

Fritz Schulz, Refugee Scholarship, and the Riccobono Seminar

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Abstract — Fritz Schulz (1879–1957) was among a number of German refugee scholars of Roman law at the advent of the Second World War. He left Germany for Oxford in 1939. Key to understanding his departure from Germany, and indeed a significant turn in his scholarship, is a series of lectures he gave at the University of Berlin, subsequently published as *Prinzipien des römischen Rechts* in 1934. The significance of the *Prinzipien* emerges when one contrasts the German academic world with its counterparts in the United Kingdom and the United States. There was already, before the War, a measure of transnational traffic by scholars of legal history and legal theory, but deteriorating circumstances in the German universities led Schulz to refashion his scholarship in a manner that would encourage its reception by Anglo-American scholars. This is evident not only in the *Prinzipien*, but also in his 1936 contribution to the Riccobono Seminar at the Catholic University in Washington, DC.

I. Introduction

Perhaps due to current circumstances in society, there has recently been a surge in the scientific output on refugee scholarship as a concept in general,¹ and the life and works of émigré legal

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¹ An early example for political theory: A. Söllner, *Deutsche Politik-*

historians at the advent of the Second World War in particular.² In the context of refugee scholarship as a concept, the question may be asked whether there actually exists such a thing, i.e. whether the very experience of fleeing one's homeland leads to the development of a more generally identifiable type of scholarship that can be classified as "refugee scholarship." In this article, I will present a case study of Fritz Schulz (1879–1957), whose life and works may possibly be representative for a larger group of refugee scholars. Central to this case study will be the Riccobono Seminar held at the Catholic University in Washington, DC, from 1928 on, as treated in an article for *Roman Legal Tradition* by Salvo Randazzo.³ At this seminar, named after the Italian Roman law scholar Salvatore Riccobono, a select group of academics who had fled or were about to flee from Germany as a result of their persecution at the hands of the Nazi regime were invited to speak before an audience of Anglo-American scholars. Schulz was one of them.⁴ As such, by taking the case of Fritz Schulz and his lecture at the Riccobono Seminar as an example, can we come closer to a conceptual identification and description of refugee scholarship as a whole?

Fritz Schulz was a German professor of Roman law who was ousted at the advent of the Nazi regime. Before his eventual forced emigration from Germany to the United Kingdom in 1939, Schulz held chairs at the universities of Innsbruck, Kiel, Göttingen, Bonn, and Berlin.⁵ Perhaps due to his politically active role as a founder of the German Democratic Party (DDP), but certainly as a consequence of his partly Jewish ancestry, Schulz had lost his chair in Göttingen at a very early stage, being forced to

wissenschaftler in der Emigration. Ihre Akkulturation und Wirkungsgeschichte, samt einer Biographie (Opladen 1996). Treating historical scholars including Levy: C. Epstein, *A Past Renewed: A Catalog of German-Speaking Refugee Historians in the United States after 1933* (Cambridge 1993).

² Foundational is E. C. Stiefel and F. Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933–1950)* (Tübingen 1991). Apart from *Jurists Uprooted* as cited below, see L. Breuning and M. Walther, *Die Emigration deutschsprachiger Rechtswissenschaftler ab 1933*, 1 (Berlin 2012), concerning the emigration to a variety of countries: the second volume on United States refugees is set to be published around the time of this writing.

³ S. Randazzo, "Roman Legal Tradition and American Law: The Riccobono Seminar of Roman Law in Washington," *RLT*, 1 (2002), 123–45.

⁴ Randazzo (note 3), 134–35.

⁵ W. Ernst, "Fritz Schulz (1879–1957)," in J. Beatson and R. Zimmermann, eds., *Jurists Uprooted. German-Speaking Émigré Lawyers in Twentieth-Century Britain* (Oxford 2004), 106–204.

move to Bonn.⁶ Notwithstanding his appointment in Berlin in 1931, Schulz was ousted a second time, this time to Frankfurt in 1933.⁷ Eventually, in 1939, he emigrated to Oxford with his family, never to come back to Germany for any extensive period of time, becoming a British citizen in 1947.⁸ As a top class scholar of Roman law, his influence on the wartime and post-War study of Civil law in the United Kingdom can hardly be overestimated, determining its content for decades to come, arguably to this day, with his English-language handbooks on the *History of Roman Legal Science* (1946) and *Classical Roman Law* (1951).

In this article, however, another of his works is central. His *Prinzipien des römischen Recht* (*Principles of Roman Law*) actually is a series of lectures held by Schulz during his time at the University of Berlin, which effectively lost him the office there.⁹ These lectures were published as a single book in Germany in 1934,¹⁰ and translated into English in 1936 under the auspices of Oxford University Press.¹¹ Of both the German and English editions of the *Prinzipien*, several reprints have been made.¹² It is a noteworthy and peculiar work in many ways: every chapter contains a discussion of a single “principle” of predominantly classical Roman law.¹³ Of course, these principles were not formulated as such by the Roman jurists, as for instance in a preamble to their own works or in a separate law or legal document. Roman law, particularly in its classical period, is notoriously casuistic, meaning it primarily consisted of decisions given in single cases. Yet, modern Roman legal scholarship has attempted to find and argue for the existence of general principles behind the development of Roman law, as the foundation for taking specific decisions, or because Roman jurists sometimes

⁶ Ernst (note 5), 117–21.

