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20.12.18

## **Narratives and normativity: Totalitarianism and narrative change in the European legal tradition after WWII\***

Conditionally accepted by the *Law and History Review* (2019)

### **Abstract**

After WWII, a new form of Europeanism emerged in legal history that gained momentum from European unification. This article explores the emergence of this new narrative as part of the process of exile from totalitarianism and its connection with the reestablishment of the European intellectual and political order after the war. My purpose is to explore the parallel afterwar processes of narrative and normative change and the influences and connections between them. It focuses on a specific historical case, the turn toward Europe, its legal heritage and human rights in the post-war era writing of legal history, especially in the writings of Paul Koschaker, Franz Wieacker, and Helmut Coing, and its linkages to the simultaneous process of European integration. It explores a new argument about the interlinkage between narrativity and normativity as cognitive processes that rely on the creation and sustaining of belief, and the ideas of legitimacy and identity construction.

### **1. Exploring narrative and normative change in history**

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\* This work has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013) / ERC grant agreement n°313100 (Reinventing the Foundations of European Legal Culture 1934-1964).

The historical relationship between narrative and normative spheres contains problematic elements on many levels. While the intermingling of narrativity and factuality has been something of a mainstay in the theory of history,<sup>1</sup> the interrelationship between narrative and normativity has gained much less interest. After the Second World War, a momentous change in the European legal traditions occurred, a change that was little noted by contemporaries. With the collapse of Nazi Germany and Fascist Italy, the ideological contestation between the liberal social and legal order and totalitarianism was settled while the Communist challenge persisted. In Germany and other Axis countries, nationalism became tainted by its ideological association with Nazism, while in places like France it formed a crucial part of the idea of the Resistance. As a result, the concept of European nationalism existed only in theory. Nevertheless, after the war a new form of Europeanism emerged that gained momentum from the European unification. Because the unification was founded on legal instruments and was soon perceived as a legal process, a novel way of approaching the European project through history made its way into legal discussions.<sup>2</sup> Roughly at the same time as the European legal integration began after the Second World

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<sup>1</sup> On historical narratives, see Ann Rigney, “History as Text: Narrative Theory and History,” in *Sage Handbook of Historical Theory*, ed. Nancy Partner and Sarah Foot (London: SAGE Publications Ltd, 2012), 183–201; Frank R. Ankersmit, *Meaning, Truth, and Reference in Historical Representation* (Ithaca: Cornell University Press, 2012); Alun Munslow, *Narrative and History* (London: Macmillan, 2007); Paul Ricoeur, *Time and Narrative* (Chicago, IL: Chicago University Press, 1990); David Carr, *Time, Narrative, and History* (Bloomington, IN: Indiana University Press, 1986).

<sup>2</sup> See, for example, Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford: Oxford University Press, 2017).

War, the narrative of a shared European legal culture as a historical concept was conceived by a group of legal historians, which is the focus of this article. A new dominant narrative that took Europe as its main focus emerged in a few years, gaining an almost uncontested position.<sup>3</sup> Using this process as an example, this article explores the emergence of this new narrative as a part of the process of exile and its connection with the reestablishment of the European intellectual and political order. The purpose is to explore a parallel process of narrative and normative change and the influences and connections between them in a specific historical case, the turn toward Europe, its legal heritage and its association with human rights in the post-war era. In doing so, I explore a new argument about the interlinkage between narrativity and normativity as cognitive processes that rely on the creation and sustaining of belief.

Earlier scholarship has noted the surge in scholarship relating to aspirational, even utopian European themes in the post-war period,<sup>4</sup> but the prehistory of this phenomenon in legal scholarship has not been examined.<sup>5</sup> While the rise in Europeanism has been linked with

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<sup>3</sup> In addition to the works of Koschaker and Wieacker dealt with in this article, some of the most influential books promoting the same narrative are Manlio Bellomo, *The Common Legal Past of Europe: 1000-1800* (Washington, D.C.: Catholic University of America Press, 1995); Peter Stein, *Roman Law in European History* (New York and Cambridge: Cambridge University Press, 1999); Paolo Grossi, *A History of European Law* (Chichester, West Sussex, U. K. and Malden, MA: Wiley-Blackwell, 2010).

<sup>4</sup> Summarized in Jayne Svenungsson, “After Utopia: On the Post-war Debates on History and Ideology,” *Storiografia* 18 (2015): 203–218.

<sup>5</sup> An important exception is Thomas Duve, “European Legal History – Global Perspectives,” *Working Paper for the Colloquium, European Normativity – Global Historical Perspectives* (Max-Planck-Institute for European Legal History, September, 2nd-4th, 2013), Max Planck

the political steps of European integration, the aim of this article is to refocus the origins of this phenomenon to the influence of earlier exile scholarship. I argue that tracing back this development leads to a group of scholars who were exiled from Nazi Germany during the 1930s. I foreground the examples of Fritz Schulz (1879-1957)<sup>6</sup> and Fritz Pringsheim (1882-1967),<sup>7</sup> who were exiled in Britain. Schulz developed the idea of the Roman legal tradition as the foundations of European legal thought as a counterargument to Nazi legal theory,<sup>8</sup> while Pringsheim's works drew a similar line between ancient Rome and the modern European rule of law.<sup>9</sup> Another central figure is Paul Koschaker (1878-1951),<sup>10</sup> a scholar of cuneiform law

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Institute for European Legal History Research Paper Series No. 2013-06 (August 5, 2013).

Available at SSRN: <https://ssrn.com/abstract=2292666> or

<http://dx.doi.org/10.2139/ssrn.2292666>, 9.

<sup>6</sup> Wolfgang Ernst, "Fritz Schulz," in *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, ed. Jack Beatson and Reinhard Zimmermann (Oxford: Oxford University Press, 2004), 106–204.

<sup>7</sup> Tony Honoré, "Fritz Pringsheim," in *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, ed. Jack Beatson and Reinhard Zimmermann (Oxford: Oxford University Press, 2004), 205–233.

<sup>8</sup> Fritz Schulz, *Prinzipien des römischen Rechts* (München: Duncker & Humblot, 1934); Fritz Schulz, *Roman Legal Science* (Oxford: Oxford University Press, 1946).

<sup>9</sup> Fritz Pringsheim, "The Legal Policy and Reforms of Hadrian," *Journal of Roman Studies* 24 (1934): 141-153; Fritz Pringsheim, "Höhe und Ende der Römischen Jurisprudenz," in *Gesammelte Abhandlungen* (Heidelberg: Winter Verlag, 1961), 53–62.

<sup>10</sup> Tomasz Giaro, *Aktualisierung Europas, Gespräche mit Paul Koschaker* (Genoa: Name, 2000); Tommaso Beggio, *Paul Koschaker (1879-1951): Rediscovering the Roman Foundations of the European Legal Tradition* (Heidelberg: Winter Verlag, 2018).

who turned to European heritage as a reaction to Nazi repression.<sup>11</sup> For the European narrative to succeed, it was vital that it was further developed and adapted by two younger scholars, Franz Wieacker (1908-1994)<sup>12</sup>, a pupil of Pringsheim, and Helmut Coing (1912-2000).<sup>13</sup> They had both been in frontline military service, Wieacker had been active in the Nazi movement, but realigned themselves quickly after the war. Wieacker was central in developing the idea of legal heritage as a European frame of reference,<sup>14</sup> while Coing outlined the theory of the tradition of rights as a jurisprudential construct that was particularly

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<sup>11</sup> Paul Koschaker, “Die Krise des römischen Rechts und romanistische Rechtswissenschaft,” in *Schriften der Akademie für Deutsches Recht: Römisches Recht und fremde Rechte*, vol. 1 (München: Duncker & Humblot, 1938), 1–86; Paul Koschaker, *Europa und das Römische Recht* (München: Duncker & Humblot, 1947).

<sup>12</sup> Viktor Winkler, *Der Kampf gegen die Rechtswissenschaft. Franz Wieackers “Privatrechtsgeschichte der Neuzeit“ und die deutsche Rechtswissenschaft des 20. Jahrhunderts* (Hamburg: Verlag Dr. Kovač, 2014); Ville Erkkilä, *The Conceptual Change of Conscience: Franz Wieacker and German Legal Historiography 1933-1968* (Helsinki: Unigrafia, 2017).

<sup>13</sup> Beyond short notes and an autobiography [Helmut Coing, *Für Wissenschaften und Künste. Lebensbericht eines europäischen Rechtsgelehrten, hrsg., kommentiert und mit einem Nachwort von Michael F. Feldkamp* (Berlin: Duncker & Humblot, 2013)], no major study on Coing exists.

<sup>14</sup> Franz Wieacker, *Das römische Recht und das deutsche Rechtsbewußtsein* (Leipzig: Barth, 1944); Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (Göttingen: Vandenhoeck & Ruprecht, 1952).

European.<sup>15</sup> While the turn toward Europe forms a parallel with the beginning of the political process of European integration, the emergence of human rights as part of the European tradition coincides chronologically with the more general enthusiasm on human rights generated by the preparation and 1948 signing of the Universal Declaration of Human Rights.

Though scholarship on academic exile has grown since the 1960s, the theme of the subsequent scholarly change has been addressed only very recently.<sup>16</sup> One of the crucial issues of the present study is that of narrative continuities from the Nazi period to the post-

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<sup>15</sup> Helmut Coing, “Zum Einfluss der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 69 (1952): 24–59; Helmut Coing, “Römisches Recht in Deutschland,” *Ius Romanum Medii Aevi* 5.6 (1964): 26–28; Helmut Coing, “Die ursprüngliche Einheit der europäischen Rechtswissenschaft,” in *Gesammelte Aufsätze II* (Frankfurt am Main: Klostermann, 1982), 137–156.

<sup>16</sup> Laura Fermi, *Illustrious Immigrants: The Intellectual Migration from Europe 1930-1941* (Chicago: University of Chicago Press, 1968); Mitchell G. Ash and Alfons Söllner (ed.), *Forced Migration and Scientific Change: Émigré German-Speaking Scientists and Scholars after 1933* (Cambridge: Cambridge University Press, 1996); Felix Rösch, *Émigré Scholars and the Genesis of International Relations: A European Discipline in America?* (London: Palgrave Macmillan, 2014). On exiled lawyers, see also Kyle Graham, “The Refugee Jurist and American Law Schools, 1933-1941,” *American Journal of Comparative Law* 50 (2002): 777; Marcus Lutter, Ernst C. Stiefel, and Michael H. Hoeflich (ed.), *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland. Vorträge und Referate des Bonner Symposions im September 1991* (Tübingen: Mohr Siebeck, 1993); Leonie Breunung and Manfred Walther, *Die Emigration deutscher Rechtswissenschaftler ab 1933*, vol. 1 (Göttingen: De Gruyter, 2012), second volume forthcoming.

war era, for instance in the usages of concepts such as cultural heritage and lineages.<sup>17</sup> Though the rise of liberal universalism has gained much attention in the recent years in areas such as the history of human rights thought,<sup>18</sup> this article seeks to establish the inherent mechanisms of narrative dominance and pluralism within the multifaceted discourse. As such, it joins new scholarship that is working to establish narrative continuities and discontinuities in the understanding of Europe from the interwar period to the post-war period.<sup>19</sup> While earlier scholarship on European legal integration has focused either on continuities or discontinuities from the interwar period to the postwar integration,<sup>20</sup> the aim of this article is to show the complexity and the human interaction behind the changes.

