano 1982] 62 ff.). The juridical configuration of this matter, in its conceptual complexity, could not but feel the effects of Roman tradition (above all for transactions and *aquiliana* responsibility), though it necessarily derived from a Writ of Trespass which, in spite of its dating back to a period when English law did not distinguish between civil and criminal liability, represented 'the fertile mother of actions'. In this context the system of common law evolved in a perspective in which Roman law assumed predominant importance for the practical necessity of compensating for the approximations of the old writs. But this importance was never explicitly recognized and was greatly complicated by the web of jurisprudential precedents.

<sup>25</sup> As a complete system, as civil law 'si intende la tradizione giuridica del continente europeo di derivazione romana, caratterizzata principalmente da una codificazione di carattere generale e da una particolare tecnica normativa ed interpretativa': so DE FRANCHIS, *Dizionario giuridico* (1984) 23–24; the civil law is considered '*the oldest, most widely distributed and most influential*': MERRYMAN, *The civil law*

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*tradition* (Stanford 1985). The ‘common’ law is, by contrast, ‘un termine praticamente intraducibile la cui accezione principale è, letteralmente, quella di legge comune a tutto il paese’: DE FRANCHIS, *Dizionario*, cit. 493. Apparently they are two incompatible systems, so that Anglo–Saxon jurists define the civil law system as ‘rigido, astratto, incapace di evolversi e basato su di una applicazione automatica delle norme giuridiche’: ARMANNO, *Formazione e cultura giuridica*, cit. 31. But it is clear to the jurists of both systems that there is a progressive evolution of them both toward one another. Actually the Anglo–American common law and the European law tend to be similar (but this approach had ancient roots: STEIN, *Continental Influences of English Legal Thought, 1600–1900*, in *La formazione storica* cit. 1105 ff.): the common law has experienced expansion of statutes and consolidations to the detriment of pure ‘judge made law’, while jurisprudence is assuming a growing importance in many civil law countries: for example in those which have a Constitutional Court, constitutional law tends to become more and more a jurisprudential law *stricto sensu*. The culture of civil law, law, expressed in abstract and general terms, must be able to provide for the most recurrent hypotheses, because the aim of law is to attain certainty of the law.

The common law, by contrast, was never systematically configured, as it developed by examining, case by case, the analogies present in the controversies submitted to judges. Actually the common law judges, thinking they could not formulate general principles precisely, ‘preferiscono appellarsi alla autorità degli esempi del passato piuttosto che impegnarsi in ragionamenti astratti’: STEIN, *I fondamenti del diritto europeo* (Milano 1987) 114. This fact would explain why jurists who operate in the common law systems, by contrast to those in civil law systems, think their law is flexible and able to evolve rapidly. But this belief by Anglo–American jurists about their law does not mean that the tradition of the common law does not feel the exigency of continuity of the law. The point is, rather, that in Anglo–Saxon countries such an aim is accomplished with the doctrine of ‘*stare decisis*’, that is to attribute a binding strength to precedent, which is a creation of jurisprudence rather than a direct expression of the legislator’s will. Moreover, when it operates in this way, it assumes a practical function of creation of the law, becoming a kind of ‘legislation,’ and with a strength and a cogency of the rule probably even greater than the legislator’s one *stricto sensu*, since judges create rules and enforce them upon the considered case, *seduta stante* and without any intermediation. In conclusion, certainty of law in the common law is attained by recognizing binding force in judges’ decisions. But if on one side the accumulation of judgments over the years offered a variety of concrete and detailed precedents to which to refer in the resolution of controversies, it is just as true that case–law had reached so high a level of complexity as to require legislative intervention with the aim of organically systematizing jurisprudential rules. Thus also the Anglo–Saxon countries must resort to a certain extent to ‘codes’, even as civil



very different concept of economy and progress peculiar to the Americans.<sup>26</sup> These systems were further complicated by their difficult coordination with Federal Common Law, an often chaotic *corpus* of jurisprudential decisions of American Federal Courts, and by an inextricable multitude of non-written and customary rights, local statutes and jurisprudential rules, isolated or gathered in ponderous collections: every year over 20,000 new decisions and statutes modified the normative frame for US jurists.<sup>27</sup>