⁷ Ernst (note 5), 127–28.

⁸ Ernst (note 5), 188.

⁹ Ernst (note 5), 123–24 n.149.

¹⁰ F. Schulz, *Prinzipien des römischen Rechts. Vorlesungen gehalten an der Universität Berlin von Fritz Schulz* (Munich 1934). See Ernst (note 5), 123–26.

¹¹ F. Schulz, *Principles of Roman Law*, trans. M. Wolff (Oxford 1936). See Ernst (note 5), 130–32.

¹² The German text was reprinted by Duncker & Humblot in 1954 and 2003; the English text was reprinted by Oxford University Press in 1956 and 1967. An Italian translation was made by Vincenzo Arangio-Ruiz: F. Schulz, *I principii del diritto romano*, trans. V. Arangio-Ruiz (Florence 1946). For further publication history see Ernst (note 5), 126.

¹³ The (unnumbered) chapters are: “Gesetz und Recht”; “Isolierung”; “Abstraktion”; “Einfachheit”; “Tradition”; “Nation”; “Freiheit”; “Autorität”; “Humanität”; “Treue”; “Sicherheit.”

used certain terms and notions to base their decisions on.¹⁴ As such, Schulz's *Prinzipien* appears to have been a watershed moment in this tradition: firstly, because the pre-War German contributions tended to focus on "Interpolationenforschung"¹⁵ and secondly, by his extensive use of non-legal and even non-ancient sources in formulating these principles.¹⁶ Therefore, it is no coincidence that later contributions often refer to the *Prinzipien* as their inspiration or point of departure.¹⁷

In this article, I would like to go beyond Roman legal scholarship alone, and first of all ask the question: in what measure did the ideas of Schulz as expressed in the *Prinzipien* anticipate a move to the Anglo-American academic world? For this, I shall start by saying something about the relation between the German and the Anglo-American academic worlds in the fields of legal history and legal theory before the War. The previous existence of this relation is arguably essential in the subsequent rise of refugee scholarship as a result of the advent of Nazism in Germany in the 1930s. Then, I will compare the change in the thought of Schulz as the result of his contemporary political circumstances to that of a Roman law scholar in a similar situation, namely Ernst Levy. Specifically, I shall consider lectures held by both Schulz and Levy at the Riccobono Seminar mentioned at the start of this article. The final question I will then pose regards the extent to which Schulz can be seen as a pivotal figure in a larger group of émigré scholars, and thus exemplary for refugee scholarship as a concept.

II. Refugee scholarship and the connection between German and Anglo-American legal science

Strong academic connections had already existed between the German and Anglo-American legal scholarly communities long before the advent of the Second World War. For the field of law, relevant figures include James Bryce (1838–1922), Member of Parliament and Regius Professor of Civil Law at Oxford, who had studied under the German professor of Roman law Adolph von Vangerow,¹⁸ and Benjamin N. Cardozo (1870–1938), who was not

¹⁴ For example L. C. Winkel, "The Role of General Principles in Roman Law," *Fundamina*, 2 (1996), 103–20.

¹⁵ Though hardly absent in the *Prinzipien*, for instance at 24, 32, 93.

¹⁶ For example Savigny (see Schulz, (note 10), 8) and Jhering (see id., 2) figure prominently.

¹⁷ See the literature in Winkel (note 14), 114 (citing Schulz, *Prinzipien*).

¹⁸ As noted by Schulz (note 10), 2 n.6. Recent biography by J.

primarily an academic, but a judge at the United States Supreme Court between 1932 and 1938.¹⁹ In their works both scholars show a remarkable familiarity with contemporary discussions in Germany on law, legal history, legal theory, and legal philosophy. On the other hand, the early twentieth-century interest of the German academic world in developments in English and American scholarship is barely acknowledged in the literature. Case-in-point is the famous legal theorist, legal sociologist, and comparative lawyer Hermann Kantorowicz (1877–1940),²⁰ who had already traveled to the United Kingdom in 1924 and the United States from 1927 as a visiting professor at Columbia University.²¹ Moreover, in 1929 Kantorowicz published a book he wrote at the request of the German Reichstag to investigate the question of First World War guilt.²² Yet, the book is also a treatment of the “spirit of British policy” in general. The position of Kantorowicz in the later biographical literature is extremely telling: the Anglo-Americans focus on his practical work in comparative law, whereas German and German-speaking scholarship mainly see him as a participant in technical discussions on legal theory and legal history, which usually go ignored across the Channel and the Pond alike.

Comparing the works of Bryce, Cardozo, and Kantorowicz, my first contention is that there did exist a scholarly dialogue among this academic community itself. Generally through the mediums of legal theory and Roman law, these scholars understood one another and discussed difficult conceptions and notions on an even plane. Based on these examples, my second contention then is that contrary to popular belief all of this had happened long before the advent of the Second World War. The War, however, would expedite and revamp this process, with far-reaching conse-

Seaman, *Citizen of the World: The Life of James Bryce* (London 2006).