The novelty of this article is that it seeks to track the correlation between narrative change and its motivations and normative implications. In order to establish this, we will begin by tracing the correlations between Nazi repression and narrative change by observing the inclusion into the discourse of themes associated with liberal theories of the rule of law. While this narrative influence appears straightforward, the next steps are more convoluted. Instead of a direct adaptation or returning to a previous narrative, I seek to demonstrate that the way that former Nazis like Wieacker or Coing appropriated narrative themes resulted in a new hybrid narrative which incorporated elements both from the liberal narrative and from

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<sup>17</sup> Benjamin George Martin, *The Nazi-Fascist New Order for European Culture* (Cambridge, MA: Harvard University Press, 2016).

<sup>18</sup> Glenda Sluga, *Internationalism in the Age of Nationalism* (Philadelphia, PA: University of Pennsylvania Press, 2013); Svenungsson, “After Utopia,” 203–218.

<sup>19</sup> Mark Hewitson and Matthew D’Aura (ed.), *Europe in Crisis: Intellectuals and the European Idea 1917-1957* (Oxford: Berghahn Books, 2012).

<sup>20</sup> A good example is Christian Joerges and Navrag Singh Ghaleigh (ed.), *Darker Legacies of Law in Europe* (Cambridge: Hart, 2003).

the Nazi narratives of Europe. However, these narrative changes, from the Nazi narratives to the counternarratives before and after the war, were closely interwoven with the changes of the normative surroundings both in Germany and the within the wider Transatlantic legal world, from the Nazi New Legal Science to the natural law revival after the war. Finally, within the narrative changes there are crucial distinctions between individual reactions to experiences of repression. As suggested by narrative theory,<sup>21</sup> I claim that the narrative and normative spheres share critical traits in their modes of persuasion. Historical narratives are thus connected with both historical culture and the uses of the past, for instance as legitimization and the construction of identity.

As with all fundamental historical narratives, that of the European legal heritage has a number of conceptual peculiarities that have different connotations in various historical layers. One example is the concept of Roman law. In European legal history, Roman law meant both the law of the ancient Roman empire, but more importantly it was code for the European legal tradition, also known as civil law, which was derived from the foundations of Roman legal writings. Roman law was not only a legal system, but due to its emphasis on commerce and property rights, it had distinct ideological underpinnings in the Continental European debates from the nineteenth to the twentieth centuries.<sup>22</sup> Consequently, the Party Program of the Nazi Party, the NSDAP (1920) called for the abolition of Roman law and its

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<sup>21</sup> Ankersmit, *Meaning, Truth, and Reference in Historical Representation*; Jörn Rüsen, “Historik: Umriss einer Theorie der Geschichtswissenschaft,” *Erwägen-Wissen-Ethik* 22 (4) (2011): 477–619.

<sup>22</sup> James Q. Whitman, “Long Live the Hatred of Roman Law!,” *Yale Law School, Public Law Working Paper No. 36*. <https://ssrn.com/abstract=383761>



replacement with national German law.<sup>23</sup> As a result, the Nazis sought to abolish Roman law from the law curriculum and to eradicate it from German law books through the ultimately failed Volksgesetzbuch codification program. The rationalization behind this aim was the perceived capitalistic nature of Roman law and the cosmopolitan (for which read Jewish) influences it contained. However, one of the crucial traits for the repression and resurgence of the tradition was its reliance on the ancient tradition for both content and legitimation. While this historical legitimation was a liability in the Nazi reforms, within the post-war search for sources of universal law, it became an asset. The ancient roots for the historical legal narrative were an argument for the legitimacy of law that did not depend on political will. Thus, writing about Roman law had been a sign of intellectual opposition to the Nazi regime, but after the war it became a part of the search for the shared roots of European legal traditions.

## **2. The Destruction of the Old Order**

The downfall of the German Empire in 1918 had wide-ranging repercussions even in the field of law and legal education. The modernization of private law that had slowly gained pace during the latter half of the nineteenth century and had struggled to keep up with the growth of commerce and industrialization was now joined with constitutional and social change with the advent of the Weimar Republic. Politically, the period from 1918 to 1933 was one of almost continuous crisis, where the turmoil led to the questioning of many of the previous certainties.<sup>24</sup>

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<sup>23</sup> Paragraph 19 of the NSDAP party program from February 24, 1920: “We demand that Roman Law, which serves a materialistic world order, be replaced by a German common law.”

<sup>24</sup> There is immense literature on the intellectual crisis, see for example Martin H. Geyer, *Verkehrte Welt: Revolution, Inflation und Moderne, München 1914-1924* (Göttingen:

For the German academic and legal elites, which consisted of a particular social group called the Bildungsbürgertum (the learned bourgeoisie), the changes were unsettling and led to physical, economic and status deprivation. Revolutions, street fighting and violence in general shattered the sense of safety, while the economic crises such as hyperinflation led to hopelessness and financial distress. In many cases, these compounded to a sense of deep disillusionment about the crumbling of the very foundations of society and the tendency to approach this as a moral or value crisis as well.<sup>25</sup>

The Nazis came to power and the official persecution of Jews began on January 30<sup>th</sup> 1933. For Jews and for the active members of the Leftist parties, the situation very quickly took a turn for the worse. Nazi student organizations would harass Jewish teachers at the universities, but the main threat to academics was the Law for the Restoration of the

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Vandenhoeck & Ruprecht, 1998) or Liisi Keedus, *Crisis of German Historicism* (Cambridge: Cambridge University Press, 2015).

<sup>25</sup> Regarding changes among the legal profession, see Kenneth F. Ledford, “German Lawyers and the State in the Weimar Republic,” *Law and History Review* 13 (1995): 317–49. On the Bildungsbürgertum, see Jürgen Kocka, “Bürgertum und Bürgerlichkeit als Probleme der deutschen Geschichte vom späten 18. zum frühen 20. Jahrhundert,” in *Bürger und Bürgerlichkeit im 19. Jahrhundert*, ed. Jürgen Kocka (Göttingen: Vandenhoeck & Ruprecht, 1987), 21–63. On the idea of a generational crisis, see Hans Mommsen, “Generationskonflikt und Jugendrevolte in der Weimarer Republik,” in *“Mit uns zieht die neue Zeit.” Der Mythos Jugend*, ed. Thomas Koebner, Rolf-Peter Janz, and Frank Trommler (Frankfurt am Main: Suhrkamp, 1985), 50–67. The sense of crisis spread, setting off debates on the crises of science and reason. See José Ortega y Gasset, *Man and Crisis*. Translated by Mildred Adams (New York: W. W. Norton & Company, 1958); Paul Valéry, *History and Politics* (New York: Pantheon Books, 1962).

Professional Civil Service, enacted on April 7<sup>th</sup> 1933, which dictated the expulsion of Jewish civil servants, including university professors.<sup>26</sup> The first round of mass dismissals of professors took place during the spring of 1933. The firing of hundreds of professors gained wide international attention, leading the *Manchester Guardian* to publish in May 1933 a list of nearly two hundred professors who had been dismissed in April and May, including legal notables Hans Kelsen, Alfred Weber, Gerhart Husserl, (son of Edmund) and Guido Kisch.<sup>27</sup> In addition to university professors, younger scholars and professional lawyers like Franz Neumann would go into exile very early on. Neumann received a tip that he was about to be arrested and fled to Britain in May 1933.<sup>28</sup>

The repression was a gradual process which first hit Jews and opponents of the new regime. Those who had a Jewish background but had converted to Christianity, such as Schulz and Pringsheim, were not targeted by the early regulations. For them, the loss of status came after a long wait. For instance, in 1931 Schulz was at the pinnacle of his career, culminating in taking up the chair of Roman law in Berlin in 1931. At 54, he enjoyed a

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<sup>26</sup> Law for the Restoration of the Professional Civil Service in April 7, 1933 (*Gesetz zur Wiederherstellung des Berufsbeamtentums*, GWBB, RGBI. I 175). This law was subsequently enlarged to include different categories such as notaries, and numerous ordinances were used to implement it.

<sup>27</sup> *The Manchester Guardian Weekly*, 19 May 1933. In the list, there were already numerous familiar names, such as, among others.

<sup>28</sup> Thomas Wheatland, "Franz L. Neumann: Negotiating Political Exile," *Bulletin of the German Historical Institute* 54, suppl. 10 (2014): 111–138.

comfortable life in Dahlem with his large family.<sup>29</sup> He had not been particularly politically active either in his private or academic life, though he was a member of the German Democratic Party (Deutsche Demokratische Partei) since 1918. His publications were mainly technical and focused on the post-classical sources of Roman law.<sup>30</sup>

The way in which Schulz's position deteriorated was comparable to many of his peers. Technically, he was a Protestant from an assimilated Jewish family from Silesia, but because his grandparents had been Jewish and his wife Martha was Jewish, he counted as Jewish according to the peculiar Nazi racial criteria that emphasized both blood relations and association. In a series of bureaucratic engagements he was first denied the right to teach and his professorship was moved to Frankfurt. In the end, he was given early retirement. In private life, he was forced out of Dahlem as the area was declared Aryan only. Finally, his library rights were revoked.<sup>31</sup>

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<sup>29</sup> The biographical details have been gathered from Ernst, "Fritz Schulz"; Jacob Giltaij, *Fritz Schulz* (Leiden: Brill, forthcoming); Hans Niedermeyer and Werner Flume (ed.), *Festschrift Fritz Schulz*. 2 Bde. (Weimar: Verlag Hermann Böhlaus Nachfolger, 1951).

<sup>30</sup> The main early works of Schulz are: *Sabinus-Fragmente in Ulpian's Sabinus-Commentar* (Halle: M. Niemeyer, 1906); "System der Rechte auf den Eingriffserwerb," *Archiv für die civilistische Praxis* 105 (1909): 1-488; *Einführung in das Studium der Digesten* (Tübingen: Verlag von J. C. B. Mohr (Paul Siebeck), 1916); *De claris iuris consultis by Thomas Diplovatatus*, ed. Hermann Kantorowicz (Berlin: W. de Gruyter, 1919); *Die epitome Ulpiani des Codex vaticanus reginae 1128* (Bonn: A. Marcus und E. Weber, 1926).