In such a situation American scholars of Roman Law increasingly contemplated a law whose supposed uniformity was not prejudicial to the principles of self-government of the individual States, but which would allow a systematic evolution of American Law so that it could evolve from “*congestum*” to “*digestum*” . This was the aim which emerged from Charles P. Sherman’s words delivered on the occasion of the International Meeting held in Bologna in 1933: “...the progress made towards the realization of the second and third phases of the world-mission of Roman Law since Justinian: witness the spread of the movement towards uniformity of the American Common Law, and witness the beginnings of embodying American Common Law in the permanent and salutary form of a codification.”<sup>28</sup> However, the idea was not new: consider the plan for a much-discussed<sup>29</sup> “so-called” Civil Code worked out about 1860<sup>30</sup> by David Dudley Field<sup>31</sup> for the State of New York

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law countries feel the need for major flexibility of the law to accommodate the changeable demands of reality. There is therefore definite evidence that the approach process between these two cultures is already taking place, and faster than we may imagine.

<sup>26</sup> RADIN, *Roman Law in the United States*, in *Atti del Congresso internazionale* cit. 346 ff.

<sup>27</sup> SHERMAN, *Roman law*, cit. 330.

<sup>28</sup> *Ibid.* 329.

<sup>29</sup> See STRONG, *An analysis of the reply of Mr. David Dudley Field to the Bar association of the City of New York* (New York 1881).

<sup>30</sup> Assembly Bill N. 215.

<sup>31</sup> Field (1805–1894), a multifaceted jurist (author of essays on topics from civil and penal law to the law of procedure, from the maritime law

and for this reason better known as Mr. Field's Code, still proudly contested 20 years later in a passionate note sent to the editor of the *Albany Law Journal* on the 22<sup>nd</sup> March 1822<sup>32</sup> by Theodore W. Dwight, Professor of Law at Columbia University. So in the articulate debate which had already engaged both European and American scholars from the beginning of the 19<sup>th</sup> century,<sup>33</sup> balanced between common law traditions and a strong codifying tendency, fruit of the prevailing positivist atmosphere of the time, the theoretical and practical *querelle* is based squarely on Roman Law tradition with regard to the opportunity of introducing a codified system in the law of States which were governed under non-codified law, as was the State of New York. Such a possibility was supported by argumentation which rose above geographical limits and had repercussions for the situations of almost every State of the Union, which except Louisiana and, in some measure, California, were not regulated by codes.

This debate took place amidst political and legislative will to reform US law, which in the twenties and the thirties seemed an attainable goal. To reach this goal, however, what was needed was to promote a general rationalization which had to be entrusted to academic education, the only institution able to accustom Law School students to think of law in scientific

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to international law), was also the author of a Code of civil procedure accepted by the State of New York, and of a criminal Code.

<sup>32</sup> *Defects of the proposed Civil Code for the State of New York. A critical examination of the proposed Chapter on 'Servitudes'* (New York 1882). The polemic with the author of the Code project arose from Field's seven-point memoir on the opportunity of the acceptance of a Civil Code for the State of New York. Dwight's reply followed it in the *Evening Post* of 22<sup>nd</sup> March 1882.

<sup>33</sup> See Bentham's famous letters 'to the Citizens of the several American United States' and in particular that devoted to the *Codification of the Common Law* (repr. New York 1882) together with the Report with which the special Committee appointed to the codification of the Common Law of Massachusetts indicated to the Governor of the Commonwealth of Massachusetts the apparent practicability of the path to codification (*ib.* 24 ff.), which would give order to a legal system still bound to the first settlers' customs: see *The Perpetual Laws of the Commonwealth of Massachusetts* (Worcester 1788, repr. cur. CUSHING, Wilmington 1981).

terms, and not merely have them look for the solution of specific “cases” inductively. The latter approach also had to be preceded by textbook study to give students control of such fundamental principles as the law of persons, family law, real law,<sup>34</sup> obligations, successions,<sup>35</sup> and the law of procedure, as “keystones” of a new substantive law system which harmonized the precious Roman *regulae iuris* with the pliability of a jurisprudential system surely more flexible and reassuring if attached to exact and strong foundations of substantive law.