¹⁹ Biography by A. L. Kaufman, *Cardozo* (Cambridge, MA 1998). He was actually only the second associate judge in the Supreme Court of Jewish descent, Brandeis having been the first: id., 461–62.

²⁰ See V. Grosswald Curran, “Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-formalism,” in A. Riles, ed., *Rethinking the Masters of Comparative Law* (Oxford 2001), 66–91; D. J. Ibbetson, “Hermann Kantorowicz (1877–1940) and Walter Ullmann (1910–1983),” in J. Beatson and R. Zimmermann, eds., *Jurists Uprooted. German-Speaking Émigré Lawyers in Twentieth-Century Britain* (Oxford 2004), 269–98.

²¹ Ibbetson (note 20), 277–78.

²² H. Kantorowicz, *Der Geist der englischen Politik und das Gespenst der Einkreisung Deutschlands* (Berlin 1929) (published in English as *The Spirit of British Policy and the Myth of the Encirclement of Germany*, trans. W. H. Johnston (London 1931)). See Ibbetson (note 20), 275–76.

quences. Kantorowicz himself was forced to flee before the War broke out, moving to the United Kingdom.²³ Other world-renowned scholars followed, the examples of Ernst Levy, Fritz Pringsheim, and Fritz Schulz being well-debated in the literature. Less discussed is the fact that even though they were uprooted, they also ended up in extremely fertile soil: in most of these cases, their names had preceded them and often there was as much of a “pull” as there was a “push.” This pull can primarily be explained by a general interest in the state of German scholarly debates before the War, as already mentioned. Also, it came from various specific sources, for instance the community of Roman law experts in the United Kingdom from which Buckland and De Zulueta must be named, in conjunction with organizations like the Oxford University Press. In the United States, clearly due to contemporary political developments, the early twentieth century had already seen an enormous rise in interest in the history of international law in particular, evidenced by the publication of foundational texts by the Carnegie Institution.²⁴ Lastly, charitable foundations like the Rockefeller Foundation and the Society for the Protection of Science and Learning (SPSL) provided funds and support where needed.

Yet, the refugee scholars had to pay a price. The new context forced them to reinvent their scholarship for a new audience, an audience that was perhaps interested in but not necessarily acquainted with the particular technicalities of Roman law. Their scholarship had to be placed in a context their new audience was familiar with, without losing its academic qualities. They did so in a most impressive way. For example, Fritz Pringsheim in a manner very reminiscent of Bryce’s works composed a comparison between Roman and English law, indicating their weird but noteworthy similarities, in a piece for the *Cambridge Law Journal*.²⁵ Bryce and Cardozo also played a fundamental role in Schulz’s *Prinzipien*: the book even carried an excerpt from a lecture by Cardozo as the epigraph to the first chapter.²⁶ Finally,

²³ Already from 1933 on: Ibbetson (note 20), 278–82.

²⁴ On one of the main editors of the Carnegie Institution series, see C. Rossi, *Broken Chain of Being. James Brown Scott and the Origins of Modern International Law* (The Hague 1998); and in general, see M. Koskeniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge 2002), 284, 310, 466, and *passim*.

²⁵ F. Pringsheim, “The Inner Relationship between English and Roman Law,” *Cambridge L.J.*, 5 (1935), 347–65.

²⁶ Taken from “The Nature of the Judicial Process,” which is a series of lectures held at Yale University, first published in 1921: Kaufman (note 19), 199, 205. The quote in Schulz (note 10), 1, reads:

a very specific instance of this process of reinvention were the Riccobono lectures mentioned in the introduction, which were held at the Catholic University in Washington, DC, from 1928 on.²⁷ These lectures were attended by many influential American jurists, and Schulz delivered an extremely noteworthy talk there.

III. Refugee Romanists and the Riccobono Seminar

In the context of the Riccobono Seminar, I would like to now compare the situation of Schulz to that of Ernst Levy, another very prominent refugee Romanist. The lives of Schulz and Ernst Levy are parallel in many ways. Like Schulz, Levy was an outstanding Romanist, with chairs in Freiburg and Heidelberg before the advent of the fascist regime. Like Schulz, he lost his office and was forced to flee to the Anglo-American academic world in 1935 after being targeted as a person with a Jewish background by that regime.²⁸ Like Schulz, Levy seems to adapt his scientific thinking to the new situation even at an early stage. Finally, like Schulz, the relation to Germany after the war appears to remain fraught and uncomfortable, notwithstanding their enormous influence on the post-War study of Roman law on both sides of the Channel and the Pond. Contrary to Schulz however, Levy actually did succeed in obtaining a post abroad, namely as a professor of European history and Roman law at the University of Washington in Seattle.²⁹ Kunkel in his obituary of Levy in the *Savigny Zeitschrift* sketches how that came about:³⁰

Amerikas Universtäten haben damals viele deutsche Gelehrte mit offenen Armen aufgenommen. Für Juristen freilich, deren Wissenschaft in weitem Maße an die nationale Rechtswelt gebunden ist, war es weit schwerer als für andere, dort eine befriedigende Wirkungsstätte zu finden, und selbst für die Vertreter eines internationalen Zweigs des Jurispru-

The elements (of the “brew” of judge-made law) have not come together by chance. Some principle, however unavowed and inarticulate and subconscious, has regulated the infusion . . . a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis.