<sup>31</sup> Humboldt-Universität zu Berlin, Universitätsarchiv zu Berlin, UK Personalia Sch 303, Personal-Akten des Prof Dr Schulz; Ernst, "Fritz Schulz," 14-25. On the transformation of the Berlin law faculty, see Anna Maria Gräfin von Lösch, *Der nackte Geist. Die juristische Fakultät der Berliner Universität im Umbruch von 1933* (Tübingen: Mohr Siebeck, 1999).

Pringsheim went through a similar process, but he was protected by his influential students and the fact that Freiburg was far from the center of the Reich. Nevertheless, he was subjected ultimately to the same deprivation of status, culminating in being sent to a concentration camp after Reichskristallnacht in 1938.<sup>32</sup>

The decision by both Schulz and Pringsheim to go into exile in 1939 was not taken lightly. It meant renouncing a position of authority and respect within legal academia, moving from a highly paid and high-status occupation to the mercy of friends and acquaintances. However, the process of exile had in their case begun earlier, with their desperate seeking for a suitable position abroad, Schulz taking a lecture tour in 1936 through Western United States,<sup>33</sup> and Pringsheim seeking a position in Britain. Though they had to see how others used their dismissals as an opportunity to advance their careers, they were ultimately the lucky ones. They had the stamina to reinvent themselves academically, they had the linguistic skills to begin writing in a new language, and they had the necessary connections to be offered positions in Oxford.

### **3. Escape and Narrative Change**

Within the academic community, the exodus of scholars from Germany began almost immediately. In addition to the official repressions, Nazi student organizations began to harass Jewish professors and organize lecture boycotts. Those who were fired went into exile, either abroad or to inner exile. The concept of inner exile meant a retreat into scholarly work that was either purely apolitical or carefully hid its message. They began using methods of analogy or, in the case of historical work, surrogate stages, where current issues were discussed through historical examples. According to Leo Strauss, writing under persecution

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<sup>32</sup> Honoré, "Fritz Pringsheim," 220.

<sup>33</sup> Ernst, "Fritz Schulz," 139–140.

means “writing between the lines” to express matters of a shared understanding between the author and readers knowledgeable enough to recognize the intended meanings.<sup>34</sup> In the beginning of the Nazi persecutions, scholars would take up different defensive strategies even within academic settings. Meetings with students were carefully organized, and public demonstrations of opposition were avoided because they would be met with hate campaigns.<sup>35</sup>

The tens of thousands of scholarly exiles among the roughly half a million refugees leaving Germany was not a phenomenon limited to Germans leaving for Britain or the US, although these are the most commonly known examples. In Europe, the exiles of the 1930s joined innumerable predecessors, from exiles of the Russian Revolution or the dissolution of empires and the founding of nation states after 1918. The first exiles fleeing Fascism and totalitarianism left Italy in the 1920s; in Spain the trickle of refugees from the Civil War and Franco’s purges became a flood in 1939. France itself, hosting nearly two million refugees from the aforementioned crises, had its internal refugee crisis beginning with the evacuations of 1939. Hundreds of thousands of Poles left as refugees in 1939. For many, the seeking of refuge turned into a long exile with little chance of return, especially in the Spanish or Polish cases.<sup>36</sup> Beyond escaping the immediate threat, scholarly exiles sought for a new beginning, a place to settle. This was a hard task and very few succeeded. Learning a new language,

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<sup>34</sup> Leo Strauss, *Persecution and the Art of Writing* (Chicago and London: University of Chicago Press, 1988), 24–25.

<sup>35</sup> Remy, *The Heidelberg Myth*, 21.

<sup>36</sup> Sharif Gemie, Laure Humbert, and Fiona Reid, *Outcast Europe: Refugees and Relief Workers in an Era of Total War 1936-48* (London: Bloomsbury, 2011); Pierre Milza and Denis Peschanski (ed.), *Exils et migration. Italiens et Espagnols en France, 1938-1946* (Paris: Editions L’Harmattan, 1994).

reinventing themselves professionally and finding employment required support and persistence, and those who lacked it were sidelined.<sup>37</sup>

The German academic community capitulated to the Nazi regime with very little resistance, but there were some exceptions. Even with scholars brandishing exceptionally good nationalistic qualifications such as Ernst Kantorowicz, the tolerance for dissent was low. Kantorowicz had to discontinue his famous second inaugural lecture series in the face of boycotts and protests. Kantorowicz lectured on ideals like beauty as the true German calling. His national reawakening was a spiritual one, while the Nazis offered only “rabble, corpses, and vomit.” Kantorowicz, who had been a frontline fighter not only in WWI but also in the right-wing paramilitaries during the Communist uprisings after the war, loathed the Nazi rejection of the link between patriotism and the higher arts as a national calling.<sup>38</sup>

For others, the way forward was to present resistance in such a form that would be undetected to persons who were not supposed to notice, namely by writing between the lines. Rather than presenting an open criticism of Nazi policies, these critical voices were presented as counternarratives. Schulz’s counternarrative was by far the most elaborate, an intricate tapestry which wove together both traditional Roman law, novel interpretations of European historical traditions, the defense of the liberal legal heritage and a liberal sprinkling of quotations from Fascist and Nazi authors. The first iteration of this counternarrative was the principles of Roman law. This was a lecture series during the spring semester of 1933 that

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<sup>37</sup> Kaius Tuori, “Exiled Romanists between Traditions: Pringsheim, Schulz and Daube,” in *Roman Law and the Idea of Europe*, ed. Kaius Tuori and Heta Björklund (London: Bloomsbury, forthcoming).

<sup>38</sup> Koontz, *Nazi Conscience*, 46–68 on academic capitulation; Robert E. Lerner, *Ernst Kantorowicz: A Life* (Princeton, NJ: Princeton University Press, 2017), 159–171, quote from p. 159. Lerner rejects as absurd Cantor’s claims that Kantorowicz was a Nazi sympathizer.

was very quickly turned into a book published by the traditional publishing house Duncker & Humblot in Berlin.

The book was a celebration of Roman law as one of the greatest achievements of Western culture and as the antithesis of Nazi legal policy. The focus on principles was novel and cunning, as it allowed speaking both of purely technical matters such as abstraction or simplicity, but equally of things that were politically sensitive and in clear opposition to the Nazi regime.<sup>39</sup> The book was quickly translated into English and published in 1936 by OUP. For Schulz, it was both his introduction into the Anglophone academic world and the beginning of his personal reinvention as a scholar.

The principles that were politically relevant were isolation, tradition, nation, liberty, authority, humanity, fidelity, and security. While the Nazi policy was that the will of the Führer was the highest law and that law was a mere tool for advancing political aims, Schulz underlined the indifference of Roman law to politics or economics. This was in line with the idea developed by nineteenth-century German conceptual jurisprudence that law was an independent science.<sup>40</sup> This was crucial in the line connecting Roman law to the European heritage, because the independence of law was the central tenet of the whole tradition.

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<sup>39</sup> Schulz, *Prinzipien des römischen Rechts*, 1 readily admitted that the Romans themselves did not really talk about principles of law as their focus was different. But see Laurens C. Winkel, “The Role of General Principles in Roman Law,” *Fundamina* 2 (1996): 103–120.

<sup>40</sup> Schulz, *Prinzipien des römischen Rechts*, 13-26. In addition to the works of Carl Schmitt, where this idea was repeatedly stated, it was expressed more bluntly by less refined lawyers like Heinz Hildebrandt, *Rechtsfindung im neuen deutschen staate: ein Beitrag zur Rezeption und den Rechtsquellen, zur Auslegung und Ergaenzung des Gesetzes* (Berlin: W. de Gruyter, 1935), tr. Carolyn Benson and Julian Fink, “New Perspectives on Nazi Law,” *Jurisprudence* 3 (2) (2012): 341–346, 31–32: “The initial point of national socialism is neither the individual



Nazi legal theory presented law as a force for reform or even revolution; its goal was to achieve new ends and brush away old structures. In contrast, Schulz's Roman law was conservative. It was bound to tradition and gained legitimacy from this continuity. Nazi opposition to old law was aimed not only at Roman law, but equally the Bürgerliches Gesetzbuch (BGB, the German civil code of 1900), which was to be replaced by the new codification of people's law (the Volksgesetzbuch).<sup>41</sup> When talking about nationality and citizenship, Nazis envisioned a blood community that was primary to legal status. Schulz reminded how ancient Romans accepted aliens, even freed slaves to Roman citizenship, envisioning a radically open conception of community.<sup>42</sup> It is a testament to Schulz's critical

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nor humanity, but the entire German people; its aim is the securing and promotion of the German blood community . . . . The outcome of this are certain principles of law: first, the unconditional alignment of the correctness of the law with the general good and the future of the German blood community; second, the constant evaluative primacy of the correctness of law over legal security; and third, the increased acceptance of legal flexibility over legal constancy!"

<sup>41</sup> Schulz, *Prinzipien des römischen Rechts*, 57–73. The Volksgesetzbuch project was headed by Nazi legal historian Justus Hedemann, but beyond a few publications the initiative foundered. See Heinz Mohnhaupt, "Justus Wilhelm Hedemann als Rechtshistoriker und Zivilrechtler vor und während der Epoche des Nationalsozialismus," in *Rechtsgeschichte im Nationalsozialismus: Beiträge zu einer Disziplin*, ed. Michael Stolleis and Dieter Simon (Tübingen: Mohr Siebeck, 1989), 107–159.

<sup>42</sup> Schulz, *Prinzipien des römischen Rechts*, 74–94. The idea behind the law of the blood community was that the innate sense or feeling of law should be supreme.

skill in writing that these two principles which were the most pointedly against Nazi policies have sometimes been interpreted as acquiescing to Nazi worldviews.<sup>43</sup>

Schulz wrote how the growth of the humanity of Roman law, the restriction of cruelty and unnecessary physical punishment, was one of the main trends of the classical period of ancient Roman law. This was in stark contrast to the dehumanization of non-Germans advocated by the Nazis, not to mention how even Germans were subjected to harsh capital punishments for the smallest offences.<sup>44</sup> Stripping people of the protection of law, the perversion of the legal machinery and the explicit abandonment of legal principles became the new norm.<sup>45</sup>

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<sup>43</sup> Martin Josef Schermaier, “Fritz Schulz’ *Prinzipien*. Das Ende einer deutschen Universitätslaufbahn im Berlin der Dreißigerjahre,” in *Festschrift 200 Jahre juristische Fakultät der Humboldt-Universität zu Berlin. Geschichte, Gegenwart und Zukunft*, ed. Stefan Grundmann, Michael Kloepfer, and Christoph G. Paulus (Berlin: Humboldt-Universität, 2010), 694–695. See also Hedemann’s letters to Schulz (July 13, 1934 and August 27, 1934, Schulz Archive), showing how even a Nazi might be oblivious to the criticism. Hedemann wrote these two laudatory letters to Schulz about the *Prinzipien* after receiving a copy from the author. The letters will be published in Giltaij, *Fritz Schulz*.