Such, therefore, was the context in which Riccobono “landed” in America. The Italian scholar realized that the moment was suitable from an historical point of view, and so first in his Exegesis course at the Catholic University of America in Washington, and then in his Seminar, he methodically trained the full weight of his influence on this evolutionary process, with the restless awareness of an historian who saw events happen and knew he could influence them; the science of Roman Law in the USA, the teaching of that subject as well, and above all US law itself were at stake.

Despite Riccobono’s detailed reports in the *Bullettino*, summarizing the state of the first proceedings of the Seminar in the years 1934 –1935 is complicated by the difficulties of resolving some methodological disputes which arose early among the scholars who took part in this new academic institution. In the presence of the *Magister* on 31<sup>st</sup> May 1935 Fr. Cleary spoke on *The Jurisprudential basis of Roman Law*, starting from a comparative analysis between Justinian’s *Novellae* and Gregory IX’s *Decretales* as to the alienation of ecclesiastical properties. The specificity of the proposed topic did not prevent Riccobono from leading a detailed discussion on

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<sup>34</sup> The real *punctum dolens* of the systems of common law; see, for example, on the usefulness of the Roman concept of *dominium*, RADIN, *Roman Law in the United States*, cit. 355.

<sup>35</sup> See DORSEY, *The Roman and Common Law origins of certain anomalies now existing in those rules of law and principles of equity governing precedent and subsequent conditions contained in wills and testaments and imposed upon devises and besquets*, in *Atti del Congresso internazionale* cit. 361 ff.

the foundations of Roman juridical experience: the connections among jurisprudential consideration, the influences of Christianity and Greek philosophy, the *ius gentium* and natural law, the *fides* as a paradigmatic category of the history of Roman Law. H. Milton Colvin's lecture on 8<sup>th</sup> November 1935 (Lardone *magister pro tempore*) enabled the Seminar to get to the heart of the problem which was the basic assumption of the creation of the Seminar itself, as Riccobono himself would point out in that sitting<sup>36</sup>: *Roman and Civil law Elements in Sources of the Law of the United States*. The proceedings continued at regular intervals, touching the nerve-centres of the discipline, characterized by articulate comparison with the law in force: if A.K. Ziegler dwelt upon Isidore of Seville, in the following sitting Dorsey related about his studies on the condition in Roman Law and in the Anglo-American juridical system, linking a "concrete" consideration on a classic question of Continental dogmatics with an accurate acknowledgement of doctrine and cases. In the same direction Charles Sumner Lobingier, a famous scholar of anthropological-comparative study of Roman Law,<sup>37</sup> developed his reflection on *Salient Features of the Lex Rhodia de Iactu – Jettison and General Average*, and in a successive sitting on *The Roman law in Thirteenth Century England, with a New Interpretation of the Baron's Reply at Merton*. The minutes of the meetings evidence a very lively debate among the scholars, who, examining the institutions, dissected topics into the smallest details, yet without losing sight of the most general aims of the Institute.

On 18<sup>th</sup> March 1936 the Seminar hosted a distinguished guest: Fritz Schulz, who addressed a fundamental question in Roman Law studies with an evocative title: *Invention of the*

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<sup>36</sup> *BIDR*. 43 cit. 333.