²⁷ Randazzo (note 3), 123–45; Ernst (note 5), 139 n.268.

²⁸ D. Simon, “Levy, Ernst,” in *Neue Deutsche Biographie*, 14 (Berlin 1985), 403.

²⁹ Simon (note 28), 404.

³⁰ W. Kunkel, “Ernst Levy zum Gedächtnis,” *ZSS* (RA) 86 (1969), xvii.

denz wie der Wissenschaft vom römischen Recht bot die eigentümliche Gestaltung des Rechtsunterrichts in den Vereinigten Staaten keinen genügenden Raum. Nur dem, der sich entschlossen auf amerikanisches Recht und angelsächsisches Rechtsdenken umstellte, winkte eine gute, wenn auch keineswegs leicht zu gewinnende Chance. Für Ernst Levy, den damals fünfundfünfzigjährigen, der in seinen romanistischen Forschungen lebte und webte, wäre dieser Weg kaum gangbar gewesen. Unter solchen Umständen muß man es als ein besonderes Verdienst der University of Washington in Seattle betrachten, daß sie, im Bewußtsein, einem bedeutenden Gelehrten zu helfen und ihn für sich zu gewinnen, die Frage der fachlichen Einordnung in die zweite Linie rückte. Sie verlieh ihm einen Lehrstuhl, in den sich das Department of History und die Law School teilten. In jenem lehrte Levy europäische Geschichte, in dieser römisches Recht. Bei allem herzlichen Entgegenkommen, das er fand, war die Aufgabe, vor die er sich gestellt sah, freilich schwer genug. Es fehlte ihm zu zunächst die mündliche Beherrschung der englischen Sprache. Er mußte sich in ein umfangreiches Lehrgebiet einarbeiten, das ihm von Hause fernlag, und auf ein ganz anderes Lehrsystem umstellen. Die Art, wie er diese Schwierigkeiten ohne jede Klage überwand, erweckte die Bewunderung seiner Kollegen. Er gewann auch die Studenten. Man konnte von ihnen nicht selten den Satz hören: *Germany's loss is our gain.*

Paraphrasing Kunkel's words, it is obvious the appointment was made on the basis of Levy's personal situation as a refugee scholar, not a sudden rise in interest in Roman law in Seattle, Washington. In that context, a clear schism due to the political circumstances in Levy's body of work entails the shift of focus to natural law, in a presentation for the Natural Law Institute of the University of Notre Dame in 1948.³¹ From this article I quote:

Quite different [from the era of peace in which Savigny, Gierke, Austin, and Holmes lived] is the outlook when mankind in general or some country in particular faces a cataclysm threatening to destroy or distort the fundamental liberties. . . .

³¹ Published as "Natural Law in Roman Thought," *SDHI*, 15 (1949), 1–23 = *Gesammelte Schriften*, 1 (Cologne 1963), 3–19. The quote is at *Gesammelte Schriften* 1:19.

At such a juncture has mankind arrived in these days under the shocking impression of unbelievable mass crimes committed under totalitarian rulers in conformity with their positive laws. Full of fear that the waves of such lawlessness may spread, men are again appealing to that higher law which holds out the promise to ensure their basic individual rights against encroachments of tyrannical powers. In this state of mind they find comfort in the works of past philosophers and theologians, in the constitutions and legal writings of many countries and periods. The classical jurists themselves, as we noted, offer only sporadic support. But some of their pertinent statements, supplemented by postclassical additions, were given a prominent place in Justinian's *Corpus juris*. From that time they have never ceased to form a vital link in the chain of arguments for the recognition of a law of nature.

However, the schism between Levy's purely scientific output and the composition of works referring to the political circumstances seems to occur before that, firstly in the early 1930s, with a series of articles on Roman criminal law. At the Riccobono Seminar in 1938, Levy spoke about the topic of "Statute and Judge in Roman Criminal Law."³² As I will set out, the topic and content of this lecture as well as the concurrent articles seem motivated by the change in Levy's personal circumstances, his new status as a refugee scholar in particular.

In any case, hypothetically speaking, there is ample reason to believe that both Schulz and Levy adapted their scholarship already in the early 1930s with the purpose of finding new employment in the United States due to the circumstances in Germany. Moreover, it seems obvious at least that Schulz was eager to participate in the Riccobono Seminar with precisely that purpose. The object of our research project however is not only to study the published literature in the light of contemporary political circumstances, but also to see if these are reflected in the relevant archival sources. As such, highly valuable is a series of letters written to and from Max Radin, professor of law at the University of California in Berkeley between 1919 and 1948, and himself a son of Jewish immigrants. The collection, edited by

³² E. Levy, "Statute and Judge in Roman Criminal Law," *BIDR*, 45 (1938), 396–410, published in an altered and extended form as "Gesetz und Richter im kaiserlichen Strafrecht," *BIDR*, 45 (1938), 57–166, reprinted in *Gesammelte Schriften*, 2 (Cologne 1963), 433–508. See Randazzo (note 3), 138.