<sup>44</sup> Schulz, *Prinzipien des römischen Rechts*, 128–150; Franz Leopold Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933-1944* (London: Rowman & Littlefield, 2009), 452-458. On Roman law and humanity, see Luigi Garofalo, “L’humanitas tra diritto romano e totalitarismo hitleriano,” *Teoria e storia di diritto privato* 7 (2015): 1–48.

<sup>45</sup> Robert D. Rachlin, “Roland Freisler and the *Volksgerichtshof*,” in *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, ed. Alan E. Steinweis and Robert D. Rachlin (New York: Berghahn Books, 2013), 63–87, at 80.

According to Schulz, the principle of fidelity meant observing the rule of law in that a magistrate is bound by law, even to the rule he has himself set, and that law has no retroactive force. The Nazis had no qualms about retroactive laws, maintaining that officials should have free range of operation unencumbered by formal rules. However, fidelity even encompassed the binding nature of the social binds of friendship, a theme that had unfortunate importance in the ways that adherence to the new regime led to the abandonment of old friendships.<sup>46</sup>

The principle of the security of the law is easy to see as a criticism of the terror at the heart of Nazi rule. According to Schulz, the principle of security meant that law should be predictable, give adequate protection and that the courts should be impartial and know the law. Nazi legal practice relied on general principles, where individual acts were seen as violations of a principle and punishable as such.<sup>47</sup> In sum, Roman law as presented by Schulz was the polar opposite of Nazi law. Roman law represented a legal culture based on professional jurists faithful to the law. It meant upholding the rule of law, offering protection of the law to all, and giving every possibility of attaining full legal rights through citizenship.

However, this interpretation is simply a hypothesis, because Schulz does not mention contemporary politics or even Nazis by name. Instead he just refers to “recent political

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<sup>46</sup> Schulz, *Prinzipien des römischen Rechts*, 151-161. The extreme form that Nazi oppression took meant that people would frequently abandon spouses, friends and relatives when they were singled out for persecution.

<sup>47</sup> Schulz, *Prinzipien des römischen Rechts*, 162-171. The Nazi sense of legal security was also based on the sense of law shared by the blood community, for example Hermann Göring, “Die Rechtssicherheit als Grundlage der Volksgemeinschaft,” in *Schriften der Akademie für Deutsches Recht*, ed. Hans Frank (Hamburg: Hanseatische Verlagsanstalt, 1935), wrote how law should not be founded on the letter of the law or even on law itself, but rather an innate sense of law; Neumann, *Behemoth*, 440–450.

experience” in the conclusions of his book (1934, p. 172; 1936, p. 253). Because direct criticism was very dangerous at the time, Schulz presents a veiled criticism, a fundamental condemnation of the Nazi legal policy in the guise of an analysis of Roman law. Of course, he talks equally of Roman law, making an argument on two levels about contemporary legal policy and Roman law, sometimes indistinguishably so. Thus, its references are heterogeneous to say the least. There are references to Roman law literature, to social sciences, to contemporary common law and to Nazi and Fascist authors, from Carl Schmitt to Max Weber and Benjamin Cardozo. However, the change in Schulz’s scientific work is remarkable in that he changes from a technical legal analysis into a politically charged interpretation within the field of Roman law, rather than writing a strictly political text.

In the case of Pringsheim, the counternarrative was even more concealed. In two articles, one published in Germany and the other in the British *Journal of Roman Studies*, he used Hadrian’s Rome as a model for the cosmopolitan empire and the rule of law. These articles depicted Hadrian’s Rome as an empire of peace, prosperity and law, of multicultural tolerance. When petitioned, the Roman emperor would respond even to poor provincials and answer their legal queries. This was an empire where the ruler would personally ensure that justice was served even to the lowliest of people and a professional class of legal officials existed that would ensure the rule of law.<sup>48</sup> It is debatable how historically accurate the image of Rome presented by Pringsheim actually was, and his idea of the rule of law being realized in ancient Rome was probably a hyperbole meant to make a point about Nazi policies. The aim was clearly to underline the principled opposition between Nazi legal ideas and the

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<sup>48</sup> The same themes come up in both Pringsheim, “Höhe und Ende der Römischen Jurisprudenz” and Pringsheim, “The Legal Policy and Reforms of Hadrian,” but the conclusions drawn and the explicitness with which they are presented are markedly different, the German text being much more technical and understated.

Western tradition of the rule of law, legality and good governance. Writing to a British audience, Pringsheim presents the ancient Roman heritage and British values as existing in a continuum.

This idealization of Hadrianic Rome was a very bold choice. Glorifying Roman law in the period of an emperor with artistic tendencies and a penchant for beautiful boyfriends was not a topic that would please Nazi authorities. In general, Roman law scholars seeking to reconcile Roman law with Nazi ideology usually focused on earlier periods, such as archaic Rome, where they sought to underscore the similarity of the Roman and Germanic martial virtues and loyalty to the state.<sup>49</sup> In contrast to these appeasers, Pringsheim idealized the cosmopolitanism, the rule of law, the bureaucratization and the professionalization of legal administration inherent in Hadrian's Rome. All of these things ran counter to the Nazi ideology on many levels. Cosmopolitanism was a code word for Jewish, while the independence of the legal profession and the rule of law meant subverting the will of the Führer.

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<sup>49</sup> Max Kaser, *Römisches Recht als Gemeinschaftsordnung* (Tübingen: Mohr Siebeck, 1939), 8-9: "Das stolze Bild das Schönbauer hier von echtem Römertum entworfen hat, erinnert in manchen Zügen stark an die ältere deutsche Rechtsgeschichte, sind es doch die gleiche Tugenden, 'männliche Selbszucht, nationaler Instinkt, starkes Sendungsbewußtsein, Größe im Unglück und Opferbereitschaft für das Gemeinwesen', die den Character beider Völker bestimmen." Franz Wieacker, *Vom römischen Recht. Wirklichkeit und Überlieferung* (Leipzig: Koehler & Ameland, 1944). On approaches to Roman law, see Massimo Miglietta and Gianni Santucci (ed.), *Diritto romano e regimi totalitari nel '900 Europeo* (Trento: Università degli studi di Trento, 2009) and Jan Nelis, "Constructing Fascist Identity: Benito Mussolini and the Myth of Romanità," *Classical World* 100 (2007): 391–415.

In the cases of both Schulz and Pringsheim, their counternarratives were explicitly tied to the British experience in academia and in legal and political tradition. They both had contacts in Britain long before the Nazi years and knew the language. England was rightly considered the origin of a certain kind of liberal tradition, one which emphasized individual freedoms and the limited powers of the state.<sup>50</sup> In these early writings, both Schulz and Pringsheim were already orienting themselves towards Britain and seeking to develop narratives that would have resonance both at home and in Britain.

In the face of a totalitarian regime not shy of using extreme violence, such counternarratives were by and large gestures which had little or no impact on the course of events at the time. Despite their personal heroism, conscientious people who stood up to protest against the regime were mercilessly crushed, their fates merely demonstrating to the public the futility of resistance.<sup>51</sup> For legal academics, what was left was escape. For Jews, the alternative to escape was death; for non-Jews the most common option was inner exile.

Escape and exile could take place through many routes, but we tend to hear mostly about people who ended up in Britain or the US. One of the main reasons for this is that the numerically larger group of exiles who went to the Low Countries or France, their escape lasted only until June 1940. Schulz was very close to being part of this group, residing first in

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<sup>50</sup> Even the British tradition of liberalism was inexorably tied to reflections and reactions to the Continent, as is visible in works like Lord Acton, *History of Freedom* (London: Macmillan, 1907).

<sup>51</sup> There is a wealth of examples about men and women of dignity and conscience who met untimely ends, but few are as compelling as the story of Max Hirschberg, who actually sought to bring Hitler to court and lived. Douglas G. Morris, *Justice Imperiled: The Anti-Nazi Lawyer Max Hirschberg in Weimar Germany* (Ann Arbor: University of Michigan Press, 2005).

Holland before leaving for England on the last boat before the war started. Even those who did go to Britain, this did not mean the end of their troubles. When war between Germany and the Western allies began in earnest and France collapsed in June 1940, Britain imposed a draconian regime on enemy citizens. Men of military age, but also those considerably older were interned in camps, primarily on the Isle of Man. Even in places such as Oxford, which was accustomed to foreigners, their presence caused opposition.<sup>52</sup>

Despite the limitations imposed on exiles, they were by and large impressed by the dedication to ideals such as liberty and the rule of law that they noticed in both Britain and the US. This is not to say that exiles would not have been critical of their new hosts and the inequalities they detected. There were many issues in their personal situation that left room for improvement, from the problems relating to finding employment to the restrictions (from internment to restrictions of movement typical in the US) of their personal freedoms. In many cases the encounter with British or American tradition led to an almost direct set of references in their works. For example, historian Arnaldo Momigliano wrote about the issue of liberty in

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<sup>52</sup> Ernst, "Fritz Schulz," 158–160; Honoré, "Fritz Pringsheim," 221–223; Calum Carmichael, *Ideas and the Man: Remembering David Daube* (Frankfurt: Vittorio Klostermann Verlag, 2004), 63; Christopher Stray, "Eduard Fraenkel (1888–1970)," in *Ark of Civilization: Refugee Scholars and Oxford University, 1930–1945*, ed. Sally Crawford, Katharina Ulmschneider, and Jaś Elsner (Oxford: Oxford University Press, 2017), 185–187. Even someone like Kenneth Sisam, who was instrumental in helping exiles in Britain, reveals in his correspondence his lack of patience for the refugees and their complaints. Oxford University Press Archives, Oxford, Schulz PB ED 010382, 47 Sisam to C. H. S. Fifoot (17.10.1939); "I cannot stand the refugees who are always grumbling about their lot at a time when most of us have something hard to think about; but a few of them, and Schulz is one, are of a different class, and recognize that they are lucky to be here."

ancient culture, seeking to place it in the continuum of the liberal tradition. Franz Neumann, a social democratic labor lawyer, wrote extensively about the rule of law as a bulwark against tyranny.<sup>53</sup> Other exiles, such as Theodor Adorno, emphasized the personal freedom that divided America from the old continent.<sup>54</sup>

The creation of a new narrative was clearly part of the exile process and reflected both the ideas and expectations of the liberal tradition in the English-speaking world and the experience of the collapse of the rule of law in Germany. The Roman example was by no means simply a reference to ancient Rome, but rather the European tradition that it symbolized. In creating these narratives, Schulz, Pringsheim, Momigliano and others were both making sense of this transformation and equally writing out their experiences. The exile process meant by definition marginalization, a loss of status and accustomed privilege and extended to the core of their being. In the making of these new interpretations, they sought both to make sense of what was happening and to reclaim their place in the academic world.