<sup>37</sup> His research established this field; see in particular, *The people's law, or, Popular participation in law-making: from ancient folk-moot to modern referendum: a study in the evolution of democracy and direct legislation: With An Introduction By George Elliott Howard* (New York 1909, repr. Holmes Beach, Fla. 2001); *The Evolution Of The Roman Law: From Before The Twelve Tables To The Corpus Juris* (Omaha 1923); *The Beginning Of Law: A Summation Of Results In Legal Anthropology* (Washington 1934).

*Science of Law at Rome.* Jurists' logic, their creative activity, their role in the dialectics between *verba* and *voluntas* interested the attendees, and the debate developed widely, enabling Francesco Giuseppe "Franz" Lardone,<sup>38</sup> *magister pro tempore*, to commend Schulz for his being "primarily a lawyer, only secondarily an historian in the matter of Roman law; and ... the seminar also approved this point of view."<sup>39</sup> Also the conclusion of the work of the Seminar for the academic year 1935/1936, entrusted to Frederick J. de Sloovere — who would undertake the functions of *magister* for the following academic year — consistently articulated the aims of the Institute. The scholar faced the problem of the interpretation of statutes, following the mental process which started from the individuation of the rule, continued through its interpretation, and culminated in its concrete enforcement upon the considered case. In this hermeneutic–applicatory *iter* de Sloovere found a hierarchical process which governed the interpretation of the modern rules of civil law and which respected the order: Natural Law; Roman Law; Legal Reasoning; Customary Law; Usages; Custom of judicial decision "and so on including reasoning by analogy."<sup>40</sup>

The 55 dense pages in which the *Bullettino*<sup>41</sup> related the activities of the Seminar in the academic year 1936–37 opened with the report of Wenger's lecture on *The importance of Greek Papyrology in the study of Roman law*, a learned occasion to clarify the situation of the studies of juridical papyrology in Europe. They then continued with meetings which dealt with the themes of the relationship among common law, Roman Law tradition, and also other juridical systems: *Custom in the*

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<sup>38</sup> Lardone, Professor at the CUA in Washington, was certainly one of the most active and enthusiastic members of the Seminar and one of Riccobono's closest collaborators. He would offer an important contribution published in the Studies dedicated to the Sicilian Professor: *The imperial Constitutions in the Institutes of Gaius*, in *Studi in onore di S. Riccobono* I cit. 653 ff.

<sup>39</sup> *BIDR.* 43 cit. 356.

<sup>40</sup> *BIDR.* 43 cit. 368.

<sup>41</sup> *BIDR.* 44 (1936–1937) 419 ff.

*Justinian Law and its influence on Canon law* was actually the theme with which Merlin Joseph Guilfoyle penetrated into the difficult field of custom in Justinian law, through an analysis of the definition of *Iust. Inst.* 1.2.9 (*Ex non scripto ius venit quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur*), and the progressive assimilation of this concept in Canon law. And if the lectures by James B. Thayer on *Iusta causa in traditione* and by Cormack and Brown on *Stoic Philosophy and the Roman Law* had a more marked historical interest, important reflections were devoted to themes closely linked to the relationship between the Roman Law and Common Law systems. The lucky coincidence of being at the same time both a Professor of Roman Law at the Brooklyn Law School and also a practicing lawyer allowed Franklin F. Russel to discuss a subject of disarming concreteness: *The Practical Value of the Study of Roman Law*. Russel reported about his “promotional” activity for the history of law, both from an academic point of view on the basis of his experience at the University of Oxford where the course is organized so that “from one quarter to one third of the legal curriculum be devoted to the study of Roman Law,” and from an empiricist point of view with a digression on the usefulness of the knowledge of the principles of Roman Law to prepare for the New York Bar Examination.

This fact seemed still more germane because a lawyer in New York could easily come into contact with questions which required a knowledge of the rules of Roman Law on account of the peculiar abundance of interests and contacts with European law which a practical attorney working in New York or in New Jersey could face. In the debate Murdock would point out how “a composite picture of law is necessary. The study of Roman Law affords a relative approach to the Common law, and dispels the erroneous idea that the Common law is absolute.”<sup>42</sup> Moreover, the mixture of theoretical principles drawn from the Roman juridical experience with common law rules seemed more and more to emerge in the work of the Seminar: an example of this is Roscoe I. C. Dorsey’s treatment on *Roman*

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<sup>42</sup> *Ibid.* 450.