Petit and published in 2001 by Jovene under the title *Cartas Romanisticas (1923–1950)*, is a treasure trove with regard to German / United States refugee scholarship, not only with regard to Schulz and Levy, but also for instance Kantorowicz, Pringsheim, and many others, simply showing that from 1933 onwards large-scale attempts were made to rehouse and reemploy Jewish or otherwise persecuted scholars from Europe in the United States, at least those from the field of legal history.³³

On April 21, 1936, Schulz then writes the following to Radin:³⁴

Pardon me that I write this letter to you. I hope I am not a stranger to you. I am staying here at my relatives for a few weeks and take pains to come in personal touch with the Romanistic scholars of this country. I met Prof. Schiller here, read a paper in the Riccobono Seminar in Washington and made an address in Dean Pound's Seminar in Harvard. I should of course have paid a visit to you, if California would not be so very far from here. Allow me therefore at least to make me personally acquainted to you by letter. I do not know whether my last book ("Prinzipien des Roemischen Rechts," Jhering would have called it "Geist des Roemischen Rechts") is in your hand. If not, it would really be a pleasure for me to send you a copy, provided you do not prefer the English edition which will be published by the Oxford Press in the course of this summer. I should be extremely grateful to you, if you would take the pains to read this book (which I am arrogant enough to believe will interest you) and to recommend it a little within the circle of your students and adherents. If you could make up your mind to review the book in an American paper or review, I should only be too glad. I have just read your critique on Caesars Mantle in a New York newspaper which stimulated me to ask you this question. It is not quite impossible that I return to this country in the fall or during next winter in order to give occasionally some lectures in American universities — in the law schools or in the department of ancient history — , as I can give no more lectures in Germany in consequence of the new racial legislature (though I have been treated tolerably by the government by giving me a pension). If you know a university who might be interested in such lectures, I should

³³ See for example the letter from Kantorowicz: C. Petit, ed., *Cartas Romanisticas (1923–1950)* (Naples 2001), no. 71.

³⁴ Petit (note 33), no. 89. See also *id.*, no. 112.

be sincerely grateful to you for an advice and if possible for a recommendation. Certainly you have the best and fullest survey over the study of Roman law in this country. It is a pity that in the law schools here there is generally but little interest for the history of Roman law.

From this source, it seems clear Schulz attempts to find new employment in the United States by means of the *Principles* and the contents of the Riccobono lecture. Similar letters were sent to Radin by Levy,³⁵ without however mentioning the lectures or suggesting a change in his work for the sake of employment to the level that Schulz does. It remains, therefore, to examine and compare the respective texts of the actual Riccobono lectures held by Schulz and Levy. Of both, we have the texts of the lectures themselves, as well as the reports published in the *Bullettino*.³⁶ For now, to see if the text of the lectures was in any way determined by their personal circumstances, I will focus on several aspects possibly indicating a purpose outside of the purely scientific realm. I shall supplement the texts from the lectures by concurrent statements from the *Prinzipien* in the case of Schulz, and some of Levy's contemporary output, as well as the relevant archival sources where needed.

IV. The Riccobono Seminar as a door to the Anglo-American academic world

The obvious matters to look for are references to the contemporary political situation in Germany on the one hand, and premeditated links to Anglo-American legal scientific discussions on the other. The topics of both Schulz's and Levy's lectures generally speaking have in common the fact that they both seem to concern the notion of the individual judge or jurist as a primary law-maker. In Levy, this plays out in the role of the magistrate in Roman criminal law vis-à-vis an underlying statute ("Gesetz und Richter im kaiserlichen Strafrecht"), with particular concern for the principle of *nulla poena sine lege praevia*. In the work of Schulz on the *Prinzipien*, the same relation between statute and judge is prevalent, for instance in the context of the principles of

³⁵ Petit (note 33), nos. 88, 91.

³⁶ Report of Seminar of March 18, 1936, *BIDR*, 43 (1935 but pub. 1935–1937), 353–56; see also Randazzo (note 3), 134–35. The text of Schulz's lecture, titled "The Invention of the Science of Law at Rome," was published as an appendix to H. H. Jakobs, *De similibus ad similia bei Bracton und Azo* (Frankfurt am Main 1996), 99–110.

“statute and the law” (*Gesetz und Recht*) and “fidelity” (*Treue*).³⁷ In his Riccobono lecture, the focus however is on the creation of a legal science by the Roman jurists. Reiterating his principle of “isolation,” Schulz emphasizes the independence of the Roman jurists as a professional group. Yet, the principle of “isolation” as formulated by Schulz does not primarily entail an independence from the political sphere, but rather an independence in an academic sense, meaning the science of law at Rome was characterized by an autonomous development, separated from societal and other extra-legal concerns.³⁸

As Jakobs notes in his interpretation of Schulz’s lecture, the notion of an autonomous legal science harkens back to a late nineteenth-, early twentieth-century German legal-theoretical debate.³⁹ These debates were still very much conducted on the basis of Roman law, which sounds strange to us, but up until 1900 Roman law was still the law of the land in Germany. In this debate, Kantorowicz, whom I mentioned earlier, also has a prominent role. The main question in the discussion was whether individual jurists, including judges, should take societal, political, and economic questions into account in formulating laws and adjudicating disputes. Given he clearly sees Roman law as an “ought” rather than an “is,” Schulz takes a definite stand on the “no”-side by means of his principle of “isolation.” In the *Prinzipien*, legal and societal norms are fastidiously separated, which Schulz shows with an abundance of examples derived from a variety of contexts.⁴⁰ Interestingly, the discussion was co-opted by Nazi-sympathizing jurists in the advent of the Second World War,⁴¹ giving scientific credence to the legal discrimination of Jews as a “societal norm” a judge should adhere to. It does not seem to be far-fetched to argue that Schulz explicitly has this turn in the debate in mind in both his stating of the principle of

³⁷ Schulz (note 10), 8 and 155–56, respectively. In the context of the principle of “authority” (*Autorität*), *nulla poena* is cited *id.*, 118, 120, however only to emphasize it was unknown to the Romans as such.