#### **4. The Nazi Revolution in Law**

From the hindsight of history, Nazi justice has been with good reason pilloried. However, during the 1930s, there was still a very active policy for progressive justice reform and party

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<sup>53</sup> Arnaldo Momigliano, “Peace and Liberty in the Ancient World,” *Decimo contributo alla storia degli studi classici e del mondo antico* (2012): 4–105, at 9; Oswyn Murray, “Arnaldo Momigliano on Peace and Liberty,” in *Ark of Civilization: Refugee Scholars and Oxford University, 1930-1945*, ed. Sally Crawford, Katharina Ulmschneider, and Jaś Elsner (Oxford: Oxford University Press, 2017), 204–205; Neumann, *Behemoth*, 440–452.

<sup>54</sup> Theodor Adorno, “Scientific Experiences of a European Scholar in America,” in *The Intellectual Migration: Europe and America, 1930-1960*, ed. Donald Fleming and Bernard Bailyn (Cambridge, MA: Harvard University Press, 1969), 338–370.



elites were engaged in disputes over the direction of these reforms. Among those drawn to Nazi jurisprudence were not only luminaries like Carl Schmitt, but also a large group of young legal academics. The Nazi New Legal Science or Neue Rechtswissenschaft sought the alignment of the people and the law, the resolution of the alienation of the law from daily life. In some respects, the movement had parallels with contemporary legal realism and drew upon earlier legal reform movements such as the free law school.<sup>55</sup>

Within law schools, the younger generation of academics, struck with existential angst about their future prospects and a more general sense of crisis and decay, were eager to join the Nazi movement. While for the older professors, especially Jewish ones, the Nazi takeover was catastrophic, for the younger generation, the possibility of jobs, stability and progress was enticing. Many of the young scholars joining the Nazis were members of the so-called war generation, who grew up during WWI, understanding the nationalistic ethos and the propaganda but being too young to serve in the military. When the war ended, they were left with a conflicted sense of both the past and the future. Though it is easy to approach the Nazi revolution through the lens of the Holocaust and the foreshadowing it implies, for contemporaries there was a widely shared sense of taking back control and progress that the Weimar years had lacked.<sup>56</sup>

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<sup>55</sup> On the Neue Rechtswissenschaft, see Bernd Rüthers, *Die unbegrenzte Auslegung* (Tübingen: Mohr Siebeck, 2017).

<sup>56</sup> For a summary of the literature and the example of Heidelberg, see Steven P. Remy, *The Heidelberg Myth: The Nazification and Denazification of a German University* (Cambridge, MA: Harvard University Press, 2003), 28–33. On the different interpretations of the war generation, see Claudia Koontz, *The Nazi Conscience* (Cambridge, MA: Harvard University Press, 2003), 49 and Ulrich Herbert, “‘Generation der Sachlichkeit’. Die völkische Studentenbewegung der frühen zwanziger Jahre in Deutschland,” in *Zivilisation und*

One of the most important centers of the New Legal Science was a group called the Kiel School or Kieler Schule. It was a loose conglomeration of young legal scholars associated with the law school at the University of Kiel. The Kiel law school was seen as a model faculty for the new Nazi policies of legal education after it had been purged of Jewish scholars. A central figure was Karl August Eckhardt, who had a key role in both ousting resisting scholars from law faculties and placing young Nazis in their place.<sup>57</sup>

One of the phenomena often observed with revolutionary movements is the generational gap. The younger generation, whether from idealism or self-interest, rejects the values and ideals of their teachers. In the case of the Nazi movement, there were numerous examples of such conflicts. One of the brightest students of Fritz Pringsheim was Franz Wieacker, who would be drawn to the Kieler Schule.

The Nazi New Legal Science was intensely nationalistic and tied to the idea of a new national awakening which mirrored that of the nineteenth century. As such, it limited its interests to the German blood community and its members, who would be its beneficiaries. However, there was, especially after the war began in the Eastern Front, a growing tendency to discuss Europe and European culture. This was in line with the German war propaganda,

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*Barbarei, Die widersprüchlichen Potentiale der Moderne*, ed. Frank Bajohr, Werner Johe, and Uwe Lohalm (Hamburg: Hans Christians Verlag, 1991), 115–143, where Koontz represents the view that it was actually the generation that had gone to war, the ones born around 1880-1890s, while Herbert and others see it as those born around 1900-1910s.

<sup>57</sup> Ernst Döhring, “Geschichte der Juristischen Fakultät 1665-1965,” in *Geschichte der Christian-Albrechts-Universität Kiel 1665-1965*. Bd 3, ed. Karl Jordan and Erich Hofmann (Neumünster: Wachholtz, 1969), 209-211. The members of the Kieler Schule were Karl August Eckhardt, Paul Ritterbusch, Ernst Huber, Karl Larenz, Karl Michaelis, Friedrich Schaffstein and others.

which presented Europe as a community of values from which the English-speaking world and particularly the Communist East was separated. The Nazi idea of Europe, the New Europe, was an area dominated by Germany, something that was even reflected in ideas such as Schmitt's concept of Grossraum.<sup>58</sup> Scholars were recruited to join the propaganda effort in the so called Aktion Ritterbusch, a program named after the Kiel rector and dedicated Nazi Paul Ritterbusch. Ritterbusch was a professor of constitutional law and a member of the Kieler Schule. The aim of the program was to use science as a weapon of war, to harness the best forces in the German social sciences and humanities to advance the German war aims. Wieacker joined this program in order to outline the New Europe that would emerge after the war under German leadership. Wieacker's contribution was listed under Kriegseinsatz (war effort) and moved along the narrow path between science and propaganda.<sup>59</sup>

While much of the war propaganda was facile and easily dismissed, Wieacker took the idea of Europe as a community and began to use it as a way to rehabilitate Roman law. In 1943, Wieacker began to analyze the role of nationalism in the relationship between the Roman and the German legal consciousness. Earlier, legal historians inspired by the national awakening began to emphasize the German cultural heritage and the spirit of freedom and to denounce the influence of Roman law as an alien implant. Within the historical consciousness and the organic conception of the people, later adopted wholeheartedly by Nazi scholars, Roman law was first of all a national self-betrayal, but equally an irrelevant relic in a modern

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<sup>58</sup> On the variations within the authors of the Nazi era, see Herlinde Pauer-Studer and Julian Fink (ed.), *Rechtfertigungen des Unrechts. Das Rechtsdenken im Nationalsozialismus in Originaltexten* (Berlin: Suhrkamp, 2014).

<sup>59</sup> Frank-Rutger Hausmann, *“Deutsche Geisteswissenschaft” im Zweiten Weltkrieg : die “Aktion Ritterbusch” (1940-1945)* (Heidelberg: Synchron, 2007); Erkkilä, *The Conceptual Change of Conscience*, 91.

world. It is interesting to note how Wieacker uses the words un-German and un-European almost interchangeably. However, Wieacker (echoing Savigny) redeems Roman law as a product of the Western creative spirit, not a foreign and ancient implant suppressing national law. Comparable to the works of Homer and Aristotle, Roman law was a product of the common spirit of the West, the European destiny, that would then form a basis for new developments.<sup>60</sup>

In this work, published in 1944 when the war was clearly coming to a bitter and bloody end, Wieacker co-opts the Nazi terminology and imaginary to a startling extent. He equates European and German civilization, presents culture and people as primary, and refers to blood as a metaphor of the people. Wieacker continues on the organic, almost biological imaginary, presenting culture as almost like a plant that spreads and grows, gaining influences and nourishment. The biological metaphor was a key element in Wieacker's idea of reception but it was also a metaphor heavily used by the Nazis. He is adamant that Roman law and the idea of Rome were not something alien to the German people (*volksfremd*, *Undeutsches*, p. 26), and here he responds directly to Nazi language. In Nazi terminology, *volksfremd* was used to define Jews, who could be completely assimilated but were still not part of the German people. Roman law and the European tradition were nourishments of learning and rationality that were incorporated into German and by extension European culture.<sup>61</sup>

Wieacker's ideas were therefore in stark contrast with early Nazi theories about Roman law being a dangerous weed, something to be uprooted. While Wieacker himself had earlier attempted to consolidate Roman law and Germanic culture by emphasizing the similarities of their early histories, now he accepted the whole of the history of Roman law, even the Eastern influences which the Nazis saw as Semitic, as parts of the same continuum.

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<sup>60</sup> Wieacker, *Das römische Recht und das deutsche Rechtsbewußtsein*, 3–9.

<sup>61</sup> Wieacker, *Das römische Recht und das deutsche Rechtsbewußtsein*, 10–27.

While the position of Wieacker was initially against the main current, it later moved to the mainstream following the evolution of Nazi legal thought. The opposition toward Roman law was gradually forgotten, especially after the alliance with Fascist Italy whose enthusiasm for Roman law was considerable. Hans Frank, the leader of Nazi legal academia, maintained that they had nothing against the teaching and research of the law of a proud and self-conscious nation,<sup>62</sup> meaning the Rome of the Republic and Early Empire, their qualms were reserved to the potential Jewish influences. Though the initial Nazi policy had been to eradicate all of Roman law in favor of Germanic law, it is likely that opposition from the legal profession resulted in the shifting of the focus to the law of the Later Roman Empire, where the Semitic influence was thought to have been the strongest.

Where Wieacker's initial contact with Europeanist thought came from is unclear, but during the war, Wieacker was invited to join Carl Schmitt and others to give lectures as part of the Nazi war propaganda. They would go to both allied countries such as Hungary as well as occupied countries to give presentations on German culture as the essence of Europe. Wieacker, for example, was sent to occupied Paris in 1941 to give lectures with Carl Schmitt about the superiority of German culture.<sup>63</sup>

There were numerous reasons and motivations driving young academics toward Nazism, from careerism and self-interest to shared enthusiasm. Very few would later reflect on their motivations, but it is clear that the whole concept of a national mass movement that would rescue Germany from its various ills had tremendous appeal. There was also a distinct social pressure. For example, Helmut Coing would in his autobiography rationalize his

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<sup>62</sup> Hans Frank, "Zur Reform des Rechtsstudiums," *Deutsches Recht* 3 (1933): 23.