*Sources of some English Principles of Equity and Common Law Rules* on 20<sup>th</sup> April 1937, in which *fidei-commissum* discipline and the discipline of Aquilian damage in Roman Law and in Anglo-Saxon systems offered the scholar the occasion to mark the relations between these two legal systems on the basis of the relationship between the concepts of *aequitas* and equity. This prospect opened still further in the last lecture of that year, in which de Sloovere (1886–1945) himself, the first *magister pro tempore* who did not live in Washington,<sup>43</sup> talked about *Teaching Roman Law as a basis for Comparative Law*<sup>44</sup>: the account was very dense and it is perhaps the true “manifesto” of the Riccobono Seminar of Roman Law, as it discerned in an articulate way the extraordinary role of Roman Law as a legal “paradigm”, as a general category for reference in the comparative study of any other juridical experience among all the other law systems, and therefore also beyond the ambitious prospect of the relationship between Roman and Common Law.

Lectures continued non-stop in Washington in the following academic year, 1937–1938. The institution of the CUA was by that time known all over the world, the reputation of the depth and of the liveliness of its 24 dense meetings, the modernity of the methodology adopted by the speakers, the deep programmatic effect on the law in force, ensured that people everywhere<sup>45</sup> spoke highly of the Seminar and its enlivening contribution to the study of Roman Law in America.<sup>46</sup> But from some of Riccobono’s passages seemed to emerge a certain hidden reserve about the scientific orthodoxy of Roman-Law-studies of the Seminar, though the scholar did not feel the effects at all, rather he roused a sleeping academic circle sometimes susceptible to such criticisms, more or less challenging them

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<sup>43</sup> de Sloovere taught at New York University Law School: his interests included torts and hermeneutics: see *The functions of judge and jury in the interpretation of statutes* (Cambridge Ma. 1933).

<sup>44</sup> *Ibid.* 463 ff.

<sup>45</sup> This was the enthusiastic comment of Riccobono himself in pages from which his satisfaction with the scientific vitality of the Seminar was apparent: *BIDR.* 45 (1938) 335 ff.

<sup>46</sup> See WENGER, *Römisches Recht in America*, cit. *passim*.

with the authoritativeness of his words: "alcuno," he wrote in the *Bullettino* "forse potrebbe desiderare una maggiore attività nella analisi dei testi di legge, specie rispetto alle fonti romane... questa esigenza tuttavia io non la ritengo imprescindibile," and he noticed as regards the diffusion of Roman Law that "quando si voglia promuoverne lo studio, ed eccitare la curiosità e l'interesse degli studiosi, quel che occorre è, in primo luogo, dimostrare l'utilità immediata, anzi la necessità imprescindibile di una preparazione sintetica per la intelligenza del diritto vigente." "Di analisi minuta, di critica dei testi se n'è fatta molto in Europa negli ultimi 50 anni. Direi troppo."<sup>47</sup> These were ever Riccobono's words, spoken with unexpected liveliness.

Thereafter the direction of the Seminar appeared again more clearly: according to the intention of the *magister ad vitam* it needed to return to rigor, to synthesis, against a tendency to erudite fragmentation of problems, in order to accomplish an indispensable historical commitment resting above all on Roman Law scholars: "se il mondo è oggi chiamato a rivedere e ricostruire i suoi istituti, in tutti i rami del diritto, pubblico e privato e dell'economia, la necessità di abili costruttori è evidente."<sup>48</sup> I shall therefore refrain from reviewing again the chronicles of 1937–38, referring to the account of the lectures from the third year of activities of the Seminar (*magister* A. Arthur Schiller) in the forty–fifth volume of *Bullettino*, which Riccobono himself wrote in the first person, and simply list them here: A. Arthur Schiller, *De consuetudine in iure romano*; Clement Basnagel, *De aequitate in iure romano*; Roscoe I. C. Dorsey, *The Roman Concept of Res*, Francis de Zulueta, *P. Ryl. III, 474, fr. B. recto=L. 1.1 Dig. 12, I De rebus creditis*; J. B. Thayer, *Report de culpa lata et diligentia in iure romano*; Ernest Levy, *Statute and Judge in Roman Criminal Law*; Charles Sumner Lobingier, *The Natural History of the Artificial Person*; Judge Blume, *The Code of Justinian and its Value*.