³⁸ Schulz (note 10), 13–26.

³⁹ Jakobs (note 36), 112–13. Reference to Windscheid in Schulz (note 10), 68–69.

⁴⁰ Schulz (note 10), 15–16: “Die römische Jurisprudenz hat indessen die außerrechtlichen Normen nicht allein mit Strenge von den rechtlichen gesondert, sondern sie auch grundsätzlich von ihren Betrachtungen ausgeschlossen.” See also the chapter on “isolation” (*Isolierung*) throughout, with isolating tendencies also in German law on *id.*, 26.

⁴¹ Jakobs (note 36), 112–13. For, e.g., Wieacker’s position during the War, see O. Behrends, “Franz Wieacker 5.8.1908 – 17.2.1994,” *ZSS* (RA), 112 (1995), xxv–xxxix.

isolation and his employment of it in the Riccobono lecture. Thus, albeit rather veiled, Schulz appears to refer to this political discussion in his lecture at the Catholic University.

Similarly veiled political-legal theoretical allusions occur in Levy's lecture held some two years later. For example, Levy had become interested in the position of Jews in the Roman Empire, as well as the mechanics of the persecution of Christians as a religious minority.⁴² Moreover, it is hard not to view the topic of Levy's lecture, the relation between statute and judge specifically with regard to the determination of the penalty in a public criminal trial, in conjunction with for instance the notorious *Lex van der Lubbe*, enacted by the Nazi regime on March 29, 1933, giving the judge the discretion to apply the death penalty at will in explicit contravention of the principle of *nulla poena*. In his *Prinzipien*, Schulz once again also alludes to this problem in the form of a discussion of Roman legal texts pertinent to the principle of fidelity in particular.⁴³ This principle entailed the Roman magistrate as bound to his own edicts, in a similar manner as a private party being bound to his own word in a contractual relationship. As such, the retroactive application of legal norms is expressly prohibited by the principle of fidelity in Roman law as Schulz sees it.⁴⁴ In that context, contemporary reviews of the *Prinzipien* note the anachronistic character of the questions Schulz poses.⁴⁵ Clearly, the examples given show Schulz connects his interpretation of developments in Roman law to various more contemporary discussion in law and society. Comments given after his Riccobono lecture also concern the anachronistic nature of Levy's thesis: when we for instance look at the conclusion of his lecture, we read:⁴⁶

In conclusion the principle, *nulla poena sine lege*, is not in itself a high test and bulwark of civic liberties. Such it is only when that law proceeds from a power in the state which is not subject to, or changeable at, the will of an absolute ruler.

⁴² As evidenced by passages in "Gesetz und Richter im kaiserlichen Strafrecht" (note 32), 403–404 = *Gesammelte Schriften* 2:448–51.

⁴³ See M. J. Schermaier, "Fritz Schulz' Prinzipien. Das Ende einer deutschen Universitätslaufbahn im Berlin der Dreißigerjahre," in S. Grundmann, M. Klopfer, and C. G. Paulus, eds., *Festschrift 200 Jahre juristische Fakultät der Humboldt-Universität zu Berlin. Geschichte, Gegenwart und Zukunft* (Berlin 2010), 694–95.

⁴⁴ Schulz (note 10), 156.

⁴⁵ See, e.g., M. Lauria, Review of Schulz, *Prinzipien* (1934), *SDHI*, 1 (1935), 222, 225. See also Schermaier (note 43), 692–93.

⁴⁶ Levy (note 32), *BIDR* 45:406.

Again, it is very hard not to read in statements like this a comment on the situation in Germany at the time, the *Lex van der Lubbe* in particular.

However, the anachronistic character of the lectures of Schulz and Levy does not only concern the political circumstances in Germany. Also, in both lectures the presenters are at pains to connect their topic to Common law and Anglo-American scholarship. At various points in his lecture, this leads Levy to argue for the existence of the principle of *nulla poena* in United States criminal law, for instance in article 1, section 9 of the American Constitution.⁴⁷ Much of the discussion after the lecture revolves around the existence of this principle in a comparable sense in United States law and Roman public criminal law alike. For the similarities between the Common and Roman legal orders from a scientific perspective, Schulz brings another one of his principles to the fore, but with a twist. As an expansion of his principle of “isolation,” one would expect a clear-cut comparison between the methods of Roman jurists and the American judge, which indeed occurs in various instances in the *Prinzipien* based on their respective casuistic nature.⁴⁸ Yet, Schulz himself notes in his Riccobono lecture:⁴⁹

Undoubtedly this Roman casuistic literature looks similar to the Anglo-American literature on case law. But the difference is also obvious. Quite apart from the important fact that in Rome there is no principle of *stare decisis* — not even customary law binds the judge — Anglo-American case law on principle deals with cases that have actually happened and these cases are reported with all the vivid colours of actual life; all juristic research starts from these cases and is often confined to them. Roman case law inasmuch as it deals with cases which have actually happened, on principle omits whatever is not strictly juristic, the cases are more or less transformed to a mere abstraction.