<sup>63</sup> Wieacker to Carl Schmitt November 30, 1941. NL Carl Schmitt, RW 0265, Landesarchiv Nordrhein-Westfalen, Duisburg; Reinhard Mehring, *Carl Schmitt: Aufstieg und Fall* (München: Beck, 2009), 406.

involvement with the Nazi party by mentioning how senior colleagues would hint that in order to have a career in academia he should be a member.<sup>64</sup>

Most legal academics or academics in general were neither members of the opposition nor active supporters of the Nazi movements. Meissel has described the options available for academics as coping mechanisms or strategies (Anpassungsstrategien).<sup>65</sup> Among the opponents of Nazis, the situation was ambiguous. Writing after the war, Nazi opponent Paul Koschaker stated that one should not exaggerate the limitations imposed by Nazi authorities on individual scholars and teachers. By retreating to non-political themes, a non-Jewish scholar could avoid being targeted and be generally left alone. Koschaker himself would actively participate in the planning of the 1935 study reforms in order to protect his own field of study. His famous 1938 text, *Die Krise des römischen Rechts* (The Crisis of Roman Law) was actually first presented in the Nazi controlled academy of science, where it was favorably received by the audience and its director Hans Frank. In the *Krise*, Koschaker would present Roman law as a cultural heritage, a shared European tradition. Koschaker's main opposition toward the Nazi policies was regarding the continued value of Roman law, which in 1938 was still on the list of things to be eliminated.<sup>66</sup>

In the ways that the Nazi movement divided the profession a number of phases may be detected, from the early enthusiasm to the final war years, when bitter resignation and

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<sup>64</sup> Coing, *Für Wissenschaften und Künste*, 57.

<sup>65</sup> Franz-Stefan Meissel and Stefan Wedrac, "Strategien der Anpassung – Römisches Recht im Zeichen des Hakenkreuzes," in *Vertriebenes Recht – Vertreibendes Recht. Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1938-1945*, ed. Franz-Stefan Meissel, Thomas Olechowski, Ilse Reiter-Zatloukal, and Stefan Schima (Wien: Manz, 2012), 35–78.

<sup>66</sup> Koschaker, "Die Krise des römischen Rechts und romanistische Rechtswissenschaft"; Beggio, *Paul Koschaker*.

disappointment was an overwhelming sentiment. After the war, this disappointment was one of the main forces driving the reorientation.

## **5. Post-War Reckoning and Integration**

When war ended in Europe in May 1945, there was much to be reckoned with. As the murderous extent of the Nazi terror and the Holocaust were exposed, it tainted everything it was associated with, even though denialism was rampant in Germany. The horrors of Nazism and the threat of Soviet power led first to a new drive toward European integration to prevent conflict and ultimately war within Europe, and second to a push for the primacy of human rights (and by extension natural law), both by the United Nations and within the European human rights system.

In Germany, the fall of Nazism was followed by occupation and legal reprisals against the perpetrators of Nazi crimes. At the same time, there was a drive toward denazification, purging Nazis from positions of power. Due to the widespread support that Nazism enjoyed, denazification proved to be almost impossible and faced stubborn resistance from the Germans themselves. Most members of the party were quickly exonerated and the prewar elite returned to power in a stunningly rapid and uncomplicated process of renazification.<sup>67</sup>

Although the persons were the same, this does not mean that they were still the card-carrying Nazis they had been, in some cases a few months earlier. Just as they had turned from being lawyers supporting the German Rechtsstaat to Nazis promoting the exclusion of

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<sup>67</sup> On the denazification process, see Clemens Vollnhals, *Entnazifizierung. Politische Säuberung und Rehabilitierung in den vier Besatzungszonen 1945–1949* (München: Deutscher Taschenbuch Verlag, 1991). On intellectual reasonings, see Sean A. Forner, *German Intellectuals and the Challenge of Democratic Renewal: Culture and Politics after 1945* (Cambridge: Cambridge University Press, 2014), 62–63, 170–171.

Jews, they now performed another great mental about-face, toward support of democracy and human rights. From the members of the opposition such as Koschaker, this drew sarcastic remarks about them being “Nazimokraten” or Nazi(de)mocracts.<sup>68</sup>

Thus, while the Germans officially revered the idea of the “hour zero” or a new beginning, this was hardly the whole truth. There were innumerable continuities from institutional and legal to personnel continuation from the Nazi years to the new German Federal Republic. For exiles, the German approach was infuriating. Not only did they refrain from all admissions of guilt, but they regularly touted German victimhood.<sup>69</sup> While the number of scholars who would consciously integrate their writings with the experience of exile was small, the number of exiles who would return was equally small. Of the total number of roughly 500,000 German refugees, only a small part returned. The highest number of returnees were the non-Jewish “political” exiles, of which roughly half returned. Of the academics, only 12% returned. Of the Jewish refugees, only 4-5% returned.<sup>70</sup>

If the exiles remained abroad and the Nazis returned to power, how did West Germany turn quickly into a flourishing democracy, where the ideals of the rule of law and equality were apparently widely shared? How did the years of ultranationalism and exclusionary policies turn seemingly overnight into a vision of European integration, respect for human rights and shared values? There is an ongoing debate regarding the background of this transformation. Some credit the vast American effort on reconstruction, reeducation and

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<sup>68</sup> Koschaker to Kisch 3.4.48 (p. 27), Koschaker to Kisch 24.5.48 (p. 29), now in Guido Kisch, *Paul Koschaker, Gelehrter, Mensch, Freund. Briefe aus den Jahren 1940 bis 1951* (Basel: Helbing und Lichtenbahn, 1970).

<sup>69</sup> Forner, *German Intellectuals and the Challenge of Democratic Renewal*, 5–9, 35.

<sup>70</sup> Forner, *German Intellectuals and the Challenge of Democratic Renewal*, 35; Marita Krauss, *Heimkehr in ein fremdes Land* (München: Beck, 2001), 9–10.



propaganda in Germany that sought to counter the Soviet ideological threat. Others claim that the real changemakers were the Germans themselves, who chose the path to democracy often despite the transparent American propaganda.<sup>71</sup>

The obvious impulse was naturally the moral and ethical, not to mention human catastrophe that Nazi Germany had produced. This is the foundation of the narrative of the rise of human rights as a response to the horrors of totalitarianism and war.<sup>72</sup> Marco Duranti has recently argued that the traditional narrative of the emergence of human rights is not the whole story. According to Duranti, the key players of the post-WWII construction of the European human rights regime were in fact conservatives such as Winston Churchill, whose involvement precedes the generation of EU founders like Monnet and Schumann. For the conservatives, the promise of Europeanism and human rights was founded on a number of different causes. One of the most important ones was opposition to totalitarianism, where Fascism and Communism were for them two sides of the same coin. At the same time, they were deeply distrustful of the tyranny of the majority and the dangers of populism in democracy. Pluralism and securing the rights of minorities were central concerns in this regard. To secure these rights, it had become clear that the national courts were unable to uphold the rule of law and thus international solutions were needed. However, the conservative idea of a free and united Europe did not necessarily take the form of a superstate, but rather a “return to tradition and older forms of community.”<sup>73</sup>

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<sup>71</sup> Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton, NJ: Princeton University Press, 2015), 6–7.

<sup>72</sup> For the conventional story, see Lynn Hunt, *Inventing Human Rights* (New York: Norton, 2007), 200–207.

<sup>73</sup> Duranti, *The Conservative Human Rights Revolution*, 4–5.

While the narratives created by the exiles were not utilizing the language of rights in the same sense as the post-war generation of scholars, they were in essence describing the same ideals that conservative human rights advocates. The rule of law and legalism, the respect for the individual, the ideals of humanism, the protections of individuals against state power, the possibility of appealing to a higher judge were all shared themes. However, what was even more poignant was the lure of tradition, of a peculiar kind of conservatism that comes through in the works of Schulz, Pringsheim and Koschaker, where law is the product of a long tradition of legal scholarship, an expert culture outside the field of politics. In *Europa*, Koschaker even made the linkage to the tradition of supranational law explicitly, calling Roman law the relative natural law (relatives Naturrecht). While he denies the possibility of an absolute natural law, the potential for a European natural law (europäisches Naturrecht, p. 346) continues. A European treaty of human rights was, of course, a sign of a European natural law.

The situation at the end of the war was disastrous. Germany and most of Europe was in ruins. The old Nazis had returned quickly to positions of power and the German populace was retreating into their own sense of victimhood, while émigrés by and large stayed away. While human rights and European integration were talked about and promoted in official discussions, it was unclear whether something would actually be done about them. Surprisingly, it was.

## **6. The Former Nazis Reinvent Themselves**

The process of reorientation toward democracy was a combination of internal dynamics and external compulsion, where the exiles had a curious role as interlocutors. However, their role was neither unproblematic nor straightforward. At the end of the war, exiles like Schulz, Pringsheim, David Daube, Arnaldo Momigliano, Neumann and innumerable others were left

with a choice of either returning to a destroyed country or facing their former colleagues who in many cases had betrayed them, or to stay in exile. For a number of them, their exile had lasted more than a decade and they and their families had found a new life. Only a few of them decided to return permanently.<sup>74</sup> Schulz and Neumann, for example, made only periodic visits. Others, such as Pringsheim, went back as early as possible to consolidate their influence in the rebuilding of the faculty. Pringsheim returned to Freiburg for the first time in the summer of 1946 and more permanently the following year, although he held on to his apartment in Oxford. He became very active in reinvigorating the Freiburg faculty of law after the war and his influence, both through his own actions and through those of his allies, was dominant up to the sixties.<sup>75</sup>

For younger scholars who had joined the Nazis, the issue of return was equally problematic. Wieacker, Coing and many others were, having survived the war, in POW camps. They faced a process of denazification and sought to clear their reputations. In the case of Wieacker, he managed to be sentenced as a Mitläufer or fellow traveler, which enabled him to continue working in academia. In the process, he was helped by Pringsheim, who wrote him an exculpatory letter. However, he had to abandon his position at the

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<sup>74</sup> On the difficulties and the hostility faced by returning exiles, see Krauss, *Heimkehr in ein fremdes Land*.

<sup>75</sup> Bodleian Library, Oxford, Archives of the Society for the Protection of Science and Learning, MS. SPSL. 272.1, 233 on his schedule; 190, Pringsheim to Ursell (3.4.1946), on his intent to go to Freiburg in need of a certificate of identity from the HO and a return visa; 272.1, 191 Skemp to Under Secretary of State (5.4.1946), application for traveling papers for Pringsheim, who is willing to assist in the educational reconstruction of Germany, short-term, children remain in Britain. Letters 192–206 about the travel arrangements to Germany show how difficult movement was at the time.