It was, however, Riccobono himself taking stock of the activities of the Seminar for the following academic year 1938–

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<sup>47</sup> *Ibid.* 336 f.

<sup>48</sup> *Ibid.* 337.



1939, conscious of the gravity of the moment, who stressed the value of the initiatives of the American institution, which hosted 11 important lectures “mentre il volto del mondo è duro e arcigno.”<sup>49</sup> *Magister* Roscoe J. C. Dorsey, Hans Julius Wolff, then aged 36, Professor at the University of Panama,<sup>50</sup> inaugurated the work of the Seminar, discussing the theme *The lex Cornelia de captivis and the Roman Law of successions*. Rather, Franciszek Bossowski would deal with a topical subject: *Roman law and Hebrew private law*, which was read by Brendan F. Brown, the *scriba* of the sitting of 26<sup>th</sup> January 1939, while *Roman private law in Russia* would be the following topic, on which Vladimir Gsovsky would be called to speak in a sitting which opened with a commemoration of Paul Collinet, who had just died. The wide-ranging topics of the Seminar in 1938–1939 did not escape more traditional treatments, such as James B. Thayer’s lecture on *The Position of Corporations in Roman Private Law*, which, starting from a recent work by Duff on persons in Roman Law,<sup>51</sup> concerned various aspects of the problem of the legal capacity of corporations. In the same meeting they discussed a short study by F. Bossowski on *In iure cessio*. On 25<sup>th</sup> April 1939 Lobingier treated the topic *The Trial Authority in Roman Administrative Procedure*, in which he considered some trial themes which thereafter were frankly relegated to the background in the work of the Seminar, in its particular intent to examine themes of substantive law more easily comparable with institutions and rules of the law contemporaneously in force.

The report of three of these lectures presented at a single meeting on 11<sup>th</sup> May 1939 : Jolowicz’s *I precedenti nel diritto*

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<sup>49</sup> *BIDR*. 46 (1939) 328.

<sup>50</sup> Wolff, born in 1902, is an important name in Roman Law historiography. In 1932 Dr. Jur. at the University of Berlin, Professor of History of Law at the University of Freiburg in Germany, in the United States he is known especially for his *Roman law: an historical introduction* (Norman 1951), and frequented US academic circles generally, as it is attested by the circumstance that he was accepted into the School of Historical Science of the Institute for Advanced Study at Princeton University.

<sup>51</sup> DUFF, *Personality in Roman Private Law* (Cambridge 1938).

greco e romano, de Sloovere's *La dottrina dei precedenti nel diritto anglo-americano* and Evan's *Consuetudine e precedenti negli scrittori letterari*, was done by Riccobono himself, who in the pages of the *Bullettino*, took part in the discussion with the scholars visiting the Seminar, and, perhaps for the first time in such articulate terms, personally articulated a position on the question.<sup>52</sup>

The work of the Seminar for the academic year 1938–39 ended with Dean Wigmore's lecture on *Reminiscence of Fifty Years of Legal Teaching*.