In his comparison, Schulz therefore ends up arguing for a great difference on the basis of his principle of “abstraction,” presenting the Roman jurists as conceptual thinkers, who contrary to American judges tended to ignore and remove the real-life details of cases in their works. However, according to Schulz, there are

⁴⁷ See Levy (note 32), *BIDR* 45:396–97.

⁴⁸ As he does in Schulz (note 10), 11. Compare the review of *Prinzipien* and *Principles* by W. W. Buckland, in *U. Toronto L.J.*, 2 (1938), 392.

⁴⁹ Quoted in Jakobs (note 36), 108.

nevertheless various reasons to teach and study Roman law in the Anglo-American academic world: as a law entailing the roots of many legal concepts, there is a value for legal theory. Furthermore, studying these concepts has the practical advantage of forcing judges and legislators to operate with clear and succinct notions. Thirdly, it facilitates the task of applying foreign law in the growing international intercourse between legal systems. Lastly, seeing this voluminous and complicated character of the interaction between legal orders, the study of Roman law as a law of concepts foremost serves legal education.⁵⁰

In these closing remarks of the Riccobono lecture held by Schulz, in my view it is once again not difficult to infer a tactic pertaining directly to Schulz attempting to find employment in the United States. Yet, with regard to the practical value of concepts derived from Roman law in international intercourse, he goes one step further. Like scholars such as Bryce and Kantorowicz before him, Schulz relates the trope of concepts derived from Roman law as a basis for their contemporary conceptions of international (private) law. The relation of this line of thought to the study of Roman law in general and the Riccobono Seminar specifically is made clear by a letter Riccobono himself sent to Levy in 1944 upon the latter becoming magister of the seminar:⁵¹

Di fronte al diritto romano nazionale potè svilupparsi a grado a grado quel diritto universale che, attuando il principio del uguaglianza di tutti gli uomini, inauguro e promosse sin d'allora, almeno del campo del diritto privato, il livellamento di tutte le genti. E non era poco per quel tempo. . . .

Anche oggi, dopo la tragica lotta che almeno in Europa volge ormai al termine, è non solo augurabile, ma anche prevedibile che sorgerà una più vasta comunione di popoli, retta da principi più alti di libertà e di giustizia.

In questa nuova comunità di popoli pacificamente convinti sorgeranno nuove necessità, nella organizzazione dei rapporti sociali e internazionali, e quindi nuovi istituti e strutture e forme giuridiche, che dovranno essere elaborati con illuminata sapienza. In tale opera costruttiva le fonti romane potranno essere utilizzate come il più prezioso patrimonio di esperienza e di tecnica giuridica.

⁵⁰ See Jakobs (note 36), 109–110.

⁵¹ "Messaggio di Salvatore Riccobono," *BIDR*, 49/50 (1947), 2. See also Randazzo (note 3), 141. The letter was published previously in *Seminar*, 3 (1945), 69–73, a special series of the law journal of the Catholic University, *Jurist*.

Paraphrasing, in the letter Riccobono argues for a European community of states upholding basic values like human equality, founded in part on the heritage of Roman legal science, in the sense that the European legal community is based upon ethical norms such as liberty and equality, which were encapsulated in Roman law. In refugee scholarship, a similar tendency towards creating a supranational organization guaranteeing individual liberties we find elsewhere too, for example clearly in a report composed by Fritz Pringsheim after he had returned to Freiburg-im-Breisgau after the War, after witnessing at first hand the destruction the conflict had done to the town and its people.⁵² But what about the presence of an idea of a European legal culture in Schulz?

V. Conclusion

In all of the scholars we study in our Helsinki Foundlaw project the idea of a European legal community with Roman law containing its basic ethical norms is prominent. All except Schulz, at least in any obvious manner. As his comparison between Roman and American law shows, his scientific thought tends to be complex. Considering his principle of “nation,” his ethic is not a purely internationalist one. In this context, Schulz for instance links the development of Roman legal science to the existence of a specific Roman “nation” based on its citizenship, free from “foreign” — meaning Greek — influences.⁵³ However, Schulz also treats principles such as humanity, liberty, and fidelity, the latter in the meaning of an obligation of the magistrate to keep to his word, i.e. his judicial and legislative enactments.⁵⁴ Classical Roman law thus provides him with the material to critique a lack

⁵² The report is enclosed in a letter written to the Society for the Protection of Science and Learning (now: Council for At-Risk Academics, *cara.ngo*), sent on 20.12.1946, kept in the Bodleian library at Oxford (Pringsheim Bodleian MS SPSL 272.1). I cite from this report at p. 7:

The sooner the terrible isolation ends the better. The task is extremely urgent. Once the utter hopelessness begins to lift, and a community of European nations appears possible, then the dormant and faint trust in liberation and in a new life, thus set free for action, will show surprising results.