University of Leipzig, which was in the Russian zone. Helped by his network of former members of the Kieler Schule, Wieacker was able to secure a professorship in Göttingen.<sup>76</sup>

This process does very little to explain the reorientation toward Europe that took place soon after the war. In the case of Wieacker, he turned very quickly from a Nazi-inspired interpretation of history back toward a way of thinking advocated by Pringsheim, but also by Wieacker himself in his earlier writings some ten years earlier.<sup>77</sup>

The new narrative of European legal history was not purely new. The framework of Koschaker's 1947 *Europa* can be seen in his 1938 *Krise*. However, in the later work the appeal to a historical culture and tradition as the true European legal heritage becomes almost programmatic. *Europa* is nominally a history of Roman law in Europe after the fall of the Roman Empire, but in practice it attempts to tell the creation of the tradition of European jurisprudence as a shared heritage. In a similar manner, Wieacker's post-war works contain a comparable historical outline as his book from 1944. What was different was the connotations and the implications that these historical facts were given. In the case of Koschaker's *Europa*, the main point was timing. At the end of the war, the narrative of the unity of Europe as a historical fact struck a chord and the political and economic drive for European integration propelled equally the need for a narrative that would provide legitimacy and a sense of direction to the developments.

The new narrative of Europe as a cultural and legal entity, as an object of legal history and the subject of a narrative was thus a mixture of old and new, combining elements from the Nazi era texts as well as materials from the writings of exiles. Resembling in many ways the new political narrative of Europe, it took images and elements that had been utilized in

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<sup>76</sup> Winkler, *Der Kampf gegen die Rechtswissenschaft*, 571.

<sup>77</sup> Franz Wieacker, "Studien zur Hadrianischen Justizpolitik," *Romanistische Studien: Freiburger Rechtsgeschichtliche Abhandlungen*, 5 (1935): 43–81.

Nazi propaganda and repurposed them, for example the concept of a European cultural heritage.

The main formulators of the new European narrative for legal history were Koschaker, Wieacker and Coing, who promoted it in important books. Part of the turn to an explicit European framework was internal reconfiguration, partly a response to outside stimuli such as conferences on early European integration.<sup>78</sup> In Germany, another fundamental reason was that as a result of the Nazi era reforms there was a course titled Privatrechtsgeschichte der Neuzeit (History of Modern Private Law), which gave scholars the possibility of exploring the reception of Roman law in European history. The central role of Roman law in the formation of the new narrative was partially due to its oppositional role during the Nazi years. In contrast, the study of Germanic legal history had been strongly favored by the Nazi policies, leading to it falling out of favor in the afterwar years.

Koschaker's *Krise*, was already strongly focused on Europe and the study of Roman law in it, but *Europa* began to discuss Europe explicitly, asking "What is Europe?" His stated answer is that Europe is a cultural phenomenon, an original combination of Germanic and Roman cultural elements. As a starting point, Koschaker takes a heterogeneous sampling of the earlier Europeanist literature, beginning with Christopher Dawson's *The Making of Europe* (1935). This selection of literature includes Catholic universalists like Dawson, but also German nationalists of the Grossraum ideological slant, as well as medieval historians. Even Carl Schmitt makes an appearance as an author in the volume *Das Reich und Europa*

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<sup>78</sup> Franz Wieacker, "Ursprünge und Elemente des europäischen Rechtbewusstseins," in *Europa, Erbe und Aufgabe. Internationaler Gelehrtenkongress Mainz 1955*, ed. Martin Göhring (Wiesbaden: Franz Steiner Verlag, 1956), 105–119.

(1941). Despite these references, Koschaker's Europe as a legal community was simply a part of Europe as a cultural and religious community. Europe was a product of history.<sup>79</sup>

Both *Krise* and *Europa* may be seen as signs of Koschaker's astute political instincts. While the turn toward Europe was due to the favorable political circumstances, *Krise* has been compared to Husserl's crisis of European science and its European definitions. To Husserl, the concept of Europe was not only geographical but to a large degree one of philosophy. He drew from Hegel and Nietzsche, who both saw Europe as a mode of rationality, a spirit. For Hegel, Europe was a spiritual unity, an understanding of reason and rationality that reconciled individual freedom and institutions.<sup>80</sup> Koschaker's concept of crisis or the concept of Europe must be read within their multifarious contexts. While for philosophers, Europe could mean rationality, order, freedom and the triumph of the spirit, it was equally a symbol of crisis and the tired constraints of civilization and morality. For historians, Europe could be a symbol of the almost transcendent unity of religion and morality, but at the same time a catchword of imperial ambitions and "natural" spheres of influence. Its crisis could be a cultural crisis, an economic crisis, a value crisis or even a crisis of identity or race. Both words were thus easily adaptable for whatever purpose one could imagine.

Wieacker's Europe was a similar kind of cultural sphere, but his narrative was much more focused on the development of Roman law. Wieacker's 1952 *Privatrechtsgeschichte der Neuzeit* (translated as *History of Private Law in Europe*) was in essence the origin story of German law, from the rediscovery of Roman law in Renaissance Italy to the *mos italicus*, the

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<sup>79</sup> Koschaker, *Europa und das Römische Recht*, 2–4.

<sup>80</sup> Georg W. F. Hegel, *Lectures on the Philosophy of World History*. Translated by H. B. Nisbet (Cambridge: Cambridge University Press, 1975), 173; Timo Miettinen, *The Idea of Europe in Husserl's Phenomenology* (Helsinki: Philosophical Studies, 2013), 29–33.

revising of history and law by the French and Dutch early modern humanists and culminating with the historical school of law in Germany. Wieacker's and Koschaker's narratives are startlingly parallel, even though scholars have noted how their implications are quite different.<sup>81</sup>

Wieacker continued with the same themes in an article on the origins of the European legal consciousness in 1956. There, he made a clear statement against English-language scholarship and its claims to represent the Western tradition. In contrast, Wieacker stated that the European tradition has three constitutive elements: 1) the concept of law and legal order which derive from *Imperium Romanum*, 2) the continuity of these and their unique relationship with metaphysics and social ethics are the work of the Church, and 3) the vitality and will to develop social and state structures are credited to the Germans. Though there were many subsequent developments, such as the idea of freedom, these were more in the nature of sediments that accumulated on top of these foundations.<sup>82</sup> However, in his later formulations, he attempted to include the whole of the Western world in this narrative. His narrative of European law and “the foundations of European legal culture” are summarized in an article in *The American Journal of Comparative Law* in 1990, where he defines Europe as the wider Atlantic-European world, including even the offshoots of European culture as far as the antipodes. After a brief nod to the distinctiveness of the common law system, Wieacker takes up the familiar themes of historical development from Rome to the Middle Ages and

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<sup>81</sup> The second edition of the *Privatrechtsgeschichte* was translated into English in 1995 by Tony Weir. Winkler, *Der Kampf gegen die Rechtswissenschaft*, 238–239 notes the differences on the significance of the idea of Rome and the cultural implications.

<sup>82</sup> Wieacker, “Ursprünge und Elemente des europäischen Rechtbewusstseins.” Franz Wieacker, *Vulgarismus und Klassizismus im Recht der Spätantike* (Heidelberg: Carl Winter Universitätsverlag, 1955), 63 shows the same idea in a nutshell.

onwards. The role of the Church is underlined in developing the “modern” traits of European legal culture, but the true hero of the story is the autonomous legal science of jurists. The story then culminates in the “essential constants of European legal culture”: personalism, legalism and intellectualism. Personalism meant the primacy of the individual in law, as the subject, end and point of reference. Individual association and individual relationship with deities were the same results of the emphasis on freedom and self-determination. From these, Wieacker sees the foundation of the emphasis on freedoms and thus rights as being pervasive in European legal culture. The principle of legalism rested on the exclusive power of the legal rule over others, the way that relationships are objectified through law and law separated from social and ethical norms. Legalism was introduced with the idea of rationalism, the strict removal of law from ideas of social equality. The final principle was that of intellectualism, where legal science is just that, a science where systematic and conceptual reasoning rules.<sup>83</sup>

Critical studies of European integration have since the 1990s pointed out the similarities between the theories of European integration and the Nazi concepts of Europe.<sup>84</sup> Some of the similarities and continuities between Nazi era theories and post-war works inspired by European integration were purely coincidental, but others had political connotations. One of the overriding political continuities from the Nazi years to the post-war era was opposition to Communism.

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<sup>83</sup> Franz Wieacker, “Foundations of European Legal Culture,” *The American Journal of Comparative Law* 38 (1) (1990): 1–29. This is a translation of his earlier essay titled “Voraussetzungen europäischer Rechtskultur,” presented originally in Helsinki in 1983. The essay was translated and introduced by Edgar Bodenheimer, himself an exile.

<sup>84</sup> John Laughland, *Tainted Source: The Undemocratic Origins of the European Idea* (London: Little, Brown & Company, 1997).



The new European narrative was to a large extent inspired by classical liberalism. However, important segments such as the independence of law were equally conservative in the sense that the theory was aimed at separating law from the political sphere and thus from the legislative process, a key democratic principle. The freedom of law from politics was seen not only as a way to guarantee basic rights, but also as forming the very foundations of capitalist society, such as the importance of the notion of ownership. Only in the light of Nazism and Communism was it possible to present the separation and isolation of law from politics as the sole preserve of lawyers and legal professionals as a purely positive development.

Both the narratives of Koschaker and Wieacker had a clear similarity with the Catholic cultural theories of European unity and they both present the Church as the carrier of European civilization. A similar theme was taken up by Helmut Coing, who promoted the idea of the unity of European legal science both in numerous articles and in the activities of the Max Planck Institute of European Legal History, which he founded in 1964. Coing was also the first in the group of scholars to begin actively engaging with the concept of human rights, seeking to demonstrate how the idea of human rights was in fact an innate feature of the European legal heritage since the early modern period. In all of these examples, the narrative foundations laid by Schulz and Pringsheim were fused with cultural theories as well as earlier themes concerning the transmission of science.<sup>85</sup>

## **7. Normativity, Narrativity and Causality**

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<sup>85</sup> This narrative was present already in the influential Rudolph Stinzing, *Geschichte der Deutschen Rechtswissenschaft* (Münich and Leipzig: Oldenbourg, 1880). On linking legal tradition and rights discourse, see Helmut Coing, *Die obersten Grundsätze des Rechts* (Heidelberg: Schneider, 1947).