In the years that followed, activities continued and reports were edited until 1955/56<sup>53</sup> in *Seminar*, a yearly special issue of *The Jurist*, a publication of the School of Canon Law of the Catholic University of America. From 1940 on, as a consequence of the war,<sup>54</sup> the *Bullettino dell'Istituto di Diritto Romano* no longer contained a detailed report of the Seminar activities, except for Riccobono's reference to his lecture of 16<sup>th</sup> May 1940<sup>55</sup> during the work of the Seminar on *Compenso per spese fatte da possessori su cose altrui*,<sup>56</sup> in which he made some comparisons among Roman system, modern codifications and Anglo-American law. This would be the last time the *Magister ad vitam* directly took part in the work of the Institute. Thereafter the Institute in Washington continued its activities in the academic year 1939–1940, and until the mid 1950's, and these were reported in a short regular survey in each of the

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<sup>52</sup> *Consuetudo, exemplum nelle fonti giuridiche romane*, in *BIDR*. 46 (1939) 329 ff.

<sup>53</sup> Vincenzo ARANGIO-RUIZ (in ARANGIO-RUIZ – DE FRANCISCI, *Salvatore Riccobono e il 'Bullettino'*, in *BIDR*. 42 [1959] VIII) noted that the close of publication of *Seminar* precisely coincided with the death of *magister ad vitam* on 5<sup>th</sup> April 1958.

<sup>54</sup> *Seminar* 1 (1943) 2.

<sup>55</sup> There is a minor incongruity between this date, referred to by Riccobono in *BIDR*. 47 (1940) 1 n. 1, and that of 12<sup>th</sup> May, mentioned by the scholar himself in *BIDR*. 49–50 (1947) 1 ff.

<sup>56</sup> *BIDR*. 47 cit. 1 n. 1.

thirteen volumes of *Seminar*, which at the time of its first publication in 1943 was practically the only journal in the United States chiefly devoted to Roman Law and to the law of ancient times. But this magazine's chronicle of the Seminar proceedings was mostly reduced to a list of lectures and some information on the *Magistri* and on the *Concilium* for the current academic year; only a few lectures were reported in detail.

Riccobono followed the activities from Italy, after a fashion. In the autumn of 1944 he sent a letter<sup>57</sup> to Ernst Levy, *magister* that academic year, in reply to the reassuring news from Levy himself of the vitality of the American Institute. Riccobono observed that a renewed historical–juridical conscience, providing valid support for the new international order, should also prepare for the postwar reconstruction. For this purpose the flexible functionality of Roman Law instruments was useful, the same functionality which had allowed that legal system to emerge unharmed from similarly dramatic historical crises.<sup>58</sup> Riccobono's long letter to Levy was lively and rich in scientific proposals. In it he suggested the possibility of resuming the publication in the *Bullettino* of at least the main lectures of the Seminar.<sup>59</sup> With renewed enthusiasm the *Magister* surveyed the panorama of apparently interrupted interdisciplinary relations, placing the renewed study of Roman Law in the United States in a context of international policy pacified at last, and his words were confident of the future: “in this new community of nations living together in peace” he observed “new needs will arise in the organisation of social and international relationships, and hence new institutions, structures and legal forms, which will need to be worked out with enlightened wisdom. In this constructive labor, the Roman sources can be

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<sup>57</sup> *A Message by Professor Salvatore Riccobono*, in *Seminar* 3 (1945) 69 f. The letter, dated 30<sup>th</sup> October 1944, appeared in Italian in *BIDR*. 49–50 (1947) 1 ff.

<sup>58</sup> *Ibid.* 70.

<sup>59</sup> *A Message* cit. 69.

used as the most precious heritage of legal experience and technique.”<sup>60</sup>

But after this point, the life of the Seminar apparently did not interact with its founder, although the academic society of CUA always appeared affectionately linked to its *Magister ad vitam*, as for instance in the Latin message for Riccobono’s ninetieth birthday, sent to him on 29<sup>th</sup> January 1954, two days before his birthday.<sup>61</sup> Thus for many years and until its close, *Seminar* edited essays of high scientific value and often thematically linked to the original aims of the Institute, in the consideration of the common law as a system through which reflections of Roman Law could permeate. Very important scholars, often refugees in the United States for political or racial reasons, appeared one after the other in the pages of the US magazine, often animating the debates<sup>62</sup> of the Riccobono Seminar:<sup>63</sup> Buckland, Rabel, Levy, Kuttner, Berger, Schulz, Schiller, Wolff, Prinsheim, Coing, Finley, and Jolowicz, and others.