See also A. M. Honoré, “Fritz Pringsheim (1882–1967),” in J. Beatson and R. Zimmermann, eds., *Jurists Uprooted. German-Speaking Émigré Lawyers in Twentieth-Century Britain* (Oxford 2004), 225–26.

⁵³ Schulz (note 10), 85.

⁵⁴ See Schulz (note 10), 155–56, explicitly prohibiting the retroactive application of legislative norms.

of upholding the rule of law in contemporary Germany. Yet, this critique is steeped in the scientific discussions in the German legal theory of the nineteenth and twentieth centuries, which only later came to be coopted by Nazi-sympathizing scientists. In other words, in 1934, the relation between Roman law and fascist ideology is still mostly a by-product of article 19 of the *Nationalsozialistische Deutsche Arbeiterpartei* program (1920), which concerned the perceived individual or communal character of Roman law itself.⁵⁵

However, all of this does not mean Schulz only had purely scientific objectives in mind when composing the *Prinzipien*. In this article, I have reasoned from two starting points as regards the emigration of German scholars to the Anglo-American academic world at the advent of the Second World War: first, strong academic relations had already existed between Germany and the United States/United Kingdom long before the 1930s, as evidenced by the position and works of Bryce, Cardozo, and Kantorowicz. Second, academic institutions may have viewed the exodus partly as an opportunity to bring in talented and world-class refugee scholars: “Germany’s loss is our gain,” as Kunkel puts it in his assessment of Levy’s appointment as a professor of European history and Roman law at the University of Washington in Seattle. Whatever their position or background in their homeland, this did mean the refugees had to make their scholarship accessible for a new audience: we can clearly see this in the works of both Levy and Schulz, the latter’s (English edition of the) *Principles of Roman Law* specifically. Moreover, as Schulz makes clear in his letter of April 1936 to Max Radin, the same goes for his lecture at the Riccobono Seminar. As such, comparing Schulz’s and Levy’s lectures, some markers can be identified that I submit are relevant, generally speaking, for refugee scholarship as a concept.

Before going into these, it needs to be remembered Levy held his lecture as late as 1938, and after he had fled to the United States and obtained a position there. The political fallout of the advent of the Nazi regime had at that point started, although few would really grasp the enormity of its consequences. Still, the first similarity between the lectures of Schulz and Levy is a possibly veiled reference to the contemporary political situation in

⁵⁵ B. Miller Lane and L. J. Rupp, *Nazi Ideology before 1933: A Documentation* (Austin 1978), 42: “We demand the substitution of a German Common Law for Roman Law. Roman Law serves a materialistic world order.” For the problem, see Ernst (note 5), 124, and Schermaier (note 43), 696–97.

Germany. In both the *Prinzipien* and Levy's "Statute and Judge in Roman Criminal Law," the relation between the legislature and judiciary is central, seemingly criticizing the 1933 enactment of the *Lex van der Lubbe* in particular. Inasmuch as it is present in the *Prinzipien*, in "The Invention of the Science of Law at Rome" any political statement appears to be made indirectly, through previously held scholarly discussions in Germany on the purported isolated character of legal science. For the concept of refugee scholarship in general, although obviously references to the state of the homeland are paramount, the case of Schulz shows there can exist some ambivalence towards out-and-out criticism that may, hypothetically speaking, have something to do with the problem of dissension from one's "scientific upbringing." Again, in 1936 Schulz is still for better or worse part of the German academic world foremost, and criticizing the political situation might amount to distancing himself from the circle he had made his career in, many of the members of which can be considered his friends and close relations. Levy writing two years later has arguably gone through that process of distancing himself both physically and spiritually to a much further degree.

However, a clear marker for the Riccobono lectures of Schulz and Levy as representative of refugee scholarship in a more general sense are the references to the academic culture of the adoptive country. In this context, whereas the links between Levy's topic and American law seem to remain fairly superficial, prompting a critical discussion after his lecture, Schulz even goes so far as to formulate informed concrete uses for the study of Roman law in the United States. It is interesting to note these recommendations revolve around the idea of Roman jurists as conceptual thinkers, deriving abstract notions from their legal practice that would become foundational for the Europe-wide development of legal science in the Middle Ages, and were later employed by scholars like Riccobono (and at the moment like Zimmermann⁵⁶) in their arguments for the creation of a European community of states. As such, a most pertinent question with regard to refugee scholarship as a concept concerns its link to the development of an ideology. The case of Schulz (as well as Levy, inasmuch as the latter's work on natural law can be read as a treatment of its shortcomings) shows that this ideology does not necessarily have to be internationalist, universalist, or even particularly political. Yet, the idea that something has failed and

⁵⁶ To a degree: see R. Zimmermann, "Roman Law and European Culture," *New Zealand L. Rev.*, (2007), 356 (referring to Schulz).

that it has to be replaced with something else entirely to prevent a recurrent failure seems prevalent in all of the works of Schulz from 1934 onwards, including his lecture on the science of law at the Catholic University. It is this idea that may make the life and works of Fritz Schulz such an interesting case study for refugee scholarship as a concept, and the concept itself deserving of further academic study.