Did the narrative of European legal history, the understanding that law and legal science have a shared history and that they should be conceptualized through this shared history, emerge as a reaction to the European political project? Or did the legal aspects of the European political project emerge as a reaction to the emerging European narrative? Or were these two parallel developments only marginally intertwined?

As with all complex developments, seeking a definite answer or an easy causal connection to this dilemma of narrative and normative interlinkage is quite futile. An answer of sorts, or even a potential answer may be gained from the figures of Pierre Pescatore and Walter Hallstein. Pescatore was a judge in the Court of Justice of the European Union, but he was initially a student of Koschaker.<sup>86</sup> Hallstein was a friend of Coing, who became the president of the EEC commission and who used Coing as a sort of background intellectual. Hallstein was enthusiastic about the potential of law and legal tradition as a unifying factor of Europe, that law would become a cultural force to create a European community.<sup>87</sup> Both Hallstein and Pescatore were in putting to practice ideas that their teachers had formulated.

The crucial development in both the narrative and the normative turn toward Europe was one of redefining concepts. The concept of culture was central to the whole idea of nationhood and nationalism, culture as an innate *genius* of the people that was refined and interpreted by the thinkers who channeled the culture of the people into songs, poems and other art, but equally channelled into its laws as presented by Savigny and Grimm.<sup>88</sup> This

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<sup>86</sup> Letter by Koschaker to dean Hero Moeller October 8, 1943, Universitätsarchiv Tübingen 601/42.

<sup>87</sup> Duve, “European Legal History – Global Perspectives.”

<sup>88</sup> The central texts are Friedrich von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (London: Littlewood, 1984); Jacob Grimm, *Deutsche Rechts Alterthümer* (Göttingen: Dieterich’sche Buchhandeln, 1828).

conception of culture was exclusive and relied on a homogeneous definition of nationhood, its core and the expressions it manifested itself. However, the idea of European culture as a conglomeration of individual national cultures was a hard sell, especially after authors with nationalistic credentials had spent a century trying to define one against the other. The concept of culture was a key element in the post-war discussions, where the idea of culture and the Kulturnation were utilized as touchstones of German identity. Culture could be the one clean sphere where German achievement and superiority could be safely touted. For democrats and conservatives alike, resorting to Goethe gave them a neutral way of describing values and national identity.<sup>89</sup>

The concept of tradition faced a similar redefinition against the exclusive national backgrounds, requiring a novel idea of a legal canon based on the Roman tradition through which one could work. The concepts of legitimacy and universality were even harder to maintain in their transition from a national to a European framework. The legitimacy of law in the national framework was grounded on ideas of popular sovereignty as manifestations of national common will, the populace and the nation being ideally one and the same. The theme of universalism as opposed to particularism was subject to a novel conceptual turn, in which European values were understood to be universal, but at the same time particular to Europe.

The idea of Europe was by no means an exclusively liberal or progressive idea, but rather the European discourse included all sides of the political spectrum. During the war, even the Nazi regime became fascinated with the idea of Europe and began to propagate the idea of Europe as a wider community led by Germany, united by anticommunism and the notion of an ethnic basis or a cultural community.

The change of the historical narrative was prompted by the threat posed by legislative developments, especially the danger of European integration. The main idea was not that

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<sup>89</sup> Forner, *German Intellectuals and the Challenge of Democratic Renewal*, 119–120.

there would be a causal connection, but rather that the normative and narrative elements shared a basic mechanism, the element of belief as a constitutive force. By establishing Europe as the objective of history, the narratives of European legal history were working toward a similar aim as the political and normative project of European integration, namely to establish Europe as the historical actor at the center of the narrative. The historical narratives were used to ground the new interpretation to the tradition, to demonstrate that they were not reforms but rather natural continuities. Thus even the universalist language of human rights as innate and independent of any treaty, law or pact, was co-opted by formulators such as Koschaker and Coing to tie the European tradition to the language of rights, seeking to place preeminence on the European tradition as the origin of the tradition of rights.

The formulators of the European narrative were not, if one were to guess at their motivation, primarily creating a European narrative. They were most likely prompted by more mundane concerns, such as the preservation of their field in the changing circumstances; this was the main reason behind Koschaker's initial foray into European narratives. Should one seek ulterior motives, those could perhaps be found in a conscious or unconscious sense of reflecting contemporary concerns and issues.<sup>90</sup> Despite their motivations – or the lack of them – they were successful precisely because their new narrative used the literary canon, both in history and law, presenting the interpretation as though in a continuum. As always with powerful narratives, theirs created connections between issues and fields, convinced both factually and in a narrative sense in its internal coherence. This was a narrative that was easy to believe in. It addressed contemporary concerns, it gave meaning to what had happened and

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<sup>90</sup> I recently inquired from a leading scholar of feminist historiography about whether her motivations were political or whether she was inspired by feminist theory. She responded that this would have been logical, but in fact she maintained that it was simply something she felt that she should do at that time. The issues were in the air and she wanted to address them.

it linked the present and the past. As a result, narratives like that of the European legal heritage were able to be believed and built beliefs, beliefs that had normative implications. As is generally the case, normativity works when it is believed in, when individuals put their faith in it.

The change in the European narrative of law was equally reflective of the change in the normative environment. The first input was the retreat of law to the present with the onslaught of modern positive law (such as the BGB), of creative change, and social change demanding novel legal solutions. The second was the challenge of Nazi New Legal Science, which presented an existential crisis with its resentment toward the legal tradition, positive law, and legal certainty. Its aims were purely revolutionary. The third normative change was that of European integration and the rise of human rights, both producing a new normative reality.

The response provided by the European narrative was a creative conglomeration of narrative snippets combining cultural narratives of Europe, ethnic and hastily concealed racial theories, and an oddly fitting position of legal universalism. Hannah Arendt, ever the astute observer, remarked on this that the conception of civil rights as a national embodiment of universal rights was already a contradiction in terms, where on one hand something is both universal and at the same time particular to a set of people who constituted a nation.<sup>91</sup> She was discussing the issues of nationalism, but the same idea applies to Europeanism to an even larger degree. Europe in this respect was an awkward combination of both particularism and universalism, striving to present itself as uniquely adept at implementing rights that it considered to be universal. Arendt's particular universalism bear an uncanny resemblance to Koschaker's relative natural law, which is seen as logically impossible but politically desirable. The narratives of humanity, dignity, value of the individual and so forth told by

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<sup>91</sup> Hannah Arendt, *The Origins of Totalitarianism* (London: Penguin 2017), 301.

Schulz and Pringsheim were in a similar manner seeking to reconnect law with values thought to be universal. While, typical of the time, they were not discussing human rights or even using the language of rights, the basic framework they outlined contained the same elements and normative connotations that would later be associated with human rights.

The role of these historical narratives in normative developments could be explored through the concepts of tradition and myth, which exist in a complex interplay where historical narratives both explain continuity and change in society, but themselves mutate as a result of social and political changes.<sup>92</sup> In this case, the exiles were reformulating a new narrative as a reaction to contemporary events and pressures, as responses to their personal plight but also to the challenge of totalitarianism as a whole. In a similar way, the scholars who stayed in Germany through the Nazi years were reworking the past to suit different potential futures, one within the Nazi regime and then one within the new post-WWII European reality. They were in a sense radically reinterpreting the past in order to remake the future. Using the creation stories of the shared symbols of law, they were demonstrating what they thought to be the true meaning of the European heritage.<sup>93</sup> In these repeated

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<sup>92</sup> Jörn Rüsen, "Tradition: A Principle of Historical Sense-generation and Its Logic and Effect in Historical Culture," *History and Theory* 51 (4) (2012): 45–59, 52–54.

<sup>93</sup> Assmann's term *Mythomotorik* (the dynamics of myth) has been used to describe the dynamic complex of narrative symbols and evocative stories that influence the understanding of the present and the future. See Jan Assmann, "Frühe Formen politischer Mythomotorik. Fundierende, kontrapräsentische und revolutionäre Mythen," in *Revolution und Mythos*, ed. Dietrich Harth and Jan Assmann (Frankfurt: Fischer, 1992), 39–61; Jan Assmann, "Memory, Narration, Identity: Exodus as a Political Myth," in *Literary Construction of Identity in the Ancient World*, ed. Hanna Liss and Manfred Oeming (Winona Lake, IN: Eisenbrauns, 2010), 3–18; Jan Assmann, "Communicative and Cultural Memory," in *Cultural Memory Studies: An*

reinterpretations the past was not simply a vessel for ideas and ideals, it also influenced the future in the form of European integration. Due to the cumulative nature of historiography, the reinterpretation of the past was by no means a process of writing on a clean slate, for each successive rewriting left elements of its predecessor intact. Thus, the European legal narrative contained not only the visions of the exiles, but also remnants of Nazi era writings embedded into the European story.

## **8. Conclusions**

In a decade after the end of the Second World War, a new narrative concerning the European legal heritage emerged. This narrative maintained that an inherent unity existed between European legal cultures that was founded on their common roots. The purpose of this article was to examine the rise of this narrative in the interaction between scholars exiled by Nazi Germany and those who had stayed in Germany, often participating actively in the Nazi regime. Through the reinterpretation and reimagining of the past, these scholars incorporated influences from the British and American legal traditions, such as the concepts of the rule of law or the liberal idea of freedom, presenting them as parts of the European heritage deriving from the ancient Roman legal tradition. Ancient Rome and its legal succession in the European legal cultures, known colloquially as the civil law tradition, was reshaped into a European tradition. However, the resulting hybrid narrative was not purely a result of the encounter with the Anglo-American legal cultures, for there were significant continuities from the Nazi era, such as the idea of European cultural nationalism as well as opposition toward Communism.

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*International and Interdisciplinary Handbook*, ed. Astrid Erll and Ansgar Nünning (Berlin and New York: De Gruyter, 2008), 109–118.

The collusion of the narrative and the normative elements of the European legal heritage would not have been possible without the beginnings of European integration right after the war. The narrative provided a legitimacy and a purpose for the normative developments taking place, and also informed these developments in crucial interactions. It is hardly a coincidence that many of the key players in the European legal integration and the construction of the European legal system were students or friends of these legal historians.

The role of the narrative construction of the European legal heritage was quite literally one of building a history. The political significance of this was that by creating a narrative of the creation of the tradition, putative elements within the tradition were integrated into the history. If one could demonstrate that these elements had always been part of the tradition, there would be no need to introduce these elements as reforms. This was the crucial link between the conservative authors and the classical tradition of liberalism: both sought to combine the ideas of European particularism and the idea of universal rights through the European heritage. These rights and tradition were universal, but they were also central parts of the European tradition.