With the appearance of its thirteenth issue, *Seminar* interrupted its publication and a concise announcement<sup>64</sup> gave

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<sup>60</sup> *Ibid.* 71.

<sup>61</sup> *An Exchange of Messages on the occasion of the Birthday of Professor Salvatore Riccobono, February 5, 1954*, in *Seminar* 12 (1954) 67.

<sup>62</sup> The debates were organized following the *scriba*’s praxis of sending a detailed schedule of the next meeting to the members of the Institute in advance. The schedule contained the name of the speaker, the topics, and brief information about the problems to be dealt with in the lecture and in the following debate: a valuable paper attesting to this practice is conserved at the Library of the University of Michigan Law School. It is a call to the meeting of 24<sup>th</sup> February 1943 at Georgetown University Law School, in Brendan F. Brown’s (the *scriba*) own hand.

<sup>63</sup> One may consult the magazine at the principal US university libraries and in many libraries in Italy, including the Library of the Roman Law Institute of ‘La Sapienza’ University in Rome. The last issue (1955–56, pp. 75 ff.) contains a useful index of the contents of the magazine’s thirteen issues.

<sup>64</sup> *Seminar* 13 (1955–56) III.

the reasons for this. When the supplement of *The Jurist* started in 1943, in the middle of the war, there were in the United States neither other magazines which hosted studies of the history of law, nor did the situation allow their publication in European journals; and all this curiously, just at a moment at which in the United States those studies were resuming, due in part “to the presence of many distinguished refugee scholars—Hitler’s backhanded gift to American education.”<sup>65</sup> The changed situation, the renewed opportunities for American Roman Law scholars, no longer necessitated the edition of the annual issue, they said. After this time the indications of the work of the Riccobono Seminar finally dissipated as well.<sup>66</sup>

Moreover the international prominence of the Institute had already for some time seemed destined to subside: concomitant with the last edition of the chronicles in the *Bullettino*, the war, nearly in its full escalation, magnified the distance between Italy and the United States beyond even the breadth of the Ocean and abruptly interrupted an academic flow of scholars and ideas between the old and the new world: we may assume these were all reasons why the Seminar’s activity<sup>67</sup> diminished, activity which until that time had constantly drawn vital nourishment from comparison with the European scholars, a comparison now objectively difficult.

Of the experience of the Seminar only the meticulous chronicles on the yellowed pages of the *Bullettino* and of the *Seminar* remain, from which the impassioned debates, discussions and enthusiasm of a happy time emerge, a period when men of great intelligence, overcoming sterile partialities,

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<sup>65</sup> *Ib.* III.

<sup>66</sup> *The Jurist* itself published no further news of the Riccobono Seminar after the termination of the annual supplement. The last report concerning the Institute was in volume 50 (1955) 124, which referred to a lecture by Edgar Bodenheimer, who was *magister pro tempore*, whom Hessel E. Ynterna of the University of Michigan would succeed for the academic year 1955–56, followed by Martin R. P. McGuire (CUA) the next year, the last with which I am acquainted. Therefore the last news was that published in the thirteenth issue of the *Seminar*.

<sup>67</sup> TALAMANCA, *Un secolo di ‘Bullettino’* cit. LXXXIII.

understood that the vitality of Roman Law was indissolubly linked to the vitality of the Law itself, of every law, which from that experience could draw great inspiration to improve itself, to adhere ever more to the needs of that civilized and advanced society which was emerging with great effort from one of its darkest nightmares. To our sensibility as jurists and historians attaches a mission to contribute what we can, in order that the danger of such nightmares re-emerging might be definitively avoided.